



Melvin Y  
Shibuya/HCM/USDAFS  
08/12/2007 06:46 AM

To: Forrest Cole/R10/USDAFS@FSNOTES  
cc: Karlene K Hale/R10/USDAFS@FSNOTES  
bcc:

Subject: Decision Notice -- Ith

11

Hey Forrest:

Sorry I did not get to you earlier with this email but I've been stuck with stuff here at the Albuquerque Service Center (ASC). I'm sure you have a copy of Ith's rebuttal to the proposed removal. Here are some thoughts related to your decision making on the proposed adverse action.

First, your decision should consider only the contents of the proposed removal notice of your Deputy. This means the charge and the materials supporting the charge, the employee's rebuttal, and your consideration of the Douglas Factors.

Second, you are not barred from resolving issues raised by the employee in his rebuttal with those who have first-hand knowledge of the issues. This includes any and all interdisciplinary team (IDT) members, its leader, and those familiar with what can and cannot be released for public comment (and also -- and just as important -- at what stage a draft document can/should be released)

This second item is particularly important. You need to assiduously avoid considering matters not contained in the proposed removal notice as this could undermine the entire case. It could constitute prohibited ex parte communications that deprive the employee an opportunity to challenge. For example, if the proposing official pressures you to support her, that communication is fatal to the case because the employee could not respond to Olleke's apparent distaste of the employee, regardless of the gravity of his misconduct.

Or, if you gain additional information not contained in the proposal notice but is, in your mind, fatal to the employee, that information relied upon duress the case because the employee had no opportunity to rebut.

Third, you have to consider the relevant Douglas Factors. There are a total of 12. I identify them here:

1. The 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; (MSPB holds this is the most serious of all the factors and you need to give heavy consideration to this factor in your decision making. In your mind, if the charge is sustained, how serious is the misconduct of a District's Wildlife Biologist (and former IDT Leader) releasing information to Larry Edwards of Greenpeace without prior authorization?)
2. The employee's job level... including fiduciary role, contacts with the public, and prominence of the position; (In this specific case, you need to carefully consider the employee's "contact with the public" in relation to the charge identified in the proposal notice.)
3. The employee's past disciplinary record; (He has no prior discipline, right?)
4. The employee's past work record, including length of service, performance on the job, ability to get along with Federal workers, and dependability; (This factor is important in this case in light of his job performance, ability to keep information confidential, and whether he can be depended upon to do his job as a Wildlife Biologist.)
5. The effect of the offense on the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned tasks: (Again, this factor is particularly important. You need to look at the impact of the misconduct in direct relation to his job and the trust level you and his supervisor (s) have in him.)

*no to Olleke's not confidential to IDT*  
*in of instructions?*  
*not Olleke's but Olleke's*  
*meet w/ Olleke's*

*removed Ith from DC to SC for the purpose of deliberation*  
*Other advisors do not want him*  
*no bias*

6. The consistency of the penalty with those imposed upon other employees for the same or similar offenses; (Don't know if your Region has ever faced similar misconduct . Even if you have, and have imposed lesser penalty, so long as you can justify the penalty in this case, you're okay .) *(No) ok w/ R3 (Subst D) P. 27*
7. The consistency of the penalty with the agency's penalty guide; (Removal is consistent with the Guide.)
8. The notoriety of the offense or its impact upon the reputation of the agency; (If this one has spashed the headlines, the underlying misconduct of unauthorized leaking of information makes this factor important for you to consider .) *to see P. 10*
9. The clarity with which the employee was put on notice of any rules that were violated in the committing of the offense or had been warned about the conduct in question; (You'll have to check on R 10's proclamations on this .) *free statement ethics training*
10. The potential for the employee's rehabilitation; (Your thinking is critical in this factor .) *to see P. 10 to file a mit*
11. Any mitigating circumstances surrounding the offense such as unusual job tensions, personality problems; mental impairment; or harassment, bad faith, malice, or provocation on the part of others involved in the matter; (i don't remember seeing any mitigating factors in his reply . You need to make an independent reading of the reply and determine for yourself .)
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. (This factor is no less important than the previous ones . You need to consider a lesser penalty and justify whatever penalty you decide to take .)

The MSPB requires you to consider only the relevant factors in your decision making . While you need not refer to all in your decision making, we'll need to show the employee the basis (bases) for your decision. You will be taken to task in your decision making and especially your consideration of Douglas. So make sure you pay more than lip service to these factors .

Fourth, once you come to decision, you simply need to communicate your decision to me and I will draft a notice to the employee for your review and signature. The notice will contain appeal rights to the MSPB or the negotiated grievance procedure (and binding arbitration).

Some last thoughts. You need to destroy this email as it's subject to discovery (fancy term for opposing side to get information) under MSPB rules. I'm not an attorney. This email is therefore not protected by privilege between an attorney and his/her client. Nor does it constitute a "work product" by an attorney, again for the same reason. Tell everyone to not keep emails related to this matter.

Once you sign a document, the document is yours, not the one who drafted the document. You cannot disclaim ownership of the document by testifying the Employee Relations Guy wrote something for your signature. You need to convey the conviction of its contents. I've had many a deciding official try to distance himself from the letter by saying just that, paving the road for mitigation or reversal when the deciding official testifies he would not have taken the action but for the pressure by others to do so.

So please look carefully at the employee's rebuttal, clarify issues, consider the agency's case and the important Douglas Factors, and let me know your decision.

OGC promises to do a quick review.

Call if you have Qs.

Melvin Y. Shibuya  
Chief, Labor/Employee Relations Branch