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Melvin Y
Shibuya/HCM/USDAFS
05/05/2007 07:38 PM

To: Oileke E Rappe-Daniels/R10/USDAFS@FSNOTES
cc: Kariene K Ha.e/R10/USDAFS@FSNOTES
bcc:
Subject: Fw: Draft -- lth

As Deciding Official, Forrest Cole, Forest Supervisor should not be in this email. I therefore purposely exclude him.

It's clear OGC is against issuing this notice. We exercise considerable care in identifying the charge and believe the specification supports the charge. OGC disagrees.

This is information for your eyes only. Please destroy after reading. It's not protected by privilege and is subject to discovery.

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----- Forwarded by Melvin Y Shibuya/HCM/USDAFS on 05/05/2007 09:30 PM -----



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05/05/2007 09:27 PM

To: "TROST, TAMI" <TAMI.TROST@OGC.USDA.GOV>
cc: Carol Kittson/R1/USDAFS@FSNOTES
Subject: RE: Draft -- lth

I appreciate the email, Tami. Thank you for the input.

It is difficult to address your general criticism the draft is "woefully inadequate" because it "neglects to include much of the information contained in the investigative report."

Your criticism focuses principally on two critical failures. The first relates specifically our failing to "explain the timeline regarding the release of the draft Wildlife and Biological Diversity Resources Report." I fail to see the criticality of this failure but I will have the investigator specifically address that matter. Even if we cannot explain the timeline however, I don't know how that undermines the charge the employee improperly released deliberative (non-public) information to a non-Forest Service employee.

The second relates to our failing to identify clearly who released the document to whom. Does not the proposal notice identify the employee as the one who released the document to Larry Edwards of Greenpeace? As to what evidence the agency has to support this charge, the proposal notice cites the employee's own statement.

You contend the notice fails to address the critical Douglas Factors. Douglas is a substantive obligation the board places on the agency's decision making. The deciding official's failure to consider the relevant factors can constitute reversible error. However, I have not seen a board case where an agency's failure to consider the relevant Douglas Factors -- or any of the 12 factors, for that matter -- in the *proposal* stage has been found to be a procedural fatality to the agency's adverse action.

Nevertheless, a careful reading of the notice (see our Nexus section), shows we do in fact address Douglas:

Your failure to safeguard internal (draft) material entrusted in your care is serious. Worse, not only did you fail to safeguard that information, you admit to providing your draft to Larry Edwards of Greenpeace who, in turn, used that information to file an appeal against the agency. I find your act to be hardly inadvertent.

Nexus section, paragraph 1

How is the above not Douglas 1 (nature and seriousness of the offense and its relation to the employee's position and responsibilities, including whether the offense was intentional or technical or inadvertent or was committed maliciously or for gain...)?

Additionally, our Nexus section addresses Douglas 5 (effect of offense with the employee's ability to perform satisfactorily and supervisory confidence):

...Coworkers no longer trust you to keep from public release anything they say or write regarding biological, environment[al], or land-management use. So serious was your act of indiscretion that you were detailed from your position... to restrict access to sensitive information and minimize the damage of your failing to protect 'inside' information from unauthorized use.

And isn't, "I cannot think of any other alternative but to propose your removal," a consideration of Douglas 10 (potential for rehabilitation)? Implicit in a proposed removal action is the agency's belief the employee cannot be rehabilitated.

Last, doesn't the agency address Douglas 12 when it informs the employee his misconduct destroys the requisite trust the agency must have in his position at Douglas 12 (adequacy and effectiveness of alternative sanctions)? Removal is the only appropriate penalty when an employee commits an offense this serious.

The deciding official will have the opportunity -- and the obligation -- to consider these and the other factors of Douglas in his decision making. Therefore, the Nexus section identifies clearly the incompatibility of the employee's continued employment with the efficiency of the service. I therefore question your contention the draft fails to consider Douglas and worse, that it "does not adequately explain why the release of the document was so egregious as to warrant removal as the only appropriate penalty." I think we make a compelling argument for removal.

You characterize my inquiring as to the status of your review after you've had the draft for a month as a "tight deadline." Your concern the case grows increasingly stale is one I and many others share. Hence my pressing you to hasten your review.

I appreciate the assessment. I will have Carol who investigated the matter, address the matter of the timeline regarding the release of the Report.

Thank you again for your review/assessment.

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05/04/2007 01:55 PM

To: "Melvin Y Shibuya" <mshibuya@fs.fed.us>
cc: "Forrest Cole" <fcole@fs.fed.us>, "Olleke E Rapoe-Daniels" <orappedaniels@fs.fed.us>, "LELAND, ARLEAN"