

Fed Employees Have a Right to Respond to Rumors Behind Removal Actions

By Neil A.G. McPhie

Rumors have a way of spreading around federal offices like wildfire. Often they provide titillating or shocking bits of information about management decisions and co-workers' personal affairs. Sometimes federal employees can even find themselves losing their jobs over such rumors and other allegations without being given a chance to respond to them.

That is what happened to a farm loan officer at the U.S. Department of Agriculture (USDA), which was recently ordered by the U.S. Merit Systems Protection Board (MSPB)

to restore the worker's employment and provide him with back pay and benefits. MSPB affirmed

an administrative judge's ruling that USDA violated John M. Pickett's due process rights by removing him without letting him review and respond to allegations he had been arrested and rumors he held a gun to his wife's head.

Case Basics

The events leading to Pickett's termination began with a February 2009 phone conversation he had at his office in which he said, "Just kill them all" or "Just shoot them all." Two co-workers overheard this comment and all workers at a Farm Services Agency office in Mississippi were sent home for the rest of the day and the following day due to safety fears and workplace disruptions. One of the employees who overheard the disturbing comment testified that prior to this incident she heard a rumor that Pickett had held a gun to the wife's head.

The USDA proposed Pickett's removal the following May, citing his inappropriate conduct that frightened co-workers, his being intoxicated during work hours and his consumption of alcohol during work hours. Pickett responded to the agency's proposal in writing and orally, but a deciding official, R.M. Carnegie, sustained the charges. Pickett appealed his August 2009 removal to MSPB

. Carnegie later testified he based his decision on information from Pickett's case file, along with a tip about a prior arrest told to him by another agency official.

Carnegie added that the rumors he heard about Pickett's conduct outside the office played a "minor role" in his removal decision "in that... it caused [the employees] to be more fearful..." In deciding the employee's punishment, the agency said it considered a 2006 newspaper notice saying Pickett had been arrested and was expected in court for disturbing the peace. USDA never provided Pickett with the newspaper notice prior to his removal, and he denied ever threatening anyone with a gun, being charged with disturbing the peace and holding a

gun to his wife's head.

What federal employees need to know

An agency must give an employee an opportunity to review and respond to comments or rumors that could cause prejudice and are under the consideration of a deciding official weighing removal.

New and material information obtained by a deciding official for a pending case without a public employee's knowledge (i.e. "ex parte communication") can undermine the employee's constitutional due process guarantee of notice of the charges and the right to respond to them.

A federal employee is entitled to a new constitutionally correct removal procedure when a deciding official receives certain new and material information without the employee's knowledge. This ex parte communication must result in a substantial procedural defect that could cause prejudice and adversely impacts the due process guarantee.

Under the Federal Circuit Court of Appeals' ruling in *Ward v. U.S. Postal Service*, the MSPB

was directed to view ex parte communications relating to a penalty decision (i.e. the newspaper notice about Pickett's alleged arrest) instead of that of a charge as a potential due process violation.

Even if MSPB

decides such ex parte communication does not amount to a due process violation, it should be considered a harmful procedural error.

Federal employees have a right to know and challenge any information managers consider when deciding on their removal. Federal employees who have been targeted for adverse employment actions should contact a federal sector employment attorney who can aggressively protect their due process rights.

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