U.S. MERIT SYSTEMS PROTECTION BOARD

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Chairman

April 29, 2015

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Ranking Member Cummings:

I am writing in response to your staff's April 27, 2015, request for information from the United States Merit Systems Protection Board ("MSPB"). It is my understanding that this request is related to a hearing the Committee on Oversight and Government Reform will hold on April 30, 2015, entitled "EPA Mismanagement."

I would like to emphasize that MSPB is prohibited by statute from providing advisory opinions in any matter. 5 U.S.C. § 1204(h) ("The Board shall not issue advisory opinions.") As such, in response to your staff's questions, we are only providing the current state of the law, as reflected in MSPB decisions or statute. Our responses should not be construed as an indication of how an MSPB administrative judge, or the three-member Board ("Board") at MSPB Headquarters in Washington, D.C., would rule in any future case.

I would also like to emphasize that, as a quasi-judicial agency, MSPB is not involved in any managerial action or inaction by any official of a federal agency. To the extent that a federal agency chooses to impose an adverse action against an employee, and the employee exercises his or her statutory right to file an appeal with MSPB, MSPB would adjudicate the appeal in accordance with statutory law, MSPB precedent, and precedent from United States federal courts, including the United States Court of Appeals for the Federal Circuit.

The following are the questions from your staff and MSPB's answers:

Question #1

Does current law allow an agency to take adverse action (such as removal) against an employee based solely on the employee's sworn statement or admission? If so, provide relevant precedent.

Answer to Question #1

The Board has sustained adverse actions (including removal) when an employee's admission was the sole evidence presented by the agency to support its charge. In Cole v. Department of the Air Force, 120 M.S.P.R. 640 (2014), the Board reversed the decision of the MSPB administrative judge and affirmed the agency's removal of the employee based on his marijuana use. The agency charged the appellant with the "use of an illegal drug," and the only evidence in this case was the appellant's admission of marijuana use. The Board found the admission, with nothing more, sufficient to sustain the agency's charge. Specifically, the Board stated:

> [A]n agency may rely on an appellant's admission in support of its charge, Leaton v. Dept. of the Interior, 65 M.S.P.R. 331, 337 (1994) . . . , and appellant's admission to a charge can suffice as proof of the charge without additional proof of the agency. See Wells v. Dept. of Defense 53 M.S.P.R. 637 (1992) ("appellant's own admission that he engaged in alleged conduct in violation of a regulation is sufficient proof to sustain the charge of disregarding a regulation or directive."); Mascol v. Dept. of Navy, 7 M.S.P.R. 565, 567 (1981) (the appellant's admission was sufficient to sustain the charge).

Cole, 120 M.S.P.R. at 645.

The Board further stated in Cole that the "appellant's admissions [regarding his marijuana use] constitute preponderant evidence that he used an illegal drug, as charged [by the agency] . . ." Id. at 646.

Additionally, in Wells v. Dept. of Defense, 53 M.S.P.R. 637 (1992), the agency charged the appellant with, among other things, the violation of an agency regulation related to timekeeping. The appellant admitted that his conduct violated the regulation. The Board held that the appellant's admission constituted "sufficient proof of the misconduct." Id.

Question #2

Does this law apply to violation of agency policy that does not amount to a criminal violation?

Answer to Question #2

The Board has not addressed specifically - in the context of a violation of an agency policy that does not also amount to a criminal violation - whether an employee's admission, without additional evidence, can be sufficient to sustain an adverse action. Nevertheless, as stated in response to Question #1, the Board has held that admissions, without further evidence, can be sufficient to sustain agency charges and the penalty of removal.

Question #3

What is the standard of evidence required for removal in non-criminal agency policy violations?

Answer to Question #3

Removals for non-criminal violations of agency policy will typically be based on charges of employee misconduct. In cases brought pursuant to 5 U.S.C. Chapter 75 (allegations of misconduct), an agency has the burden of proof in any appeal filed at MSPB by an employee. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(b). An agency must prove the alleged misconduct by a "preponderance of the evidence." 5 C.F.R. § 1201.56(b)(1)(ii). Preponderance of the evidence is defined as: "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 C.F.R. § 1201.4(q). The United States Supreme Court has stated that a preponderance of the evidence standard "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence. In re Winship, 397 U.S. 358, 371-72 (1970).

Regarding the evidence that an agency must produce to an appellant, the Board has held that "an appellant is not entitled ... to material on which the agency did not rely" in charging the employee. Forrester v. Dept. of Health and Human Services, 27 M.S.P.R. 450, 453-54 (1985), citing Klein v. Dept. of Labor, 6 M.S.P.R. 292, 295 (1981). Thus, prior to the imposition of any adverse action, an employee is only entitled to the evidence upon which an agency intends to rely on to support its charge.

Question #4

Under current law, can an agency place an employee on indefinite suspension where alleged employee misconduct has been referred to the U.S. Attorney's Office for potential criminal prosecution? If so, does the agency need to have specific knowledge of the potential criminal violation?

Answer to Question #4

With respect to the imposition of an indefinite suspension, an agency must prove that it: 1) imposed the suspension for an authorized reason; 2) the suspension has an ascertainable end, *i.e.*, a determinable condition subsequent that will bring the suspension to a conclusion; 3) the suspension bears a nexus to the efficiency of the service; and 4) the penalty is reasonable. Hernandez v. Dept. of the Navy, 120 M.S.P.R. 14 (2013). Among the authorized reasons for imposing an indefinite suspension is an agency's reasonable belief that an employee has committed a crime for which a sentence of imprisonment could be imposed. Gonzalez v. Dept.of Navy, 120 M.S.P.R. 14 (2013). Other authorized reasons include an agency's legitimate concerns regarding an employee's serious medical condition and the suspension of an employee's access to classified information. Gonzalez v. Dept. of Homeland Security, 114 M.S.P.R. 318, 327 (2010). Regarding an agency's concern that an employee has committed a crime for which imprisonment could be imposed, the Board has held that the standard for imposing an indefinite suspension in this circumstance is not whether the agency could prevail on the criminal charge, but rather whether it had a reasonable belief that the appellant committed a crime punishable by a term of imprisonment when it imposed the suspension. Dalton v. Dept. of Justice, 66 M.S.P.R. 429, 435-36 (1995).

In Martin v. Dept. of Treasury, the Board held that "an investigation, in and of itself, is insufficient, to give rise to reasonable cause." 12 M.S.P.R. 12, 19 (1982). In Thompkins v. U.S. Postal Service, 23 MSPR 5, 10 (1984), the Board held that the mere referral to the Department of Justice, without more, would not be enough to meet the "reasonable cause" standard.

Examples that would establish "reasonable cause" under § 7513(b)(1) include: (1) an indictment; (2) an employee arrested and held for further legal action by a magistrate; (3) an arrest or investigation accompanied by such circumstances showing reasonable cause; (4) criminal information; and (5) certain egregious acts such as murder or national security offenses, which are detrimental to the agency's mission, brought to the agency's attention via the news media. Gonzales v. Dept. of Treasury, 37 M.S.P.R. 589, 591 (1988).

Question #5:

Does an agency have to wait until the U.S. Attorney's Office or the Inspector General's Office completes its investigation in order to proceed with an administrative action?

Answer to Question #5:

We cannot locate any Board decision that would prohibit an agency from imposing an adverse action against an employee (including removal) before a U.S. Attorney's Office or the Inspector General's Office completes its investigation. It is possible that, in making such a determination, an agency could have concerns in

connection with an employee's Fifth Amendment rights, or other concerns, that could impact its decision to impose an adverse action. Stated differently, the decision on when to impose an adverse action most likely depends on the facts and circumstances of each case.

Should you or your staff have any questions, please do not hesitate to contact Bryan Polisuk (202-254-4403) or Rosalyn Coates (202-254-4485) on my staff.

Sincerely,

Susan Tsui Grundmann
Chairman
U.S. Merit Systems Protection Board

c.c.:

The Honorable Jason Chaffetz
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