UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Administrative Order No. 91-19

IN RE:

Adverse Personnel Action -
Appeal of RORY J. McMAHON
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FINAL DECISION

On October 22, 1990, United States Probation Officer Rory J. McMahon was terminated from his employment because he allegedly disclosed confidential file material and supervision information, and violated certain ethical canons governing the conduct of probation officers. On October 24, 1990, McMahon filed a timely appeal of the adverse personnel action and the Chief Judge appointed the undersigned to consider the appeal and enter a final decision in the matter. After considering the evidence presented at an administrative hearing held on December 7, 1990, and having had an opportunity to review the memoranda submitted by the parties, the undersigned finds no basis for setting aside the termination.

McMahon argues that his termination should be set aside because the manner in which he was terminated violated his fifth and fourteenth amendment rights to procedural due process, and because the United States Probation Office failed to establish just cause for his termination.

I. DUE PROCESS

As a United States probation officer serving with compensation, McMahon has a property interest in his employment and is entitled to due process of law before being terminated. 18 U.S.C. §3602(a) (a probation officer serving with compensation may be removed "for cause" whereas a probation officer serving without compensation may be removed in the court's discretion); Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974); Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972). Notwithstanding this conclusion, a question remains as to "what process is due." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 1493, 84 L.Ed.2d 494, 503 (1985) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

McMahon was terminated pursuant to the Administrative Office's guidelines for adverse personnel appeals. He argues that he was denied due process because the guidelines are unconstitutional, both facially and as applied. However, relying on controlling Supreme Court precedent, the undersigned concludes that the procedures afforded McMahon comport with constitutional due process requirements.[1]

In Loudermill, the Supreme Court emphasized that an

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[1] Thus, even if the guidelines are constitutionally deficient on their face, McMahon has no standing to challenge their constitutionality because his own rights have not been adversely impacted. See Ulster County Court v. Allen, 442 U.S. 140, 154-155, 99 S. Ct. 2213, 2223, 60 L.Ed.2d 777, 790 (1979); and Broadrick v. Oklahoma, 413 U.S. 601, 610, 93 S. Ct. 2908, 2915, 37 L.Ed.2d 830, 839 (1973).

employee who has a protected property interest in continued employment should be given some pretermination opportunity to respond prior to being terminated. 470 U.S. at 542, 105 S. Ct. at 1493, 84 L.Ed.2d at 504. However, the Court explained that "the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Id., 470 U.S. at 545-46, 105 S. Ct. at 1495, 84 L.Ed.2d at 506 (citing Bell v. Burson, 402 U.S., at 540, 91 S. Ct., at 1590). Thus,

> the pretermination "hearing," though necessary, need not be elaborate. . . . [t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Boddie v. Connecticut, 401 U.S., at 378, 91 S. Ct., at 786. See Cafeteria Workers v. McElroy, 367 U.S. 886, 894-895, 81 S. Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. (citation omitted)

Id., 470 U.S. at 545, 105 S. Ct. at 1495, 84 L.Ed.2d at 506. According to the Court,

> The essential requirements of due process, . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. (citation omitted) The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. (citations omitted) To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id., 470 U.S. at 546, 105 S. Ct. at 1495, 84 L.Ed.2d at 506.

(emphasis added).

The evidence establishes that on October 17, 1990, the Chief U.S. Probation Officer, Carlos Juenke, provided McMahon with a memorandum/questionnaire enumerating several incidents in which McMahon allegedly provided confidential parole supervision information and file material to the author of the book Blue Thunder.[2] The memorandum requested McMahon to respond to these allegations. After reviewing his written responses, the Chief Judge directed that McMahon's employment be terminated.[3]

Contrary to McMahon's contention, this evidence establishes that he was provided the pre-termination "hearing" required by Loudermill. Although done informally, McMahon was (1) notified in writing of the charges against him -- disclosing confidential information and file material; (2) given an explanation of the employer's evidence -- statements made by the author of the book Blue Thunder; and (3) given an opportunity to present his side of the story -- an opportunity to provide written responses to the allegations. Thus, McMahon was afforded the essential requirements of due process, notice and an opportunity to be heard, prior to being terminated. Moreover, a balancing of "the interests involved and the nature of the subsequent proceedings" leads to the conclusion that the pre-termination "hearing" afforded McMahon comported with constitutional due process requirements.

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[2] McMahon's Exhibit No. 2.

[3] Transcript of December 7, 1990 hearing ("T") at p. 26-27, 20-22.

Loudermill, supra, 470 U.S. at 545-46, 105 S. Ct. at 1495, 84 L.Ed.2d at 506.

Because of the extremely sensitive position of a probation officer, the officer's interest in retaining gainful employment is outweighed by the government's interest in expeditiously removing an officer believed to have provided confidential information, without authorization. Furthermore, after being terminated, McMahon was afforded a prompt[4] evidentiary hearing at which he was represented by counsel, presented evidence, and cross-examined adverse witnesses. Thus, the undersigned concludes that McMahon has been afforded the procedural due process guaranteed by the fifth and fourteenth amendments.

II. CAUSE FOR TERMINATION

The adverse personnel action against McMahon was taken for "cause" as set out in the memorandum notifying McMahon of his termination.[5] The memorandum charges McMahon with unauthorized disclosure of file material and supervision information[6] and

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[4] This matter was initially set for hearing on November 9, 1990, but the hearing was rescheduled to a later date at the request of McMahon's counsel.

[5] See Memorandum of October 22, 1990, McMahon's Exhibit No. 5.

[6] The memorandum does not specifically cite to the Privacy Act, 5 U.S.C. section 552a (1988), the statutory provision upon which these charges are based. However, the Probation Office recognized that such specificity was not necessary since McMahon "[a]s a 12-year veteran of the Federal Probation Service, [is] aware of the guidelines for disclosure of file material or any other information [he] obtained as a U.S. Probation Officer." See Memorandum of October 22, 1990, McMahon's Exhibit No. 5. Furthermore, McMahon's attorney conceded at the hearing that there is no contention that McMahon did not understand the Privacy Act provisions. (T. at 105).

enumerates ten separate incidents forming the basis of this charge. Additionally, the memorandum cites six incidents providing a separate basis for termination for cause for violating the canon of ethics applicable to probation officers.[7] McMahon presents two arguments on this appeal in an attempt to show that the Probation Office could not properly terminate him for cause.

First, McMahon asserts that the U.S. Probation Office failed to establish cause for his termination by competent, substantial evidence because it relied solely on hearsay evidence consisting of statements made by the author in the book Blue Thunder. However, it is well-settled that "hearsay evidence is admissible in adverse action proceedings." Diggin v. United States, 661 F.2d 174, 178 (Ct. Cl. 1981); and see Richardson v. Perales, 402 U.S. 389, 91 S. Ct. 1420, 28 L.Ed.2d 842 (1971); Johnson v. United States, 628 F.2d 187 (D.C. Cir. 1980). The only requirement is that the evidence be sufficiently convincing to a reasonable mind and reveal sufficient assurance of truthfulness. Pascal v. United States, 543 F.2d 1284, 1289 (Ct. Cl. 1976). The hearsay evidence at issue in this matter satisfies that requirement.

As the Chief Probation Officer testified, most of the information relayed in the book accurately reflects file material and supervision information contained in the Probation Office's

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[7] See Code of Conduct for United States Probation Officers, Canon 1 - A Probation Officer Should Uphold the Integrity and Independence of the Judiciary and of his office, and Canon 2 - A Probation Officer Should Avoid Impropriety and the Appearance of Impropriety in All His Activities, McMahon's Exhibit No. 15.

files. Furthermore, the fact that the author attributes the provision of this information to McMahon is sufficiently convincing because McMahon met with the author, concedes that he provided the author with certain information reported in the book, and McMahon certainly had access to the information attributed to him.[8] Thus, the Probation Office could properly rely on statements made by the author of the book.[9]

Secondly, McMahon challenges the substance of the allegations against him by essentially denying all the allegations, except two, i.e., taking the author to view the residence of parolee Ben Kramer, and providing the author with information

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[8] At the hearing McMahon's attorney argued that the author's attribution to McMahon is undermined because the information could have been provided by someone else and falsely attributed to McMahon. However, in a prefatory note the author explained that he protected the identity of sources who wished to remain anonymous. Blue Thunder, Author's Note. Therefore, if someone other than McMahon had provided the information and did not wish to be identified, the author could have altered the description of that individual to provide the "plausible deniability" afforded to those who wished to remain anonymous. Id.

[9] Moreover, McMahon knew that the Probation Office would be relying on the author's statements, but did not call him as a witness on his behalf. Instead, McMahon produced a letter from the author which states, in its entirety, that "U.S. Probation officer Rory McMahon did not provide me with confidential files nor any information that was not a matter of public record." See Letter Dated December 6, 1990, from Thomas Burdick. However, because the author does not state that McMahon was not the source of the information at issue, the letter does not undermine the evidence that McMahon provided the author with confidential information. The determination as to whether the information was indeed "confidential," and thus not subject to disclosure, must be based on statutory and case law. The author's conclusory statement in this regard has no bearing on that determination.

regarding comments made by supervision case Vincent Fasano.[10] Thus, with two exceptions, McMahon directly contradicts the statements made by the author of the book, thereby creating a conflict in credibility. However, the Probation Office had cause for resolving this conflict against McMahon because, as stated previously, McMahon met with the author, admitted that he provided certain information reported in the book, and most of the information in the book accurately reflects information contained in the Probation Office's files.[11]

Although the Probation Office presented competent, substantial evidence to support the allegations against McMahon, as set out in the memorandum dated October 22, 1990, a question remains as to whether proof of such allegations is sufficient to establish a violation of the Privacy Act,[12] or the canons of ethics governing the conduct of probation officers.

McMahon contends that any information he provided is outside the purview of the Privacy Act because it was either public

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[10] Because McMahon did not testify at the evidentiary hearing on December 7, 1990, his responses to the allegations are derived entirely from his written responses in the October 17, 1990 memorandum. See McMahon's Exhibit No. 2.

[11] (T. at 31).

[12] The Privacy Act provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . " unless the disclosure is within an exception to this general non-disclosure requirement. 5 U.S.C. § 552a (b)(1)-(12) (emphasis added).

information, or information which cannot properly be characterized as confidential. Contrary to this contention, however, much of the information McMahon provided the author was contained within a "system of records" and therefore not subject to disclosure. 5 U.S.C. §552a (b). For example, McMahon asserts that his disclosure regarding comments made by supervision case Vincent Fasano did not violate the Privacy Act because the information was not maintained in the Probation Office's system of records.[13] However, this assertion is disproved by the chronological record which is maintained in the Fasano file in the Probation Office.[14] Furthermore, McMahon did not contest the fact that many of the allegations established by the Probation Office also constitute violations of canons of ethics governing the conduct of probation officers.

In summary, the U.S. Probation Office presented competent, substantial proof to establish its prima facie case against McMahon, and McMahon presented no evidence at the hearing to contradict this evidence, other than his previous, general denial of the allegations against him. Thus, the Probation Office satisfied its burden of proving the allegations against McMahon, as set out in the memorandum of termination dated October 22, 1990. Furthermore, the undersigned concludes that this evidence is

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[13] See Memorandum of Law in Support of Adverse Personnel Action Appeal at 9 and 10.

[14] See Attachment to Memorandum from Carlos Juenke, Chief U.S. Probation Officer, Dated January 10, 1991, responding to McMahon's Memorandum of Law in Support of Adverse Personnel Action Appeal.

sufficient to establish that McMahon violated both the Privacy Act and the canons of ethics governing probation officers, thereby justifying his termination for cause. Consequently, no basis exists for setting aside McMahon's termination and the adverse personnel action taken against him is affirmed on this appeal.

Dated this 13 day of February, 1991.

KENNETH L. RYSKAMP
Administrative Hearing Officer