Connecting the Job and the Offense ("Nexus")

To implement a suspension, demotion, or removal for misconduct, the agency must be able to show that the action was “for such cause as will promote the efficiency of the service.” This is often referred to as “nexus” – meaning that the agency must show a connection between the employee’s conduct or performance and “the work of the agency, i.e., the agency’s performance of its functions.”

For some offenses, such as absence without approved leave (AWOL), the nexus is considered self-evident. Many offenses that take place in the workplace will have a connection to that workplace and thus the work of the agency performing its functions. However, nexus can occur with off-duty as well as on-duty behavior.

The Board has recognized three methods by which the agency may meet its burden of establishing a nexus linking an employee’s off-duty misconduct with the efficiency of the service: (1) a rebuttable presumption of nexus may arise in certain egregious circumstances; (2) the agency may show, by a preponderance of the evidence, that the misconduct at issue has adversely affected the employee’s or co-workers’ job performance or the agency’s trust and confidence in the employee’s job performance; and (3) the agency may show, by a preponderance of the evidence, that the misconduct interfered with or adversely affected the agency’s mission.

However, agencies must be careful when explaining that the conduct is egregious because what one person might find clearly egregious, another may not. This is particularly true when considering the impact of off-duty conduct on one’s Federal employment status. For example, in Doe v. Department of Justice, the agency determined that the employee’s off-duty behavior, videotaping sexual encounters with women without their consent, appeared to have violated state laws and was so egregious that nexus should be presumed. However, the agency erred in its assumptions about legality, as in that particular state, the conduct was not illegal. Nevertheless, the Board initially upheld the removal action, finding there was nexus between the conduct and the efficiency of the service because the conduct in question was “clearly dishonest.”

On appeal, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") noted its prior holdings that “misconduct that is private in nature and that does not implicate job performance in any direct and

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37 5 U.S.C. §§ 7503; 7513.
38 Doe v. Department of Justice, 565 F.3d 1375, 1379 (Fed. Cir. 2009).
39 Bryant v. National Science Foundation, 105 F.3d 1414, 1417 (Fed. Cir. 1997) (explaining that “the nexus between the charged offense and the efficiency of the service is automatic when the charged offense is AWOL”).
40 See, e.g., Washington v. Department of Agriculture, 22 M.S.P.R. 374, 376 (1984) (holding that there is a clear nexus between an employee falsifying his time and attendance record and the efficiency of the service); Winner v. Department of the Air Force, 10 M.S.P.R. 177, 178 (1982) (holding that nexus was clear when the charged conduct concerned violation of agency rules).
41 Scheffler v. Department of the Army, 117 M.S.P.R. 499, ¶ 10 (2012), aff’d, 522 F. App’x 913 (Fed. Cir. 2013).
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obvious way is often insufficient to justify removal from a civil service position.”

Because the employee’s conduct was not illegal in the state where it occurred, the conduct could not be presumed to be dishonest. The court therefore remanded the case back to MSPB with the instruction to “articulate and apply a meaningful standard” to establish nexus between the conduct of the employee and the efficiency of the service.

In contrast, the Federal Circuit has repeatedly upheld Board decisions finding that proven sexual abuse of a child was so egregious that it creates a presumption of nexus. For example, in Williams v. General Services Administration, the appellant pled guilty to a charge of sexual assault on a child and received a 2-year deferred sentence. The Board found, and the court upheld, that nexus could be presumed based on the nature and gravity of the appellant’s criminal misconduct. In Graybill v. U.S. Postal Service, the court found that the Board had not erred in finding a presumption of nexus where the appellant had pled guilty to charges of sexual misconduct involving his minor stepdaughter. In Hayes v. Department of the Navy, a presumption of nexus was also found where the appellant was convicted of assault and battery of a 10-year-old girl.

While egregiousness often speaks for itself, damage to management’s trust in the employee resulting from non-egregious conduct will require more explanation by management. For example, in Beasley v. Department of Defense, an employee pled guilty to the crimes of aggravated assault and petit larceny. The agency officials explicitly told the Board they could not trust the employee in light of this criminal conduct, because the employee would have opportunities to commit theft at work and there were approximately 200 people who could be injured if the employee became violent at work. The Board found that management’s articulated connection between the offenses and their inability to trust the employee in the workplace established the required nexus to support a removal action, even though there was “no showing” that her conduct directly interfered with the agency’s mission.

Similarly, in its review of an arbitration case, the Federal Circuit was presented with an employee’s removal after conviction for intent to distribute cocaine. The agency asserted that the conviction cast serious doubt on the employee’s judgment and trustworthiness in a position where an error could put lives at risk. The court held that because “an agency’s reasonable loss of trust and confidence” can establish nexus, and given

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43 Doe v. Department of Justice, 565 F.3d 1375, 1380 (Fed. Cir. 2009). The court explained that: “Without a predetermined standard – e.g., the legality of the conduct – to clarify when the agency may and may not investigate the personal relationships of its employees, it is conceivable that employees could be removed for any number of ‘clearly dishonest’ misrepresentations, from those made to preserve the sanctity of a romantic relationship to cheating in a Friday night poker game. The danger here is twofold; federal employees are not on notice as to what off-duty behavior is subject to investigation and the government could use this overly broad standard to legitimize removals made for personal or political reasons. A clear articulation of a standard is therefore essential to the government’s ability to reasonably and legitimately remove an agent for off-duty conduct relating to personal relationships.” Id. at 1381.

44 Id. MSPB was also instructed to revisit the penalty in light of the lack of criminality in the conduct. Id. at 1383.


the trustworthiness needed for the position, the conviction combined with management’s assertions that trust had been lost established the required nexus.47

The third method to establish nexus, the conduct’s adverse effect on the mission, can be applied to a mission as broad as that of the agency or as narrow as that of the job. For example, in *Masino v. United States*, the court found presumed nexus for a customs officer who used marijuana when off-duty in light of the role of his agency in preventing marijuana from entering the country.48 In *Brown v. Department of the Navy*, the off-duty conduct was not criminal. Rather, the employee engaged in an adulterous relationship with the wife of a marine serving abroad. However, the purpose of the employee’s job with the Morale, Welfare, and Recreation Department was to plan activities to enhance the morale of military personnel. Because his off-duty conduct was antithetical to the mission of his job, it could be used to justify his removal.49

The reason why a particular adverse action will help the civil service operate better will vary by case. But, for the agency to implement an action under chapter 75 of title 5, the connection between the offense and the civil service must be present and agencies should be prepared to explain it.

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47 *Brook v. Corrado*, 999 F.2d 523, 527 (Fed. Cir. 1993).

48 *Masino v. United States*, 589 F.2d 1048, 1056 (Ct. Cl. 1978). See *Gibbs v. Department of the Treasury*, 21 M.S.P.R. 646 (1984) (holding that because there is a clear connection between the Internal Revenue Service’s mission and citizens paying their taxes, an IRS employee’s failure to pay his taxes met the test for nexus).