

CHAPTER THREE

ADVERSE ACTION CAUSES

Fivefold are crimes:

The crime of the hand, by wounding or stealing;

the crime of the foot, by kicking or moving to do evil deeds;

the crime of the tongue, by satire, slander, or false witness;

the crime of the mouth, by eating stolen things;

the crime of the eye, by watching while an evil deed is taking place.

— Old Irish Law

Assuming we have decided that the situation is one that requires adverse action coverage, we now turn to the next part of the agency's burden, which is to prove that the agency has cause for an adverse action. If it is a disciplinary situation, the most common of adverse actions, you have to show that the employee's conduct was misconduct. The federal government does not have a list of wrongdoings that we can reference to determine when an adverse action is appropriate. Rather, what we have is a general standard that we must apply deductively to all cases.

The basic substantive requirement for an adverse action has been around since 1912 and it is simple. The Lloyd-LaFollette Act, now in 5 USC 7513, says tersely that agencies may only take adverse actions "for such cause as will promote the efficiency of the service." We will discuss the "efficiency of the service" standard in general terms, then we will talk about the elements of proof you need for the most common causes for adverse actions.

Although seemingly broad and ambiguous, its meaning has evolved over the years into a workable and certain criterion that the federal courts have applied strictly since they assumed broader jurisdiction over adverse actions. The agency must show that it functions better by virtue of having taken the action. The appellate authority requires a showing of *nexus* (Latin for "connection") between the employee's conduct or situation and the agency's mission.

When dealing with a disciplinary adverse action, for example, you must convince the courts that what the employee did somehow affected the mission of the agency or the job in which he or she worked. For example, the reason that we can safely discipline employees for coming to work under the influence of alcohol is the indisputable fact that federal employees are more efficient

when they are sober. When we discipline an employee for stealing government property, it is not because of the criminality of the act but because agencies cannot function properly if employees are walking off with the property. When agencies discipline an employee for insubordination, the rationale is that federal departments cannot accomplish their mission if employees do not obey the orders of their supervisors.

Similarly, with nondisciplinary adverse actions, agencies must show that the action somehow makes them function better. For example, employees who, through no fault of their own, cannot physically perform their duties nonetheless affect the efficiency of the service and actions to remove or demote them from their jobs promote it. Employees who need a security clearance to do their jobs, but who have that clearance revoked, can no longer do their jobs. Employees who no longer have the necessary professional certification and are legally prevented from doing their jobs cannot be left in their jobs collecting pay for work not done.

As these last three common examples illustrate, showing cause in nondisciplinary cases is actually easier than in disciplinary cases because they are far less emotional. It is tough to get agency managers or personnel specialists to dispassionately weigh the pros and cons of firing a child molester or drunken driver who killed somebody off duty. Far fewer passions are aroused at considering what to do with a motor vehicle operator who no longer has a driver's license.

RELATIONSHIP TO REGULATIONS, ETHICAL STANDARDS, TABLES OF PENALTIES

Keep in mind the "efficiency of the service" is a standard independent of and superior to all other government regulations, standards of conduct, agency policies and regulations, or lists of offenses. This means two things:

First, it is not necessary to show a violation of a written rule or regulation to establish cause for an adverse action. Although a knowing violation of an agency regulation or policy certainly affects the efficiency of the service and creates a cause of action with perhaps an enhanced penalty, it is not a prerequisite. Many adverse actions are for conduct not discussed in any regulation.

A good example was the removal of a pipefitter at the Mare Island Naval Shipyard. She, like everybody else in her trade at the shipyard, worked exclusively inside submarines. Her work was acceptable, but she had become so obese that she could not fit through many of the hatches on the submarines. The shipyard gave her every opportunity to lose enough weight to move through the submarines but she never did. The Navy finally had to fire her.

Navy regulations do not address being too heavy to do your job. The Navy did not justify its action by arguing that the employee was insubordinate by refusing to lose weight, that she committed any sort of offense, or that she was somehow at fault. The Navy based its action on the fact that it promotes the efficiency of the service to remove an employee from a job that she could not physically access.

Agencies do not have rules against employees back talking their supervisors. Yet adverse actions for all varieties of contentious and insolent conduct are common. No government or agency regulations prohibit employees from having sex in the office during working hours, but I have seen several adverse actions against over-amorous coworkers who thought nobody else was around. The mission of the agency is clearly affected when employees are romancing each other on the clock when they are supposed to be working.

Second, merely stating that conduct is actionable does not necessarily make it so. Since the cause standard exists in law, it is superior to government-wide regulations and agency policies. If in the minds of an appeals tribunal a lower regulation conflicts with the legal cause standard, the legal standard prevails. Appeals authorities do give great deference to the rules of federal agencies. However, if the application of the rule does not, in their minds, promote the efficiency of the service, they will overturn the adverse action.

For example, the OPM regulation on standards of conduct (5 CFR Part 735) clearly states that federal employees shall not engage in criminal activity. Yet, if a federal agency takes an adverse action against an employee for any type of criminal activity, it must nonetheless show a *nexus* between the criminal conduct and the job. Unless, the agency can show some relation between the offense and the duties of the job, the action will be reversed regardless the OPM regulation.

Another good example is indebtedness. Many agencies have requirements in their regulations that their employees pay their just debts. Yet, third parties will still overturn an adverse action for indebtedness if the agency fails to show how the conduct of not paying private debts affects the employee's job or the mission of the agency. In many cases you can. If the employee is in a position of fiduciary responsibility, or if the debts were to government agencies, or if the failure to pay the debts might affect the ability of other federal employees to get credit, then you may have a cause. Firing a clerk in a nonsensitive job who has not paid his or her J.C. Penney's bill is unlikely to be sustained. Now let us take this concept of the "efficiency of the service" and see how appeals authorities apply it to the tougher situations.

COMMON CAUSES FOR ADVERSE ACTIONS

There is no list of all the offenses or causes for which government agencies may take an adverse action against an employee. Rather, what we have is a general standard that we apply to individual cases. You will find that deciding whether you have cause for an adverse action is not a difficult mental exercise. As long as you think in terms of whether the conduct affects the mission, you will not have too much trouble. It is worth spending some time on the most common causes for adverse actions and discussing the elements that you have to prove for different types of disciplinary or nondisciplinary situations.

DISCIPLINARY SITUATIONS

Disciplinary actions are the most common causes for adverse actions, but there are no government-wide regulations about discipline or disciplinary actions. All that we have to guide us is conventional wisdom, agency regulations, and most importantly, the case law.

Disciplinary Actions Defined

Broadly, a disciplinary action is *any* type of action that management takes to correct employee misconduct. Screaming, counselings, warnings, and suspensions are all various types of disciplinary actions. We can categorize disciplinary actions into two broad groupings: Informal and Formal.

Informal disciplinary actions can be oral or written. Since there are no government-wide regulations on discipline, the definition of an informal disciplinary action comes from agency regulations with some assistance from the case law. Most agencies make careful distinctions in their regulations by spelling out the types of letters that are mere warnings and those that are considered formal actions. If you are not sure, look at the criteria for a formal action in the next paragraph, and if the action does not meet those criteria, then it is not a formal disciplinary action.

Formal disciplinary actions are letters of reprimand, suspensions, demotions, and removals. Suspensions, demotions, and removals are formal actions because the law says so. And letters of reprimand, or their equivalent, are considered formal disciplinary actions because the MSPB says so. I note "equivalent" because the MSPB has established criteria for when written sanctions may be considered formal disciplinary actions which can then be used to establish subsequent actions as second offenses deserving an enhanced penalty. The action must be (1) in writing, (2) a matter of formal record, and (3) appealable or grievable to a higher party. See *Bolling v. Air Force*, 9 MSPR 335 (1981). The key, of course, is the last one: can the employee formally challenge the action and have somebody higher overturn it?

For example, the Navy uses a “discussion letter” as a disciplinary device. Since Navy regulations state that discussion letters are not grievable, the MSPB would not consider them formal disciplinary actions. Similarly, many agencies use “letters of admonishment.” In some agencies they are formal disciplinary actions, equivalent to a letter of reprimand, while in others they are not because in those agencies they are grievable. The distinction between a formal or informal letter may seem to be pettifoggery, but it actually takes on huge importance in the penalty phase of an adverse action. Where a formal disciplinary action is followed by another offense (most agencies have “reckoning periods” governing the life of the action), the latter offense is a second offense which means you can impose a more severe penalty. If you took only an informal action and the person commits the offense again, then it is only a first offense for purposes of assessing the penalty.

If an employee is rude to a client and the supervisor gives him or her a letter of warning or letter of counseling (both nongrievable in most agencies and therefore *informal* actions), the next offense the employee commits would be a *first* offense for purposes of his or her disciplinary record. On the other hand, if the supervisor gives the employee a letter of reprimand (usually grievable and therefore a *formal* action), then if the employee commits another offense it can be treated as a second offense for purposes of the disciplinary record and thus justify a more severe penalty.

This is why it is a terrible practice for supervisors to deal with acts of misconduct by simply warning the employee and then “documenting” these acts in their little black books with the intent of adding them all up at some later date into a serious disciplinary action. Labor arbitrators disapprove of this strategy because management did not attempt to correct the behavior with low-level formal sanctions, and the MSPB, while more tolerant than arbitrators, struggles because since no prior formal discipline exists, it must treat the sum total as a *first* offense.

Cause

The same idea of cause applies to disciplinary situations so there is no need to go into too much more detail. You must show that what the employee did somehow affected the agency’s ability to get its job done. Indeed, most of the classic examples of this nexus come from disciplinary situations.

AWOL, the most common cause for discipline in federal service, is a cause for action because federal agencies cannot get their jobs done if the employees do not come to work. Violent or threatening behavior against supervisors or coworkers prevents employees from doing their jobs. Employees who misuse government credit cards affect the public trust in civil servants and make it difficult for the government to get better rates on credit cards. And so on through the list of