

Fed Employees'™ Removals Reversed Because of Termination Secrets

Federal agency managers had better start laying all their cards on the table when it comes to the information they use in their decisions to fire employees. As of February 2011, the U.S. Merit Systems Protection Board (MSPB)

is no longer inclined to consider an agency's omission of such information from removal notices as a harmless procedural error.

In a trend that could help federal employees facing termination, the MSPB

recently delivered a series of rulings reversing agencies' removal actions. The Board held that deciding officials violated federal civil service workers' Fifth Amendment due process guarantee by not being completely forthcoming about the information on which their decisions were based. These rulings follow the U.S. Court of Appeals for the Federal Circuit's decision in *Ward v. U.S. Postal Service*

, (U.S. Ct. App. No. 2010-3021, February 17, 2011).

In *Ward*, the Federal Circuit directed the MSPB

to stop viewing as a harmless procedural error, an agency's failure to notify its employees of new and material information that could have negatively influenced a deciding official's enhanced penalty determination. *Ward* involved a U.S. Postal Service mechanic who was terminated in 2008. In its Notice of Proposed Removal, the agency only cited one incident of misconduct with a supervisor as the reason for the mechanic's removal. However, in investigating the mechanic's case a deciding official had talked to other supervisors and learned of other incidents of misconduct.

Initially, the MSPB

argued the deciding official's failure to mention the subsequent allegations of misconduct in the Notice of Proposed Removal did not constitute a due process violation because the ex parte communications related to the mechanic's penalty and not his charge. The Court swiftly rejected the argument as "arbitrary and unsupported," finding "no constitutionally relevant distinction between ex parte communications relating to the underlying charge and those relating to the penalty." The Federal Circuit vacated the MSPB's

ruling that sustained the mechanic's removal, and remanded the case.

Recent MSPB

decisions influenced by *Ward*, ordering agencies to cancel federal employees' removals and restoring their employment status include the following cases:

Lopes v. Dept. of the Navy

: In this MSPB

case, the agency removed an information technology specialist, charging her with misuse of her government phone, laptop and desktop computer. The agency ran afoul of Ward when it failed to notify the employee that the deciding official also took into consideration the IT specialist's three-day suspension for misusing a government credit card in the year 2000 and other alleged past instances of misconduct. Following the mandate set by the Federal Circuit decision in Ward, the Board held, "The court in Ward made clear that, if a constitutional violation has occurred, it cannot be considered a harmless error and the agency action must be reversed."

Pickett v. Dept. of Agriculture

: The agency proposed to remove a farm loan officer for an incident in which he frightened co-workers who overheard him talking on the phone and saying he wanted someone or something shot or killed. Instances of drinking on the job and on-the-job intoxication were also cited. However, the employee was never informed that rumors that he had threatened his wife with a gun and a newspaper article mentioning his alleged arrest also influenced the deciding official's penalty determination.

Gray v. Dept. of Defense

: The agency cited an internal review auditor's felony criminal conviction as the basis for his removal. However, the agency failed to notify the employee that the deciding official also considered concerns over the auditor's ability to maintain a non-critical sensitive position as a convicted felon.

What Federal Employees Should Know:

Federal employees need to remember that even if the MSPB

finds an agency violated their due process rights guaranteed by the Fifth Amendment by failing to disclose all of its reasons supporting termination, the employee is not in the clear. Such decisions could result in the agency subjecting the employee to an entirely new, constitutionally compliant removal procedure or other adverse action. However, in instances where new, lawful procedures for removal are implemented, federal employees are at least afforded the opportunity to respond to all the charges made against them. Federal civil services workers who have received removal notices should immediately contact a competent federal sector employment

attorney.