

# Second-Hand News Can be Misleading

It may seem ironic to warn readers – in a series of articles discussing and summarizing cases – that they should be leery of placing too much trust in articles that purport to describe cases. Yet, this article is about precisely that. While journalists and analysts – and MSPB attorneys – writing about employment cases can serve an important function in reaching an audience and drawing their attention to issues, the information is only as reliable as the second-hand author makes it. The best way to know for certain what a case says is to read it yourself. If that is not practical, then get your information from the most reliable source you can and be careful about assuming that a source is reliable. You might be surprised at how often seemingly “reliable” sources at best, get things wrong, and at worst, mischaracterize issues.

For example, recently, Congressional and media attention was given to a case in which the Environmental Protection Agency (EPA) attempted to remove an employee who allegedly was a sex offender who had violated his probation regarding a charge of indecency with a child. The EPA proposed and then implemented the removal action, and the employee subsequently filed an appeal with MSPB. In the initial decision, the administrative judge overturned the action after determining it was necessary in accordance with long-established law. The media was later filled with stories of outrage, including stories of frustration by members of Congress, that MSPB would – *for some inexplicable reason* – think it was appropriate to have child molesters in the civil service. (Hint: when something seems to defy logic, that can be a warning sign that the story may be either wrong or incomplete.)

In the EPA case, the agency’s sole charge for removal was “unauthorized absence” – not abuse of a child, violation of probation, or other criminal conduct.<sup>1</sup> This pivotal fact was not raised in the testimony before Congress, nor did it appear in most media reports about the case. There also did not seem to be any discussion of the fact that, before the removal, the agency sought to indefinitely suspend the employee on the basis of a reasonable belief that the employee committed a crime for which he could be imprisoned. That suspension was also appealed. In both the initial decision, and on review, the Board held that, consistent with established case law, the agency was permitted to place the employee on indefinite suspension until the criminal proceedings were resolved.<sup>2</sup> What the Board may have done in a review of the initial decision for the removal case – where only absence was charged – cannot be known, because the agency and appellant chose to settle the case before Board review could occur.<sup>3</sup>

One of the many risks that come with assuming that a second-hand source has the news right – particularly when dealing with civil service laws, rules, and regulations – is that it may affect how agencies and employees view their own rights and options. If all a person were to read was media accounts, he or she might walk away thinking Federal agencies are regularly forced to employ child molesters who violate probation and the agencies can do nothing about it. We cannot say what might have happened at MSPB

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<sup>1</sup> *Taylor M. Sharpe v. Environmental Protection Agency*, Docket No. DA-0752-14-0187-I-1, Initial Decision (Sept. 22, 2014).

<sup>2</sup> *Taylor M. Sharpe v. Environmental Protection Agency*, Docket No. DA-0752-14-0034-I-1 (Feb. 27, 2015). As the Board noted in its decision, the U.S. Court of Appeals for the Federal Circuit has held that any continuation of a suspension after criminal charges are resolved is a separate appealable action. *Id.* at ¶ 8.

<sup>3</sup> *Taylor M. Sharpe v. Environmental Protection Agency*, Docket No. DA-0752-14-0187-I-1, Non-Precedential Final Order (Mar. 20, 2015).

if the agency had tried to remove this employee for a probation violation, abuse of a child, or other criminal activity, because – as stated above – the agency did not use any of those charges in the removal action appealed to MSPB and MSPB is only allowed to consider the charges presented to it.<sup>4</sup> Nevertheless, the Board has an extensive history of sustaining removals for egregious off-duty misconduct, including (but not limited to) sexual abuse of children.<sup>5</sup> This fact, of course, was not included in the media reports covering this event.

The incomplete story of what happened in the EPA's case is just one example of misunderstandings about adverse actions that have been circulated in recent years. As part of our 2015 report, *What is Due Process in Federal Employment*, we created a list of misperceptions and corrections about the adverse action system because so many inaccurate statements had been given a gloss of credibility that it could have posed an obstacle to having conversations about what the system really is and why. Understanding this “what” and “why” is crucial to managers and employees being able to use the system and to Congress being able to successfully modify it if Congress deems modifications appropriate.

Throughout our series of articles about adverse actions, it will be necessary for brevity to summarize cases and their holdings. This can be a valuable introduction to subjects and a useful tool for users of the system and others with an interest in it. But, readers should keep the healthy skepticism that is so important when looking at what others say about cases. Focus on *why* a case had a particular outcome. Do not assume how your own set of facts might be viewed based on a few sentences describing one aspect of other cases. These articles are a starting place to help readers form a picture of how the system operates and to identify what pieces they want explore in greater depth on their own. Media articles and conversations with people who have used the system can certainly be helpful in learning about the process, but we encourage you to dig deeper in order to fully understand an issue. If something sounds odd, ask a follow-on question or do some research of your own. Why? Because whether you are a member of Congress, a first-line supervisor in the field, or an employee seeking help, there may be some very inaccurate information reaching you.

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<sup>4</sup> *Dupont v. Department of the Navy*, 33 M.S.P.R. 122, 126 (1987) (explaining that the Board will not consider other or lesser offenses when the agency did not charge the appellant with such offenses). Cf. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990) (explaining that the Board cannot “split a single charge of an agency into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original charge. If the agency fails to prove one of the elements of its charge, then the entire charge must fall.”)

<sup>5</sup> See, e.g., *Graham v. U.S. Postal Service*, 49 M.S.P.R. 364, 367 (1991) (finding that removal was a reasonable penalty for off-duty sexual abuse of a 14-year-old girl); *Allred v. Department of Health and Human Services*, 23 M.S.P.R. 478 (1984) (sustaining a removal for off-duty child molestation), *aff'd*, 786 F.2d 1128 (Fed. Cir. 1986); *Doe v. National Security Agency*, 6 M.S.P.R. 555 (1981) (determining that removal was warranted for off-duty incestuous behavior with a minor child), *aff'd sub nom. Stalans v. National Security Agency*, 678 F.2d 482 (4th Cir. 1982). Cf. *Hayes v. Department of the Navy*, 15 M.S.P.R. 378, 381 (1983) (determining that removal was reasonable for off-duty assault and battery of a 10-year-old child), *aff'd*, 727 F.2d 1535 (Fed. Cir. 1984).