

## White Lies Can Leave Dark Stains on Federal Careers

By Mathew B. Tully

With executive branch agencies facing tighter budgets and looking harder at the bottom line, federal employees have come under intense scrutiny. Naturally, with this greater scrutiny comes a greater fear of making mistakes. There is also an equally great temptation to cover them up, supporting a statistical trend evidencing a lack of candor in the federal work place.

According to the Merit System Protection Board's fiscal 2011 annual survey of federal employees, 62.9 percent of respondents said their organization's leaders maintain the highest standard of honesty and integrity. That figure was down from 68.4 percent in fiscal 2010. Employees who are not honest with their supervisors may end up inflicting more harm on their federal careers than through their underlying mistakes.

In the federal service, lack of candor charges can carry grave consequences. As the MSPB stated in a 2005 case, *Jackson and White v. Dept. of the Army*, "lack of candor strikes at the heart of the employer-employee relationship." It can be punished by suspension or termination.

Appellate courts also take a hard-line stance with respect to lack of candor charges. As the U.S. Court of Appeals for the Federal Circuit explained in its 2001 ruling in *Ludlum v. Dept. of Justice*, lack of candor involves an employee's "failure to disclose something that, in the circumstances, should have been disclosed in order to make the given statement accurate and complete."

This charge should not be confused with falsification, which involves an "affirmative misrepresentation" and intent to deceive.

In *Ludlum*, the Federal Circuit affirmed an MSPB decision that upheld a lack of candor charge against an FBI special agent who was not completely forthcoming about how frequently he used his work vehicle to pick up his daughter from daycare. The case represents an all too common situation whereby federal employees engage in lack of candor when attempting to explain (or not explain) work-related situations tangential to their performance objectives in the workplace.

Federal employees must be wary of agency attempts to misconstrue their statements, which may establish grounds to satisfy a charge of lack of candor. The agency does not prove a lack of candor charge when an employee merely says something incorrect or does not provide a complete explanation. The agency must prove by preponderant evidence that the employee provided incorrect information and that this act involved an element of deception. Just last March, the MSPB, in *Rhee v. Dept. of the Treasury*, upheld an administrative judge's decision that reversed a 30-day suspension imposed on a special agent charged with lack of

candor.

The employee, a special agent with the Treasury's Inspector General for Tax Administration, was asked by her supervisor the date in which she created a document and placed it in an electronic repository where it could be tracked and shared. The agent responded that she created the document within a mandatory five-workday period and she thought it had been uploaded within that time. The supervisor interpreted her statement to mean that the agent uploaded the document into the repository within the five days when, in fact, it was created but not uploaded during that period. At hearing, the agency provided evidence showing that computer data was inconsistent with the agent's testimony, as well as evidence showing the agent's motive to support the charge. The agency did not carry its burden because the evidence it presented insufficiently rebutted the agent's "entirely plausible" assertion that her statement to her supervisor was accurate.

Federal employees charged with lack of candor should immediately contact a federal employment attorney. Depending on the circumstances, a lawyer may be able to rebut the agency's charge by showing that the employee's statements were true, he or she believed his or her statements were true, or he or she lacked any intent to deceive.

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