



Meivin Y
Shibuya/HCM/USDAFS
09/26/2007 02:04 PM

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

Subject: Decision Notice w/ Douglas

28



R10/Tongass_Ketchikan/Glth_Dec.doc

Forrest:

Please see attached draft decision notice. I took your analysis of the Douglas Factors and culled much of what you put in.

I ask that you do another worksheet and destroy the one you did . Here's why.

In the first factor, the nature and seriousness of the offense... I excised from your discussion stuff like:

Mr. Ith drafted his own environmental report, would not modify the document to address concerns raised by the team and other peers, and then provided this information to the Greenpeace organization for the purpose of promoting his own agenda regarding wildlife issues and road construction on the Tongass. Use of this draft wildlife report in Mr. Ith's appeal was inappropriate. It was not available to the public nor the decision maker, 5 U.S.C. 552.(b) (5). Mr. Ith was argumentative and refused to follow proper direction and guidance regarding the Scott Peak wildlife report, thus alienating peers and co-workers. It's important to note that Mr. Ith's successful appeal against the government was based cumulative effects, not the draft wildlife report that he released without authorization. The remand of the appeal upheld the wildlife analysis used in the final analysis of the project. Mr. Ith's resource report was finally completed by another wildlife biologist following Forest protocol and documentation used in previous planning efforts.

Mr. Ith violated 5 U.S.C. 2835.808C, which states an employee may not participate in an official capacity in fundraising for a non-Federal organization. Mr. Ith has on several occasions solicited funds for FSEEE for the sole purpose of financing his appeal against the Government. Mr. Ith used his official title and position with the Forest Service to further the fundraising effort. These efforts were clearly for personal gain.

It is very dangerous to put stuff like this in . First, the appellant can state you identify stuff against which he did not have an opportunity to defend himself in his written response to the charge . This can constitute harmful procedural error . That is, in the proposal notice, we do not state he "would not modify the document to address concerns raised by the team and other peers and provided this information... for the purpose of promoting his own agenda ..."

Second, we do not cite as evidence in the proposal notice he was "argumentative and refused to follow proper direction and guidance ... thus alienating peers and coworkers ."

You have to exercise considerable care when considering Douglas . Remember, we're charging him with improper conduct (releasing deliberative material prior to their authorize release and improper fundraising). Yet, in Douglas you sustain the removal based in part on your finding he refused to modify the document based on teammate criticisms? And how can you expect him to rebut your stating he was argumentative and refused to follow instructions?

Instead, in addressing this factor you should focus principally on the misconduct itself . In your mind, how grave the offense of releasing deliberative information and improper fundraising? Is the misconduct by itself sufficiently grave as to destroy his tie with the government?

With respect to the second factor, I took the following out:

Varying opinions are normal relating to recommendations and the need to air differences is paramount when discussing recommendations. Mr. Ith failed to perform work in a timely manner; take recommendations from peers after being informed his work was incomplete and lacked supporting documentation to justify his recommendations; take direction from supervisors; follow Forest protocols; work collaboratively within a team environment; and did in fact work counter to the team.

Mr. Ith's use of his official authority for the unethical means of contacting the public and soliciting funds violated USDA Department of Ethics. Mr. Ith is known to have done this on at least three occasions.

My reasoning for doing so is again related to injecting matters to which the employee has not had a chance to respond.

Can the employee take issue with your stating he "failed to perform work in a timely manner, take recommendations from peers after being informed his work was incomplete and ... did in fact work counter to the team?" I think he can.

Can he challenge your claim that he misused his authority and solicited funds against ethics regulations on at least three occasions? I think he can. And yet, these are not identified in the proposal notice.

3. The employee's past disciplinary record. I took out the following:

Mr. Ith was issued a three day suspension, dated January 9, 1995 for failure to wear required protective equipment when required. Additionally, a letter of reprimand was developed based on Mr. Ith's failure to follow direction, but as a result of his whistle blowing it was advised by counsel that the Forest not issue the reprimand due to the appearance of retaliation and timing of circumstances.

I think the disciplinary action 12 years ago too stale to cite. Also, citing a reprimand that was never issued may hurt more than help. After all, we're claiming that standing alone, the current misconduct is sufficient to remove the employee.

4. The employee's past work record, including length of service, performance on the job, ability to get along with Federal workers, and dependability.

I took the following out:

A letter of expectations, dated May 31, 2005, addressed to Mr. Ith cautions him to work cooperatively and professionally with peers. It was in this letter that Mr. Ith was removed as the Scott Peak EIS IDT team leader and the Scott Peak IDT wildlife biologist. Concerns were raised regarding Mr. Ith's inability to finalize his resource report, meet time frames, to cease assuming additional work without approval, and to improve communications with his supervisor. Mr. Ith was argumentative and refused to follow proper direction and guidance regarding the Scott Peak wildlife report, thus alienating peers and co-workers. The investigation identifies that Mr. Ith, after being removed from the team and the team itself being directed to not work on the Scott Peak Timber Sale, continued to work on the project.

Similar concerns associated with the attitude exhibited by Mr. Ith was documented and discussed with him regarding his work on the Port Houghton-Cape Fanshaw project. Mr. Ith acknowledged these concerns and referenced others had observed the same traits.

Mr. Ith's first appeal of the Scott Peak logging project was in 2006. Importantly, this is after he was removed from the project.

Again, my reasoning in the earlier factors applies to this one. You show that he is unable to get along with co-workers or heed supervisory instructions. I think at hearing you can state that his

conduct/performance surrounding the matter on which he was removed demonstrated undependability and an inability to work productively with co-workers. I would not put it in the analysis.

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:

As a result of the Scott Peak situation, co-workers felt used in some circumstances and others were concerned for the official records. The Petersburg District has one planning team and team members refuse to work with him on matters deliberative in nature. Attempts have been made to find a match for Mr. Ith on other Districts of the Forest, however, there was no confidence expressed by other teams in Mr. Ith's ability to perform his duties with the integrity expected of a government employee and placement was not possible.

Additionally, when the Management of the Tongass National Forest became aware of the appeal by Mr. Ith it was necessary to remove him from the District Office to another office in order to protect the government's ability to provide the supporting documentation necessary to defend its decision. Mr. Ith was detailed to a special project unassociated with what he was hired to do, outside of the Petersburg Ranger District to protect the integrity of the IDT deliberative process. The work he was assigned is completed and no additional work or funding is available to continue this arrangement.

Employees felt they couldn't have open conversations around the office, in meetings or elsewhere for fear that Glen would use these conversations against them in future appeals. Mr. Ith went outside the limits of his profession to shut down Scott Peak and the Overlook timber sales.

I condense much of what you write in this Factor . I advise against identifying co-workers feeling "used" by the employee. That kind of testimony comes from the co-workers themselves.

The part where the employee had to be reassigned to preserve the security of the deliberative process is germane, no doubt. And you make a good argument that the adverse effect of his misconduct resulted in the action.

6. The consistency of the penalty with those imposed upon other employees for the same or similar offenses;

See my change

7. The consistency of the penalty with the agency's penalty guide.

See my change.

8. The notoriety of the offense or its impact upon the reputation of the agency.

I took out the following :

The offenses have become notorious in the Forest, the Region, and the Nation. Mr. Ith, on his own volition, has provided interviews to local news stations and he has engaged other State Agencies as well as the environmental groups such as Greenpeace and FSEEE (Forest Service

Employees for Environmental Ethics). Mr. Ith has on several occasions solicited the amount of \$50,000.00 through FSEEE for the purpose of bringing suit against the Tongass even after his original concerns were addressed in a new environmental analysis. Currently, members of the public are engaged in a letter writing campaign against the Forest based on misinformation provide them by Mr. Ith and FSEEE. The FSEEE website routinely updates the status of Mr. Ith's situation with information that is not factual. Most recently, Mr. Ith has filed suit on the Scott Peak Timber Sale project.

Here's my thinking. This factor asks you to speak to the notoriety of the offense. The offense is improper conduct (release of deliberative material and improper fundraising). That the employee has gone to the media to publicize his struggles with the agency does not make the offense notorious.

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.

I took out the following :

He was advised on several occasions by his supervisor, co-workers and peers that he was not following standard procedures regarding his draft wildlife report. Interviews and declarations state that his report was not timely, did not substantiate his conclusions, was not clear enough to help the public understand the analysis, and did not follow protocols of previous environmental analysis projects. He was also informed that his report did not warrant placement in the record as it was not sufficiently complete to support the documents released to the public. This report was not accepted in the project record by the individual responsible for its compilation. Mr. Ith placed the document in the record on his own. Later completion of the document by another wildlife biologist and team leader updated the shortcomings identified to Mr. Ith whereby their report became the document supporting the final decision. Mr. Ith's report was not available to the decision maker nor should have been made available to the public.

Again, we do not cite in the proposal notice his being instructed on several occasions that he was not following standard procedures. Nor do we cite his untimely report, lack of substantiation, etc. Like that.

10. The potential for the employee's rehabilitation;

I took out the following :

Mr. Ith has taken the position that regardless of how the Forest addressed his issues on the Scott Peak project, with exception of not implementing it, that he intended to sue the government. This was stated during appeal resolution discussions and posted on the FSZEE website. He has in fact filed the suit he stated he would regardless of the additional analysis performed. Based on this fact, there are no positions suitable for Mr. Ith on the Tongass because of the lack of trust in his abilities to carryout the responsibilities of his position. Consequently, we are not able to find placement for him anywhere in the Forest Service.

Here, you are tasked to speak to whether the employee is salvageable. His telling you he intends to sue, absent your not implementing the project, does not speak to his rehabilitation potential. On the other hand, if he is not contrite, shows no remorse, is adamant he did nothing wrong, that speaks to the employee's rehabilitative potential. But filing suit does not seem to me to speak to this factor.

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.

This is okay.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

I took out the following :

Mr. Ith has stated that he would not cease his illegal and unethical efforts.

Did he really say he would not cease his "illegal and unethical efforts? " Anyway, I just used your last sentence.

Please let me know your thoughts after reading this revised decision notice that now includes Douglas. If you agree, trash your first worksheet and use my advice as a guide when you address anew. Your worksheet is releasable to the appellant when he files an appeal and the parties engage in discovery. That's why you should destroy your original worksheet and any attachment of it in emails. Make sure it does not exist. Also, you should trash this email as it too is discoverable. I'm not an attorney.

Melvin Y. Shibuya
Chief, Labor/Employee Relations Branch
Phone # (505) 563-9500
Cel # (505) 331-2848

Email: mshibuya@fs.fed.us