



TULLY RINCKEY PLLC
YOUR LAWYERS FOR LIFE - 1888LAW4LIFE.COM

Tully Rinckey PLLC's Neil McPhie, Esq. tells Federal Times sometimes, 'I'm Sorry' is not enough

**Sometimes, 'I'm sorry' is not enough.
Neil A.G. McPhie, Esq. Director of Legal Services**

There is never a want of news articles about politicians, celebrities or business leaders who do or say something stupid and – after they stir widespread public outrage – apologize, or provide something that loosely resembles an apology, for their actions. For the most part, whether the genuine or pseudo apology came from a congressman who threatened to break a news reporter “in half,” or from a chief executive who publicly complained about two female employees “distressed babies,” this apologize-after-outrage strategy has proved successful for high-profile individuals. However, it is less effective for federal employees. The motto, “forgive and forget,” does have its place in the federal merits system. One of the 12 so-called “Douglas” factors that deciding officials are supposed to consider when weighing how severely an employee should be punished is his or her rehabilitative potential. The Merit Systems Protection Board (MSPB) has repeatedly stressed an “appellant’s expression of remorse when the agency investigated his misconduct demonstrates rehabilitative potential,” as it noted in *Fushikoshi v. Department of Agriculture* (2013). However, half-hearted apologies will not fly with deciding officials or the Board, and I have long believed even genuine apologies cannot eclipse the fact that an employee engaged in misconduct. When I was chairman of the MSPB, I heard the case *Heaggans v. Department of Defense* (2006). This case involved a military pay supervisor

whom the agency demoted for violating agency policy regarding Internet use and sending to subordinates an inflammatory, religious-based statement in which she suggested the United States will "cleanse" Islamic regions. This message was sent to 28 subordinates, and one of them found its message deeply upsetting. The email was forwarded to two Muslim employees who likewise found it upsetting. The supervisor subsequently sent another email apologizing for her initial message. An MSPB administrative judge reversed the agency's decision, finding the appellant's message in this email was protected by the First Amendment's right to free speech. The judge also noted that out of the 30 employees who received the email, only three were offended by it and only one of them rejected her apology, believing it to be insincere. Only one of those upset employees worked in the supervisor's unit, and the judge found the appellant should not be held responsible for any post-apology "commotion." The agency filed a petition for review and the Board affirmed the MSPB judge's decision, but I wrote an opposing opinion. "The fact that only three employees were identified as being upset by the appellant's email and that one of those employees accepted her apology does not make the appellant's action in sending the email acceptable," I said. The apology did not change the fact that the supervisor's message "impacted the efficient operation of the agency by disrupting employees in the performance of their official functions and disparaging the religion of some workers." It is one thing for a federal employee to express remorse after learning something he or she did was wrong; it is another thing for an employee to express remorse because he or she feels obligated to do so. Sincerity counts, and deciding officials and the MSPB look for it. The case *Laniewicz v. Department of Veterans Affairs* (1999), for example, involved a telephone operator whom the agency removed because she, among other things, misdirected a cardiac failure response team during an emergency and then verbally abused a volunteer. At the recommendation of a deciding official the operator wrote a letter of apology to the volunteer, even though she did not believe she was at fault. Consequently, the Board noted, the deciding official found the employee "lacked sincere regret for her behavior and a conscious decision to reform" and "had little chance for rehabilitation." The Board found the agency's removal of her to be reasonable. Federal employees need to remember that it usually gets harder to apologize for misconduct the longer they wait, and deciding officials may go easier on them the

sooner they say “sorry.” Neil McPhie is Director of Legal Services for Tuljy Rinckey PLLC and the former chairman of the U.S. Merit Systems Protection Board. He concentrates his practice in federal sector employment and labor law and can be reached at info@fedattorney.com.