

ADVERSE ACTION FOLLOWING DECLINATION OF PROSECUTION

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I. MSPB PROCEDURE: APPEALS INVOLVING MISCONDUCT CONCURRENTLY ADDRESSED IN CRIMINAL PROSECUTIONS

a) Dismissal of Appeal Pending Criminal Proceedings

1. General MSPB Policy

The MSPB has announced that its policy is to “stay its proceedings when criminal proceedings involving the same matter are pending.” *Acree v. United States Dep’t Treas.*, 74 M.S.P.R. 119 (April 2, 1997) (citing *Rice v. United States Dep’t Treas.*, 52 M.S.P.R. 317, 321 (1992)); *see, also, United States Dep’t Labor v. Slattery*, 2000 MSPB LEXIS 1161 (November 30, 2000)(dissent of Chair Slavet)¹ (“The Board has recognized the inherent unfairness of subjecting an individual to an administrative disciplinary proceeding at which he is unable to fully respond to the charges because to do so could jeopardize such a defense. *Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 110 (1990); *Engdahl v. Department of the Navy*, 40 M.S.P.R. 660, 664-65 (1989), *aff’d*, 900 F.2d 1572 (Fed. Cir. 1990).”).

As a practical matter, the MSPB may be inclined to dismiss an appeal without prejudice, rather than “stay” the proceeding. *See, e.g., Acree v. United States Dep’t Treas.*, 74 M.S.P.R. 119 (April 2, 1997); *see also Medina v. United States Dep’t Air Force*, 66 M.S.P.R. 194, 197 (January 9, 1995).

Even when criminal proceedings have not formally commenced, the MSPB is likely to grant an appellant’s request to stay the administrative proceedings pending resolution of an “ongoing criminal investigation by the U.S. Attorney’s Office into . . . charges which are closely linked with the charges underlying the agency’s [adverse] action.” *Green v. United States Postal Serv.*, 16 M.S.P.R. 203 (August 17, 1983).

2. Rationale

The MSPB has articulated the rationale underlying its policy, as follows:

The Board has generally stayed its proceedings pending the completion of a criminal trial because its proceedings could interfere with an ongoing criminal case involving the same conduct. *Wallington v. Department of Treasury*, 42 M.S.P.R. 462, 464-65 (1989). In *Pidock v. Department of Treasury*, 54 M.S.P.R. 28, 31-32 (1992), the Board further found that the agency had established good cause for a continuance of the hearing in the face of a criminal investigation involving the same facts, where the agency asserted that its case would be severely impaired in that its witnesses could not testify because of Federal Grand Jury proceedings and

¹ Note that *Slattery* is a non-precedential decision. At the time of its issuance, the Board had only two members. They could not come to agreement and, as a consequence, the administrative judge’s initial decision became final. Therefore, the opinion of Chair Slavet, which rejected the initial decision, is best described as a dissent.

there was no prejudice to the appellant since, if he ultimately prevailed, he would be restored to the *status quo ante* . . . [T]he Board also noted that “to proceed might constitute improper interference with the ongoing criminal case.” . . . [T]he U.S. Court of Appeals for the Federal Circuit [has] recognized the potential harm to the prosecution of the criminal case, as well as to the criminal defendant, which may result from the broad scope of civil discovery, in contrast to criminal “discovery.” It further noted that postponement of civil proceedings is “desirable . . . for the protection of the integrity of two separate processes” . . . We therefore find that such a consideration must enter into the stay determination, even if it does not directly affect the presentation of the agency’s case on appeal and there is no specific showing that the related criminal case necessarily will be harmed . . . We further find, however, that the extent of the potential harm to the related criminal case and the specificity of that showing would affect the weight given to this factor in determining the stay request . . .

In *Wallington*, 42 M.S.P.R. at 465, the Board, while acknowledging that it would suspend its proceedings pending the completion of the trial, adopted the [Federal Circuit’s] standard . . . -- “whether the interests of justice seem to require such action” -- for determining whether to stay its proceedings until the final resolution of the appellant’s criminal proceedings. [Footnote 2] We find that, regardless of whether the stay is requested by the appellant or the agency, this standard is generally met where a stay is requested for a reasonable period pending the completion of a related criminal trial, it is unlikely that either party would be prejudiced thereby, and prosecuting authorities have concurred in the stay request to prevent undue interference in ongoing criminal proceedings and have provided specific reasons therefor.

[Footnote 2: “In determining whether a stay of proceedings or discovery is appropriate, the courts have considered the following factors: (1) the interest of the plaintiff in proceeding expeditiously with the civil action as balanced against the prejudice to the plaintiff [from] delay; (2) the burden on defendants; (3) the convenience to the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. *In re Mid-Atlantic Toyota Antitrust Litigation*, 92 F.R.D. 358, 359 (D.Md. 1981).”]

Keay v. United States Postal Serv., 57 M.S.P.R. 331 (May 5, 1993).

3. Exception: Permitting Discovery to Avoid Loss or Destruction of Evidence

The MSPB has recognized a limited exception for discovery when evidence may be lost or destroyed as a result of delaying the administrative proceedings. *Keay v. United States Postal Serv.*, 57 M.S.P.R. 331 (May 5, 1993). Presumably, the MSPB would carefully weigh the need to preserve evidence against the risk of affecting the criminal proceeding, as discussed in the preceding

subsection. *Id.* (“[T]he U.S. Court of Appeals for the Federal Circuit [has] recognized the potential harm to the prosecution of the criminal case, as well as to the criminal defendant, which may result from the broad scope of civil discovery, in contrast to criminal ‘discovery.’”).

4. The Agency Need Not Stay Its Personnel Action

Notwithstanding the MSPB’s policy of postponing its administrative proceedings, the agency need not wait to take disciplinary or adverse action against an employee pending resolution of the criminal matter. The following excerpt aptly demonstrates this principle in action:

The appellant alleged that the agency acted in bad faith and committed harmful error by intentionally adopting an “on-again, off-again” posture toward her criminal prosecution, which was designed to deny her an effective reply to the notice of proposed removal (due to her need to exercise her Fifth Amendment right against self-incrimination) and/or to discourage her from appealing to the Board . . . In her cross petition, the appellant reiterates that she declined to reply based on Fifth Amendment grounds, and that the agency erred by removing her rather than imposing an indefinite suspension. As the administrative judge found, however, the agency had the right, in the exercise of its managerial discretion, to effect a removal action rather than an indefinite suspension. Moreover, the agency indisputably provided all requisite procedures to which an employee under a notice of proposed removal is entitled. The appellant was not denied an opportunity to reply; she merely failed to exercise her right to do so. *See Apple v. Department of Transportation*, 16 M.S.P.R. 280 (1983).

Colon v. United States Dep’t Navy, 58 M.S.P.R. 190 (June 29, 1993).

5. Staying the Administrative Proceedings Over Appellant’s Objection

The right to file an appeal with the MSPB is, admittedly, a right belonging to the appellant, not one belonging to the agency. However, the MSPB will consider the interests of both parties when determining whether to stay its proceedings. As the following excerpt demonstrates, the MSPB may find good cause for a stay even when the appellant objects:

[The AJ] noted the agency’s contentions, based in part on a letter from . . . the Assistant U.S. Attorney, that: (1) The U.S. Attorney had custody and control of the agency’s original documents, and would have to approve release of those documents to the agency; (2) the documents the agency submitted pursuant to a grand jury subpoena could not be used in this appeal absent an order from the controlling Federal court judge; and (3) the agency would be precluded from fully developing the record before the Board because appellants . . . were likely to resist testifying under a claim of 5th Amendment privilege. The [AJ] found that, while criminal proceedings do not ordinarily require a stay of civil proceedings, the Board

has held that its proceedings should be stayed pending the completion of ongoing criminal investigations that are closely linked to charges underlying the agency's removal action . . . [A]lthough there is no record evidence that continuing the Board's proceedings would improperly interfere with the ongoing criminal case, the administrative judge appears to have properly exercised his discretion in this appeal in balancing the appellant's interests against those of the agency and her fellow appellants . . . Moreover, the agency cannot control the circumstances of this appeal and can evidently do little to anticipate or ameliorate the problems created by the simultaneous existence of the Board appeals and the criminal prosecutions. *Compare Thomas v. Department of Veterans Affairs*, MSPB Docket No. CH07529110191, slip op. at 4-5 (Nov. 19, 1991).

Henderson v. United States Postal Serv., 52 M.S.P.R. 592 (February 12, 1992).

6. Reverse Situation: Criminal Proceedings Held in Abeyance

In at least one decision, the MSPB addressed the reverse situation, in which the criminal matter was held in abeyance while the administrative matter proceeded. *Sleboda v. United States Dep't Justice*, 54 M.S.P.R. 386 (July 15, 1992). Under the particular circumstances of the case, the fact that the administrative proceeding concluded first rendered the ultimate status of the appellant's employment somewhat uncertain.

In *Sleboda*, a Physician's Assistant who had pled guilty to drug charges applied to hold the prosecution in abeyance while he completed a drug treatment program. In removing this employee for misconduct, the agency relied on his guilty plea and his failure to respond to the notice of proposed removal. On appeal from an AJ's unfavorable decision, the employee challenged the factual finding that he committed the charged conduct. Although the employee indicated that the court would expunge his records upon his successful completion of the program, the MSPB sustained the removal:

[The AJ] did not rely upon a criminal conviction in sustaining the charge. Rather, he considered the appellant's guilty plea to be an admission establishing *a prima facie* case of misconduct, and he found no denial or refutation by the appellant rebutting that *prima facie* showing . . . In light of the appellant's stipulation and his failure to deny his involvement in the criminal conduct, we find that the administrative judge correctly found that the agency proved the charge by preponderant evidence.

Id. The MSPB left open one important question, however, by declining to "resolve the question of whether the charge can stand if his records are expunged." *Id.*, n. 3.

7. Challenging a Decision to Stay the Administrative Proceedings

The MSPB has prescribed a specific procedure for challenging any decision to stay its administrative proceedings:

APPEAL RIGHTS FROM A RULING ON A STAY REQUEST. An order granting or denying a stay request is not a final order and therefore cannot be the subject of a petition for review. *See Weber v. Department of the Army*, 47 M.S.P.R. 130 (1991). An interlocutory appeal, 5 C.F.R. §§ 1201.91-.93, is the only means for securing immediate review of an order regarding a stay request. The AJ has discretion to certify an interlocutory appeal of an order regarding a stay request in accordance with 5 C.F.R. § 1201.92.

MSPB Administrative Judge's Handbook, Ch. 16, Sec. 4 (available on the internet at <http://www.mspb.gov/foia/forms-pubs/judgehb.html>).

b) Deadline for Refiling the Appeal

When an AJ dismisses an appeal without prejudice pending the outcome of criminal proceedings, the AJ might set a specific date by which the appellant must refile. *See Acree v. United States Dep't Treas.*, 74 M.S.P.R. 119 (April 2, 1997)(citing *Medina v. United States Dep't Air Force*, 66 M.S.P.R. 194, 197 (January 9, 1995)). Alternatively, the AJ might require the appellant to refile within a certain period of time (e.g., twenty days) after either the criminal proceeding concludes or the government declines prosecution. *Id.*

c) Refiling the Appeal: Due Diligence

The MSPB will construe the deadline in accordance with the plain language of the AJ's order. *Acree v. United States Dep't Treas.*, 74 M.S.P.R. 119 (April 2, 1997) (citing *Garcia v. United States Dep't Veterans Affairs*, 66 M.S.P.R. 610, 612-613 (1995)). As the following examples show, the order may or may not impose a duty of due diligence.

1. Example: AJ's Order Imposed No Duty of Due Diligence

An AJ dismissed an appeal without prejudice in August 1992. The order required Appellant to refile not later than twenty days after "the date he is informed that the U.S. Attorney has declined prosecution." Fully four years later, in August 1996, Appellant refiled. The AJ dismissed this refiled appeal as untimely, but the MSPB reversed and remanded the appeal for a hearing.

The decision recounts the reason for Appellant's delay. Shortly after the dismissal in 1992, Appellant's attorney unsuccessfully sought information from the Assistant U.S. Attorney (AUSA) as to whether Appellant would be prosecuted. In August 1993, the attorney again contacted the AUSA, who responded by offering a plea bargain. Taking this offer as an indication of likely prosecution, the attorney considered it "inadvisable" to make further contact until the statute of

limitations expired. He feared that any such inquiry “might have caused [the AUSA] to focus on the mater and initiate prosecution.” The attorney was also concerned that further mention of his client’s intent to pursue an administrative appeal was “one way to be sure he doesn’t decline the case.”

In August 1996, after the statute of limitations had run, the attorney contacted the AUSA and discovered that the U.S. Attorney’s offices in the District of Columbia and the Eastern District of Virginia had declined prosecution in 1994 and 1995, respectively. However, these offices did not routinely issue affirmative notices of their declinations. The MSPB excused Appellant’s delay because the AJ’s order imposed no duty of due diligence on Appellant with regard to ascertaining the status of the prosecution. Significantly, Appellant refiled promptly after his attorney actually learned of the declination. *Acree v. United States Dep’t Treas.*, 74 M.S.P.R. 119 (April 2, 1997).

2. Exception: Intentional Delay

Notwithstanding the lack of any requirement of due diligence in the AJ’s order, the MSPB did suggest in *Acree*, summarized immediately above, that it would not allow an employee to extend a deadline for refiling by intentionally avoiding receipt of notice of the declination. *Acree v. United States Dep’t Treas.*, 74 M.S.P.R. 119 (April 2, 1997). In support, the MSPB cited an analogous Federal Circuit case involving an employee who intentionally avoided receiving an agency’s final decision on an EEO complaint before filing an untimely appeal with the EEOC. *Id.* (citing *Saddler v. United States Dep’t Army*, 68 F.3d 1357 (Fed. Cir. 1995)). In that case, the employee’s intentional non-receipt of the EEO decision did not toll the deadline. Of course, this exception’s applicability to MSPB appeals may be limited, as a practical matter. In an EEO case, the agency must affirmatively notify the complainant of its decision. However, there may be no analogous requirement that a U.S. Attorney’s office must issue affirmative notice of a declination. Certainly, neither of the two U.S. Attorney’s offices in *Acree* had a practice of issuing such notice. Absent the issuance of such notice, there is nothing for an employee to be culpable of intentionally avoiding.

3. Contrary Examples: An AJ’s Order May Impose a Duty of Due Diligence

An AJ’s order may, in fact, impose a duty on the appellant. In *Acree*, summarized above, the MSPB carefully examined the language of the AJ’s order. Presumably, different language could have imposed a duty of due diligence. The *Acree* decision also cites three cases in which the orders arguably imposed, at least, some degree of responsibility on the appellants. *Acree v. United States Dep’t Treas.*, 74 M.S.P.R. 119 (April 2, 1997). In the first case, “the administrative judge specifically instructed the appellant to refile his appeal within ninety days of the initial decision if a criminal prosecution had not been *initiated* during that time period.” *Id.* (citing *Staples v. United States Postal Serv.*, 67 M.S.P.R. 36, 38-39 (March 8, 1995))(emphasis added), *aff’d*, 70 F.3d 129 (Fed. Cir. 1995)(Table). Similarly, in the other two cases, “the administrative judges imposed a date certain by which the respective appellants had to refile in the event that the criminal proceedings had not *ended*.” *Id.* (citing *Medina v. United States Dep’t Air Force*, 66 M.S.P.R. 194, 196-197 (January 9, 1995) and *Jones v. United States Dep’t Air Force*, 66 M.S.P.R. 204, 207 (January 9, 1995))(emphasis added).

4. Practical Consideration

The agency may want to consider requesting that any dismissal without prejudice include a deadline for refiling by a date certain. The foregoing examples provide useful language, and an appropriately worded draft order might increase the likelihood of success.² Even if the criminal matter has not concluded, the requirement of refiling will afford the MSPB an opportunity to monitor its status. Either party could request another dismissal without prejudice, subject to a deadline for refiling. If the MSPB rejects this approach altogether, the agency might monitor the criminal matter on its own initiative. By advising the appellant, with the permission of the U.S. Attorney's office, of a declination, the agency may be able to trigger a duty of due diligence as to refiling the appeal.

5. Laches

In *Acree*, the MSPB rejected the agency's asserted defense of laches. *Acree v. United States Dep't Treas.*, 74 M.S.P.R. 119 (April 2, 1997). Although the defense of laches is available in MSPB proceedings, the MSPB explained that it is available only when the employee has acted "unreasonably" in failing to act. As discussed above in I(c)(1), the employee was motivated by a reasonable fear of prosecution when he decided to wait until after expiration of the statute of limitations to inquire about the status of the prosecution. The MSPB noted that the agency could have monitored the criminal matter and notified the employee of the declination, if it desired expeditious processing of the administrative appeal. *Id.* Therefore, agencies may want to monitor any related criminal matter whenever an AJ has dismissed an appeal without prejudice.

II. EFFECT OF DECLINATION

A declination of prosecution should not deter administrative action. Standing alone, the declination has little or no probative value. The factual circumstances surrounding the declination may, however, be probative or persuasive. An agency might also emphasize the criminal nature of the misconduct, notwithstanding the declination, especially with regard to the penalty determination. The following examples are necessarily fact-specific, but they may provide some useful context.

a) Example 1: The Criminal Nature of the Misconduct May Be Relevant

In one case, the MSPB emphasized the gravity of the offense, noting the declination only in a passing footnote:

The [AJ] found that the appellant's offense was serious, but found it outweighed by: (1) His lack of a significant disciplinary history; (2) his lengthy service (twenty-

² It may help to emphasize in any motion that the agency is not responsible for the prosecution. On a different but related issue, the MSPB acknowledged that, "[T]he administrative agency, as the employer, does not have any control over the progress of the litigation, including delays caused by prosecution tactics. See 28 U.S.C. § 547(1); *United States v. Kysar*, 459 F.2d 422 (10th Cir. 1972)." *Jarvis v. United States Dep't Justice*, 45 M.S.P.R. 104 (May 4, 1990).

two years) [with favorable ratings]; (3) his supervisor's and coworkers' continuing faith in him; (4) the lack of public knowledge of the appellant's offense; (5) the significant mitigating factor of the appellant's compulsive gambling addiction; and (6) his recovery and potential for rehabilitation . . . We find that describing the appellant's offenses as "serious" understates their significance. The appellant's misappropriation of \$5,000.00 in government funds, which the agency entrusted to him for the performance of his duties, is criminal conduct for which the appellant could have been prosecuted. [Footnote 3: "We do note that the appellant paid back the \$5,000.00 he misappropriated, and the Department of Justice declined prosecution."] . . . We find that these factors, *the criminal character of the appellant's misconduct* and his status as a law enforcement officer, outweigh the factors that support mitigating the penalty. Accordingly, we find that, under the circumstances of this case, the agency's decision to remove the appellant did not exceed the bounds of reasonableness.

Rezza v. United States Dep't Justice, 35 M.S.P.R. 40 (September 22, 1987) (emphasis added).

b) Example 2: Different Standards in Civil and Criminal Proceedings

In another case, the MSPB rejected an appellant's allegation of bias when his supervisor decided to take an adverse action after the U.S. Attorney's office declined prosecution:

[W]e find nothing in appellant's other contentions sufficient to overcome the presumption of good faith accompanying administrative adjudications. We find that the deciding official was acting reasonably and responsibly by requesting the complaining female employee to make a statement to the military police, especially in view of the seriousness of the alleged offense. Moreover, the fact that the [Civil Investigative Division (CID)] declined to prosecute the case is irrelevant to the issue of bias in this case. Appellant's removal was based on his misconduct and not on any criminal prosecution or conviction. *Standards for prosecution of a criminal offense differ from those in civil proceedings*. Therefore, this action is not affected by any action the CID may have declined to take. *See Messersmith v. General Services Administration*, 9 M.S.P.R. 150, 156 (1981).

Teichmann v. United States Dep't Army, 34 M.S.P.R. 447 (August 7, 1987) (emphasis added).

c) Example 3: Explanations of Declinations Might be Persuasive

The Customs Service removed two employees who failed to destroy a quantity of seized drugs. They left the site untended after placing the drugs in an incinerator. The incinerator failed to destroy the drugs completely, and a portion was subsequently stolen. Reversing the removals, the MSPB

found the agency's standard procedure, rather than the employees, to be at fault. In reaching this conclusion, the MSPB was partly persuaded by the U.S. Attorney's remarks:

The [Agency's] Report further indicated that the U.S. Attorney's Office declined to prosecute any Customs employee regarding the destruction operations, stating that the employees were following established Customs procedures, and that responsibility for these flawed procedures rested with the El Paso Port Director, who retired during the investigation. It also indicated that appellant Daly, and other interviewed employees who participated in earlier burn operations "earnestly believed" that the narcotics were "adequately destroyed" by the time they left the . . . facility, when, in fact, they departed the site prior to the complete destruction.

Mendez, et al. v. United States Dep't Treas., 88 M.S.P.R. 596 (June 25, 2001).

d) Example 4: Cancelling An Indefinite Suspension Before Proposing Removal

The agency indefinitely suspended appellant from his position with the Secret Service upon obtaining evidence of illegal drug use while in an off-duty status. After the U.S. Attorney's Office notified the agency of its decision to decline prosecution, the agency properly terminated the indefinite suspension and reinstated appellant to duty. Three weeks later, the agency proposed and, then, sustained appellant's removal on the same charge. The MSPB affirmed both the indefinite suspension and the removal. *Canevari v. United States Dep't Treas.*, 50 M.S.P.R. 311 (September 18, 1991).

e) Example 5: DOJ Declined Prosecution But Urged Administrative Action

The MSPB considered the case of an Administrative Law Judge (ALJ) who falsely represented his experience on three separate applications. *Spielman v. United States Dep't Health, Educ. & Welfare, Soc. Sec. Admin.*, 1 M.S.P.R. 53 (June 12, 1979). The MSPB noted the involvement of the Department of Justice (DOJ):

Since these false statements were indictable as felonies under 18 U.S.C. § 1001, the Civil Service Commission brought them to the attention of the Department of Justice. [DOJ] informed the Commission . . . "that the facts in this case do not rise to the level needed for successful Federal criminal prosecution." . . . Although he declined prosecution, [DOJ's] Chief of the Public Integrity Section suggested strong administrative action: ["Please feel free to take the strongest administrative measures you feel appropriate against this [ALJ], including his termination for cause.["]

Id.

DOJ sent another letter before the agency recommended action against the ALJ.³ The MSPB approved the action, and the MSPB's ALJ offered the following discussion of the approval:

Considering the seriousness of the offenses alleged and the fact that the false statements were made on three separate occasions, the presiding officer requested the [agency's] Associate Commissioner for Hearings and Appeals to explain why he had recommended 60 days suspension. In response the Associate Commissioner stated that in making his recommendation he took into account several mitigating factors: (1) Judge Spielman did not profit directly from the falsifications -- he was qualified for his initial, temporary appointment, (2) the respondent's willingness to submit the case to the Board without contesting the charges would save the time and expense of a full hearing, and (3) Judge Spielman has an exemplary record as one of the hardest working judges in the agency and has expressed contrition for making the false statements. Stating that the agency did not wish to lose respondent's valuable services, the Associate Commissioner pointed out that a 60-day suspension would be the equivalent of a very substantial fine.

. . . Removal from the service is the sanction that first comes to mind when the nature and gravity of the offenses in this case are considered. A judge's business is to seek the truth in disputes of law and fact; he must not compromise truth for favor or expediency. The judicial system can survive with judges of moderate legal talent but it can be undermined by those who are dishonest -- appeals will expose the errors of the former, while it is often difficult to detect the wrongdoing of the latter. Truthfulness and honesty are essential in a judicial officer.

Dishonesty repeated may be a more serious matter than a single, impulsive act, for it raises the question of whether a lasting trait of character is manifested. This aspect of the case -- three separate falsifications -- has been the most troublesome issue. Were it not for the strong statement submitted by the Associate Commissioner on behalf of Judge Spielman, I would be disposed to recommend removal, since the offenses are relevant to the very integrity of the adjudicative process. Nevertheless, I recommend that the penalty proposed by the agency be approved by the Board.

Id. (footnote omitted). It is unclear whether DOJ's recommendation had a direct effect on the MSPB's decision. In light of the agency's concern about the "valuable services" of its wayward ALJ, however, one is left to wonder whether the agency would have recommended any administrative action at all in the absence of DOJ's second letter.

³The agency merely "recommended" the action because 5 U.S.C. § 7521 provides for disciplinary action against an ALJ appointed under 5 U.S.C. § 3105 "only for good cause established and determined by" the MSPB after affording the ALJ an opportunity for a hearing.

f) Example 6: A Manager’s Articulated Reason For Detailing Subordinate Lacked Credibility Following the Declination

A factual variation involves a declination of prosecution against an employee other than the appellant. In one case, the agency suspended a Medical Center Director for whistle-blower retaliation. The Director justified the detail of a subordinate on the ground that the subordinate may have engaged in criminal activity. The MSPB found this explanation lacked credibility because the government had already declined prosecution. Sustaining the Director’s suspension, albeit in reduced form, the MSPB discussed the declination, as follows:

[The charge alleges] that the appellant’s decision to continue [the] detail after [learning] that the U.S. Attorney had declined to investigate the blackmail allegation constituted whistleblower reprisal . . . [One witness] stated that . . . when he informed the appellant that the U.S. Attorney had no interest in pursuing the blackmail allegation, and that there would be no FBI investigation, the appellant told him not to tell anyone about the declination because, if [the subordinate] should learn of it, he might change his mind about filing for disability retirement . . . The appellant argued below that . . . [he] was justified in continuing the detail until the OIG completed its investigation . . . [He] further contended that, if the OIG had found evidence of wrongdoing by [the subordinate employee], an administrative action could have been taken against him, even if the U.S. Attorney chose not to press a criminal action against him . . . Nevertheless, we find that, regardless of the appellant’s original motive for detailing [the subordinate], there was no basis to continue the detail once [the witness] had informed [him] that the U.S. Attorney would not pursue the matter . . . [W]e find that the appellant’s continuance of the detail constituted whistleblower reprisal.

Gores v. United States Dep’t Veterans Affairs, 68 M.S.P.R. 100 (June 27, 1995).

g) Example 7: Reliance on Factual Circumstances of Declination Requires Accurate Understanding of Facts

An agency relied, in part, on an employee’s admission of guilt in the criminal matter. However, the agency’s understanding of the facts proved inaccurate:

The agency asserts in part that, subsequent to the issuance of the initial decision, the appellant entered into a pre-trial diversion program in lieu of the issuance of a criminal complaint by the U.S. Attorney, and that her actions supported the administrative judge’s finding on the falsification charge . . . The appellant has filed a reply in which she states that the agency’s arguments are misleading, that she withdrew her application to the pre-trial diversion program when she learned that her enrollment was contingent on her admitting guilt to the falsification charge, and that the U.S. Attorney has declined at this time to prosecute her . . . Based on

the appellant's submissions, the agency has withdrawn its arguments regarding the appellant's enrollment in the pre-trial diversion program . . . Accordingly, we will not consider this matter further.

Stewart-Maxwell v. United States Postal Serv., 56 M.S.P.R. 265 n. 1 (January 19, 1993).

III. DE FACTO DECLINATION

a) Effect on MSPB Proceedings

In some cases, criminal prosecution is not possible or likely as a practical matter. *See, e.g., Moran v. United States Veterans Admin.*, 43 M.S.P.R. 547, 551 (February 20, 1990) ("prosecution [was] declined because of the low dollar amount involved and the availability of administrative remedies"). Nevertheless, the potentially criminal nature of an employee's conduct may be a factor in the administrative proceeding, as the following excerpt demonstrates:

The administrative judge erred in not sustaining the charge of possession. The record clearly establishes the appellant's possession of a measurable amount of marijuana. The administrative judge's holding that the appellant's possession of marijuana was not actionable because the amount of the drug possessed was *de minimis* is unsupported in Board case law or agency regulation. Further, the amount of marijuana possessed by the appellant would have supported a criminal prosecution for possession of an illegal substance. The California Code does not prescribe a minimum amount of marijuana necessary for prosecution for possession of the drug . . . Accordingly, the Board sustains the agency's charge of possession of marijuana on government premises.

The administrative judge also erred in finding that the agency failed to establish a nexus between the appellant's off duty misconduct of transfer of marijuana and the efficiency of the service. In finding no nexus, the administrative judge distinguished this case from [two other cases] . . . because no known criminal charges had been brought against the appellant, the incident did not receive publicity, the quantity was small, and there was no evidence that the appellant profited from the transactions.

The administrative judge improperly failed to weigh into her consideration that the appellant obtained the marijuana from a co-worker and admitted doing so on several occasions . . . Moreover, at least some of the arrangements for the off duty drug transfers occurred on duty. The appellant testified that she gave her supplier money for the purchases while they were both on base . . . Thus, the Board finds a nexus between the off-duty misconduct and the efficiency of the service.

Ingram v. United States Dep't Air Force, 53 M.S.P.R. 101 (February 21, 1992).

b) One Alternative: Agency Prosecution

One agency solved the problem of frequent declinations, due to the U.S. Attorney's backlog, by having the Department of Justice appoint three of the agency's own attorneys as Special Assistant United States Attorneys (SAUSA). The three attorneys were authorized to prosecute misdemeanors occurring on Government property.

The agency's union filed an unfair labor practice charge, arguing unsuccessfully that the agency should have bargained over the impact and implementation of this development. The union asserted that the resultant increased likelihood of prosecution constituted a change in the conditions of employment of bargaining unit members. The FLRA rejected the union's argument, as follows:

The Authority notes, in agreement with the Judge, that bargaining unit employees have always been subject to prosecution by the U.S. Attorney for their unlawful acts committed at the Center, and that the implementation of the agreement with the U.S. Attorney did not result in the imposition of any new penalties, new investigative procedures or regulations. Given the Authority's finding that there was no change, the Authority concludes that the complaint should be dismissed.

United States Defense Logistics Agency, Alexandria, Va., et al., and American Fed'n of Gov't Employees, Local 1148, 22 F.L.R.A. 327, 22 FLRA No. 31 (June 30, 1986).

IV. PROCEDURAL DEFENSES

a) Fourth Amendment: Evidence Obtained in Improper Searches

The MSPB has held that the exclusionary rule does not bar an agency's use of evidence that was illegally seized by law enforcement officers for use in a criminal proceeding. The exclusionary rule is a rule of public policy aimed at deterring illegal searches by suppressing evidence acquired illegally. However, suppression of such evidence in an administrative, non-criminal, proceeding would have little or no deterrent effect because the offending officers' "zone of primary interest" is the collection of evidence for criminal prosecution. *Delk v. United States Dep't Interior*, 57 M.S.P.R. 528 (June 3, 1993); *see also, Middleton v. United States Dep't Justice*, 23 M.S.P.R. 223 (September 21, 1984).⁴ Moreover, the MSPB has identified an important countervailing interest of

⁴ In *Middleton*, the MSPB held that, "The presiding official . . . [correctly] denied appellant's motion to suppress the tape recorded conversations between himself and the informant on the ground that no law prohibited the recording of a conversation where one party, here the informant, consented to the procedure. [He] further held that even if the taping had been illegal, the exclusionary rule did not bar the employing agency's use of evidence in an administrative proceeding where the evidence had been seized by law enforcement officers for use in a criminal proceeding since suppression would not have any deterrent effect." *Middleton v. United States Dep't Justice*, 23 M.S.P.R. 223 (September 21, 1984) (noting that, "The local United States Attorney declined to bring a criminal prosecution against appellant").

public policy favoring administrative action against government employees:

[I]t is in cases which involve government employees, where the primary purpose of the exclusionary rule, the deterrence of police misconduct, is not well served, that “society’s interest in maintaining levels of integrity and fitness of its public servants far outweigh any possible interest protected.

Delk v. United States Dep’t Interior, 57 M.S.P.R. 528 (June 3, 1993) (quoting *Turner v. City of Lawton*, 733 P.2d 375, 383 (Okla. 1986) (Simms, C.J., dissenting)).

The MSPB offered the following analysis on the applicability of the Fourth Amendment to the Federal workplace generally:

Before an area may properly be held to be free of “governmental intrusion,” there must be a “reasonable expectation” of such freedom. *Katz v. United States*, 389 U.S. 347, 352 (1967). *See also Mancusi v. DeForte*, 392 U.S. 364 (1968). More specifically, the Postal Service has a valid interest in ensuring the safety of the mails and in discovering theft, which does not end at the door to the lockers it provides its employees. Thus, courts have recognized that the public’s interest in the integrity of the mail greatly outweighs the Postal Service employee’s private interest in the “very restricted and regulated employment related use” of his locker. *United States v. Bunkers*, 521 F.2d 1217, 1220 (9th Cir.), *cert. den.*, 423 U.S. 989 (1975). *See also United States v. Sanders*, 568 F.2d 1175 (5th Cir. 1978). *Bunkers* and *Sanders* were not simply administrative actions, but were criminal prosecutions brought against employees for misconduct discovered as a result of a search. Both courts found no Fourth Amendment right to be free of the search and allowed the convictions to stand based on the finding that the employees had no “reasonable” expectation of privacy in the lockers which the Postal Service had provided them. We conclude, therefore, that in the absence of some limiting provision, an agency has the right to enter its employees’ lockers for a proper reason.

Robinson v. United States Postal Serv., 28 M.S.P.R. 681 (August 23, 1985).⁵

b) Fifth Amendment: Compelling an Employee to Cooperate with an Investigation

1. General Rule

The general rule is that statements compelled by a threat to terminate employment are deemed coercive. However, once a Federal employee has received immunity, the agency may remove the

⁵ In *Robinson*, the MSPB did, however, find just such a “limiting provision” in the applicable collective bargaining agreement, as addressed in another section. For additional discussion of *Robinson*, see Pages 23-24, below.

employee for refusing to answer questions. *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967). Applying this rule in administrative proceedings, the MSPB has held:

An employee may be removed for not replying to questions in an investigation by an agency if he is adequately informed both that he is subject to discharge for not answering and that his replies and their fruits cannot be employed against him in a criminal case. *See, e.g., Kalkines v. United States*, 473 F.2d 1391, 1393 (Ct. Cl. 1973); *Ashford v. Department of Justice*, 6 M.S.P.R. 458, 465-66 (1981). The right to remain silent, however, attaches only where there is a reasonable belief that the elicited statements will be used in a criminal proceeding.

Haine v. United States Dep't Navy, 41 M.S.P.R. 462 (August 9, 1989); *see, also, Pope v. United States Dep't Navy*, 63 M.S.P.R. 51 (June 8, 1994). With regard to the reasonableness of an employee's fear of prosecution, the MSPB has observed that, "The agency's mere assurance of immunity would not bind law enforcement officials." *Ashford v. United States Dep't Justice, Bureau of Prisons*, 6 M.S.P.R. 458 n.9 (June 1, 1981).

2. Compelling Employees to Respond

The Federal Circuit recently reiterated the extent of the general legal authority of Federal agencies to compel responses when employees invoke the Fifth Amendment:

The Fifth Amendment privilege against self-incrimination may be asserted in an administrative investigation to protect against any disclosure an individual reasonably believes could be used in his own criminal prosecution or could lead to other evidence that might be so used. *Kastigar v. United States*, 406 U.S. 441, 444-45, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972). In addition, the threat of removal from one's position constitutes coercion, which renders any statements elicited thereby inadmissible in criminal proceedings against the party so coerced. *Garrity v. New Jersey*, 385 U.S. 493, 497, 500, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967) ("The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."). Nevertheless, because an employee receives "use immunity" through the so-called *Garrity* exclusion rule, he may be removed for failure to cooperate with an agency investigation. *Gardner v. Broderick*, 392 U.S. 273, 276, 20 L. Ed. 2d 1082, 88 S. Ct. 1913 (1968). Invocation of the *Garrity* rule for compelling answers to pertinent questions about the performance of an employee's duties is adequately accomplished *when that employee is duly advised of his options to answer under any immunity actually granted or remain silent and face dismissal.* *Weston v. Dep't of Hous. & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983).

Modrowski v. United States Dep't Veterans Affairs, 252 F.3d 1344 (Fed. Cir. 2001) (emphasis added).

One issue in any such case will be whether the agency afforded the employee sufficient notice as to the grant of immunity. In the above-quoted *Modrowski* decision, the Federal Circuit found that the agency's notice to the employee was insufficient. *Id.* In particular, the agency improperly denied the appellant adequate opportunity to consult with an attorney about "the effective scope of a purported grant of prosecutorial immunity." For this reason, the Court reversed the portion of the MSPB's decision that sustained a charge of refusal to cooperate with an official investigation.⁶

The Court's analysis focused on the reasonableness of the employee's request for time to consult an attorney, under the circumstances of the case. The Court explained that the investigation had "originally targeted [the appellant's] suspected participation in criminal acts, particularly theft of property from [agency]-owned houses, vandalism, and illegal issuance of checks." The record did not indicate whether the authorities declined prosecution. It did indicate, however, that the agency's investigation coincidentally revealed the appellant's participation in the sale of two agency-owned houses to his son-in-law.

According to the appellant, a management official confronted him about these sales and presented him with documentary evidence suggesting "criminal and/or ethical violations." The official advised him to seek representation, and the appellant offered no response to the accusations. Two days later, the official again confronted the appellant, who brought his union representative to the meeting. At that meeting, the appellant refused to answer the official's questions and invoked the Fifth Amendment.

The Court recounted that, "Thereafter, [agency] officials informed the local United States Attorney's Office of the situation, and ascertained that the U.S. Attorney declined to prosecute" the appellant. A few weeks later, on July 30, 1997, the management official sent a letter on agency letterhead to the appellant, in which he made the following statements:

1. The U.S. Attorney has been apprised of the situation, granted you immunity and has declined to prosecute you in the matter of the purchase of two properties by [the son-in-law].
2. You are hereby notified your assertion of your Fifth Amendment rights is unnecessary since you will not be prosecuted.
3. You are therefore ordered to respond to my questions concerning this matter.

Id. at 1347. One day later, on July 31, 1997, the official questioned the appellant for a third time. Once again, the appellant refused to respond.

⁶ The decision upheld two charges involving ethics issues: "(1) that [the appellant] violated conflict of interest rules by participating in the sale of agency-owned property to his son-in-law, and (2) that he knowingly concealed such information from the agency, in violation of agency rules of conduct for employees." *Id.* Accordingly, the Court remanded the case to the MSPB for a determination as to the appropriate penalty for the two sustained charges.

The following week, on August 6, 1997, the official attempted to question the appellant one final time. This time, the appellant indicated that he had scheduled an appointment with an attorney for August 8, 1997, and that he would not respond to the official's questions until after he had consulted with the attorney. The appellant did, in fact, meet with the attorney as scheduled. However, the agency did not attempt to question him again. The Court noted with significance the agency's failure to explain its decision not to question the appellant again. Shortly thereafter, the agency proposed the appellant's removal on August 22, 1997.

Defending its charge of failure to cooperate, the agency contended that the appellant should have cooperated as soon as he received the letter informing him of the U.S. Attorney's declination. The appellant responded that he had not been "duly advised" of his options to respond or face dismissal. The MSPB was unsympathetic to the appellant's explanation:

In effect, [the appellant] argues that the questioning should have been adjourned to August 9. The Board disagreed, determining that [the appellant] had no right to delay the proceedings until he met with his lawyer. *See slip op.* at 25 ("Although the appellant argues that the agency should have given him time to consult with his attorney concerning the scope of his immunity, I find no legal authority that imposes such an obligation on an agency once it has informed an employee he has been granted immunity.").

Id. at 1351.

Reversing the MSPB's decision, the Court emphasized the appellant's reasonable confusion as to the question of immunity:

Modrowski's legal rights in this case were far from clear cut. The June 30, 1997 letter stating that the U.S. Attorney had declined to prosecute [the appellant] was written on [agency] letterhead and signed by [an agency manager]. Even if such a letter is a suitable means of conveying immunity, it is entirely understandable that [the appellant] would suspect the validity and scope of the alleged grant. Furthermore, the letter only references the U.S. Attorney's decision to decline prosecution of [the appellant], without setting forth an express grant of immunity. Also, the only transaction covered in the alleged grant of immunity is the "purchase of two properties by [the son-in-law]." There is thus considerable ambiguity in the scope of this alleged immunity. The Board's opinion notes that [the appellant] testified that he believed he would be subject to criminal prosecution as a result of the investigation, in particular for vandalism and improper issuance of checks. Watson, the Deciding Official, acknowledged during the hearing that the investigation started out focusing on whether "[the appellant] might have been stealing materials from [agency] houses." Although it is unclear from the record whether the agency was continuing to investigate [the appellant] for criminal violations at the time of the July 31 and August 6 interrogations, the agency never

issued a formal statement announcing the close of such an investigation. The terse language of the letter suggests to us that [the appellant] had a reasonable apprehension that any of his responses to [the manager] made under the supposed grant of immunity with respect to the sale of the houses could nevertheless be used against him in any eventual criminal proceedings concerning theft from, or vandalism to, the houses. Cf. *Kastigar*, 406 U.S. at 449 (“If, on the other hand, the immunity granted is not as comprehensive as the protection afforded by the [Fifth Amendment] privilege, petitioners were justified in refusing to answer.”).

Id.

The Federal Circuit did limit its decision in *Modrowski* to the factual circumstances of that case and similar cases. Under different circumstances, Federal agencies are not without the authority to compel an employee to respond to investigative questions, provided that the investigators carefully advise the employee as to the status of the criminal matter and make reasonable accommodation of any request to consult counsel concerning the declination or grant of immunity. In *Modrowski*, the Federal Circuit addressed this distinction:

[The appellant] did, indeed, attempt to meet with his lawyer to ascertain his rights. He did so in a timely fashion, scheduling an appointment with his attorney for the week following his receipt of [the manager’s] letter. No evidence of record suggests that such a delay was unreasonable. Nonetheless, the agency refused to allow [the appellant] the time to meet with his attorney, without explanation, then or now, as to why this request could not be accommodated. We find this to be an arbitrary and capricious decision that unfairly denied [the appellant] the opportunity to consult with his attorney. We need not reach the question as to whether [the appellant] had an absolute right to counsel, as provided by the Fifth or Sixth Amendments or the Administrative Procedure Act, 5 U.S.C. § 555(b) (1994). Nor do we hold that all federal employees who are called to respond to questions in an agency investigation have the right to delay proceedings to obtain legal counsel. In the limited circumstances of the present case, however, we conclude it was arbitrary and capricious to charge [the appellant] with a refusal to cooperate. The dispositive factors here are: (1) the agency was admittedly investigating [the appellant] for criminal violations; (2) the purported grant of immunity had ambiguous scope; (3) statements elicited under the alleged grant of immunity could conceivably be used against [the appellant] in related criminal proceedings; (4) there was no formal assurance from the agency that the criminal investigation had terminated; (5) [the appellant] was faced with the penalty of removal for failure to cooperate; (6) [the appellant] timely arranged to meet with an attorney; and (7) there is no allegation that [the appellant] request was unreasonable.

The present appeal is thus distinct from *Weston*, where we affirmed the Board’s decision sustaining the removal of a federal employee who refused to

cooperate in an investigation. *Weston*, 724 F.2d at 943. In *Weston*, there was no allegation that the scope of protection conferred by the U.S. Attorney's declination to prosecute was ambiguous, and the employee had full access to counsel. *Id.* at 946. The issue in *Weston*, not present in the instant appeal, was whether the employee's penalty for non-cooperation could be mitigated in light of her good-faith reliance on incorrect advice supplied by her lawyer. *Id.* at 950-51. As distinct from *Weston*, Modrowski was denied an adequate opportunity to consult with his lawyer.

Id. at 1352 - 1353.

Weston, which the Federal Circuit discusses in the foregoing excerpt, provides a useful example of notice that was sufficient to extinguish the employee's right to remain silent without facing disciplinary action. The notice, which agency officials provided verbally and in writing, read:

Before we ask you any questions you must understand your rights and your responsibilities as an employee of the Department of HUD.

The purpose of this interview is to obtain your responses to questions concerning possible violations of the HUD Standards of Conduct (24 Code of Federal Regulations Part O, Subpart B, 0.735-202(a)(b)(c)(d),(f); 0.735-204(a)(1)(4)(5)(6)(7)(8)(d); 0.735-205(a)(8) (b)(1); 0.735-210(b)) with respect to the purchase of the HUD-owned property located at 1 Pilling Street, Brooklyn, New York, during 1976 and your outside employment as they relate to your official duties.

You are advised that the United States attorney has declined criminal prosecution of you in the above matter. This is purely an administrative inquiry. You have all the rights and privileges, including the right to remain silent and the right to be represented by legal counsel, guaranteed by the Constitution of the United States, although, since you have a duty as an employee of HUD to answer questions concerning your employment, your failure to answer relevant and material questions, as they relate to your official duties, may cause you to be subjected to disciplinary action, including possible removal by the Department of HUD.

Any information or evidence you furnish in response to questions propounded to you during this interview, or any information or evidence which is gained by reason of your answer, may not be used against you in criminal proceedings; however, it may be used against you administratively.

Weston v. United States Dep't Hous. & Urban Dev., 724 F.2d 943, 945-946 (Fed. Cir. 1983). The Court found it particularly significant that the employee "was thus informed that (1) criminal prosecution against her had been declined by the United States Attorney, (2) no information gained

from the interview could be used against her in a criminal proceeding, and (3) her failure to cooperate could subject her as a HUD employee to disciplinary action, specifically including removal from employment.” *Id.* at 946.⁷

3. “*Miranda* Rights”

The MSPB has affirmed that *Miranda* rights are inapplicable to non-custodial interrogations:

[A]ppellant maintained that his conversations with the FBI’s informant had to be excluded for failure to provide the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Even assuming that the informant was a law enforcement official for this purpose, *Miranda* rights are limited to custodial interrogations . . . Appellant’s conversation with the informant did not take place in a custodial setting. [Footnote 5: “The Supreme Court has refused to find custody when a citizen comes to the place of interrogation on his own. *See Roberts v. United States*, 445 U.S. 560-561 (1980) (U.S. Attorney’s Office) and *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (police station).”]

Middleton v. United States Dep’t Justice, 23 M.S.P.R. 223 (September 21, 1984). However, agency investigators should be careful to note that, in some circumstances, an interrogation in the course of an administrative investigation can be custodial:

It is well established that where an individual is subject to a custodial interrogation, any inculpatory statements may not be used unless the individual is provided the procedural protections against self-incrimination set forth in *Miranda v. Arizona*, 384 U.S. at 444-45. This rule applies to all custodial interrogations where criminal prosecution could result, *even if the interrogation is administrative in nature*.

Gamber v. United States Postal Serv., 58 M.S.P.R. 142 (June 22, 1993)(emphasis added); *see also Moulding v. United States Dep’t Air Force*, 52 M.S.P.R. 19 (December 19, 1991)(citing *Cooper v. United States Postal Serv.*, 42 M.S.P.R. 174, 178, (1989), *aff’d*, 904 F.2d 46 (Fed. Cir. 1990) (Table); *Connett v. United States Dep’t Navy*, 31 M.S.P.R. 322, 327 (1986), *aff’d*, 824 F.2d 978 (Fed. Cir. 1987) (Table); *United States Postal Serv.*, 7 M.S.P.R. 116, 120 (1981)).

Consistent with Federal criminal law, the MSPB has drawn a bright line distinction between custodial and non-custodial settings. *Tannehill v. United States Dep’t Air Force*, 58 M.S.P.R. 219

⁷ The factual circumstances of *Weston* can be summarized briefly. The agency received information suggesting that the employee’s son “was the actual buyer of real property . . . sold by HUD when [the employee] was serving as a realty specialist exercising certain responsibilities toward the property and . . . that she subsequently received and endorsed a check from an insurance company in settlement of a claim for fire damage to the property.” Suspecting criminal activity, the agency attempted to interview the employee, but she invoked the Fifth Amendment. After the U.S. Attorney declined prosecution, the agency initiated an administrative investigation and attempted again to interview her. This time, the employee’s attorney attended, and the agency provided her the notice quoted above.

(July 2, 1993); *see also Long v. United States Veterans Admin.*, 12 M.S.P.R. 244 (June 22, 1982) (comparing *Cooper v. United States Postal Serv.*, 42 M.S.P.R. 174, 178 (1989), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990) (Table) (custodial interrogation requiring affirmative waiver of Fifth Amendment rights) with *Connett v. United States Dep't Navy*, 31 M.S.P.R. 322, 327 (1986), *aff'd*, 824 F.2d 978 (Fed. Cir. 1987) (Table) (non-custodial interrogation that did not require *Miranda* warning)).

If the MSPB excludes evidence on the ground that the agency should have given a *Miranda* warning to the employee during a custodial interview, the MSPB will, nonetheless, sustain the adverse action if the record contains other evidence sufficient to support the charge. *See Miguel v. United States Dep't Army*, 14 M.S.P.R. 461 (January 31, 1983).

4. Voluntary Responses

When an employee responds voluntarily, the agency may rely on the employee's statements. In one case, an employee cooperated but later alleged coercion because the agency's regulations established penalties for failure to cooperate in administrative investigations:

The appellant argues that his statement should nonetheless be considered the product of coercion because the agency could have removed him if he had refused to answer [its] questions. *See IAF*, Tab 6 (Ex. 1, para. 16) (the agency's regulations contemplate sanctions ranging from reprimand to removal for a first offense of "withholding of material facts in connection with matters under official investigation [or] refusal to testify or cooperate in an inquiry, investigation, or other official proceeding"). The appellant relies primarily on *Garrity v. New Jersey*, 385 U.S. 493 (1967), where the court held that statements made by public employees cannot be used against them in criminal prosecutions if the employees made the statements after being told that they could be fired for not answering the questions put to them. The court also noted that, under state law, the employees were subject to automatic removal for refusing to answer the questions . . .

The *Garrity* principle has limited application in these proceedings, which are not criminal in nature. In *Terry v. United States*, 204 Ct. Cl. 543 (1974), *cert. denied*, 421 U.S. 912 (1975), a postal employee was removed based upon his admission to a Postal Inspector that he had converted agency funds to his own use. Terry contested his removal and argued, based on *Garrity*, that the agency was not entitled to rely on his admission because he had made it out of fear that he would be removed if he did not answer the Postal Inspector's questions. 204 Ct. Cl. at 551. The court disagreed, noting that there were "no specific threats of a job loss for failing to speak" and, further, that the agency's regulations could not reasonably be interpreted as "requir[ing him] to give incriminating information to investigators." *Id.* at 554.

Here, as in *Terry*, [the investigator] did not threaten the appellant with removal for declining to answer his questions; indeed, as noted above, [the investigator] testified that he told the appellant that he did not have to answer any questions . . . [He] also testified that he has no authority to take an adverse personnel action against an agency employee . . . Further, although the agency's regulations contemplate sanctions for an employee's refusal to cooperate with an official investigation, they cannot be read as requiring automatic removal (as the law at issue in *Garrity* plainly did) if an employee declines to answer potentially incriminating questions posed by an agency investigator . . . The appellant was not discharged for refusing to answer questions, however, but as a consequence of the answers he did give.

Tannehill v. United States Dep't Air Force, 58 M.S.P.R. 219 (July 2, 1993).

One final note on the subject is that the Fifth Amendment right to remain silent does not include a right to make false statements. *Lachance v. Erickson*, 522 U.S. 262, 118 S. Ct. 753 (1998). An employee who elects to speak to an agency investigator must tell the truth.

c) Violation of a Collective Bargaining Agreement

The MSBP will enforce the provisions of negotiated collective bargaining agreements, giving such provisions the same weight as provisions of an agency's regulations. *Robinson v. United States Postal Serv.*, 28 M.S.P.R. 681 (August 23, 1985) (citing *Lunkin v. United States Postal Serv.*, 20 M.S.P.R. 220, 223 (1984); *Stalkfleet v. United States Postal Serv.*, 6 MSPB 536, 537 (1981); *Giesler v. United States Dep't Trans.*, 3 MSPB 367 (1980)). However, the MSPB will not give greater weight to collective bargaining provisions than it gives to the agency's regulations. *Id.*⁸ The MSPB will apply a "harmful error" standard, just as it does with violations of an agency's regulations.

Under the "harmful error" standard, the MSPB will reverse an adverse action only when the violation of a contract provision was outcome-determinative:

In Parker v. Defense Logistics Agency, 1 MSPB 489 (1980), the Board determined that a procedural error would be found to be harmful only if there was an "appreciable probability" that, absent the error, the outcome of the case would be different. *Id.* at 493. It is the employee who bears the burden of proving, by preponderant evidence, that such harm occurred. 5 C.F.R. § 1201.56; *Pinto v. Department of Labor*, 10 MSPB 365 (1982) . . . The Supreme Court's recent decision in *Cornelius v. Nutt*, 53 U.S.L.W. 4837 (U.S. June 24, 1985), supports our

⁸ "[W]e find no basis for according violations of contractual rights greater importance than is accorded violations of the procedures mandated by Congress. See *Handy v. U.S. Postal Service*, 754 F.2d 335 (Fed. Cir. 1985); *Baracco v. Department of Transportation*, 15 M.S.P.R. 112 (1983) . . ." *Id.*, n.6.

conclusion that agency violations of collective bargaining agreements must be harmful to constitute reversible error. In *Cornelius*, . . . one of the rights violated was similar to that at issue in the present case, i.e. the right to union representation, as required by the applicable collective bargaining agreement. The Court stated that in an appeal of an agency disciplinary decision to the Board, the agency's failure to follow negotiated procedures must affect the result of the agency's decision to take the action, in order for the action to be overturned.

Robinson v. United States Postal Serv., 28 M.S.P.R. 681 (August 23, 1985).⁹

d) Violation of the Labor Statute

The MSPB will enforce rights derived from the Federal Service Labor Management Relations Statute, 5 U.S.C. § 7101, et seq.; however, it will apply a harmful procedural error standard.¹⁰ See *Cornelius v. Nutt*, 472 U.S. 648, 105 S. Ct. 2882, 86 L. Ed. 2d 515 (1985). For example, in one case the MSPB acknowledged that, "5 U.S.C. § 7114(a) . . . provides that an employee who reasonably fears discipline has a right to the presence of a union representative at an investigatory examination. The Board has considered violations of this statutory provision under the harmful error rule of 5 U.S.C. § 7701." *Robinson v. United States Postal Serv.*, 28 M.S.P.R. 681 (August 23, 1985) (citing *Smith v. United States Dep't Navy*, 10 MSPB 172 (1982)).

e) Entrapment

"The Board has consistently held that entrapment is unavailable as an affirmative defense in administrative proceedings." *Gallan v. United States Postal Serv.*, 48 M.S.P.R. 602 (June 5, 1991) (citing *Butler v. United States Postal Serv.*, 37 M.S.P.R. 457, 461 (July 15, 1988); *Middleton v. United States Dep't Justice*, 23 M.S.P.R. 223, 226 (September 21, 1984), *aff'd*, 776 F.2d 1060 (Fed. Cir. 1985) (Table)).

The MSPB will consider evidence of entrapment as potentially probative with regard to the penalty determination. However, the real issue appears to be the employee's willingness to commit

⁹ In *Robinson*, the MSPB rejected a letter carrier's defense based on a contract violation when management opened his locker, without giving the contractually required notice to the union, and discovered 1,314 pieces of mail that he had never delivered: "Under the circumstances of this case, we find that appellant has not met this burden because he has not demonstrated that, had the agency followed the procedure called for by the contract, the outcome of this case would have been different . . . Had the agency complied with that procedure, appellant or a union representative would have been able to be present when the locker was opened. There is no indication in the contract or elsewhere in the record that they could have prevented the agency from opening it, or even delayed or impeded in any way the agency's right to do so. We note that there is no suggestion in the record that the mail was placed in appellant's locker without his knowledge."

¹⁰ For discussion of the harmful error standard, refer to the preceding section addressing violations of collective bargaining agreements.

the charged misconduct, as the following excerpt demonstrates:

Although entrapment cannot be asserted as an affirmative defense in Board proceedings, evidence of a similar nature can be introduced as a mitigating circumstance in connection with the Board's review of the reasonableness of the penalty. *See Schaffer v. U.S. Postal Service*, 39 M.S.P.R. 153, 158 (1988) (the Board considered as a mitigating circumstance the fact that the agency's confidential informant kept "bugging" the appellant to supply her with drugs). In this context, however, the issue is whether and to what degree the government's actions mitigate the seriousness of the offense, not whether those actions constitute entrapment under applicable law. In ruling that the government entrapped the appellant under Michigan law, the state court judge relied on his finding that confidential informant Valentine supplied the appellant with the cocaine that the appellant then sold to Inspector Lane . . . In reviewing the transcript of the two drug transactions, we find no indication of reluctance on the appellant's part to engage in the sale of cocaine . . . We find this factor to be more pertinent than the source of the cocaine in assessing the seriousness of the offense.

Gallan v. United States Postal Serv., 48 M.S.P.R. 602 (June 5, 1991).

The case of *Middleton v. United States Dep't Justice* is also instructive. In that case, the agency removed the appellant "based on his acceptance of \$100.00 from a known felon upon whom the agency directed him to serve a grand jury subpoena." The MSPB made the following findings:

The target of the subpoena was an acquaintance of appellant's. Initially, appellant was unable to locate him but shortly thereafter he contacted appellant and arranged a meeting in a local night club. During this meeting, appellant advised the target of the status of the unserved subpoena and advised him how to avoid any subsequent subpoenas. He also agreed to warn the target should another subpoena be issued. The target gave appellant five \$20 dollar bills in a matchbook. Unknown to appellant, the target was a paid FBI informant who was "wired" with microphone and tape recorder. Transcripts of the tape recordings of appellant's conversations with the target/informant constituted the primary evidence against appellant . . . Appellant was charged with accepting a gratuity from a person known to have a criminal record in return for nonperformance of official duties, retaining the money received and not advising his superiors of the incident, and improperly divulging official information to a private party, all in violation of several [agency] regulations as well as Government-wide standards of conduct.

Middleton v. United States Dep't Justice, 23 M.S.P.R. 223 (September 21, 1984). The MSPB affirmed that the defense of entrapment is unavailable in administrative proceedings. *Id.* (citing

United States v. Perl, 584 F.2d 1316, 1321 (4th Cir. 1978), *cert. denied*, 439 U.S. 1130 (1978)). The MSPB added that, even if the defense were available, the appellant had not established entrapment:

Neither mere solicitation nor setting a “trap for the unwary” constitute[s] entrapment. *See, e.g., United States v. Rippey*, 606 F.2d 1150, 1154-1155 (D.C. Cir. 1979). In this case, the informant merely afforded appellant the opportunity to engage in wrongdoing and appellant accepted . . . There is no evidence that his conduct was the result of anything other than his own predisposition.

Id., n.3.

f) Best Evidence Rule

In the following excerpt, the MSPB rejects an appellant’s objection to the use of a transcript, rather than the original electronic recording from which the agency generated the transcript:

[A]ppellant objected to admission of transcripts of the tape recordings of his conversations with the informant. He argued that the original tapes were not introduced into evidence and alleged that no foundation was established for admission of the transcripts. His argument is rejected. First, there is no evidence that appellant ever moved to discover the tapes prior to the hearing or that he moved to have them produced at any time . . . Hearsay evidence is admissible in Board proceedings and the best evidence rule is not applicable. *Banks v. Department of the Air Force*, 4 MSPB 342, 343 (1980). A transcript is a more convenient and accessible medium for evaluating evidence than are tapes. Finally, there was absolutely no showing of any evidentiary problem with the transcripts. To the contrary, FBI agency Rives testified as to the circumstances of both the recording and the transcription. He also testified that the transcripts were accurate and authentic. Appellant pointed to no alleged inaccuracies; in fact, his own admissions corroborate their accuracy in all material aspects. Appellant had a full opportunity at the hearing to examine the circumstances of their creation and to determine their accuracy.

Middleton v. United States Dep’t Justice, 23 M.S.P.R. 223 (September 21, 1984).

g) Collateral Estoppel

The MSPB rejected an appellant’s reliance upon the favorable legal determination of a state court in a related criminal proceeding. The appellant, who had successfully asserted an affirmative defense before the state court, raised the issue of collateral estoppel in the subsequent

administrative proceeding. The MSPB explained that, although it might be inclined to accept certain factual determinations of a court in a related criminal matter, it makes its own legal determinations:

Although collateral estoppel properly can be invoked to preclude the relitigation of issues of fact, or mixed issues of fact and law, the doctrine does not apply to pure questions of law. See 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4425 (1981). Thus, although collateral estoppel might be invoked to preclude relitigation of the factual circumstances under which the appellant distributed cocaine to Inspector Lane, the Board's own precedent determines what legal significance such facts would have.

Gallan v. United States Postal Serv., 48 M.S.P.R. 602 (June 5, 1991).

h) Coercion

1. Settlement Agreements

The MSPB rejected an appellant's argument that a settlement agreement barring his appeal was invalid because an agency official remarked that, "he could be prosecuted":

The administrative judge also rejected the appellant's assertion that he had based his decision to accept the agreement on misrepresentations by the agency that he could be criminally prosecuted . . . The administrative judge found no evidence of any misrepresentation, noting that the agency's Inspector General had referred the matter to the U.S. Attorney for prosecution, but was subsequently informed that prosecution had been declined because of the low dollar amount involved and the availability of administrative remedies . . . The administrative judge explained that the U.S. Attorney's decision not to proceed did not render false the agency's previous representations concerning possible prosecution.

Moran v. United States Veterans Admin., 43 M.S.P.R. 547, 551 (February 20, 1990).¹¹ In a similar case, the MSPB rejected an appellant's unsupported allegation of coercion:

[T]he appellant asserts . . . that he entered into the settlement agreement "under duress," due to "threats of criminal prosecution, and by his then counsel's stated inability to defend him in a criminal prosecution" . . . This unsupported statement is insufficient to demonstrate that [he] was coerced into entering the settlement agreement . . . The alleged fact that [he] was faced with unpleasant choices, i.e., to

¹¹ One subsequent decision cited *Moran* for the proposition that, "(an agency's threat of possible criminal prosecution does not constitute duress sufficient to invalidate a settlement agreement)." *Frizzell v. United States Dep't Air Force*, 53 M.S.P.R. 413 (March 31, 1992). However, another decision offered a contradictory explanation of *Moran*: "(there was no misrepresentation or duress sufficient to invalidate a settlement agreement where there was no indication in the record that the agency threatened the appellant with possible criminal prosecution)."

face criminal charges while represented by an individual who was unprepared to represent him thereon . . . or to enter into the settlement agreement, does not affect the voluntariness of [his] ultimate decision to enter into the agreement settling his appeal. *See Garland v. Department of the Air Force*, 44 M.S.P.R. 537, 540 (1990).

Souza v. United States Dep't Veterans Affairs, 54 M.S.P.R. 107 (May 12, 1992).

Of course, extreme care should be taken to avoid committing, or even appearing to commit, potentially criminal extortion by threatening to press charges unless a party settles.¹² It should also be noted that the MSPB has expressed its willingness to find coercion in some circumstances: "It is well-settled that duress in civil cases may be found on the basis of threats to detain or . . . threats of prosecution of a relative and other forms of economic compulsion." *Johnson v. United States Dep't Trans., Fed. Aviation Admin.*, 13 M.S.P.R. 652 (November 10, 1982) (citations omitted).

2. Resignation

The government's pursuit of criminal charges will not ordinarily constitute coercion rendering a resignation involuntary. Early in its history, the MSPB cited a case in which an employee resigned in an effort to avoid criminal prosecution: "The courts have repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened removal for cause. . . . *Pitt v. United States*, 420 F.2d 1028 (Ct. Cl. 1970) (removal resulting from a possible criminal prosecution)." *Murray v. Defense Mapping Agency*, 1 M.S.P.R. 352 (June 1, 1979). More recently, the MSPB found it lacked jurisdiction when an appellant "chose to resign after the agency correctly informed him that retaining his federal employment while running for partisan political office would subject him to prosecution and possible removal for violation of the Hatch Act." *Holloway v. United States Dep't Interior*, 82 M.S.P.R. 435 (June 2, 1999).

These decisions are consistent with the MSPB's precedent on the issue of coercion generally. The burden is on an appellant to demonstrate coercion with respect to a resignation. *See, e.g., Ragland v. United States Dep't Army*, 84 M.S.P.R. 58 (October 4, 1999) ("An employee-initiated action such as a resignation or a retirement is not appealable to the Board unless the appellant proves that it was involuntary and thus constituted a constructive removal."). However, an employee may satisfy this burden if the agency has threatened or proposed removal in bad faith:

[W]here an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act. On the other hand, inherent in that proposition is that the agency has reasonable grounds for threatening to take an

¹² Of related interest is the discussion, beginning on Page 29 below, of a decision declining to enforce agreements barring referral of crimes to the proper authorities. *Fomby-Denson v. United States Dep't Army*, 247 F.3d 1366 (Fed. Cir. 2001) (noting a limited exception "where prosecuting authorities contract not to prosecute").

adverse action. If an employee can show that the agency knew that the reason for the threatened removal could not be substantiated, the threatened action by the agency is purely coercive.

Schultz v. United States Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987).

i) Settlement Agreements Barring Referral to Law Enforcement Authorities

The Federal Circuit declined to enforce a provision in a settlement agreement that arguably barred the United States from referring a potential criminal violation to German law enforcement authorities. *Fomby-Denson v. United States Dep't Army*, 247 F.3d 1366 (Fed. Cir. 2001). The Court determined that public policy required it to construe the agreement as permitting such referral.¹³

In *Fomby-Denson*, the Army removed an employee, in part, for the alleged forgery of a rotation agreement extending her tour of duty in Germany. The parties eventually negotiated a settlement agreement resolving the ensuing administrative proceedings. Subsequently, the Army referred the allegation of forgery to German authorities. The referral documents contained information about the settlement agreement, including the monetary award. Upon learning of the referrals, the employee filed a petition for enforcement of the settlement agreement with the MSPB. However, the MSPB denied her petition, ruling that nothing in the agreement expressly precluded the referrals.

The employee, then, sought judicial review. She insisted that several provisions of the agreement implicitly barred the referrals. Relying on the Federal Circuit's decision in *Pagan v. United States Dep't Veterans Affairs*, 170 F.3d 1368 (Fed. Cir. 1999), she argued that the Army "was required to act, in matters relating to [her] as if she had a 'clean record.'" She also argued that the release of information about the settlement breached a confidentiality clause. The Court acknowledged that, "[T]he agreement is ambiguous as to whether it encompasses the referrals to the law enforcement authorities." However, the Court declined to ascertain the parties' intent.

Instead, the Court addressed the broader question of "whether it would be contrary to public policy to construe a settlement agreement to bar the Army from referring [the employee] to the German authorities." The Court identified the public policy at issue in the case, as follows:

[T]he public policy interest at stake - the reporting of possible crimes to the authorities - is one of the highest order and is indisputably "well defined and dominant" in the jurisprudence of contract law . . . As the Supreme Court has

¹³ The agreement did not bar referrals explicitly, the issue was whether it barred them implicitly. Consequently, *Fomby-Denson* does not directly address the circumstance in which an agreement contains language explicitly barring referral. The Court's discussion of public policy, however, strongly suggests the decision is broadly applicable. The only real question in the case of an explicit provision would likely be whether the entire agreement is void. An agency could reasonably argue that only the offending provision is unenforceable. The Court's reference to *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S. Ct. 847 (1948), supports such an argument. *Id.* at 1374. In *Hurd*, the Supreme Court invalidated a racially restrictive covenant without invalidating the original conveyance of the real estate to the seller.

noted, “concealment of crime has been condemned throughout our history. The citizen’s duty to raise the ‘hue and cry’ and report felonies to the authorities was an established tenet of Anglo-Saxon law at least as early as the 13th century.” *Roberts v. United States*, 445 U.S. 552, 557, 63 L. Ed.2d 622, 100 S. Ct. 1358 (1980) . . . In *Branzburg v. Hayes*, 408 U.S. 665, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972), for example, the Court held that a journalist’s agreement to conceal the criminal conduct of his news sources did not give rise to a testimonial privilege under the First Amendment. In reaching that decision, the Court reasoned, in part, that “it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.” *Id.* at 696. Noting that the first Congress had enacted a statute defining the common-law crime of misprision of felony (currently codified at 18 U.S.C. § 4), the Court concluded that “it is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor.” *Id.* at 697.

Given the magnitude of the public policy interest here, it is not surprising that contracts barring the reporting of crimes are held to be unenforceable. For example, in *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th Cir. 1972), the defendant informed a third party of the plaintiff’s possible misappropriation of certain oil and natural gas deposits belonging to the third party. The plaintiff sued for breach of a non-disclosure agreement. *Id.* at 851. The trial court dismissed the action on the basis that public policy “will never penalize one for exposing wrongdoing . . .” *Id.* at 852. The Tenth Circuit affirmed.

Id. at 1375-1376. The Court also cited secondary sources for the proposition that the public policy interest applies with equal force to both felonies and misdemeanors.¹⁴ *Id.* at 1377.

In light of this paramount interest of public policy, the Court refused to construe the agreement as barring referral. Although this decision left the employee without a remedy, the Court cited authority demonstrating that public policy determinations must be made “without regard to the interests of individual parties.” *Id.* at 1374 (citing *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 262, 29 S. Ct. 280 (1909)). The Court similarly rejected the employee’s claim concerning the release of information: “Absent a clear abuse, we will not second-guess the Army’s decision as to the quantum of information provided to the German authorities regarding the forgery allegations and the existence of and terms of the settlement agreement.” *Id.* at 1378.

¹⁴ The Court did note a limited exception only “where prosecuting authorities contract not to prosecute.” *Id.* at 1377. The Court also articulated a limitation on the applicability of its decision in some instances involving foreign authorities: “We wish to make clear, however, that there are limits on the rule we recognize and apply today. We do not decide whether this rule will apply if there is no allegation of a crime that would violate United States law if committed in the United States, or if the punishment imposed would not be of the same type as could be constitutionally imposed in the United States. Nor do we decide if this rule would apply if the alleged wrongdoer were not appropriately subject to the jurisdiction of the foreign sovereign.” *Id.* at 1378.

j) Stale Charges

If the declination is not immediately forthcoming, an agency may face the prospect of taking administrative action based on stale charges. Whatever the reason for the delay, this obstacle is not necessarily insurmountable:

The agency asserted . . . that the presiding official erroneously found that the appellant was harmed by the agency's failure to confront him with his falsely stated time and attendance reports immediately after the U.S. Attorney's Office declined to prosecute him on February 6, 1979. The agency argued that the Food Safety and Quality Service, the appellant's former employer, was a separate entity from the Office of Investigation, although both were part of the Department of Agriculture. The agency contended that, in accordance with its internal procedures, it could do nothing about the case until the Office of Investigation forwarded the final results of the investigation of the appellant to the Food Safety and Quality Service on April 7, 1980 . . . [W]e need not consider the actual extent of the agency's delay in bringing the action because we find from our review of the record that the appellant has failed to make the requisite showing of "demonstrable prejudice" that might have been caused by the delay. *Polcover v. Department of the Treasury*, 477 F.2d 1223, 1232 (D.C. Cir. 1973). The appellant's witnesses appeared to have little difficulty recalling the significant details of the incidents about which they were asked to testify, and the appellant made no showing that there were other necessary witnesses whose presence could not be obtained because of the passage of time.

Affsa v. United States Dep't Agriculture, 7 M.S.P.R. 446 (August 24, 1981) (emphasis added).

k) Failure to Provide Evidence of the Declination to Appellant

The MSPB generally applies a "harmful error" standard to claims of procedural irregularity. The following excerpt demonstrates this principle in relation to an agency's failure to provide its employee with documentation concerning a declination:

[A]ppellant argues that she was not given notice of all the material considered by the agency in reaching the decision to remove her. 5 U.S.C. 7513 and 5 C.F.R. 752.401(b). She specifically points to a document contained in an Office of Investigation report . . . The document shows that the Department of Justice declined to initiate criminal prosecution of appellant concerning the vouchers in question . . . The agency denies it considered this document, and by its very nature it is not the type of information on which the agency would base its decision to remove appellant . . . Appellant has introduced no evidence which indicates that the agency relied on this information which was not in the file.

Sibert v. United States Dep't Health, Education & Welfare, 4 M.S.P.R. 41 (November 10, 1980).

V. INVESTIGATING MISCONDUCT AFTER (AND BEFORE) THE DECLINATION ¹⁵

a) Union Representation

1. Investigations, Generally

5 U.S.C. § 7114(a)(2)(B) provides that a bargaining unit employee is entitled to representation during any examination by a “representative” of the agency in connection with an investigation, if the employee reasonably believes it may lead to disciplinary action and requests representation.¹⁶ Significantly, the FLRA has held that a bargaining unit employee may exercise this right without regard to whether the agency’s investigation is administrative or criminal in nature. *United States Dep’t Justice, Washington, DC, et al. and American Fed’n of Gov’t Employees, Local 709, et al.*, 56 F.L.R.A. 556, 56 FLRA No. 87 (August 11, 2000) (“*DOJ & AFGE*”).

2. Investigations Conducted by the Office of the Inspector General (OIG)

In *DOJ & AFGE*, cited immediately above, the FLRA considered two unfair labor practice (ULP) charges addressing OIG interviews of bargaining unit employees. In one instance, OIG conducted a purely criminal investigation; in the other instance, the investigation transformed from a criminal matter to an administrative matter after the U.S. Attorney’s office declined prosecution. In both instances, OIG officials denied requests for union representation.

In denying the requests, OIG had relied on the D.C. Circuit’s precedent, which held that OIG officials were not “representatives” of the agency. While the ULP charges were pending, however, the Supreme Court found OIG officials to be “representatives” of the agency for the purposes of the labor statute, 5 U.S.C. § 7101, et seq. *National Aeronautics & Space Admin. v. Federal Labor Rel. Auth.*, 527 U.S. 229, 119 S. Ct. 1979 (1999) (“*NASA*”). Therefore, the right to union representation under 5 U.S.C. § 7114(a)(2)(B) applied to OIG’s interviews of bargaining unit employees.

Following the *NASA* decision, the agency attempted to salvage its defense with regard to the criminal investigation by arguing that the Supreme Court had carved out an applicable exception:

Respondents rely upon a footnote in *NASA* which provides that the application of section 7114(a)(2)(B) “to law enforcement officials with a broader charge” was not before and therefore not decided by the Court . . . [However, the] phrase “law enforcement officials with a broader charge” clearly refers to the FBI -- not OIG investigators.

¹⁵ See, also, the discussion of related Fifth Amendment issues beginning on Page 15, above.

¹⁶ 5 U.S.C. § 7114(a)(2)(B) provides: “(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at- . . . (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if- (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.”

Although the *NASA* case did involve an administrative rather than a criminal investigation, this was not the focal point of the Supreme Court's decision. The Court, instead, focused on the OIG's undeniable role within the agency and noted that "unlike the jurisdiction of many law enforcement agencies, an OIG's investigative office, as contemplated by the [IG Act], is performed with regard to, and on behalf of, the particular agency in which it is stationed." *NASA*, 119 S. Ct. at 1986. That is, "as far as the [IG Act] is concerned, [OIG] investigators are employed by, act on behalf of, and operate for the benefit of" the agency. *Id.* at 1987. Because of this role of the OIG within the agency, the Court found that section 7114(a)(2)(B) applies to OIG investigations.

Thus, Respondents' claim that the DOJ-OIG special agents were "conducting an independent investigation to determine whether any criminal activity had occurred with the intent of referring the matter to the appropriate authorities for criminal prosecution" . . . is undercut by the Supreme Court's reliance on the fact that OIG agents are stationed within and act on behalf of the agency . . . Nothing in the *NASA* decision indicates that this interrelationship between the agency and OIG changes when a criminal matter is investigated. [Footnote 7: "In addition, the Authority has long held that section 7114(a)(2)(B) applies to OIG investigations that involve allegations of criminal activity, to include when an investigation is jointly conducted by the OIG and local police."]

Id. (citations omitted).

b) Confidentiality of Communications Between Employees and Union Representatives

The FLRA has not allowed agency officials to inquire about communications between bargaining unit employees and their union representatives. In one case, an agency interrogated a union representative about his confidential communication with a bargaining unit employee. The agency was seeking to ascertain whether the bargaining unit employee had disclosed his participation in potentially criminal misconduct. Surprisingly, the FLRA explained that,

A reasonable belief that the information could result in criminal charges being brought does not by itself establish such an extraordinary need for an agency investigator to extract such information. *Customs Service*, [38 F.L.R.A. 1300 (1991)]. The fact that Nelson questioned Gillies at the direction of an Assistant United States Attorney does not change this determination. *Cf. Department of Justice, INS, U.S. Border Patrol, El Paso, Texas*, 36 FLRA 41, 50 (1990), *remanded on other grounds, sub nom. Dept of Justice, INS v. FLRA*, 939 F.2d 1170 (5th Cir. 1991), *decision on remand*, 42 FLRA 834 (1991).

United States Dep't Justice, Washington, D.C., et al., and National Border Patrol Council, et al., 46 F.L.R.A. 1526 (February 26, 1993).

The decision is somewhat questionable because the FLRA lacks any authority for determining the admissibility of evidence in a criminal proceeding. If evidence obtained during the interview of a union representative is later admitted in a criminal proceeding, the interview might result in a criminal conviction of the bargaining unit employee, despite the unfair labor practice charge. Therefore, an agency may want to consult carefully with the U.S. Attorney's office before deciding not to interview a union representative who possesses knowledge of criminal activity. Alternatively, if acquisition of such testimony is desirable for the criminal prosecution, an agency might consider asking the U.S. Attorney's office to direct non-agency law enforcement authorities to interview the union representative, without involving agency investigators.¹⁷

c) **Collective Bargaining Agreements**

Investigators, including OIG officials, should observe any agency-specific requirements contained in collective bargaining agreements when interviewing bargaining unit employees. The FLRA has held that many seemingly non-negotiable bargaining proposals are, in fact, negotiable. For instance, the FLRA held that all of the following proposals were negotiable and that they applied with equal force to both regular agency personnel and OIG officials:

Proposal 1 . . . When the person being interviewed is accompanied by a Union representative, in both criminal and noncriminal cases, the role of the representative includes, but is not limited to[,] the following rights: (1) to clarify the questions; (2) to clarify the answers; (3) to assist the employee in providing favorable or extenuating facts; (4) to suggest other employees who have knowledge of relevant facts; and (5) to advise the employee.

Proposal 2 . . . The [agency] shall advise the employees annually of their rights to Union representation . . . In addition, when an investigation is being conducted and where the employee is a potential recipient of disciplinary action, the employee shall be advised by the investigator of the general nature of the interview, and of his/her right to be represented by the Union . . . prior to taking any oral or written statement from that employee . . .

Proposal 3 . . . Where the subject of an investigation is being interviewed regarding possible criminal conduct and prosecution, at the beginning of the interview the employee shall be given a statement of Miranda rights.[¹⁸] The warning shall contain the language listed in Appendix A . . . If the employee waives his/her rights, the employee shall so indicate in writing and will be given a copy . . .

¹⁷ As quoted in the preceding section, the FLRA has emphasized that any involvement of agency personnel may trigger a right to union representation. *DOJ & AFGE*, 56 F.L.R.A. 556, n.7 (“[T]he Authority has long held that section 7114(a)(2)(B) applies to OIG investigations that involve allegations of criminal activity, to include when an investigation is jointly conducted by the OIG and local police.”).

¹⁸ This outline discusses “*Miranda* rights” on Page 21, above.

Proposal 4 . . . In an interview involving possible criminal conduct where prosecution has been declined by appropriate authority, at the beginning of the interview the employee shall be given a statement of the *Kalkines* [¹⁹] warning in writing. Further, the employee will acknowledge receipt of the warning in writing and shall receive a copy for his/her records.

National Treas. Employees Union and United States Nuclear Reg. Comm'n, 47 F.L.R.A. 370, 47 FLRA No. 29 (April 9, 1993). Inasmuch as the FLRA's negotiability holdings are often counter-intuitive, an investigator should take care to review all applicable collective bargaining agreements and, if necessary, to consult with labor relations officials.

Beyond provisions like those in the foregoing examples, which specifically address investigations, investigators should also carefully review general provisions, such as provisions concerning grievances. In one case, an arbitrator held that an agency violated its collective bargaining agreement when an agency investigator reported bargaining unit employees to state authorities for prosecution. *United States Dep't Air Force, Aerospace Guidance Metrology Ctr., Newark, AFB and American Fed'n of Gov't Employees, Local 2221*, 41 F.L.R.A. 550, 41 FLRA No. 55 (July 12, 1991). The agreement allowed grievances over any misapplication of agency regulations, and the pertinent agency regulation specified that only an "installation commander" could request criminal prosecution. The FLRA affirmed the arbitrator's finding that the investigator's actions violated the contract.²⁰

VI. ATTORNEY'S FEES IN DECLINATION CASES

a) Fees Related to Criminal Proceedings

The MSPB has held that it lacks jurisdiction under 5 U.S.C. § 7701(g)(1) to award attorney fees for services rendered by counsel in criminal proceedings. *Richards v. United States Dep't Justice*, 67 M.S.P.R. 46 (March 13, 1995) (citing *Boese v. United States Dep't Air Force*, 33 M.S.P.R. 410, 414 (April 21, 1987); *McWilliams v. United States Dep't Treas.*, 51 M.S.P.R. 422, 426-27 (November 26, 1991); *Burrell v. United States Dep't Navy*, 40 M.S.P.R. 494, 496 (May 9, 1989)). In *Richards*, a case in which the government ultimately declined prosecution, the MSPB speculated that it would lack jurisdiction to award such fees even in cases where criminal proceedings resulted directly from negligent investigative work by the employing agency. *Id.* The FLRA similarly reversed an arbitrator's award of attorney's fees related to a criminal matter. *United States Dep't Air*

¹⁹ See *Kalkines v. United States*, 473 F.2d 1391, 1393 (Ct. Cl. 1973).

²⁰ One might reasonably argue that this decision stands in stark contrast to the Federal Circuit's discussion of the duty to report criminal activities. See *Fomby-Denson v. United States Dep't Army*, 247 F.3d 1366 (Fed. Cir. 2001) ("As the Supreme Court has noted, 'concealment of crime has been condemned throughout our history. The citizen's duty to raise the 'hue and cry' and report felonies to the authorities was an established tenet of Anglo-Saxon law at least as early as the 13th century.'").

Force, Aerospace Guidance Metrology Ctr., Newark, AFB and American Fed'n of Gov't Employees, Local 2221, 41 F.L.R.A. 550, 41 FLRA No. 55 (July 12, 1991).²¹

The FLRA's decision, however, may be limited to the circumstances of that case. It arguably falls short of explicitly declaring that such relief is always inappropriate:

[T]he Arbitrator's award of attorney fees is deficient because the Arbitrator failed to support his award with the findings required by law. We have repeatedly held that an award of attorney fees under the Back Pay Act requires a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement . . . An award granting attorney fees without the proper support will be found deficient, the provision for attorney fees will be struck, and the issue will not be remanded to the parties for further proceedings . . . The Arbitrator's statement, without further discussion, that each grievant should be reimbursed for his or her attorney fees and his award ordering the payment of attorney fees do not meet the requirement for a fully articulated, reasoned decision supporting the determination that fees are warranted . . . The Union has cited no statutory authority, other than the Back Pay Act, that would provide a basis for the Agency to pay the grievants' legal expenses in this case . . . Consequently, in the absence of a showing of some other statutory authority, we find no basis under Congressional Research Service for awarding attorney fees to the grievants.

Id. It may be safe, nonetheless, to cite this decision for the proposition that the Back Pay Act does not authorize payment of attorney's fees for services rendered by counsel in criminal proceedings.

b) Fees Related to Criminal Investigations

As with criminal proceedings, attorneys fees associated with criminal investigations are unrecoverable in MSPB proceedings. *Richards v. United States Dep't Justice*, 67 M.S.P.R. 46 (March 13, 1995). Recovery for such fees is unavailable even when the administrative and criminal investigations arise out of a common core of facts. *Id.* (citing *Burrell v. United States Dep't Navy*, 40 M.S.P.R. 494, 495-96 (May 9, 1989)).

c) Fees Related to Administrative Investigations or Proposed Actions

The MSPB may award fees for work performed in relation to an administrative investigation, as well as for work performed in relation to the agency's proposal to take adverse action. *Richards v. United States Dep't Justice*, 67 M.S.P.R. 46 (March 13, 1995).

²¹ By regulation only an "installation commander" could request prosecution, but the agency's investigator contacted state authorities on his "own initiative." Upon learning of this referral, the agency asked the state to dismiss all charges. As part of the relief, the arbitrator improperly required payment of fees associated with the criminal matter.

d) Fees Related to Non-Criminal Proceedings

In certain cases, the MSPB may award fees for services performed in other administrative proceedings that are related to the MSPB appeal. *Boese v. United States Dep't Air Force*, 33 M.S.P.R. 410, 414 n.5 (April 21, 1987).²² The MSPB considers whether, “(1) The claimed portion of work done in that proceeding is reasonable under the standard set forth by the Board in *Kling v. Department of Justice*, 2 M.S.P.R. 464 (1980); and (2) the work, or some discrete portion of it, done in the other proceeding, significantly contributed to the success of the subsequent Board proceeding and eliminated the need for work that otherwise would have been required in connection with that subsequent proceeding.” *Richards v. United States Dep't Justice*, 67 M.S.P.R. 46 (March 13, 1995).

VII. WHISTLE-BLOWER RETALIATION: EXAMPLE

The agency's Office of Inspector General (OIG) investigated an employee for a possible violation of 18 U.S.C. § 205, which restricts the activities of employees in support of claims against the United States. The employee had participated in a meeting held by a non-governmental organization that was engaged in litigation with the United States. The purpose of the meeting was to discuss the organization's settlement options, and appellant made remarks based on knowledge obtained in the course of his official duties. Following OIG's investigation, the U.S. Attorney's office declined prosecution and the agency reprimanded the employee. After exhausting his remedy with the Office of Special Counsel, the employee filed an individual right of action appeal with the MSPB. The administrative judge dismissed the appeal for lack of jurisdiction. However, the MSPB reversed and remanded the appeal for a hearing on the merits, finding that the employee had stated a cognizable claim of whistle-blower retaliation. *Van Ee v. United States Envtl. Prot. Agency*, 64 M.S.P.R. 693 (October 24, 1994).²³

The MSPB subsequently summarized the holding in *Van Ee* as follows: “[An] employee's disclosures are protected if they concern matters that [the] employee reasonably believes constitute specific violations of law inherent in a course of action under consideration by [the] agency.” *See, e.g., Bump v. United States Dep't Interior*, 69 M.S.P.R. 354; (January 23, 1996).

²² “For example, we have considered whether to award attorney fees for work done before the agency prior to filing a Board appeal, *Brown v. U.S. Coast Guard*, 28 M.S.P.R. 539 (1985), for work done before the Board's Special Counsel in pursuit of a successful resolution of a matter before the Board, *Wells v. Schweiker*, 14 M.S.P.R. 175, 177-79 (1982), for work done on an EEO complaint that preceded a Board appeal, *Young v. Department of the Air Force*, 29 M.S.P.R. 589 (1986), and for work expended on an EEOC petition, *Bartel v. Federal Aviation Administration*, 30 M.S.P.R. 451 (1986).” *Id.*

²³ Following a subsequent unfavorable decision against the agency, the parties entered into a settlement agreement. *See Van Ee v. United States Envt'l. Prot. Agency*, Docket No. DE-1221-92-0161-B-1, 1995 MSPB LEXIS 1524 (August 24, 1995), Docket No. DE-1221-92-0161-R-1, 1995 MSPB LEXIS 1951 (December 6, 1995).

VIII. SOME USEFUL OGE MATERIALS

“Administrative Enforcement of Ethics Rules and Requirements - Case List,” prepared by Stuart D. Rick, Deputy General Counsel, for the 11th Annual Government Ethics Conference (December 4-6, 2001) (available on OGE’s internet site at www.usoge.gov under the section titled “OGE Conference,” the subsection titled “conference materials,” and the link to “conference handouts”).

Prosecution Surveys. OGE prepares an annual survey of prosecutions involving the conflict of interest criminal statutes (18 U.S.C. §§ 203, 205, 207, 208, 209). This annual survey contains summaries of the cases. *See, e.g.*, DAEOgram DT-02-003 - 2000 (February 12, 2002), “Conflict of Interest Prosecution Survey” (available on OGE’s internet site at www.usoge.gov under the section titled “Laws & Regulations”).