

**RECENT CASES INVOLVING
ETHICS AND CONFLICTS OF INTEREST
AT THE MERIT SYSTEMS PROTECTION
BOARD**

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A. DISCIPLINE FOR VIOLATIONS OF CONFLICT OF INTEREST STATUTES

1. 18 U.S.C. § 208 – ACTS AFFECTING A PERSONAL FINANCIAL INTEREST

Fea v. Dep't of the Army, 2008 MSPB LEXIS 4233 (Sept. 15, 2008).

The appellant, a Deployable Training Operations Specialist, was removed from his position for: conduct unbecoming a federal employee; and failure to follow administrative regulations, specifically 18 U.S.C. § 208(a), DOD 5500.7, Chapter 5 Section 4, 5-400, 5 C.F.R. § 2635.101(b)(14) and Federal Acquisition Regulations (FAR) part 3.101-1. The appellant was charged with forming a company with another federal employee and two local nationals, for the purpose of bidding on a government contract on which he served as the Technical Oversight Representative (TOR). He was also charged with manipulating/unduly influencing the contract solicitation process to favor his company, which was ultimately awarded the contract.

On appeal to the MSPB, an administrative judge found that the appellant's actions violated 18 U.S.C. § 208(a), 5 C.F.R. § 2635.101(b)(14) and Federal Acquisition Regulation (FAR) part 3.101-1. The administrative judge found significant that the agency proved, through testimony and documentary evidence that the appellant knew or should have known that his conduct was improper because he had completed ethics training as part of his Technical Oversight Representative training.

Gregory v. United States Postal Service, 2006 MSPB LEXIS 2882 (June 1, 2006).

The appellant was demoted from the position of Postmaster, EAS-20, to the position of Part-Time Flexible Clerk, PS-05, based on charges that he failed to follow Postal Service regulations concerning his wife's request for reinstatement into a position at his post office and circumvented the normal selection and evaluation process in a manner that benefitted him and his wife. The appellant was charged with violating 18 U.S.C. § 208 and 5 C.F.R. §§ 2635.101 and .502, as well as several provisions of the Postal Service Employee and Labor Relations Manual (ELM). The appellant was the officer-in-charge at a post office, and was responsible for hiring and approving reinstatement and transfer requests. When the appellant's wife applied for a transfer to his post office, he was warned by a supervisor that hiring his wife was not in the best interests of the Postal Service because it would raise an appearance of impropriety. The supervisor denied the transfer request. When the appellant's wife applied to transfer a second time, the appellant delegated his reinstatement responsibilities to an acting supervisor who was under his direct supervision. However, the appellant failed to inform the acting supervisor of the previous warnings about the appearance of impropriety related to his wife's transfer request. In addition,

the appellant knew that the acting supervisor was not qualified to make reinstatement or transfer decisions due to lack of training.

On appeal to the MSPB, an administrative judge found that the appellant knew or should have known that he was required to turn over his wife's reinstatement request to the next higher management level and that he violated the cited laws and regulations when he, instead, delegated the matter to an untrained subordinate.

2. 18 U.S.C. § 209 – SALARY OF GOVERNMENT OFFICIALS AND EMPLOYEES PAYABLE ONLY BY THE UNITED STATES

Berman v. Dep't of Interior, 2009 MSPB LEXIS 5299 (M.S.P.B. Aug. 18, 2009), aff'd, 112 M.S.P.R. 657 (2009).

Appellant was a GS-15 Economist, who was removed from his position on charges that he used his public office for private gain when he accepted \$383,600 from a private organization, the Project on Government Oversight (POGO), for performing his official duties, in violation of 18 U.S.C. § 209(a). The agency determined that any reasonable person should assume that a federal employee could not accept an extremely large cash award from an outside entity for performing his job duties, and that such an action created an appearance of impropriety. Prior to the removal action, both POGO and the appellant were found civilly liable for a violation of 18 U.S.C. § 209(a) by a jury in a district court case.¹

The appellant appealed his removal to the MSPB, arguing that the charge of using public office for private gain in violation of section 209 required a showing of intent. The agency argued that collateral estoppel precluded any review by the Board of the jury's finding in the district court case that the appellant violated 18 U.S.C. § 209(a). The Administrative Judge determined, that through the application of collateral estoppel, the appellant's violation of section 209 was established by the jury finding in the district court case. Nevertheless, she addressed the appellant's arguments regarding intent, and agreed that intent was an element of a claim of use of public office for private gain, relying on Burkett v. General Services Administration, 27 M.S.P.R. 119, 122 (1985) and Walker v. United States Postal Service, 10 M.S.P.R. 341 (1982). She then found that intent had been established with regard to the appellant's actions, based on the totality of the circumstances in the case. Specifically, the administrative judge found that the appellant's failure to ascertain the acceptability of the payment from POGO, (by, for example,

¹ The civil litigation in this case continues. Notably, the Court of Appeals for the District of Columbia Circuit vacated the jury verdict and remanded the case for a new trial. See United States v. POGO and Berman, 616 F.3d 544 (D.C. Cir. 2010). The D.C. Circuit determined that intent is a necessary element of proving a section 209(a) violation. In addition, Berman's appeal of the personnel action is pending at the Court of Appeals for the Federal Circuit.

consulting an agency ethics official) demonstrated a reckless disregard for ascertaining the truth and demonstrated his intent to use public office for private gain.

B. DISCIPLINE FOR VIOLATIONS OF OGE STANDARDS OF CONDUCT

1. SUBPART A -- VIOLATIONS OF STANDARDS OF CONDUCT IN GENERAL

Voorhis v. Dep't of Homeland Security, 2010 MSPB LEXIS 1521 (May 5, 2010)(misuse of position; use of nonpublic information).

The appellant, a GS-13 Senior Special Agent with Bureau of Immigration and Customs Enforcement (ICE), was removed from employment based on charges of conducting unauthorized queries of individuals on an official government computer database; making unauthorized disclosures; misuse of position; and lack of candor. The Colorado Bureau of Investigations (CBI) received a complaint from the Bill Ritter Democratic Gubernatorial Campaign reporting possible misuse of the National Crime Information Center (NCIC) database in connection with a televised political advertisement by the Robert (Bob) Beauprez Gubernatorial Campaign for Governor. Prior to running for governor, Ritter had been the Denver District Attorney (DDA). The television advertisement accused Ritter of giving lenient treatment to an illegal alien arrested on drug charges in Denver and claimed that a plea deal allowed the illegal alien to avoid deportation, which freed him to commit a subsequent sexual assault on a minor in California. The complaint alleged that the information used in the political ad was not public information and could only have come from the NCIC database. After an investigation of the CBI complaint, it was determined that the appellant had accessed information about Ritter's tenure as the District Attorney through the NCIC database and had provided information obtained through his queries to the opponent's political campaign for the purpose of damaging Ritter's record. In taking the removal action, the agency cited 5 C.F.R. § 2635 generally for the proposition that federal employees are not permitted to misuse their positions by allowing improper use of non-public information, and observed that the standards of conduct are "vital to ensure that every citizen can have complete confidence in the integrity of the federal government."

On appeal to the MSPB, an administrative judge sustained the misuse charge.

Elhashash v. Dep't of Homeland Security, 2010 MSPB LEXIS 5503 (Sept. 22, 2010)(conflict with official government duties; importance of agency mission).

The appellant was removed from her position as a Customs and Border Protection Agriculture Specialist GS-11, with the Bureau of Customs and Border Protection (CBP), Department of Homeland Security based, in part, on charges that she engaged in conduct that created the appearance of a conflict of interest. The appellant posted bond for her brother-in-law, who was charged with an immigration violation and testified on his behalf at his deportation hearing dressed in her CBP uniform. Under DHS Standards of Conduct, employees must “avoid any action, whether or not specifically prohibited by agency Standards of Conduct (which cite Standards of Ethical Conduct for Employees of the Executive Branch; 5 C.F.R. Parts 735, 2635, Employee Responsibilities and Conduct), which might result in, or reasonably create the appearance of: Using public service for private gain; Engaging in activities which conflict with official government duties and/or responsibilities.”

On appeal to the MSPB, an administrative judge sustained the appearance of conflict of interest specifications. With regard to the appellant’s testifying on behalf of her brother-in-law at his deportation hearing, the administrative judge found that the appellant’s actions created an appearance of a conflict of interest because they were not in furtherance of her official duties and she was not authorized to testify in her official uniform. With regard to the posting of bail for her brother-in-law, the administrative judge found that the appellant’s conduct created the appearance of a conflict of interest because it contravened both her duties and the agency’s mission to enforce immigration laws.

Sanghi v. Principi, Secretary, Dep’t of Veteran’s Affairs, 2005 U.S. Dist. LEXIS 18903 (D.D.C. 2005)(honest effort in performance of duties).

The plaintiff, a VA physician, was terminated from employment on the grounds that he violated 5 C.F.R. § 2635.101(b)(5) when he failed and refused to timely complete patient discharge summaries despite several warnings and a suspension. A VA disciplinary appeals board affirmed the discharge and the plaintiff filed a civil action under Title 18, alleging that his removal was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; and unsupported by substantial evidence.

The district court held that the proper procedures were followed in terminating the plaintiff and that his termination was supported by substantial evidence. The court concluded that the plaintiff did not meet the requirement in 5 C.F.R. § 2635.101(b)(5) that he put forth an honest effort in the performance of his duties because, although he had a fiduciary duty to his patients to complete their discharge summaries prior to the time they were actually discharged, he failed to timely prepare the reports and refused to work evenings and weekends to complete his outstanding work.

Suarez v. Dep't of Housing and Urban Development, 96 M.S.P.R. 213 (2004)(circumstantial evidence sufficient to support violations of ethics rules; engaging in financial transactions using non-public information and actions creating an appearance of a violation of law or ethical standards).

The appellant was removed from her position as a GS-11 Single Family Housing Specialist on the basis of two charges. First, it was alleged that she used privileged information concerning HUD property, gained through her HUD employment, in order to aid her companion in the purchase of the property in violation of 5 C.F.R. §§ 2635.101(b)(3) and 2635.2635.703(engaging in financial transactions using non-public information), § 2635.101(b)(8)(giving preferential treatment to a private organization or individual) and § 2635.101(b)(14)(avoiding actions creating an appearance of violating the law or ethical standards in OGE's regulations), in addition to 5 C.F.R. § 7501.104(a)(4)(HUD supplemental standard of conduct regulation). Second, it was alleged that she falsified a financial disclosure form (450) by failing to disclose her ownership interest in the disputed property and a loan taken to assist her partner with the purchase and improvement of the property.

On appeal to the MSPB, an administrative judge did not sustain any of the charges and reversed the removal action, finding that there was no direct evidence proving that the appellant engaged in any misconduct. The agency appealed the initial decision to the full Board. The MSPB found that the agency proved the violations of OGE standards of conduct prohibiting financial transactions using non-public information and actions creating an appearance of a violation of law or ethical standards "through a preponderance of circumstantial evidence" and reinstated the removal. The Board stated that taken as a whole, there was compelling circumstantial evidence of violations of ethical standards. The Board also found that the appellant had falsified her OGE 450. The Board did not sustain the charges of preferential treatment or violation of HUD's supplemental regulations.

2. SUBPART B -- GIFTS FROM OUTSIDE SOURCES

Fletcher v. Dep't of Veterans Affairs, 2007 MSPB LEXIS 8047 (Nov. 1, 2007), aff'd, 108 M.S.P.R. 604 (2008)(failure to promptly return improper gifts equates to acceptance).

The appellant was removed from her position as a Police Officer, GS-6, with the Department of Veterans Affairs Police Service. The agency's action was based on charges of: 1) accepting gifts; 2) conduct unbecoming a federal employee; and, 3) failing to comply with orders of an Administrative Board of Inquiry (ABI). The appellant had formed a friendship with a volunteer Eucharist Minister who worked at the medical facility where the appellant was employed. The friendship was based on the appellant's interest in converting. The appellant was not aware initially that the minister was also a patient at the medical center, but became aware of this fact

later. The appellant was given several gifts by the minister before she became aware that he was a medical facility patient, including gifts of a religious nature and jewelry. After an investigation was initiated into her relationship with the minister and after she learned that he was a patient at the medical facility, the appellant returned all of the gifts she had received from him. The appellant was charged with, among other things, accepting gifts/loans in violation of 5 C.F.R. §§ 2635.202(a), 2635.101(b)(7) and 2635.

On appeal to the MSPB, an administrative judge sustained the gift charge. The administrative judge noted that the minister could be considered a “prohibited source” under the ethics regulations because he was seeking official action by the agency, *i.e.*, treatment. Further, the administrative judge found that even though the appellant did not initially know the minister was a patient when she received gifts from him, the appellant kept the gifts “long after” she became aware of this fact. Finally, though the appellant testified that she intended to return the gifts and eventually did so, the fact that she initially retained the gifts, without reporting her receipt of them to anyone at the agency or seeking legal advice about what to do with them, was enough to constitute “acceptance” in violation of the gift rules.

Sher v. Dep't of Veterans Affairs, 97 M.S.P.R. 232 (2004)(soliciting and receiving gifts from prohibited source; knowledge of ethics rules a factor in penalty determination).

The appellant was demoted from his position as a GS-13 Chief of Pharmacy Service to a position as a GS-12 Clinical Pharmacist and suspended for 45 days based on charges that he solicited and received free pharmaceuticals in violation of 5 C.F.R. § 2635, and refused to provide information relating to an administrative investigation in violation of Title 38. With regard to the Standards of Conduct violation, the agency determined that the appellant had solicited and received several hundred free samples of the drug Lipitor from a Pfizer salesman, and that these actions amounted to appellant soliciting and receiving a “gift” from a prohibited source in violation of 5 C.F.R. § 2635 of the Standards of Ethical Conduct for Employees of the Executive Branch, Subparts A and B, General Provisions and Gifts from Outside Sources.

On appeal to the MSPB, an administrative judge sustained both charges and the personnel actions taken by the agency. Although the appellant filed a petition for review with the full Board, he did not challenge the administrative judge’s findings with regard to the improper gift. Therefore, the Board sustained this charge without further analysis. The Board also looked at the ethics violations with regard to the penalties imposed because the appellant presented evidence that the agency had not adequately informed employees that accepting free samples of drugs was improper. The Board found that, although the agency could have done more to educate employees about this issue, the appellant was properly charged, the charges were correctly sustained and the penalty was appropriate because the appellant had attended ethics training and received a pamphlet explaining the Standards of Conduct.

3. SUBPART C -- GIFTS BETWEEN EMPLOYEES

Grossman v. Dep't of the Air Force, 2010 MSPB LEXIS 516 (Jan. 12, 2010)(providing free professional services to superior meets definition of "gift").

The appellant was suspended for 30 days and demoted from his position as a Command Post Manager, GS-13 to a GS-12 position on the basis of several allegations of misconduct, including misuse of government property in violation of 5 C.F.R. §§ 2635.704(a) and 2635.704(b), and DOD regulations, and giving an improper gift to his supervisor in violation of 5 C.F.R. § 2635.302(a)(1). With regard to misuse of government property, the agency alleged that the appellant, who was a licensed attorney, had used government communications systems and equipment to perform legal work for private clients. With regard to the gift charge, the agency alleged that the appellant had provided free legal services to his supervisor pertaining to the supervisor's divorce.

On appeal to the MSPB, an administrative judge sustained both ethics violation charges. With regard to the gift charge, the administrative judge found that provision of free legal services to the appellant's supervisor met the definition of "gift" under the regulations. Further, the administrative judge found that there was no evidence to support a finding that the relationship between the appellant and his supervisor constituted a friendship or a personal relationship that would justify the gift.

Siozon-Petersen v. Dep't of the Air Force, 2005 MSPB LEXIS 2067 (April 27, 2005)(proof of improper "gift" from subordinate).

The appellant was employed as a GS-13 Supervisory Contract Specialist with the Air Force. In 2003, she was arrested and charged with extortion relating to her acceptance of money from a subordinate employee. After a trial in the United States District Court for the District of Maryland, the appellant was acquitted of the criminal charges. Nevertheless, the agency subsequently proposed her removal for violating the Department of Defense Regulation (DODR) 5500.7-R (Joint Ethics Regulation) by accepting the money from her subordinate (a total of \$2820 over two occasions). The Joint Ethics Regulation incorporates by reference 5 C.F.R. Part 2635, the "Standards of Ethical Conduct for Employees of the Executive Branch."

In her appeal to the MSPB, the appellant argued, among other things, that her removal was improper because she was acquitted of the criminal charges, that she had not violated the ethics regulations by accepting money from an employee because she had a personal relationship with the employee involved, and that the employee involved was not her subordinate at the time of the events at issue. The administrative judge evaluated the case under 5 C.F.R. § 2535.302(b), which prohibits gifts from employees receiving less pay unless the employees are not in a supervisory subordinate relationship and there is a personal relationship that would justify the gift. The administrative judge found a violation was proven because the appellant had a supervisory role (either first or second level supervisor) over the employee when the "gifts" were given. The administrative judge also noted in a footnote that the appellant's assertions that she was unaware of the ethics regulations until after she accepted the money was not significant because the agency was only required to show that she violated the regulations, not that her violation was

willful.

4. SUBPART D – CONFLICTING FINANCIAL INTERESTS

Callis v. Dep’t of Justice, 2009 MSPB LEXIS 3045 (May 27, 2009), aff’d, 112 M.S.P.R. 301(2009)(definition of prohibited financial interest taken from 5 C.F.R. § 2635.403(c)).

The appellant was demoted from his position as a Clinical Psychologist (Drug Abuse Program Coordinator) GS-13 with the Bureau of Prisons (BOP) to the position of Clinical Psychologist (Staff Psychologist) GS-12, based upon charges that he had an inappropriate relationship with a subordinate. The appellant was found to have worked as an independent contractor at a group home owned and administered by a subordinate and to have jointly purchased a home for the subordinate’s non-profit.

In an appeal to the MSPB, the parties stipulated that the charge was really a conflict of interest or apparent conflict of interest charge, based on BOP Program Statement No. 3420.09, Standards of Employee Conduct, which states that, “[e]mployees shall . . . [a]void conflicts of interest in matters that affect their financial interests,” and “[o]utside employment, including self employment, must not result in, or create the appearance of, a conflict of interest.” The administrative judge sustained the charges using the definition of “prohibited financial interests” contained in 5 C.F.R. § 2635.403(c) because the BOP regulation does not define those terms. The administrative judge concluded that the appellant earned income from a business operated by his subordinate and entered into a joint business venture with his subordinate, both of which had a direct and predictable effect on or reasonably created an appearance of having an effect on his official duties. The administrative judge also concluded that the appellant was aware of the relevant prohibitions when he engaged in this misconduct.

5. SUBPART E -- CREATING AN APPEARANCE OF A CONFLICT OF INTEREST

Wallace & Martin v. Dep’t of Commerce, 106 M.S.P.R. 12 (2007)(charge of creating an appearance of conflict of interest requires actual participation by employee).

The appellants, Wallace and Martin are sisters. The agency removed Wallace from her position as a GS-15 Patent Examiner and canceled the appointment of Martin to a Human Resources Specialist position. The agency contended that, while detailed to a position in the agency’s Human Resources Office, Wallace acted improperly by making inquiries to a subordinate about the application process for a vacancy in which her sister was interested. Martin was subsequently selected for this same position. Among other allegations, the agency charged that Wallace engaged in conduct unbecoming a federal employee and violated 5 C.F.R. § 2635.502(a) by engaging in conduct that created an appearance of a conflict of interest.

In an initial MSPB decision, an administrative judge sustained both appellants' removals. With regard to the charge that Wallace violated section 2635.502, the administrative judge found that Wallace engaged in actions that amounted to advocating for her sister's hiring, and that her actions would cause a person with knowledge of the relevant facts to question her impartiality. Both appellants petitioned for review by the full Board, which reversed the initial decision. With regard to the charge that Wallace violated section 2635.502, the Board found that the lynchpin of the regulation is an employee's actual participation in a particular matter. Therefore, if an employee refrains from participating in the matter, the regulation is not implicated and the employee is not required to take the steps dictated in the regulation to seek out ethics advice and obtain approval from an agency ethics official. The Board further concluded that in this case, Wallace took steps to recuse herself from the actual selection process and the agency failed to show that Wallace actually participated in Martin's selection and appointment in any substantive manner. Therefore, no violation of section 2635.502 was proven.

6. SUBPART G – MISUSE OF POSITION

Ellis v. Dep't of Defense, 114 M.S.P.R. 407 (2010)(off-duty ethics violation supported penalty of removal).

The appellant was removed from his position as a Quality Assurance Specialist (Electronics), GS-11, based on charges of that he willfully forged or falsified a government document and misused his position. Specifically, the appellant was found to have created two documents, including one on agency letterhead, using an agency computer, falsely stating that he had been recalled to active military duty and would be relocating. The appellant was found to have created these false documents in order to vacate rental property before the end of his lease term. The appellant was charged with misuse of position in violation of 5 C.F.R § 2635.702 because he misused official government stationery and modified his orders from the Air Force. In his written response to the agency's charges, the appellant admitted to the misconduct at issue but argued he should not be disciplined because he did not receive any financial gain from his actions and because his inappropriate use of official government stationery was not related to performance of his job duties (off duty misconduct).

On appeal to the MSPB, an administrative judge sustained the misconduct and the removal action. With regard to the penalty, the administrative judge found that even though the appellant's misconduct was off-duty, nexus was established because the government had an interest in its employees not misusing their positions to forge government documents.

The full Board upheld the removal penalty on the grounds that the agency had provided evidence demonstrating a link between the employee's misconduct and its negative impact on the agency's trust in him.

See also Suarez v. Dep't of Housing and Urban Development, 96 M.S.P.R. 213 (2004)(circumstantial evidence sufficient to support violations of ethics rules; engaging in financial transactions using non-public information and actions creating an appearance of a violation of law or ethical standards).

A summary of this case is reported in section B.1, supra at p. 6.

7. SUBPART H – OUTSIDE ACTIVITIES

a. Satisfaction of Just Financial Obligations

Wesley v. Dep't of Treasury, 280 Fed. Appx. 966 (Fed. Cir. 2008)(5 C.F.R. § 2635.809 mentioned).

The appellant was removal from his position as an Information Technology Specialist with the IRS for failing to properly file his income tax returns and to timely pay his income tax liability for several years. The agency charged him with violating "Section 1203(b)(9) of the Restructuring and Reform Act of 1998" (RRA) and/or "other laws rules or regulations including [5 C.F.R.] section 2635.809 of the Office of Government Ethics (OGE) Standards of Conduct."

On appeal, to the MSPB, the board affirmed the removal, finding that the agency proved by a preponderance of the evidence that Wesley had violated section 1203(b)(9) of the RRA, and therefore removal was mandatory. The appellant's petition for review at the Court of Appeals for the Federal Circuit was denied.

Jenkins v. Dep't of Treasury, 104 M.S.P.R. 345 (2007), aff'd, 244 Fed. Appx. 349 (Fed. Cir. 2007)(5 C.F.R. § 2635.809 sustained as an alternative charge).

The appellant was removed his from position as GS-8 Contact Representative with the IRS on the grounds that he failed to timely file a personal income tax return for the 2002 tax year; and failed to properly file the return. On appeal to the MSPB, the administrative judge did not sustain the failure to timely file charge, finding that the appellant's actions were not willful. The administrative judge sustained the remaining charge, finding that the appellant willfully understated her tax liability, which constituting a failure to properly file her 2002 return.

On appeal to the full MSPB, the Board's sustained both charges. With regard to regard the failure to timely file charge, the Board found that in addition to violating section 1203 of the IRS Restructuring and Reform Act, the appellant was charged, in the alternative, with violating OGE regulation 5 C.F.R. § 2635.809, which states that "employees shall satisfy in good faith their obligations as citizens. . . especially those such as Federal, State, or local taxes that are imposed by law". Therefore, the full Board concluded that, contrary to the administrative judge's finding in the initial decision, the agency was not required to prove that the appellant acted willfully in

order to sustain the charge. Therefore, the Board upheld both charges as well as the removal action.

Ledbetter v. Dep't of Treasury, 102 M.S.P.R. 598 (2006) (5 C.F.R. § 2635.809 mentioned).

The appellant was removed from his position as a GS-11 Senior Associate Advocate with the Taxpayer Advocate Service at the IRS on the grounds that he failed to properly file a personal income tax return for the 2001 tax year and failed to timely and properly satisfy his tax obligations, in violation of section 1203 of the IRS Restructuring and Reform Act, 5 C.F.R. § 2635.809 of OGE's Standards of Ethical Conduct.

The Board affirmed the initial decision of the administrative judge, primarily based upon the 1203 violation under which removal was mandatory.

C. WHISTLEBLOWING AND ETHICS/CONFLICT OF INTEREST VIOLATIONS

Ingram v. Department of Army, 2011 MSPB LEXIS 4527 (July 25, 2011)(unspecified ethics charges as basis for individual right of action appeal).

The appellant sought corrective action from the MSPB under the Whistleblower Protection Act. He claimed negative personnel actions were taken against him after he made protected disclosures involving, among other things, violations of unspecified ethics regulations.² The appellant had obtained a legal opinion that allowing a department training event to proceed would violate ethics regulations and possibly compromise trade secrets of agency contractors. He was also concerned about a memorandum from the Deputy Secretary of the Army emphasizing the importance of avoiding these same ethical issues and stating there were penalties for doing so. Based on this information, the appellant disclosed to his supervisors that the program manager in charge of the event engaged in improper conduct, evidently, by planning and then holding the event. The appellant alleged that, after he made these protected disclosures, his project manager took away his job duties, denied his transfer request, involuntarily transferred him to another team, and lowered his performance appraisal.

Appellant's whistleblower reprisal appeal was initially dismissed by an administrative judge and remanded by the full Board for additional findings. After a second dismissal by an administrative judge, the full Board ruled on the merits in appellant's favor, concluding that the appellant had made protected disclosures, that the appellant's whistleblowing was a contributing factor in each of the challenged disciplinary actions, and the agency failed to show by clear and

² Notably, the MSPB decision does not discuss the actual ethics violations raised by the appellant in any detail.

convincing evidence that the same disciplinary actions would have been taken against the appellant in the absence of his protected disclosures.

Phillips v. Dep't of Transportation, 113 M.S.P.R. 73 (2010)(agency's concerns about ethics violations sufficient to support whistleblower's lateral reassignment).

The appellant was reassigned from her position as a GS-14 Division Administrator based on findings by the agency's OIG that she violated several (unspecified) provisions of OGE's Standards of Conduct when she used her public office for the gain of a private business and maintained a close personal friendship with a principal of a carrier over which she was exercising the agency's regulatory authority. The agency laterally reassigned the appellant to a position in a different office based on its conclusion that her conduct damaged her relationships with her coworkers in the Division as well as the agency's reputation among motor carriers. While the OIG complaint was pending, the appellant released to the media and others a complaint filed by another regulated carrier.

The appellant sought corrective action at the MSPB under the Whistleblower Protection Act, arguing that her reassignment was really the result of her protected disclosures. On appeal to the MSPB, an administrative judge found in favor of the agency, holding that the while the appellant's disclosures were protected under the WPA and were a contributing factor in her reassignment, the agency proved by clear and convincing evidence that she would have been reassigned, even in the absence of the protected disclosures. The appellant filed a petition for review with the full Board, which upheld the initial decision, finding that the agency had legitimate reasons, i.e., concerns about the appellant's violations of ethical conduct rules, to reassign the employee notwithstanding her protected whistleblowing..

Gaines v. Dep't of Navy, 2009 MSPB LEXIS 4101 (July 13, 2009)(disclosure of a violation of 5 C.F.R. § 2635.302(b) is whistleblowing).

The agency alleged that the appellant physically threatened his supervisor and removed employee from his position. In an appeal to the MSPB, the appellant raised an affirmative defense of whistleblower reprisal, alleging that the agency's removal action decision was in reprisal for his disclosure that his supervisor borrowed money from him in violation of 5 C.F.R. § 2635.302(b)(improper gift from subordinate employee).

The administrative judge found that the appellant did disclose information prior to his removal that he reasonably believed constituted a violation of law, and that this disclosure was a contributing factor in the agency's removal action. Nevertheless, the agency, established by clear and convincing evidence that it would have removed the appellant notwithstanding his whistleblowing activities.

Santos v. Dep't of Energy, 102 M.S.P.R. 370 (2006)(disclosure of 18 U.S.C. § 209 violation is whistleblowing).

The appellant, a GS-5 Student Trainee, alleged that the agency took several personnel actions against him in retaliation for his disclosure to its Office of Inspector General that his supervisor had offered him a bribe, in violation of 18 U.S.C. § 209. Specifically, the appellant complained to the agency's Office of Inspector General that his supervisor offered him money in an attempt to gain his support as a witness in equal employment opportunity complaints filed by another employee.

The appellant sought corrective action for the personnel actions taken against him at the MSPB, but an administrative judge dismissed his appeal on jurisdictional grounds. On appeal to the full Board, the MSPB found that the appellant's claim constituted a non-frivolous allegation that he engaged in whistleblowing activity because his disclosure of a violation of section 209 was a protected disclosure; the appellant's allegations, if proven, could support a finding that a disinterested observer, with the information available to the appellant, could reasonably believe that he was disclosing a violation of law. Nevertheless, the Board upheld the initial decision, concluding that the agency proved by clear and convincing evidence that the agency would have taken the same personnel action absent the disclosure.