

ADVERSE ACTIONS UNDER 5 U.S.C. CHAPTER 75: AN OVERVIEW

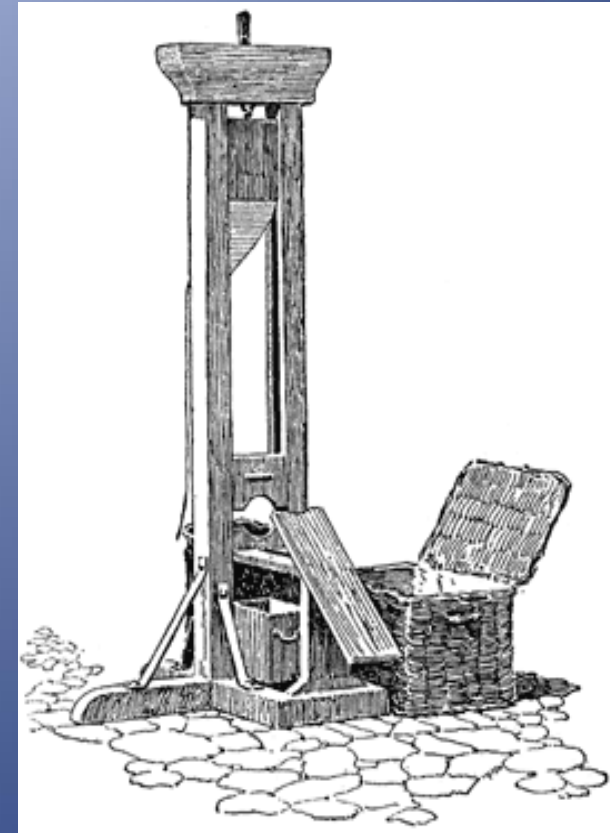


Presented for
Employee and Labor
Relations Roundtable
U.S. Office of Personnel
Management

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What Is an Adverse Action?

- Well yes, that is pretty “adverse” ... but for our purposes, it is a suspension for 14 days or less (5 USC § 7502), a removal, a suspension for more than 14 days, a reduction in grade, a reduction in pay, and a furlough for 30 days or less (5 USC § 7512).
- What is an appealable adverse action? All the above except a suspension of less than 15 days.



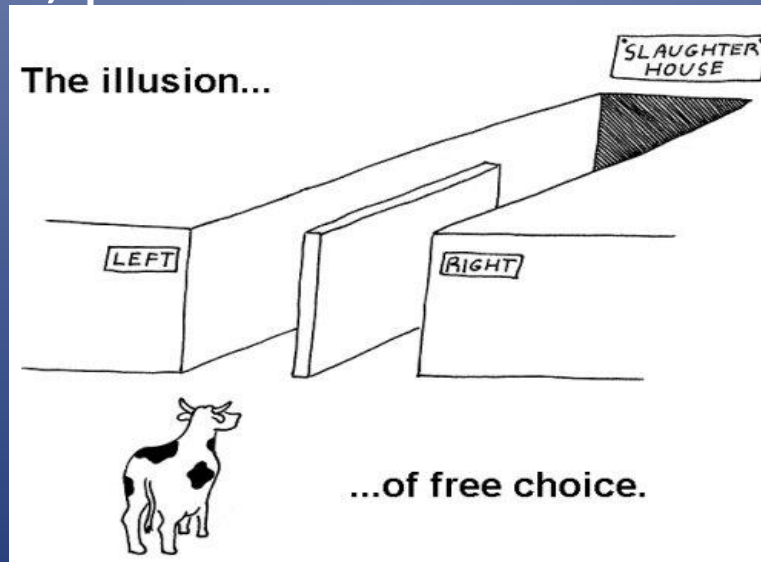
Constructive Actions

- What are constructive actions and are they adverse actions?
- Constructive actions appear to be voluntary, but the employee claims they are not. A claim that s/he was forced to resign or retire, to be absent from work, to request a reduction in pay or grade, or to sign up to be furloughed for 30 days or less may be an appealable adverse action.



So How Do You Know?

- *Bean v. US Postal Service*, 120 MSPR 397 (2013):
“... all constructive adverse action claims whatsoever, have two things in common: (1) the employee lacked a meaningful choice in the matter; and (2) it was the agency's wrongful actions that deprived the employee of that choice. Assuming that the jurisdictional requirements of 5 U.S.C. chapter 75 are otherwise met, proof of these two things is sufficient to establish jurisdiction.”



Board

Who Can Appeal an Adverse Action?

- 5 USC § 7511 answers that question in different ways depending whether an employee is:
 - in the competitive service
 - in the excepted service
 - a preference eligible
 - in a probationary or trial period and
 - whether his or her service is “current” and “continuous”

5 USC § 7511

- (a) For the purpose of this subchapter--
- (1) “employee” means— (A) an individual in the competitive service--(i) who is not serving a probationary or trial period under an initial appointment; or (ii) except as provided in section 1599e of title 10,* who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
- (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions-- (i) in an Executive agency; or
- (ii) in the United States Postal Service or Postal Regulatory Commission; and

§ 7511 (cont'd)

- **(C)** an individual in the excepted service (other than a preference eligible)--
- **(i)** who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
- **(ii)** who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less ...
- * 10 USC § 1599e imposes a 2-year probationary period on DOD employees.

Most Recent § 7511 Decision

Winns v. USPS, 124 MSPR 113 (2017)

Overrules the “continuing employment contract” theory of *Roden v. TVA*, 25 MSPR 363 (1984), which said to look past the form of the appointment to its effect. *Roden* granted appeal rights to a person hired on 5 consecutive temporary appointments to the same position separated by brief breaks in service although he had spent only 9 months in the one from which he was removed. In *Winns*, the Board read “current continuous employment” to match 5 CFR § 752.402 and find a similar appellant was not an “employee” with chapter 75 appeal rights.

Probationers

- Proof that termination was due to partisan political reasons or marital status or was based on pre-appointment reasons allows the Board to consider just those claims - 5 CFR § 315.806(b), (c). Only if such a claim is proven, may a claim of discrimination also be heard.
- For the rules for crediting prior civilian service, time in an absence status, and part-time service toward the completion of a probationary period, see 5 CFR § 315.802

Probationer as Employee?

- Yes. Appeal rights if not serving a probationary or trial period under an initial appointment or completed one year of current continuous service under an appointment other than a temporary one limited to a year or less. **5 USC 7511(a)(1)(A)**. Need not be in the same agency or in the same or similar positions.
- Or, may “tack” prior service if: (1) it was rendered immediately preceding the probationary appointment; (2) it was performed in the same agency; (3) it was in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days.

Burden of Proof

- Who Has It? What Is It? And By What Degree of Proof? Leaving constructive actions out of this:

The agency has the burden of proof of 3 things:

1. Charges
2. Nexus
3. Reasonableness of the Penalty

Proof of 1 and 2 must be a preponderance of the evidence: “The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.”

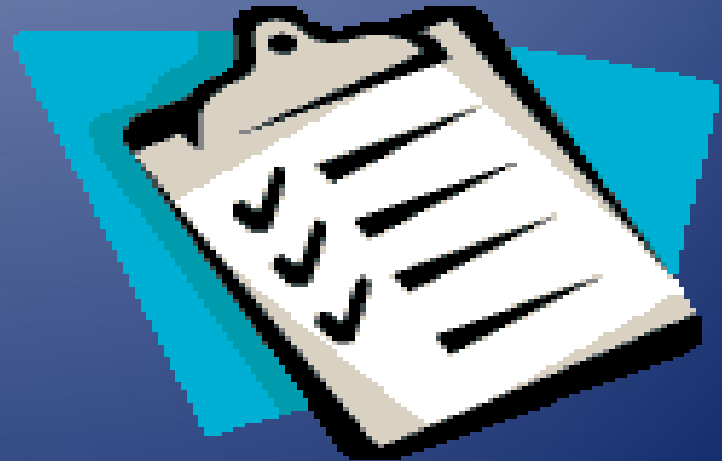
5 CFR § 1201.4(q).

Charges: Be Sure or Start Over!

1. Descriptive/Specific Charge
2. Generic Charge
3. Narrative Charge

Parts of a charge

1. Charge label
2. Specifications
3. Legal elements



Common Charging Issues

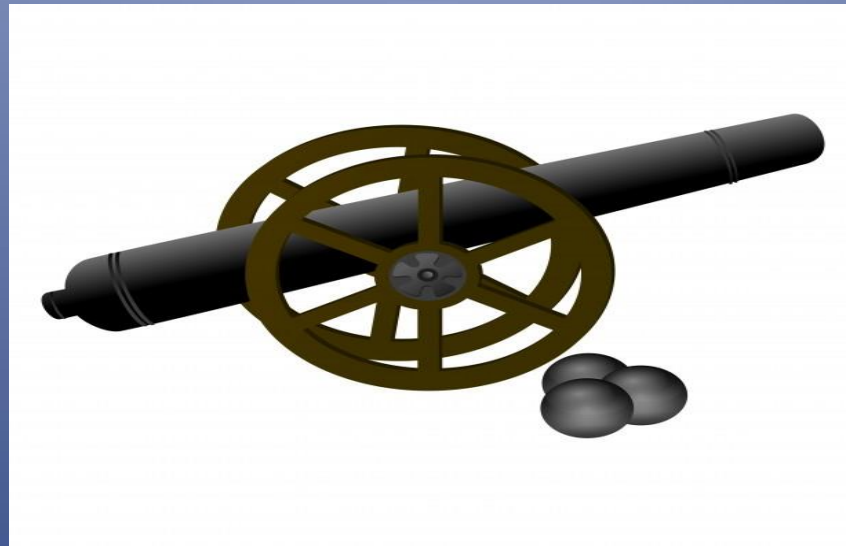
- **Splitting of Charges**
 - Splitting of a unified charge is impermissible. *Burroughs v. Army*, 918 F.2d 170 (Fed. Cir. 1990)
- **Merger of Charges**
 - While an agency may take a single instance of misconduct and prepare charges containing several specifications, the Board will merge charges if they are based on the same conduct and proof of one charge automatically constitutes proof of the other charge. *Shifflett v. Justice*, 98 MSPR 289, 292 ¶5 (2005); *Mann v. DHHS*, 78 MSPR 1 (1998)
- **Multiple Specifications Under a Single Charge**
 - If a single charge has multiple specifications, an Agency need only prove one specification to sustain the charge. *Avant v. Air Force*, 71 MSPR 192, 198 (1996).
- **Charge Does Not Match the Specifications or Narrative**
 - The specific charge and not the factual recitation controls the agency's burden of proof. The recitation and proof must match the charge. *Nazelrod v. Justice*, 54 MSPR 461, 463-68 (1992).

Charging Issues, Cont'd.

- **Independent Elements of a Single Charge**
 - e.g., allegation that employee struck a co-worker and threatened her with physical harm.
 - Each element (striking the co-worker and threatening her) can be an independent basis for discipline. *Fairley v. USPS*, 63 MSPR 545, 548-49 (1994)
- **Lesser Included Offenses**
 - A judge may not eliminate elements of a charge brought by the Agency and find the Appellant guilty of a lesser offense. *Greenough v. Army*, 73 MSPR 648 (1997)
- **Criminal Offenses**
 - If an agency charges an individual with a criminal offense, the agency must prove the elements of the crime. *Knuckles v. USPS*, 1 MSPR 358, 359 (1980).

“Loaded” Words

- Words implying intentional misconduct may require an agency to prove that element of intent: “knowingly,” “willfully,” “threatened,” etc.



- Board may examine the “structure and language of the proposal notice” to determine how charges are to be construed.

CHARGES REQUIRING PROOF OF INTENT

- Intent is a state of mind and is generally proven by circumstantial evidence. *Riggins v. DHHS*, 13 MSPR 50 (1982).
Examples:
- **Theft** - intent to deprive the owner permanently of possession and use of the property. *King v. Nazelrod*, 43 F.3d 663, 665-67 (Fed. Cir. 1994).
- **Threat** – reasonable person test applied to: listener’s reactions and apprehension of harm; speaker’s intent; the circumstances; and if conditional. *Metz v. Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986).
- **Insubordination** - willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed. *Phillips v. GSA*, 878 F.2d 370 (Fed. Cir. 1989). But see The Follow The Rules Act of 2017!!
- **Falsification** – knowingly providing wrong information with the intention of defrauding, deceiving, or misleading the agency. *Naekel v. Transportation*, 782 F.2d 975, 978 (Fed. Cir. 1986).

CHARGES WITH ELEMENTS, BUT NOT REQUIRING INTENT

Misuse of Government Property – misuse or unauthorized use means use for purposes other than those for which the property is made available to the public or other than those authorized by law, rule, or regulations. 5 CFR § 2635.704

AWOL – the employee was required to be at the duty station; s/he was absent; and the absence was not authorized or a leave request was properly denied. If based upon a denial of LWOP, the Board will determine whether the denial was reasonable. *Johnson v. DLA*, 54 MSPR 370 (1992).

Failure to Follow Leave Requesting Procedures – the agency has procedures for requesting leave; the employee knew what the procedures are; and s/he failed to follow them. *Wilkinson v. Air Force*, 68 MSPR 4 (1995).

ELEMENTS BUT NOT INTENT, CONT'D

- **Failure to Follow Instructions** - proper instructions were given and the employee failed to follow them. *Hamilton v. USPS*, 71 MSPR 547 (1996). Again, though, consider The Follow The Rules Act of 2017!
- **Unauthorized Use of an Official Government Vehicle** – but to trigger the statute, 31 U.S.C. § 1349(b), conduct must either be willful or done with reckless disregard.
- **Lack of Candor** - may involve failure to disclose something that should have been disclosed to make a statement accurate and complete. *Ludlum v. Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). Has morphed over time. See *O’Lague v. DVA*, 123 MSPR 340 (2016) & *Fargnoli v. Commerce*, 123 MSPR 330 (2016), finding that proof “necessarily involves an element of deception,” although intent to deceive is not a separate element as it is for falsification. But, the misrepresentation or omission must have been made knowingly.

Elements, continued

- Sexual Harassment (Title VII) - 1) Submission is implicitly or explicitly a term or condition of employment, 2) submission or rejection is the basis for employment decisions, or 3) the conduct has the purpose or effect of unreasonably interfering with an individual's work performance. 29 C.F.R. § 1604.11. Closely related: "**Creation of a Hostile Work Environment,**" *see Campbell v. Air Force*, 72 MSPR 480 (1996)
- Approved Leave – not a valid charge unless: absence is for compelling reasons beyond employee's control so that approval or denial of leave was immaterial; absence went beyond a reasonable period; employee was warned of the consequences if s/he did not return to duty; and the position needs to be filled on a regular, full- or part-time basis. *Cook v. Army*, 18 MSPR 610 (1984). *See also McCauley v. Interior*, 116 MSPR 484 (2011), holding that a charge of Excessive Leave may include sick leave, annual leave, LWOP, and AWOL but may never be based on FMLA leave.

Nexus

An agency may take an adverse action only for such cause as will promote the efficiency of the service. 5 USC § 7513(a), 5 CFR § 752.403(a)



Nexus need not be specifically alleged in the proposal letter; it can be inferred from the facts or charges described in the proposal.

PROOF OF NEXUS

An agency may show a nexus between off-duty misconduct and the efficiency of the service by

- (1) a rebuttable presumption in certain egregious circumstances;
- (2) preponderant evidence that the misconduct adversely affects the appellant's or coworkers' job performance or the agency's trust and confidence in the appellant's job performance; or
- (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission, including a showing that an employee engaged in off-duty misconduct that is directly opposed to the agency's mission.

Kruger v. Justice, 32 MSPR 71 (1987)

EXAMPLES OF NEXUS

- *Graham v. USPS*, 49 MSPR 364 (1991) - Postal employee's off-duty misconduct resulting in conviction of first-degree sexual abuse of 14-year old girl was sufficiently egregious to raise rebuttable presumption of nexus.
- *Doe v. Justice*, 113 MSPR 128 (2010) - unprofessional conduct of videotaping sexual encounters with two co-workers adversely affected the job performance of those two, as well as the job performance of other employees and the efficiency of the office as a whole.
- *Wild v. HUD*, 692 F.2d 1129 (7th Cir. 1982) - a HUD appraiser's off-duty actions as manager of deteriorated rental properties was contrary to the agency's mission.

PENALTY: The Douglas Factors



IS THE PENALTY WITHIN THE BOUNDS OF REASONABLENESS?

- **The Rule:**

“...the Board's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.”



Factor # 1 – Seriousness of Offense

★ “The most significant *Douglas* factor”

★ *Starks v. Army*, 94 MSPR 95, ¶ 11 (2003)

★ Specific “serious” misconduct

★ Insubordination

★ Falsification

★ AWOL

★ Assault

★ Drugs

Some factors affecting seriousness:

★ Delay in taking action

★ Repeated misconduct

★ Poor Judgment

★ *Halper v. USPS*, 91 MSPR 170 (2002)



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Factor # 2 – Employee’s Job

- ★ Higher Standard:
 - ★ Law Enforcement
 - ★ Supervisors
 - ★ “Informal Supervisor”
Faucher v. Air Force,
96 MSPR 203 (2004)
 - ★ Fiduciary positions
 - ★ Contacts with public
 - ★ Prominence of position
- ★ Low level position does not excuse behavior if it is egregious.



Factor # 3 – Prior Discipline

- ★ Must be in proposal letter
- ★ *Bolling* factors
 - ★ Informed of action in writing
 - ★ Matter of record
 - ★ Higher level review
- ★ Pending grievance
 - ★ *USPS v. Gregory*,
534 U.S. 1 (2001)
- ★ Stale discipline
 - ★ Agency regulation
 - ★ CBA
 - ★ Other uses – notice



Factor # 4 – Past Work Record

- ★ Lengthy service is a mitigating (not aggravating!) factor
 - ★ *Shelly v. Treasury*, 75 MSPR 677 (1997)
 - ★ “Should have known better” can be used under *Douglas* Factor # 9 (Notice) - *Brown v. Army*, 96 MSPR 232 (2004)
- ★ Poor performance
 - ★ If aggravating, must be in proposal letter
 - ★ Inconsistency between appraisals and *Douglas* analysis must be explained
- ★ Employee’s good performance may be outweighed by nature and seriousness of offense



Factor # 5 – “The Trust Factor”



- ★ Loss of trust is a significant aggravating factor
- ★ Continued assignment of important tasks or
- ★ Remaining in position of trust
 - ★ *Mann v. HHS*, 78 MSPR 1 (1998)
- ★ Does every position require trust? *Jackson v. Navy*, 52 MSPR 1 (1991) (meatcutter)
- ★ Untruthful hearing testimony
 - ★ *Richardson v. RTC*, 66 MSPR 302 (1995)

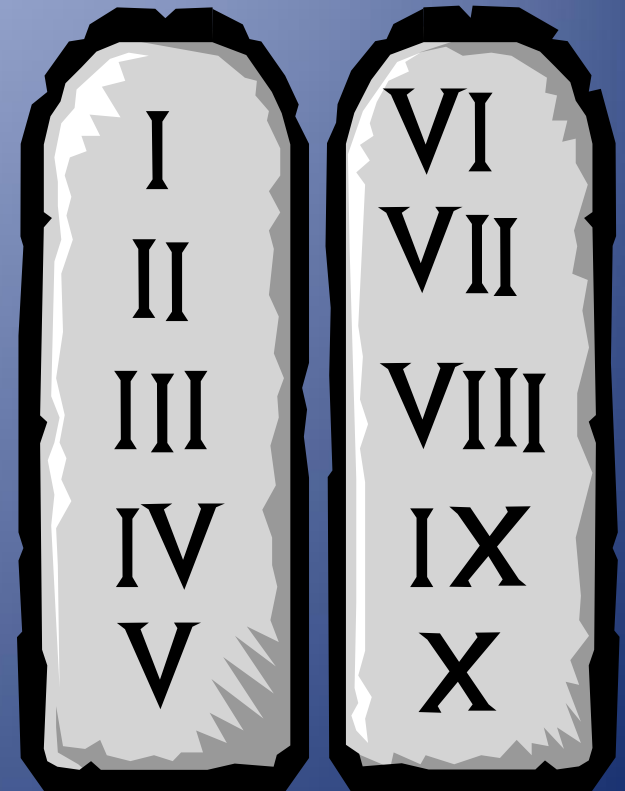
Factor # 6 – Consistency of Penalty

- ★ Similarly situated employees
 - ★ “Nearly identical” *Doe v. USPS*, 95 MSPR 493 ¶ 10 (2004)
 - ★ Military vs. Civilian – not a valid comparison
 - ★ Same organizational unit & Same supervisor had been required & Conduct vs. Charge was significant, but more recently, see
- ★ *Lewis v. DVA*, 113 MSPR 657 (2010) “there must be enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but we will not have hard and fast rules regarding the ‘outcome determinative’ nature of these factors.”
 - ★ Settlement of comparative employees’ cases
Spahn v. Justice, 93 MSPR 195 (2003).



Factor # 7 –Table of Penalties

- ★ “Reprimand to Removal” – no weight
- ★ Agency’s interpretation entitled to deference if reasonable
 - ★ *Phillips v. Interior*, 95 MSPR 21 (2003)
- ★ Not binding unless agency intended to be bound, and
 - No constitutional right to advance notice of possible range of penalties
 - ★ *Farrell v. Interior*, 314 F.3d 584 (Fed. Cir. 2002)
- ★ Not to be applied inflexibly as to impair consideration of other factors



Factor # 8 – Notoriety of Offense

- ★ Must be supported by the record
 - ★ Include copies of newspaper articles/television coverage
- ★ Not just limited to media
 - ★ *Wilber v. Treasury*, 42 MSPR 582 (1989) (M.A.D.D.)
- ★ Widely known within Agency
- ★ Can consider recent general bad press, e.g., USPS – “Going Postal”



Factor # 9 – Prior Notice



★ Agency policies - are not rules

★ *Mazares v. Navy*, 302 F.3d 1382 (Fed. Cir. 2002)

★ Common sense

★ *Brown v. Navy*, 229 F.3d 1356 (Fed. Cir. 2000)

★ *Farrell v. Interior*, 314 F.3d 584 (Fed. Cir. 2002)

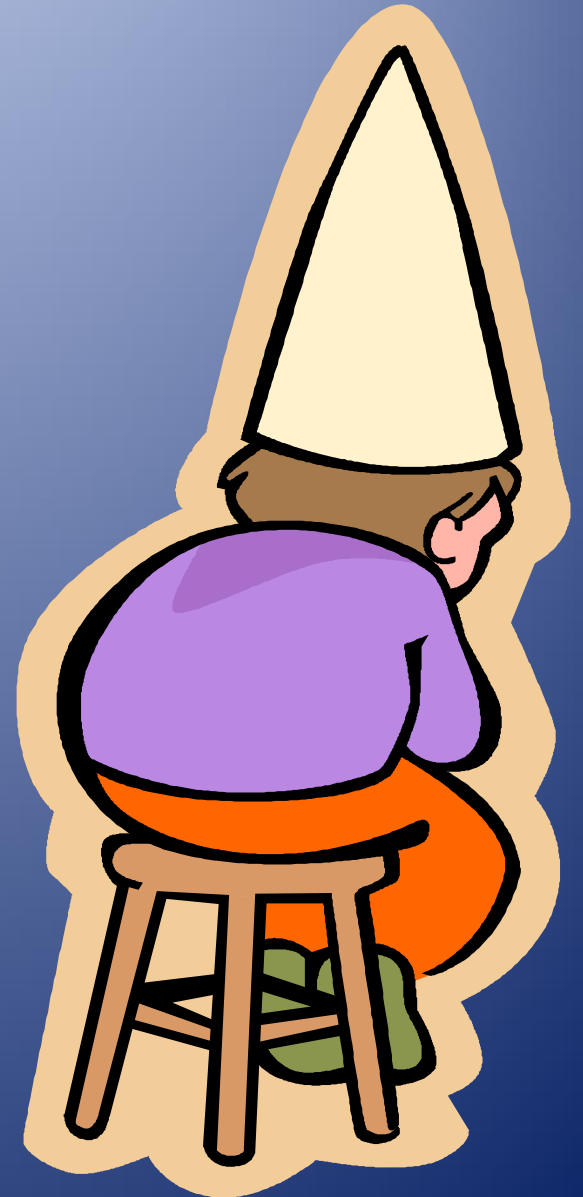
★ Length of Service

★ Lack of training

★ Stale Discipline

Factor # 10 – Rehabilitative Potential

- ★ Apologies - weight depends on when employee shows remorse
- ★ *Singletary v. Air Force*, 94 MSPR 553 (2003)
 - ★ Significant – own volition prior to investigation
 - ★ Some – immediate admission upon initial inquiry by Agency
 - ★ Little or No weight – after agency conducts investigation
- ★ Seeking treatment: good
- ★ Continuing lack of remorse: bad
 - ★ *Lentine v. Treasury*, 94 MSPR 676 (2003) (appellant kept contacting an employee after warnings and during appeal)



Factor # 11 – Mitigating Circumstances

- ★ Entitled to considerable weight
- ★ Corroborating evidence of wife's hospitalizations lacking - *Lavette v. USPS*, 96 MSPR 239 (2004); series of personal tragedies – *Woebcke v. DHS*, 114 MSPR 100 (2010)

Must be nexus between misconduct and medical condition

If serious misconduct – mitigation not appropriate
Provocation/Stress

- ★ *Zazueta v. Justice*, 94 MSPR 493 (2003) (claim that personal problems led to drug use not mitigating)
- ★ *Barry v. Treasury*, 71 MSPR 283 (1996) (same)



**IF ONLY NEEDY
AND DESPERATE
WERE
ATTRACTIVE
QUALITIES.**

Factor # 12 – Alternative Sanctions

- ★ Required to show lesser penalty would be ineffective - only in rare circumstances
- ★ Deciding official testified isolated incident probably would not be repeated - *Robertson v. Justice*, 81 MSPR 658 (1999)
- ★ Sending a message to others: exemplary punishment is inconsistent with *Douglas*
 - ★ *Blake v. Justice*, 81 MSPR 394 (1999)
 - ★ *Harper v. Air Force*, 61 MSPR 446 (1994)
- ★ Zero tolerance policy does not always mean removal: also contrary to *Douglas* - *Omites v. USPS*, 87 MSPR 223 (2000)



Top 4 *Douglas* Factors?

- ★ Nature and seriousness of offense
- ★ Prior discipline
- ★ Mitigating circumstances
- ★ Employee's potential for rehabilitation



The Process

- 30 days advance written notice
- a reasonable time, no less than 7 days, to answer orally and in writing
- right to be represented
- written decision stating specific reasons
- notice of appeal right to Board, alternatives, and required elections

5 USC § 7513, 5 CFR § 1201.21

And if There's a SNAFU?

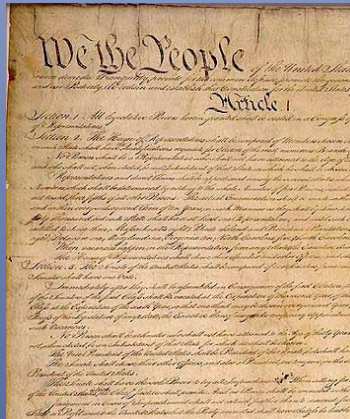
Procedural reversal only if the error is “harmful”

5 CFR § 1201.4(r) “Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.”

- But wait, it's more complicated than that ...

What is Due Process?

- Due Process considerations are procedural protections that stem from the Fifth Amendment to the Constitution.
- Due Process is a guarantee of a fair legal process when the government seeks to deprive an individual of life, liberty, or property.



- The “root requirement” of the Due Process Clause is that “an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.” *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Tenure gives a property right in employment.

A “Hearing” is Notice and Opportunity to be Heard

- A public employee dismissible only for cause is entitled to a limited pre-termination “hearing.” Its purpose is “an initial check against mistaken decision – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-46 (1985).
- Due Process entitles a tenured public employee to three things:
 - 1) oral or written notice of the charges against him; 2) an explanation of the employer’s evidence; and 3) an opportunity to present his side of the story. *Loudermill*.
- The question to be resolved in this type of due process issue is whether the notice of proposed removal and its supporting documentation contemporaneously provided to the appellant, afforded him sufficient notice of the charges against him to enable him to make a meaningful reply to the proposal. *Alvarado v. Air Force*, 97 MSPR 389 (2004)

Some Important Points

The Pre-termination

“Hearing” Covers:

- Factual disputes giving rise to the charges
- Appropriateness or necessity of the penalty
- An opportunity to invoke the discretion of the decision-maker

Importance of Due Process:

- Can be raised by the AJ/Board *sua sponte*.
- If an employee’s right to due process was violated, he is entitled to “an ‘entirely new’ and ‘constitutionally correct’ removal proceeding.” *Ward v. USPS*, 634 F.3d 1274, 1279 (Fed. Cir. 2011)

Ex Parte Communications and Due Process — Can They Coexist?

- What are ex parte communications?
- They occur when the Deciding Official receives information without the employee being aware of it.
- Such communications are important because they may implicate due process concerns of notice and the opportunity to respond.

“Procedures” or Due Process: *Ex Parte* Communications

- A deciding official may receive, consider, and weigh evidence from *ex parte* sources, subject to constitutional due process requirements of fair notice to the employee of the information obtained and an opportunity for the employee to respond to that information. *Amar v. Treasury*, 89 MSPR 505 (2001)
- *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999) in order to invalidate the disciplinary process, *ex parte* contacts with the deciding official must “introduce new and material information to the deciding official” and be “so substantial and so likely to cause prejudice that they undermine the due process guarantee.”

What Is Material Evidence?

– Three part test

- Whether the *ex parte* communication introduces “cumulative” or “new” information;
- Whether the employee knew of the error and had a chance to respond to it; and
- Whether the *ex parte* communications were of the type likely to result in undue pressure on the deciding official

The ultimate *Stone* inquiry: Was the *ex parte* communication so substantial and so likely to cause prejudice that no employee can fairly be required to be deprived of her property interest in employment under the circumstances?

Slow Down, Proceed with Caution



Ward v. USPS, 634 F. 3d 1274 (Fed. Cir. 2011)

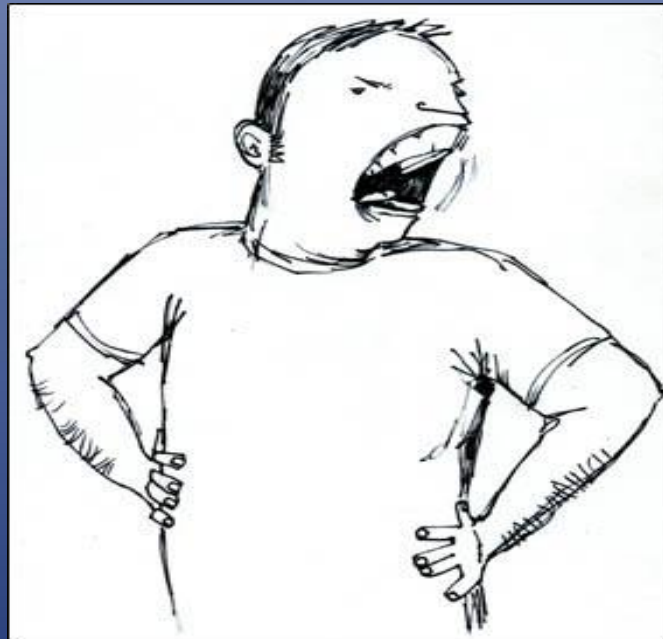
If the deciding official received new and material information in ex parte communications, it violates the employee's due process rights and the violation is not subject to the harmless error test. Where the deciding official spoke to the employee's supervisors about him and was told of prior record incidents that were not charged, the action was reversed. The Board's distinction between communications on the charges and on the penalty are "arbitrary and unsupportable."

Blank v. Army

- Employee was removed on two charges. On appeal he disputed the charges and raised claims of discrimination and hostile work environment.
- The deciding official interviewed, *ex parte*, several others to determine whether there was validity to the employee's assertions. Is this a due process error?
- Held: No, because the information obtained during the interviews was **cumulative** of the documentary evidence in the proposal notice. When *ex parte* information only confirms or clarifies information that is already in the record, it does not introduce new and material information and is not a due process violation. **247 F.3d 1225 (Fed. Cir. 2001)**.

Young v. HUD

- The appellant's removal was proposed for shouting insults at a witness during a recess in an arbitration hearing.
- After the appellant submitted his oral and written replies, the deciding official interviewed the hearing witness and a co-worker who supposedly watched the event. The coworker told the official that the appellant did not yell at the witness, but then later stated that he had not remained at the scene and had gone during the period, so the the coworker the appellant misconduct. this was confirming



into his cubicle relevant time official concluded was not credible and had committed the The agency claimed clarifying or information.

Clarifying or a Due Process Error?

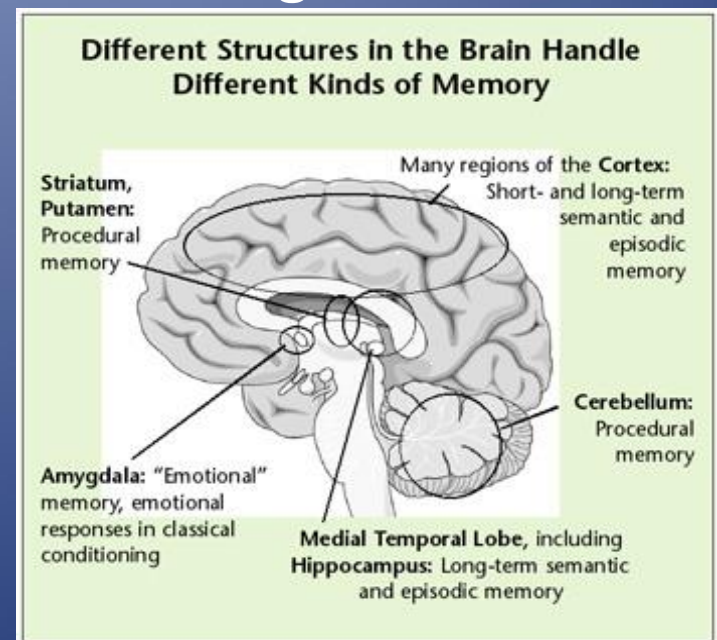
- This is a violation. It was not cumulative evidence because the deciding official testified that the *ex parte* statements were a “huge” departure from the written statement and they were the most “critical” statements.
- When the deciding official admits that the *ex parte* communication influenced her decision, any issue regarding the third *Stone* factor – undue pressure – is less relevant in determining whether the appellant was deprived of due process.

706 F.3d 1372 (Fed. Cir 2013)

Lopes v. Navy

Employee was removed for misuse of government equipment. The deciding official knew that he had a prior three-day suspension and was aware of other allegations of misconduct for which he had not been disciplined, but he did not so inform the appellant. In the *Douglas* Factor worksheet and in his testimony, the official referred to them with respect to the penalty factor considering the appellant's past work record.

- Was there a due process violation?



- Yes! Personal knowledge of the deciding official may violate due process without any “communication.”
- Although the appellant knew about her suspension and the uncharged misconduct, she did not know they would be relied on. Therefore, the information was new, not cumulative.
- There was no evidence that there was undue pressure on the official, but his testimony and the worksheet are “clear evidence of the materiality” of the employee’s prior work record in the decision to remove her.
- And it meets the ultimate test: Consideration of aggravating factors was so likely to cause prejudice that no employee can fairly be required to be deprived of a property interest in employment under the circumstances.

116 MSPR 470 (2011)

Norris v. SEC

An attorney was removed for misuse of government property when he sent improper emails.

- The deciding official testified that, prior to the removal, she learned that several years ago, the employee had a confrontation with agency Commissioners resulting in him being unable to present cases to the Commissioners in the future, but she did not include this information in the proposal or the removal.
- She also testified that the appellant's prior uncharged misconduct leading to his presentations bar has "a direct impact on how an attorney is able to perform his duties."
- Was this a Due Process violation?

Obviously, Right???

Nope!

- Mere knowledge of an employee's prior misconduct does not constitute prohibited *ex parte* communications.
- A deciding official's knowledge of an employee's background only raises due process or procedural concerns where that knowledge is a basis for a determination on the merits of the charges or the penalty imposed.
- This official testified that her knowledge of the presentations bar had "no effect" on her decision to impose removal.
- When she testified that the appellant's bar has an impact on how he can perform his duties, it was in direct response to the question, "Would that conduct be something that you would like to see in a trial attorney?"

675 F.3d 1349 (Fed. Cir. 2012)

Wilson v. DHS

A Senior Special Agent was removed following an investigation into her conduct after her ex-husband alleged that she had misused TECS, an internal computer system, for personal gain. The proposal did not advise the employee that she had shared the information from TECS with her ex-husband or any other unauthorized person.

- The deciding official testified that he had relied on the fact that the appellant had shared TECS information in determining the penalty.
- The AJ found no Due Process violation.
Did the Board agree?



- The deciding official considered information not cited in the proposal as an aggravating factor as evidenced by his *Douglas* Factor worksheet stating that sharing information with unauthorized persons seriously undermines public trust. He also testified it was an aggravating factor. But, the Board declined to find that this was a prohibited communication.
- Why? The appellant had raised the issue in her reply to the proposal when she made several explicit statements denying that she had shared TECS information with her ex-husband or anyone else. She also had repeatedly **responded** to it.
- Credibility determination made: AJ found credible the official's testimony that he would have removed the appellant on two other charges alone; thus, the information was not material.
- After the Board found no due process violation, it addressed the harmful error argument and concluded there was none.

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To Be Determined ...

- A teacher's 3rd level supervisor, the district superintendent, emailed the teacher's 1st and 2nd level supervisors (the principal and the community superintendent) that they needed to try to terminate her for recent conduct. The principal proposed removal and the community superintendent imposed it. The teacher was unaware of the district supervisor's email. Due process violation?
- Over a strong dissent, the court found it was ex parte, material, and a violation, despite having come prior to the proposal. *FEA v. DOD*, 841 F.3d 1362 (Fed. Cir. 2016). But, the court agreed to rehear, *en banc*, so stay tuned. 873 F.3d 903 (Fed. Cir. 2017)

Lessons Learned?

- Whether an ex parte communication is addressed to the merits or penalty does not matter.
- Whether it occurred before or after the proposal notice does not matter.



- The credibility of the deciding official can make a big difference, but it is not always decisive.
- If the employee raises something in reply to the proposed action that the deciding official wants to check out, that may insulate the information from being a *Stone/Ward* violation, but the further beyond a simple confirmation or denial the information goes, the less likely that is to be true.
- That the official knows a fact about the employee may itself be a violation although there was no communication.

So, Can the Agency Avoid a Violation?



- Yes!
- How? If there's a question, provide employee written notice of the additional information and a short time to address it. Problem gone.

Questions??



THANKS FOR YOUR ATTENTION!

