ADVERSE ACTIONS AND APPEALS UNDER THE CIVIL SERVICE REFORM ACT, 1978

A CASE STUDY

by

Debby R. Hall

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Debby Ranee Wivholm Hall

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Approved for the Major Department

October 9, 1986
Date

Head, Major Department

Approved for the College of Graduate Studies

November 10, 1986
Date

Graduate Dean

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ABSTRACT

This study will look at the application of the Civil Service Reform Act, by the Merit Systems Protection Board, in the area of adverse actions and appeals. The Act was intended to streamline the appeals process, making it easier to get rid of incompetent workers, and to improve government efficiency and balance management authority with employee protections. This study's objective is to determine if disparity exists between the original intent of CSRA and the actual implementation. Methodology consists of a survey of pertinent literature, a study of Federal, departmental, and agency personnel regulations, evaluation of two case studies, and interviews with federal managers.

Review of the regulations, analysis of the case studies, and the managers' perspectives supported the conclusion that it is not easier to get rid of incompetent employees; therefore, a gap between intent and administration of the Act does exist. The researcher developed some recommendations designed to alleviate the gap at the agency level.

CHAPTER 1

INTRODUCTION

During his election campaign, former President Jimmy Carter charged that there was not enough merit in the merit system that governed the federal work force. He pledged that if elected, he would make federal bureaucracy more responsive to the public. The idea of civil service reform was not new to the executive branch; other Presidents had contemplated and attempted to make changes. However, the content of President Carter's package and the emphasis he placed on its passage marked a major effort in this area.[1]

In May 1978, the reorganization plan and administration reform bill were formally submitted to Congress. The proposed package contained two parts, the first part reorganized the Civil Service Commission into an Office of Personnel Management and the Merit Systems Protection Board. This was because the Civil Service Commission as chief government personnel manager and appeals board for employee complaints performed a dichotomous role.[2] As rulemaker, it was also prosecutor and judge. As a result, neither of these jobs was being done effectively.[3] Under the plan, the Civil Service Commission would be divided into (1) a center for personnel administration - the Office of Personnel Management, and (2) an appeals board that would hear, adjudicate and enforce compliance in cases resulting from employee complaints - the Merit Systems Protection Board. "This Board

would be the first independent and institutionally impartial Federal agency solely for the protection of Federal employees."[4]

The second part of the package was a civil service reform bill. Civil service reform was purported by President Carter to be absolutely vital to a government that is efficient, open, and truly worthy of the people's support.[5] As outlined on March 2, 1978, President Carter's Civil Service reform was to be the centerpiece of government reorganization during his term in office. The objective of the civil service reform he presented focused on strengthening the protection of legitimate employee rights, providing incentives and opportunities for managers to improve the efficiency and responsiveness of the Federal Government, reducing red tape and costly delay in the present personnel system, promoting equal employment opportunity, and improving labor management relations.[6] The President based the need for reform on the fact that the civil service system "has become a bureaucratic maze which neglects merit, tolerates poor performance, permits abuse of legitimate employee rights and mires every personnel action in red tape, delay and confusion."[7]

The Civil Service Reform Act (CSRA) was passed by Congress in October, 1978. This legislation was described as the most extensive revamping of the federal employment system since the Pendleton Civil Service Act of 1883.[8] As a major reform to the civil service system, this legislation would affect a majority of the nation's federal work force. Administration of CSRA would be the impetus to changes and adjustments in the management of personnel, within government agencies, for a period extending beyond the Carter Administration.

The CSRA was conceived with specific intent and purpose in mind. They are:

1. To streamline the appeals process available to employees who are fired, in order to make it easier for managers to get rid of incompetent workers; and

2. To improve government efficiency and to balance management authority with employee protections.

The final Act contained nine titles. They are:

Title I	Merit System Principles
II	Civil Service Functions; Performance Appraisal; Adverse Actions
III	Staffing
IV	Senior Executive Service
V	Merit Pay
VI	Research, Demonstration, and other Programs
VII	Federal Service Labor Management Relations
VIII	Grade and Pay Retention
IX	Miscellaneous

Due to the magnitude of CSRA coverage, the intent of this study is to focus on one area of particular concern, that portion of Title II which covers the sections on the Merit Systems Protection Board and Adverse Actions and Appeals. More specifically, this study will look at the application of the Civil Service Reform Act, by the Merit

Systems Protection Board, in the area of adverse actions and appeals. This particular portion of the act plays a major role in facilitating and achieving the intended efficiency and accountability in the federal work force. Carter in his proposal was striving for a fairer and speedier disciplinary system. It was, in the opinion of the President as he spoke to Congress in March of 1978, "a sad fact that it is easier to promote and transfer incompetent employees than to get rid of them."[9] The new adverse action process was intended to make it easier for managers to discharge employees and at the same time provide procedures to protect employee rights.

This study's objective is to determine if disparity exists between the original intent of CSRA and the actual implementation. If indeed there is disparity, a look at what impact it creates for managers who continue to operate under CSRA legislation and who must administer its provisions will also be necessary. These key issues form the basis for the problem statement and research, with particular reference to the Forest Service, where the researcher was employed.

Methodology consists of a survey of the pertinent literature, a study of Federal Personnel regulations derived from CSRA and Department of Agriculture and Forest Service policy, case studies of two adjudicated Forest Service cases, and an evaluation of the cases based on criteria of the law. Selective interviews will also be conducted with Forest Service managers who all have responsibilities in the area of adverse actions, but have differing degrees of authority. The interviews will capsulize the experience and philosophies of the managers based on their actual dealings in the area of adverse actions.

The following chapter covers the composition, structure, and function of the Merit Systems Protection Board, and deals with adverse action processes and procedures prior to CSRA and under CSRA. Chapter 3 examines controlling case law and judicial precedents in the adverse action area, along with an analysis of two cases. Chapter 4 covers interviews with federal managers, to gauge their perceptions of the law, process, and administrative practices. The final chapter will draw conclusions and make recommendations on the use of adverse action processes and procedures.

[1]Ann Cooper, "Carter Plan to Streamline Civil Service Moves Slowly Toward Senate, House Votes," Congressional Quarterly, July 15, 1978, p. 1777.

[2]Ibid.

[3]U.S., President, Weekly Compilation of Presidential Documents, vol. 14, no. 9, 6 March 1978, pp. 444-448.

[4]U.S., President, Weekly Compilation of Presidential Documents, vol. 14, no. 21, 29 May 1978, pp. 952-958.

[5]Cooper, op.cit., p. 1779.

[6]U. S. President, 6 March 1978, p. 445.

[7]Cooper, op.cit.

[8]Ann Cooper, "Congress Approves Civil Service Reforms," Congressional Quarterly, October 14, 1978, p. 2945.

[9]U. S. President, 6 March 1978.

CHAPTER 2

MERIT SYSTEMS PROTECTION BOARD AND ADVERSE ACTIONS

The Merit Systems Protection Board is composed of three members appointed by the President, by and with the advice and consent of the Senate. Not more than two members of the board may be adherents of the same political party. The term of office of each member of the Board is 7 years, members may not be reappointed to successive terms.[1]

The Board operates through a headquarters office and eleven regional or field installations throughout the country. The directors of these regions are responsible for the administration of their offices and for appeals adjudication. Authority is delegated by the Board to other headquarters officials and to Board employees in the regions. The Assistant Managing Director for Regional Operations is responsible for the processing and adjudication of all appeals filed with the Board under CSRA jurisdiction, and has the authority to delegate decisional and administrative authority to regional directors.[2]

Case adjudication is entrusted to presiding officials in each of the regions. These presiding officials are the hearing examiners and decision makers in cases that appear before the Board. In order to achieve some consistency throughout the eleven regions, decisions on cases are required to meet certain criteria before they are released. A decision must identify and dispose of issues, summarize the evidence,

explain the legal authority and adhere to clear legal precedent. If a decision does not meet these criteria it cannot be released.[3]

Presiding officials issue what are known as initial decisions. These decisions become final after 35 days if no petition for review is filed with the Board members. The Board may also decide on its own motion to reopen an initial decision before or after it becomes final.

The Merit Systems Protection Board's primary functions are to hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board.[4] The Board has the power to order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted, and to enforce compliance with any such order.[5]

Prior to CSRA, actions appealed by employees were reviewed by the Civil Service Commission; they are now reviewed by MSPB for procedural correctness. An adverse action is a management action or decision that results in an adverse impact on an employee. These actions may be disciplinary or non-disciplinary in nature. For purposes of this study, adverse action will refer to disciplinary actions covered under Chapter 752 of the Federal Personnel Manual (FPM). The phrase adverse action is one that describes Board jurisdiction. It is a term of law, not the subjective impression of an employee. The Federal Personnel Manual Chapter 752, under CSRA coverage, defines adverse action as suspensions for 14 days or less, removal, suspension for more than 14 days, reduction in grade or pay, and furlough for 30 days or less. The process contained therein is a guide to personnel specialists within

the federal sector, who have the responsibility of interpreting and applying the necessary processes and procedures.

The following is a breakdown of adverse action processes and procedures as they were defined and covered prior to the Civil Service Reform Act of 1978. The information is contained in FPM Chapter 752; hence the agency used phrase "a 752 action".

Subpart B of FPM Chapter 752 covered removal, suspension for more than 30 days, furlough without pay, and reduction in rank or pay. An agency could not take an adverse action against an employee covered by this part except for such cause as would promote the efficiency of the service. An employee was issued a notice of proposed adverse action which contained the charge, outlined the employee's entitlement to at least 30 full days advance written notice, and stated any and all reasons for the proposed action. The employee was entitled to answer the proposed action personally and/or in writing.

The employee was entitled to written notice of the agency's decision at the earliest practicable date. The decision notice was required to inform the employee: (1) which of the reasons in the notice of proposed adverse action were sustained and which were not sustained, (2) of the right of appeal to the appropriate office of the Civil Service Commission, (3) of the time limit for appealing, and (4) where information could be obtained on how to pursue the appeal.

An employee was entitled to appeal an adverse action under this subpart to the Commission. An employee could submit an appeal at any time after receipt of the notice of adverse decision, but not later than 15 days after the adverse action has been affected. The decision of the

Commission office which had appellate jurisdiction was final. However, either the agency or appellant could petition the Appeals Review Board to reopen and reconsider the decision.

Subpart C of Chapter 752 covered suspensions of 30 days or less. An employee was entitled to an advance written notice specifically stating the reasons for the proposed action. A reasonable time was given for filing a written answer to the notice of proposed suspension and for furnishing supporting material. The agency had to deliver the notice of decision to the employee at or before the time the action was made effective. Again, the notice was to be in writing, inform the employee of the reasons for the suspension, inform the employee of his/her right of appeal to the appropriate office of the Commission, and give the time limit for submission of an appeal. An employee was entitled to appeal an agency's decision. The employee could submit an appeal at any time after receipt of the notice of adverse action, but not later than 15 calendar days after the suspension had been affected.

On appeal, the Commission reviewed the procedure used in a suspension under this subpart and matters such as; a suspension taken as a result of discrimination, a suspension taken for partisan political reasons not required by statute, and a suspension imposed during the advance notice period of some adverse action covered by subpart B of this part. The decision of the office of the Commission having appellate jurisdiction was final. However, either the agency or appellant could petition the Appeal Review Board to reopen and reconsider the decision. Subpart B coverage and Subpart C coverage were pre-CSRA delineations.

The laws and regulations governing adverse action give basic rights to employees against whom adverse action is being proposed, and prescribe certain procedural requirements agencies must observe when taking actions. The major overall purposes of these legal and regulatory provisions are to require that adverse actions be taken only for "such cause as will promote the efficiency of the service", and to establish fair, orderly, and uniform procedures for effecting actions which are warranted on their merits. Beyond these requirements, whether or not a particular action is warranted on its merits is always a matter of judgment.

With the passage of the Civil Service Reform Act adverse actions are separated into the following categories and are covered as outlined. Suspensions for 14 days or less: An employee will only be suspended for 14 days or less, for such cause as will promote the efficiency of the service. An employee, against whom a suspension for 14 days or less is proposed, is entitled to advance written notice stating the specific reasons for the proposed action. The law does not specify any minimum time for the advance notice period under Subpart B; however, regulations require at least a 24 hour notice.

In arriving at its decision, the agency shall consider only the reasons specified in the notice of proposed action, and any answer of the employee and/or his or her representative, made to a designated official. The law does not provide for appeal of a suspension of 14 days or less. Since a suspension of 14 days or less is not within the jurdisdiction of MSPB review, the agency decision is final.

Removal, Suspension for more than 14 days, Reduction in Grade or Pay, and Furlough for 30 days or less: This subchapter is limited to an action based solely on non-performance related factors; an action that involves both performance and non-performance related factors; and a solely performance based action which is not covered by performance management critieria.

Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter only for such cause as will promote the efficiency of the service. Having an identifiable cause is not by itself enough to warrant adverse action; the action must be for cause as will promote the efficiency of the service.

A cause for adverse action rests upon the agency's determination that an unfavorable personnel action covered under adverse actions procedures is necessary in the terms of the employee-employer relationship. If the agency's proposal for action is based on misconduct which does not directly affect the performance of the employee's job tasks, case law has demonstrated the agency will bolster its case by an express explanation of how the efficiency of the service will be promoted by its action; in other words, establish the nexus. Cases involving the relationships, nexus, between off-duty misconduct or employee performance, and an agency's ability to discharge its responsibilities, have been decided by the Board. These cases involve not only the issue of whether a nexus exists, but also the issue of whether the nexus requirement in taking action was changed by CSRA.

The agency penalty is a matter left to the discretion of the agency itself, except when it exceeds the limits of permissible penalty specified by statute or regulations, or when it is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion.[6] MSPB will not mitigate and reduce an agency penalty unless it finds abuse of discretion in setting the penalty, or that the agency has exceeded limits of permissible penalties. However, MSPB will look to see if the agency has shown the appropriateness of the penalty in the case documentation.

In these types of actions 30 days advance written notice is required by law. Such a notification shall be in writing stating the specific reasons for the proposed action. The notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for an action, as given in the notice. An agency may not use material which cannot be disclosed to the employee or his or her representative. The agency may wish to consider prior disciplinary actions (reprimands, suspensions, etc.) in determining the severity of the appropriate remedy to be set for the current charges. The notice must make it clear that the action is proposed but not yet decided. The advance notice must state specifically the most severe action proposed, in order to enable the employee to answer the notice properly. The agency may of course lessen, mitigate, the proposed penalty.

A reasonable time, but not less than seven days, is given to the employee, to answer the charge or charges. The answer may be given orally and in writing; the employee may also furnish affidavits and

other documentary evidence in support of the answer. Seven days is only a minimum which the agencies may modify upward to suit their own situation. It is better practice, when possible, for the agency to give full consideration to a delayed answer; such as in cases when the answer was received late because of slow mail delivery, or the agency has not issued its final decision and has no compelling reason for completion of the action in the shortest time. An agency is required by the regulation to give consideration to any answer of the employee or the employee's representative.

The law requires at least 30 full calendar days before a proposed action is effected. In other words the decision may be issued, but may not be imposed until the specified time period has past. An employee is entitled to appeal an action taken under this section to the Merit Systems Protection Board.

In comparing the pre-CSRA and post-CSRA processes and procedures it may be said that the changes were very basic and quite minimal. In fact, the changes are not numerous; but, there is significance in the scope of the changes. The first difference noted is that prior to CSRA adverse actions were broken into suspensions of 30 days or less; and removal, suspension for more than 30 days, furlough without pay, and reduction in rank or pay, with adverse action decisions in either case being appealable to the Civil Service Commission. The process as delineated by the Civil Service Reform Act broke adverse actions into suspensions for 14 days or less; and removal, suspension for more than 14 days, reduction in grade or pay and furlough for 30 days or less. A suspension of 14 days or less is not appealable to the MSPB; other

actions listed are. The agencies can now take disciplinary action to a limited extent without the cost or time of a possible appeal as a major factor.

Procedures under CSRA are more clearly defined, the agencies are given specific guidelines on what to consider and how to proceed with actions. CSRA also ensures that employees are given a specific amount of time in which to respond to proposed adverse actions so that decisions are based on all the facts and information available. A greater cognizance of the potential for procedural error and an increased awareness of what this can mean to the viability of an agency's case exists among agency representatives . It should also be noted that CSRA requires that an agency support its action by a preponderance of evidence. This increases the scope of burden of proof and will be discussed later in this paper.

The next chapter deals with controlling case law that has evolved from agency application of their perogative to take adverse actions. It also outlines procedures and processes that have become required factors as a result of MSPB case decisions.

[1]Public Law 94-454, Civil Service Reform Act of 1978, 5 USC.

[2]Peter B. Broida, A Guide to Merit Systems Protection Board: Law & Practice, 2 ed. (Washington D.C.: Dewey Publications Inc., 1985), pp. 6-7.

[3]Ibid.

[4]P.L. 95-454

[5]Broida, p. 11.

[6]Broida, op. cit.

CHAPTER 3

CONTROLLING CASE LAW

Reference has already been made to some concepts and considerations that the Board has determined to be controlling in the application of adverse action procedures and processes. Further explanation of those concepts and considerations is imperative to an understanding of the Board's position. An agency's understanding of the Board's position is the key to the pursuit of a successful adverse action. Like other adjudicatory systems, clarification and elucidation of regulations and statutes become an integral part of operation. This fine tuning is accomplished through established case law and decisions put forth in regard to those cases. Through these decisions an agency develops a clearer picture of how to proceed and what to cover in the development and presentation of information to MSPB. These case decisions afford agencies the opportunity to review what MSPB will consider and what is being looked for in cases. The latter is especially important to the success of agencies or employees. Each case decision that is issued may be used to give credence and support to agency action or may point out the inappropriate handling of a case that caused the failure of an agency action.

One concept that has been extensively developed through case law is nexus. Adjudication of an employee's appeal from an adverse action involves the determination of whether the conduct has in fact taken

place. This is followed by whether the action taken by the agency, the penalty imposed, promotes service efficiency. The second element is referred to as nexus. An examination of a few cases should serve an illustrative purpose.

Parsons v. Department of the Air Force (1983) determined that nexus is an element of every adverse action case. In this case the court held that in an agency removal action based on misconduct the agency must make three determinations; (1) that the employee actually committed the alleged misconduct, (2) that there is a sufficient nexus between the misconduct and the efficiency of the service to sustain the adverse action, and (3) that the penalty imposed has been appropriately chosen for the specific misconduct involved.[1]

The leading nexus case is Merritt v Department of Justice (1981) where the court determined that a nexus determination must be based on evidence linking the employee's off duty misconduct with the efficiency of the service.[2] It is from this case that judicial precedents showed a trend toward increasing scrutiny of nexus determinations. In this same case the Board held that nexus may not be presumed on the basis of a criminal conviction alone. This puts the area of adverse action in an arena that disassociates itself from criminal judicial proceedings. What the Board is saying is that a criminal act is not in and of itself nexus, and a presumption of nexus would be a weak link at best.

In determining whether the conduct has actually taken place the agency always has the burden of proof with respect to charges. The burden is on the agency to support its actions with a "preponderance"

of evidence. Simply stated, the definition of preponderance is greater weight of evidence or evidence which is more credible and convincing to the mind. The burden is on the agency to persuade the Board of the propriety of the penalty imposed, including the burden of establishing by a preponderance of the evidence any considerations of fact upon which the action rests.

Once the agency has established the facts, the Board cedes to the employing agency responsibility for determining the penalty, ranging from reprimand to removal. The agency determined penalty will stand unless the Board deems the penalty to be unreasonable. Reasonableness refers to the penalty being within the range allowed by law, regulation, and an applicable table of penalties. It should also be noted that "reasonableness" is subject to interpretation by the Board, and may be influenced by external factors. There are a range of punishments for many different offenses, these ranges are based on first and subsequent offenses. Case law clarifies and supports the interpretation that penalties for a first offense in a given action may exceed the prescribed penalty for a first offense, when there is a past record of other unrelated offenses.

Another concept that is of great concern to the MSPB is that of mitigation. The prime decision in the area of mitigation is the Douglas case. Douglas v Veterans Administration (1981) as a precedent has put forth certain factors that agencies must consider in setting penalties. Agency documentation must demonstrate that Douglas factors were considered in making the overall decision on whether to proceed and to what extent. It was in this decision that the Board asserted

what it concluded to be inherent authority to reduce penalties.[3] The Douglas decision established the requirement that an agency decision notice contain information demonstrating that all mitigating factors have been considered and why a lesser penalty is determined to be inadequate. While this requirement is not stated specifically in the Act or OPM regulation, the Board held that "a decision notice which does demonstrate such reasoned consideration may be entitled to greater deference from the Board as well as from the courts."[4]

The Douglas factors have become a requisite to agency determination of discipline in adverse action cases. Factors as enumerated by the Board are as follows:

1. The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities;

2. The employee's job level and type of employment including supervisory or fiduciary role, contacts with the public and prominence of the position;

3. The employee's past disciplinary record;

4. The employee's past work record;

5. The effect of the offense upon the employee's ability to perform;

6. Consistency of the penalty with those imposed upon other employees for similar offenses;

7. Consistency of the penalty with the applicable agency table;

8. The notoriety of the offense and the impact on the reputation of the Agency;

9. The clarity of any notice given to the employee regarding

expected behavior;

10. Potential for employee's rehabilitation;

11. Mitigating circumstances surrounding the offense and;

12. The adequacy of alternative sanctions to deter such conduct by anyone in the future. Not all factors are pertinent to each case and not all factors need to be applied to each case.

Following are two case studies adjudicated by the Merit Systems Protection Board. The application of rules and regulations and the knowledge of applicable case law have a definite bearing on the outcome of any case heard by MSPB.

CASE STUDIES

Case I

In this case the removal action was implemented March 12, 1982 and the first MSPB decision was issued March 30, 1983. The employee was charged as follows:

> Charge A - unauthorized removal of Agency property from previous places of work - 9 items identified.
>
> Charge B - unauthorized removal of Agency property from place of work - 6 items identified.
>
> Charge C - Personal use of Government property for other than official purposes.

In his position the employee was responsible for a substantial amount of property valued at more than $200,000. The nature of his work was such that he operated, for the most part, independently under minimum supervision. Accordingly, there needed to be a high level of

trust between employee and supervisor. Trust was destroyed by these actions, this severely affected the employee's ability to do his job, and severely damaged the employer-employee relationship.

In reviewing the employee's previous record it was found that the employee had previously been suspended for misuse of a government credit card. Based on the facts of the case and the previous instance of misconduct, the agency proposed removal.

The employee had in his possession equipment removed from his previous place of employment. Location of the unit was over 100 miles from his present place of employment. The employee had left his previous place of employment approximately one year prior to the investigation. The employee had various items and pieces of equipment that were the property of the present employing unit, at his home. The employee had no authorization to have equipment at his private residence and would not have obtained permission to use equipment for personal use, such as remodeling of his home.

The employee returned the property identified as belonging to the agency after it was discovered at his residence. This action represented tacit admission by him that property did in fact belong to the agency. In fact, he admitted to investigators that the property indeed belonged to the agency. The agency proposed removal.

In his oral reply to a designated official, the employee alleged he had been given authorization for some of the equipment and was merely storing the rest in a place for safe keeping. He also alleged that friends had loaded agency property into his truck when he moved to a new location, not knowing that the property belonged to the office.

The employee stated that he intended to return the property.

Based on evidence and investigative reports, and consideration of the employee's oral response, the agency sustained the proposed charges and issued a decision to remove the employee from his position. Following the avenues available, the employee appealed to the Merit Systems Protection Board.

An MSPB hearing was held. After presentations by the agency and the appellant, the hearing examiner sustained Charge A - unauthorized removal of agency property from previous place of work, and Charge B - unauthorized removal of agency property from place of work, but did not sustain Charge C - personal use of Government Property for other than official purposes, citing that the investigators had not actually seen the employee use the equipment for personal use.

In the previously cited Douglas decision, the Board established that when an agency's action is based on multiple charges, some of which are not sustained, the penalty imposed by the agency must be re-examined. Using the Douglas determination, the MSPB hearing examiner in her final decision mitigated the removal to a 30 day suspension. Basis for mitigation was cited as: (1) agency supervisors sometimes condoned unauthorized use of government property for personal reasons; (2) even though equipment from the previous place of employment had been in employee's possession for one year, there was no evidence the employee intended to deprive the government of this equipment permanently; (3) the employee had 27 years of service; (4) there was no monetary gain; (5) that while this was a serious offense, there was a possibility the employee could be rehabilitated; and (6)

the agency had not shown by a preponderance of evidence that the appellant was not authorized to remove government property.

The agency petitioned for and was granted review by the MSPB. In its final review, MSPB found that the hearing examiner had erroneously interpreted regulations in the initial decision, that the agency had met the preponderance of evidence requirement in all three charges, and that the penalty of removal was in keeping with statute.

The hearing examiner's initial decision was reversed and the agency's removal affirmed on October 24, 1984, over two years after the initial removal. The employee's next recourse was to file a petition for review in the United States Court of Appeals for the Federal Circuit.

The initial decision in this case points to one of the major weaknesses of the system. The hearing examiner erroneously interpreted regulations in the initial decision. This is both frustrating and expensive for the agency. The fact that hearing examiners' interpretations of the regulations vary, creates the feeling expressed by many agency managers that the difficulty involved in taking removal action against an employee is outweighed by the time, expense and uncertainty of a Board hearing examiner's interpretation. This lack of consistency has only reinforced many manager's belief that the termination of an incompetent employee is still impossible, and at best a situation to be avoided if at all possible.

Case II

This case study involves an employee who had been removed for failure to report to a directed reassignment. The employee appealed

the agency's removal action to the Board alleging that the reassignment was a reprisal for his whistleblowing activities. The presiding official found that reprisal was a significant fact in the reassignment and that no independent reason for the action was shown. The agency was ordered to cancel the reassignment and to cease retaliating against the employee. The agency appealed the decision and the Board affirmed the presiding official's initial decision. The agency was ordered to comply with the final decision by reinstating the employee in a position on his current unit and to make the employee whole. In other words, there would be no reference to the removal on the employee's records and he would be reinstated with back pay as though no action had taken place.

Within months of his return to duty the employee was cited for insubordination, refusal to comply with instructions. He was suspended from his position for that particular charge on three different occasions. These suspensions were for 14 days or less and were not appealable to the Board. Subsequently the employee was suspended for refusal to comply with instructions, failure to complete a work assignment as directed, and unauthorized absence from duty. This suspension was for 30 days and was appealable to the MSPB. The employee appealed, on review the Board affirmed the agency's action.

The employee subsequently refused to comply with instructions and direction from his work supervisor on two different occasions over a three month period of time. The employee was notified that the agency was proposing removal. Following due process the agency issued its decision that within 30 days the employee would be removed from his

position.

The employee appealed this action to MSPB claiming continuing reprisal. The Board found that the employee had in fact been insubordinate and refused to comply with instructions. The Board found that the employee had provided no evidence of retaliation by the agency and that the agency had shown by a preponderance of the evidence that the employee willfully and deliberately refused to obey his supervisor's orders. Imposing the Douglas factors, the presiding official looked for the agency's consideration of past disciplinary record, potential for rehabilitation, and appropriateness of the penalty. The Board determined that the agency had supported the action by a preponderance of the evidence and the action was taken for such cause as would promote the efficiency of the service. The agency action was affirmed.

Under the regulations that applied prior to the CSRA, adjudication of these same two cases may have looked like this:

Case I: Regardless of errors made by the hearings examiner, mitigation would not have occurred. Prior to CSRA there was no established basis for mitigation. In addition, preponderance of evidence would not have been necessary. The standards of evidence are part of the CSRA package.

Case II: This case especially would have been different. The whistleblower complaint would not have been a factor to consider in looking at the agency's action. Reprisal would not have been an issue and the Office of the Special Counsel would not have become involved, since it did not exist. The hearings examiner would have had to decide

on the merits of the case as put forth by the agency.

The following chapter contains interviews with Forest Service managers who had personal involvement in the development and administration of these cases. The interviews deal with questions about the impact and implementation of CSRA and pre-CSRA experiences.

[1]Broida, op. cit.

[2]Ibid., p. 284.

[3]Broida, op. cit., p.306

[4]Broida, op. cit., p. 307.

CHAPTER 4

MANAGEMENT PERSPECTIVES

This chapter contains interviews with personnel managers who work for the Forest Service, an agency within the United States Department of Agriculture. These managers operate at different levels of authority within the organization, and in different capacities. They were chosen because of their broad base of knowledge and experience in the area of adverse action. They all have experience in preparing and presenting cases before the Merit Systems Protection Board. The interviews provide insight derived from practical application of adverse action processes and procedures and draw on the evaluation and perceptions of the results. Individuals interviewed have a direct impact on how and when management proceeds with adverse actions. Their expertise and advice determine the outcome of the final stages of actions because they develop a synthesis of what supervisors prepare and provide, what management desires as an end result, and what regulation requires.

Individuals interviewed were Raymond J. (Jack) Burton, Personnel Officer, Lolo National Forest, Missoula, Montana, 10 years of experience; Ormie Nei, Employee Relations Specialist for the Northern Region, Missoula, Montana, 21 years of experience; and Robert Quade, Assistant Director for Personnel, Northern Region, Missoula, Montana, 21 years of experience. The questions were designed to address the

issues that are integral to CSRA intent and administration. Following are the questions and individual responses, and all quotes are from the interviews unless otherwise specified:

1. Has the split of CSC into OPM and MSPB alleviated the conflict of roles CSC faced as both administrator and adjudicator?

BURTON - "There is some difference. In my dealing with the Civil Service Commission prior to CSRA I did not perceive a problem with CSC as both administrator and adjudicator, although I understand the concept of wanting to separate the regulatory function from the appeal function. The problem as I see it is more politics rather than process. The views of the administration are passed down to the Office of Personnel Management, the Department, and the Agency. Since 1977 there has been a 180 degree switch in the viewpoint of MSPB and how they deal with cases without any changes in the procedures; the only change has been in administrations."

QUADE - Quade stated that he did not see a conflict when the Civil Service Commisssion had both functions. The difference from his perspective was that under CSRA and MSPB the system became much more legalistic. The board is staffed by lawyers now, and hearings are more legalistic, resembling a courtroom hearing. Under the CSC, hearing officers were not lawyers, hearings were informal, and participating and presenting the case for the agency was easier.

NEI - "The relationship of administrator and adjudicator was not clearly defined when both tasks fell within CSC's authority, I feel the employee didn't get a fair shake because of the conflict. Under the new system there is less interference from the branch that administers

policy (OPM) with how the adjudicator (MSPB) does its job."

2. Has the appeals process been streamlined so it is easier for managers to get rid of incompetent employees?

BURTON - Burton pointed out the fact that minor actions are not appealable, which does streamline the system since these cases are not within the Board's jurisdiction. Minor adverse actions are considered as proof of progressive penalty and may be reviewed to insure employee's were given due process.

From his perspective there is one part of the process that made a difference; that being the impact procedural errors had on review of an appeal. Under the old system a procedural error was grounds for throwing out a case regardless of how significant the weight or merit of the procedural error. With CSRA the procedural error has to be definitely harmful to the appellant before it becomes a factor. It also has to be brought to the attention of the board by the appellant before it becomes a factor. Prior to CSRA, the first point of review by the Civil Service Commission was to look for procedural errors, regardless of whether or not the errors were brought forward as an issue by the appellant.

Burton did not see an increase in activity now when compared with the number of cases pursued under the old system. One reason for this is that managers still don't understand that the process is not a difficult one. The conflict of documentation, the time consuming procedures, and personally having to deal with problem employees are deterrents that managers and supervisors avoid unless they are forced to take action.

"I believe it is easier to get rid of employees, but not so much due to the process as it is due to change in attitudes. The major difference is still the attitude of how appeals are viewed. Less time is spent looking at procedural errors. The current attitude of the administration and their constituency is supportive of making it easier to get rid of employees."

QUADE - "I don't think there is much difference in the way to get rid of an employee for misconduct, it's basically the same with the exception that in the past if you had a processing error, that would have been enough to throw the case out or lose the case. Now it has to be a substantive error before you lose the case. The major difference is in the area of unacceptable performance."

NEI - Nei's opinion was that adverse action processess are almost the same and it isn't any easier to take action. The difference cited was a more professional decision. He felt that originally MSPB overreacted in deciding in the employee's favor, now agency success is predominant. His experience was a 95 percent success rate; part of that success rate was attributable to pursuing cases that looked like "sure things". The people processing actions for the agency are competent, it is the first line supervisor that is the weakest link.

"MSPB's autonomy is important, they can be more objective. In the beginning, MSPB fired all hearing examiners who weren't lawyers. MSPB's internal goal is 120 day adjudication of cases, they have to explain to Congress if they don't meet this. Currently they have come close to correcting their time problems."

3. Has CSRA changed the way you do business?

BURTON - "CSRA has offered a slight improvement, but has not offered the expedited process in dealing with problem employees that it promised. Maybe it is somewhere in between, which may not be so bad. Perhaps that is all we should have expected of it in the first place.

"Managers complain that it is still too complicated and cumbersome to deal with a problem employee, but on the other hand I have found that it is not that cumbersome to use. My unit has used it, and used it effectively; but, we still haven't used it enough."

Burton sees the major obstacle as managers and supervisors who are unwilling to do their part. The supervisor is the one who initiates a case and any subsequent action; otherwise, the agency might not even be aware of an employee's actions. The supervisor has the responsibility of documenting what has happened and identifying other knowledgeable parties; personnel takes over after the initial information is gathered.

QUADE - "A more legalistic approach has resulted in the Forest Service having to do a more thorough job of case preparation and to be more knowledgeable in laws and regulations." Recently adverse action authority was withdrawn from the Forest level to the Regional level in order to develop expertise and consistency in application. Quade felt that by withdrawing the authority the process would be slowed because managers at the field level will deal with cases in some informal way rather than do the paperwork and invest the time involved in going to the Supervisor's office and then the Regional office.

NEI - "We are more professional. The decentralization of adverse action authority to the Regional Office level from the Washington

Office changed how we do business. It is more efficient having removal authority at that level. The old system used the B and C breakdown (less than 30 days and 30 days or more, see pages 9 and 10) now we use minor and major action delineation. We use prior case law more, MSPB publishes precedent decisions in volumes and I refer to these quite often. If we do our homework MSPB will look favorably on us." Nei's opinion was that initially there was an overreaction to CSRA, a misguided feeling that MSPB was an employee advocate; they didn't understand what Congress and the President intended, but that seems to have changed.

4. Where did the attitude that it is difficult to take action originate?

BURTON - "Under the old system the almost singular emphasis on procedural error made taking action appear to be difficult. The Civil Service Commission threw out a number of cases for procedural error, regardless of how minor the error was, and the procedure was also complicated. Supervisors and managers felt it wasn't worth the effort if the case wasn't going to be looked at on its own merit."

Burton felt that another factor was incompetence on the part of people processing cases, they did not understand the processs well enough to avoid pit falls, which created problems. As Burton points out, part of the process is the work done by a manager or supervisor; under the CSC, if they didn't do a complete job it didn't matter what kind of competence personnelists had, the case could still be thrown out based on procedural error made by the manager or supervisor.

QUADE - "In the past Rangers had the authority to summarily

dismiss or discipline an employee without having to check with anyone. As the system became more complex and employee rights were more defined, a set of regulations was developed on how to deal with employee misconduct. As those regulations became more complex and more stringent, more paperwork was required and there were less options and opportunities for people to deal with problems themselves; they had to start relying on personnel specialists to interpret the regulations and the processes on how to deal with employee problems. As a result, the line managers saw the time and paperwork involved and surmised in their minds that it was a more difficult process to try and fire someone."

The resistance to taking adverse action is due to the complexity of documenting cases and preparing for taking action. Quade stated that whether it is under the old system or the new isn't as important as the objections people have to documenting why they are taking action or getting supporting documentation.

"Managers want to still be able to say `you did this, that's it you're done,' and they can't, but neither could they under the old system. In general people resist the extra work that documentation means."

NEI - Nei stated that part of the problem was that procedures were not as well defined as they are now, so the basis for determining procedural error was not clear. Reviewers had their own ideas of what was right or wrong; so, a lot of guidelines that had to be met came out in the form of decisions as opposed to direction in the manual." Nei saw inconsistencies as a problem and thought that under the new system there is a better tracking method to trace what the Board has looked at

in their decision.

5. What has CSRA done for the Forest Service as an agency?

BURTON - "Our agency decentralized adverse action authority as a result of CSRA. Prior to CSRA, if a unit wished to proceed with a removal, the Washington Office had to be convinced that action was appropriate and the case was strong enough to win.

"I don't think we have any more employees removed for misconduct now than before. The process and politics may be better, but managers and supervisors are still reluctant to proceed, so maybe the process wasn't the real reason the system wasn't being used. It takes a lot of time and energy to proceed with a case and there isn't much pay off."

QUADE - Quade's first response was to to point to how simply written the Act is, with the processes and procedures outlined very well. He felt that under CSC there was more personal judgment introduced by the hearing officer's personality and their influence over the hearing proceedings. Now the procedures and regulations are very clear, they have to be consistent, and inconsistencies that exist now are a result of personal judgment by the hearing officers in the decision they make. Quade felt that this was unavoidable reagardless of the system.

NEI - "At first we objected to the legalistic approach, but now we find there is a real consistency among board hearing officers because they are following the same rules, regulations, and processes for hearings and case review. It is better for us because we know what to expect."

6. Are employees rights protected more under CSRA?

BURTON - "Politics of the moment rules. A hearing officer from MSPB can take many different positions hearing the same information, depending on the political climate. I don't know if someone could actually abuse the system considering the mood and attitudes. Influencing attitudes are not just those of the administration, but rather the views and opinions of the nation at large. The pendulum swings and will swing back. But, the process is fair and could be used if managers were willing."

Burton stated that MSPB can be an advocate of the employee or an advocate of the agency in how it looks at the case, currently MSPB has shifted to agency advocate. Agencies are winning more cases, but not simply because they are more proficient in dealing with MSPB. He gave and example of a case that was decided when the Act was first implemented. MSPB decided in favor of the employee, it was appealed and heard by MSPB under the current administration; the second time the agency won. Burton felt the case was no stronger the second time than the first, but the attitude of the administration was different.

QUADE - "Employee rights are definitely more protected, I don't think we need a union today because employees have so many rights in so many areas by law, they don't need anything else. It's all laid out so systematically that employees who want to take the time and effort to fight any action have the rights and processes available to them to do so."

NEI - "Yes employees rights are more protected now and that was one thing that came out of this legislation. Employee rights have been made clearer and are better established in the regulations and case

law. The system is still complicated, especially as it relates to theinformation and processes required from a supervisor in order to deal with problem employees."

In looking at the future under CSRA and the process in general Mr. Burton and Mr. Quade had some specific thoughts. Burton felt employees aren't any more educated under the new process. He pointed out that initially there was confusion over levels of evidence and what preponderance meant, now the definitions are more clearly established.

He would like to see a move to hearings being discretionary if MSPB feels it needs additional information. Not all cases are automatically granted appeal, the present process provides for an appeal if there is substantive error made by the hearings officer during the hearing. An appeal may also be granted if there is new evidence that came to light after the hearing. An employee's final recourse after losing an appeal to MSPB is to appeal to federal court. When an employee appeals to federal court it is the employee versus MSPB, not the agency.

Quade was of the opinion that at the outset CSRA really didn't change much, didn't do much for management; but, with more cases being processed under CSRA the increased experience makes it easier to deal with cases now. He felt it was important for personnelists to develop good working relationships and communication processes with managers to encourage managers to seek technical advice. The personnel specialist must be able to tell a supervisor or manager how to deal with the problem so they are comfortable with taking an adverse action.

Question 1, about the split of CSC into OPM and MSPB alleviating

the conflict of roles CSC faced as both administrator and adjudicator, was intended to discover if a conflict had existed and, if it did, had the split alleviated the conflict. The general opinion reflected that there was not much of a conflict seen at the field level in the general administration of adverse actions. The conflict may have existed at a higher level and was not necessarily evidenced in the handling of cases and dealing with agency personnel. The one official who said there was conflict related it to its affect on employee rights, this is significant, but relates more to Question 6 which covers the issue of employee rights.

Question 2 dealt with streamlining the appeals process and making it easier for managers to get rid of incompetent employees. This is one premise that formed the legislative basis behind CSRA and can be used to evaluate the success of the intent of the Act. In reality, the appeals process doesn't appear to have significant influence on the ease or difficulty with which managers can get rid of incompetent employees. Prior to the Act, appeals extended the time frame for the final stages of an action, but were not necessarily an impediment to initiating or pursuing an action against incompetent employees. This question was responded to with a concensus, that there was virtually no change in making it easier to get rid of incompetent employees. The one exception was that minor actions are not appealable, and that has resulted in some streamlining.

Question 3, asked if CSRA changed the way the agency does business? This refers to process and procedural changes that were either directed by CSRA regulations or came about through the agency

adapting to the resulting regulations. The question points to whether or not there was a change in how the agency operates and if so the implications of the change.

Due to CSRA, the process changed as it pertains to procedural error and the burden on the appellant. This is just one element referred to, another was the more legalistic approach and the case preparation required; which is significant because in response to the legalistic emphasis the agency adapted by becoming more professional and knowledgeable of the regulations. The professional aspects of dealing with adverse actions have impacted the role of personnelists, and the new process has highlighted some of the inadequacies of past practices, especially those pertaining to personnel management.

Question 4, whether it is difficult to take action was responded to with a variety of rationale explaning the attitudes of agency managers and supervisors, that taking action is not worth the time or trouble, and addressing what caused the attitude. The attitudes of managers and supervisors directly impact all aspects of adverse actions; such as, documentation, supporting actions, and dealing with affected employees. Supervisor and manager attitudes may be based on perceptions and experiences, but it is at their level that adverse action becomes a necessity and finally a reality.

Question 5 about what CSRA has done for the Forest Service was responded to with some positive remarks, but is more difficult to pin down what CSRA actually did for the agency. CSRA did result in decentralization of adverse action authority. This eliminated one layer of the process; minimal as it may seem, eliminating this layer

did help make it easier for managers to take adverse action against employees. The professional legalistic influence of CSRA has led the agency to use more analytical evaluation in case preparation and promotes consistency in analysis; however, it does not make using the process easier.

Are employees rights protected more under CSRA? One response was "no" because employees are no more educated about their rights and the process; there were two "yeses" that said employees rights were better defined and to that extent more available. Overall, this seems to support the feeling that the protections are available, but not always understood or used by employees.

Employees, as well as agencies, have access to precedent case law, except employees don't seem to utilize the access. However, more employees are retaining lawyers to handle their appeals and the lawyers are astute enough to look at case law. The legal parallel between case law under the administrative process and civil law forces employees to seek legal representation. As to actual protections of employee rights, this indeed has occurred; observing and guaranteeing those protections is a priority with MSPB. Awareness of this, plus protections in the regulations, make observing employees rights a priority with the agency.

The following chapter contains analysis of the objective of this study, based on information in this and preceding chapters, and recommendations based on the information and analysis.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

This study set out to determine if there is a congruence of intent and administration of the Civil Service Reform Act, as it pertains to adverse action. The Act was intended to streamline the appeals process, making it easier to get rid of incompetent workers, and to improve government efficiency and balance management authority with employee protections. What the case analyses and interviews have shown is that a disparity does exist between intent of the Act and what has occurred during the administration of the Act.

Specifically addressing the reasons for CSRA as outlined in Chapter 1, the administration of CSRA has not made it easier to get rid of incompetent employees per se. A disparity exists here as is supported by the case analyses and interviews. The appeals process has not been streamlined. Last year (1985) MSPB implemented an expedited appeals process because of the backlog of case work that existed, but its use thus far has been very limited and not as well received as the Board had hoped. The expedited process isn't a result of legislative mandate, but rather a solution to a shortage of dollars and people. Evidence seems to point to the need for further streamlining of the appeals process.

The process is more understandable and defined well enough that

case preparation is easier from a procedural and content standpoint. With the establishment of case law, agencies have a clearer picture of how to proceed, a better measure of whether or not they will be successful, and a stronger procedural background on which to base their cases. At the present time agencies are being supported in a majority of the actions taken; in fact, in 1985 agencies prevailed in 73 percent of the cases at the Board level and 76 percent at the Regional level.[1] This means that precedent case law is being established with heavy consideration given to agency determinations. What the statistics don't show is whether or not agency success is based on a series of actions that are taken to get rid of incompetent or problem employees. Or, if the process dominates agency actions to the extent that MSPB only gets to review cases that are taken because they fit into the precedent and process schematic. Or, agency management has gained expertise in presenting their case.

The final aspect of CSRA was balancing management authority with employee rights. The intent of the law was to eliminate actions which were arbitrary in nature and not based on valid and legitimate management reasons. Employee rights were more clearly spelled out and the independence of MSPB was to be key in protecting employee rights. Employee awareness of what CSRA offers them is still marginal, but MSPB has become a watchdog to ensure that agencies don't violate an employee's rights. If agencies don't offer the guaranteed protections and processes, their case will be substantially weakened. The results of CSRA in the form of case law and regulations have put agencies on notice. Procedural error no longer has the impact it did prior to

CSRA, but the law provides procedural protections to employees. Experience in the researcher's agency indicates that the legalistic protections and the existence of precedents have created a situation where retention of legal counsel, by an employee, is necessary.

There is another side to employee rights; one that widens agency prerogatives. This refers to the recent expansion of the concept of nexus; since Merritt in 1981, many cases have arisen involving the impact of off-duty misconduct on government operations and continued employment. The Board and the courts, having struggled with nexus, attempted to redefine the parameters of nexus. In 1984, the Board expanded the scope of nexus to include an agency's lack of trust and confidence in the employee to perform assigned duties, with the efficiency of the service criteria. This makes the agency's job easier, but puts the employee in a more tenuous and vulnerable position in regard to the impact of off duty conduct.

There are other factors that also need to be considered. First there are the external factors that influence MSPB and affect dealing with MSPB. One problem with the Board is the degree of competency of hearing officers. For instance, did they ignore or miss information that was in the case file, or base the decision on something said in the hearing that was not checked out for reliability or validity? MSPB faces problems in that they have been chronically underfunded and understaffed and have had difficulty carrying out their mission as intended by the Act. Sometimes it takes four times as long as it is supposed to take to issue a decision. Staffing and funding shortages have been cited as reasons for these time frames. Currently MSPB is

processing decisions within the 120 day time frame; this is partly due to political pressure in the form of budget and organization justification.

Another factor is the human factor. Supervisors and managers, not the process, are the problem. Congress's intent was to make it easier to get rid of incompetent employees without jeopardizing employee rights. The approach failed to address one very real and very influential problem, and that is, how to get supervisors to initiate adverse actions. Forest Service direction is to take more risks and reward supervisors who take action, but we still see cases of misconduct that are not being addressed. One manager named ten instances he is aware of where action could be taken but was not even being considered. The reasons relate back to the attitude covered in the interviews that taking action is too costly, too time consuming, and has little, if any, benefits. That is still the case; under CSRA procedural requirements have not been alleviated or simplified to any great extent. The requirements that an agency supervisor must meet have a chilling effect on any effort to take action. For some supervisors it is easier to transfer, ignore, or even accommodate a problem employee, than to take an action that will require time and effort and in the final analysis may or may not be successful.

From an agency standpoint CSRA has had some positive results. In the area of minor adverse actions, agencies have the ability to take action without concern of employees appealing to MSPB. This gives agency's the option of attempting to modify behavior, which is one of the factors in proceeding with disciplinary action. Whether or not

this makes the employee more productive depends on the individual's response to discipline.

Within the Forest Service, more authority was received at the Regional level with the decentralization of adverse actions. Prior to civil service reform, all major actions were required to go to the Washington Office level. With decentralization, Regional Offices were given authority to propose and decide major adverse actions. With one less level to get involved and muddy the water it is easier to coordinate and develop better cases.

The Merit Systems Protection Board has authority to reverse an agency action on procedural ground, only if the appellant can demonstrate that the procedural defect was extensive enough to have altered the decision. Prior to CSRA, the appellate review authority could and often did reverse agency decisions for minor procedural defects before ever reaching issues related to the merits of the action.

The Civil Service Reform Act, as formulated, struck a balance between management flexibility and employee protection. The case analysis, interviews and review of procedures found in CSRA support a conclusion that there is a gap between the intent of CSRA and practice. The Civil Service Reform Act as it exists today in the area of adverse actions is a more refined and defined piece of legislation. The establishment of precedents gives agencies the basis from which to proceed. In the Act itself, adverse action procedures did not undergo major revisions. Taking adverse action and dealing with employee misconduct, or employee incompetence, was not made easier by civil

service reform alone. The impediment to getting rid of employees or disciplining employees is the perception that such action will be time consuming, costly and in the long run ineffective. This attitude or perception, coupled with resistance on the part of supervisors and managers to establish sound case work, may result in a case that goes nowhere or is not successful. From an agency viewpoint, what civil service reform has done is make the process more legalistic in the requirements and processing of cases before MSPB. The information presented indicates that the burden of a legalistic approach is outweighed by the spin off of a better understanding of what MSPB expects. The Board's findings documented in case law are made clearer and more consistent by precedent case law and published case decisions. The benefits found in the adverse actions process under CSRA are:

(1) 14 day suspension not being appealable;

(2) employee protections outlined and supplemented by case law;

(3) procedural error being less influential in case decisions;

(4) a clearer picture of what a case should contain in order to be successful; and

(5) decentralization of authority within the Forest Service.

Looking at these beneficial results one can see that CSRA for the most part augmented management authority. Properly understood, CSRA is a strong management tool. Yet, the bottom line is still the same - it isn't any easier now to get rid of incompetent employees than was the case with pre-CSRA.

Analysis of this study and the information contained in the

preceding chapters lead to the conclusion that a gap between intent and administration does exist. Following are some recommendations designed to alleviate the disparity of implementation at the agency level.

RECOMMENDATIONS

What will make the system work better? There are steps agencies should be aware of and can take to facilitate implementation of the Act. The first step is training supervisors and managers in the area of adverse action processes and procedures, . Knowing how and when to recognize and deal with problem employees is an integral part of supervision and management; but, training in this area is almost nonexistent. This is a simple but identifiable remedy.

The next step is using the process. The process as it exists will work. Inherent in training should be the development of an attitude that leads to using the process and taking action. Training must also convey the message that agencies can't afford to ignore or fail to protect employee rights in any action they pursue. Too often action is based on incidences supported predominantly by a culmination of frustration rather than sound judgment and documentation. This leads to shortcuts and less than substantiated charges which may result in loss of a case or mitigation of a penalty. The agency's score with the Merit Systems Protection Board doesn't take into account all the cases from the field offices that are turned back because the Forest Service is cognizant of the potential ramifications if it pursues a poorly prepared and processed case. This points to training and support from agency personnelists, but it also includes the need for changing attitudes toward taking adverse action.

Top management must recognize the efforts of supervisors and lower level managers in taking action or dealing with problem employees. Supervisors and managers are the point of origination in recognizing and implementing the concepts of CSRA. Leadership can set an example with support and reinforcement that is visible and tangible. Supervisors need to see an immediate and directly applicable benefit of their efforts. One form of reinforcement would be the establishment of a reward system for supervisors who take proper action. Implementation of these recommendations would lead to taking disciplinary actions that meet procedural requirements; a step to erasing the disparity outlined in this study.

[1]"MSPB Upholds Three-Fourths of Personnel Actions," Weekly Federal Employees News Digest, Vol. 35, No. 39, May 12, 1986, p. 3.

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