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JUNE 4, 2014

TOP NEWS STORIES

ADMINISTRATION, EPA ANNOUNCE NEW CARBON POLLUTION RULES

This week the Obama administration, led by the Environmental Protection Agency (EPA), announced new proposed rules to limit carbon pollution from existing power plants.

On June 2, EPA Administrator Gina McCarthy unveiled the details of the Clean Power Plan proposal.

The announcement of the proposed rules for existing power plants, under which states would have to reduce their carbon emissions from existing power plants 30% from a 2005 base level by the year 2030 is the most significant action taken by the administration as part of President Obama's Climate Action Plan.

The proposed rules are controversial because they represent the first-ever action to regulate carbon pollution, specifically those to reduce carbon pollution from existing power sources. The administration and the EPA argue the Clean Air Act, and subsequent court decisions, empower the agency to propose the rule.

IMPROVING FEDERAL FINANCIAL DECISION-MAKING – NAPA REPORT & RECOMMENDATIONS

Significant progress has been made in the past two decades improving federal financial information and standards following the passage of the Chief Financial Officers (CFO) Act of 1990.

Yet there is more work to be done, which led the Federal Accounting Standards Advisory Board (FASAB) to request the National Academy of Public Administration (NAPA) conduct a study to determine how federal executives and senior managers currently use financial and related information, what gaps they see that impact their ability to manage effectively, and what opportunities exist to close those gaps.

The NAPA panel held discussions with 27 federal executives and senior managers, including several agency CFOs, in early 2014. In April 2014, NAPA released its report, including three key findings and six recommendations, outlined below.

Key Findings:

- Data generally are highly accurate and granular, but federal agencies face challenges in analyzing and transforming data into readily understood, actionable information for executive decision-making--especially the linking of budget, costs, and performance.
- The degree to which financial data are effectively used for decision-making is heavily driven by each organization's revenue source and operational approach. Agencies tended toward one of two general camps: 1) user fee-based revenue and/or production-oriented, direct operations agencies, where external pressure for transparency fosters the creation and use of financial and cost analysis for decision-making by executives and senior managers; and 2) appropriations-based revenue and/or regulatory, policy, and grant-making agencies, which generally have fewer needs for detailed financial and cost analysis. Both types of agencies can utilize financial data more effectively if

leadership instills a culture that pays attention to costs and performance by creating structures and incentives that encourage employees to carefully examine these issues.
- CFO organizations will increasingly need to offer valuable decision-making support to executives and senior managers. They should continue to evolve from a legacy core focus on transaction processing and compliance to a more modern approach that features sophisticated cost and performance analysis tailored to the decision-making requirements of agency leadership.

NAPA Recommendations:

1. Federal agencies should strengthen the CFO staff's knowledge of program operations in order to increase their ability to act as business partners to agency program leadership.
2. Federal agencies should emphasize development of the CFO staff skillsets to ensure that traditional accounting is augmented by data analytics.
3. In order to connect financial and cost information to program outcomes, federal agencies should link budgeted resources to costs, outputs, and performance.
4. In order to ensure that relevant information is available in a readily accessible and user-friendly format, federal agencies should develop financial and programmatic dashboards specifically tailored to the decision-making requirements of executives.
5. Federal agencies should enhance existing reporting systems to integrate financial, operational, and HR-related information.
6. Congress and OMB should create specific legislative and regulatory catalysts, such as the 2009 American Recovery and Reinvestment Act reporting requirements, to focus agency attention on developing clear cost and outcome data.

To access the full NAPA report for the FASAB, *Financial and Related Information Decision-Marking: Enhancing Management Information to Support Operational Effectiveness and Priority Goals*, click here.

MSPB RELEASES FY2013 ANNUAL REPORT

The Merit Systems Protection Board (MSPB) has released its fiscal year 2013 report.

The report contains summaries of significant Board decisions and relevant court opinions issued during the year, as well as case processing statistics, summaries of MSPB merit systems studies, and a review of significant actions of the Office of Personnel Management (OPM).

Significant Board decisions issued in FY2013 highlighted in the report included those on issues such as adverse actions, jurisdiction, retirement, discrimination, veterans' rights, whistleblower protection, furloughs, due process and harmful procedural error, performance-based actions, penalties, and Board procedures.

Also included are key decisions on the retrospective application of certain provisions of the Whistleblower Protection Enhancement Act of 2012, and the inclusion of detailed explanations in non-precedential decisions, like Opinions and Orders, on petitions for review.

To access the full FY2013 MSPB Annual Report, click here.

FROM THE HILL

REPRESENTATIVES INTRODUCE BILL TO ELIMINATE AUTOMATIC UNION DUES

A group of 46 House Republicans has introduced legislation that would prohibit agencies from automatically deducting labor organization dues from the pay of federal employees.

Rep. Mark Meadows (NC-11) sponsored the Empower Employees Act (H.R. 4792), saying dues collection should be between a union and an employee and not the responsibility of the government.

"The fact is, union dues are often automatically deducted before federal employees ever see their paychecks. This bill will empower those employees to choose how they wish to spend their hard-earned money," Rep. Meadows explained.

"This bill in no way restricts a federal employees' right to join a union, but it ensure that no taxpayer dollars are used in the collection of union dues," Meadows added.

The legislation is similar to a bill introduced in the 112th Congress by now Senator Tim Scott (R-SC).

CASE LAW UPDATE

MSPB REVERSES REMOVAL AFTER AGENCY WITHHELD REQUESTED INFORMATION

A Small Business Administration ("SBA") Public Affairs Specialist was removed by the agency based on charges of improper use of a government computer (sending sexually oriented images and videos from his work computer) and lack of candor in an agency investigation into a coworker's alleged creation of a hostile work environment. On appeal to the MSPB, an administrative judge sustained the agency's charges, but mitigated the penalty to a 60-day suspension, a reduction in grade, and an optional reassignment to a different position for which the employee was qualified, finding that the agency had not properly weighed all of the Douglas factors. This finding was based on his lack of disciplinary history, tenure with the agency, rehabilitative potential, and the fact that the employee "had been working in an environment for several years in which his immediate supervisor…and other agency managers condoned the emailing of sexually oriented materials by employees." The administrative judge also concluded that the agency had violated *Douglas* by failing to provide the deciding official with information he requested about discipline imposed on other employees found to have engaged in similar misconduct during the same investigation. The agency petitioned the full Board for review, and the employee filed a cross-petition for review arguing that the penalty imposed should be mitigated further, while not specifically challenging the decision to sustain the charges against him. On May 28, 2014, the Board affirmed the administrative judge's decision, which mitigated the removal to a 60-day suspension.

The Board cited *Parker v. U.S. Postal Service*, 111 M.S.P.R. 510 (Fed. Cir. 2009) to support its proposition that even when the Board sustains all of the agency's charges, as it did in this case, it may still mitigate the penalty when the agency's penalty is too severe. According to *Parker*, the Board will only modify the penalty when it finds that the agency failed to weigh the relevant Douglas factors or when the penalty imposed is unreasonable. The Board also noted that penalties beyond the bounds of reasonableness will only be mitigated by the Board enough to bring them back within the bounds of reasonableness.

The Board began by analyzing the agency's treatment of the Douglas factor which contemplates the "consistency of the penalty with those imposed upon other employees for the same or similar offences." Exploring the record, the Board found that the deciding official at the agency had inquired into the circumstances of the other employees who were charged with misconduct as part of the same investigation that led to the employee's proposed removal. But despite the deciding official's inquiry, the agency's human resources office informed the deciding official that the office had not found that the conduct of the eight other employees who would receive a proposed suspension, or the 22 employees who would receive a letter of reprimand or verbal warning, rose to the level of removal, and that the human resources office had decided not to provide the deciding official with an internal report of the specifics. However, the human resources office did inform the deciding official that "the key item of clarification is that the explicit content of the other suspension cases does not rise to the level" of the content in the employee's case.

The Board observed that based on the agency's decision not to provide the deciding official with the information he requested about discipline and conduct that could potentially be compared to the plaintiff's for

the purpose of measuring the consistency of the penalty for the same or similar offences, the administrative judge held that the agency had contravened *Douglas.* On review, the Board agreed with the administrative judge, and added that a "deciding official must be in an informed position in order to make a conscientious penalty determination under the facts of the case before him."

The Board found that since the employee specifically raised the issue of the consistency of the penalty in his written reply before the deciding official, the agency had actively prevented the deciding official from undertaking a conscientious consideration of the consistency of the penalty by withholding the information he requested. Citing *Williams v. Social Security Administration*, 586 F.3d 1365 (Fed. Cir. 2009) and *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640 (2012), the Board stated that under *Douglas*, "it is insufficient for another agency employee to predetermine for the deciding official which instances of misconduct he should consider," and that this is particularly true in a case where the deciding official was "denied comparator information" about employees with similar misconduct discovered during the same investigation which led to the removal discussed in this case.

While the MSPB administrative judge, based on his finding that the agency failed to conduct a correct penalty analysis, concluded that the maximum reasonable penalty was a 60-day suspension, reduction in grade, and optional reassignment to a vacant position within the agency, the full Board on review affirmed the mitigation to a 60-day suspension and reduction in grade, but vacated the administrative judge's order permitting optional reassignment to a vacancy for which the employee was qualified.

Although the agency argued that removal was the maximum reasonable penalty that should be imposed, the Board distinguished the MSPB precedent cited by the agency (*Von Muller v. Department of Energy*, 101 M.S.P.R. 91, *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006) and *Social Security Administration v. Steverson*, 111 M.S.P.R. 649 (2009), *aff'd*, 383 F. App'x 939 (Fed. Cir. 2012) by noting that those cases included aggravating factors (sending sexually explicit images to external constituents, and storing sexually oriented material through the misuse of government equipment, respectively) that were not present in the employee's case.

The agency also challenged the administrative judge's finding that the appellant's misconduct took place in an environment in which such conduct was condoned. The Board dismissed this challenge by stating that the agency's "mere disagreement with the administrative judge's factual conclusion on this point, which is supported by the record, does not support re-imposing" the removal instead of the 60-day suspension. The Board also found that the agency's attempt to use the employee's acknowledgment of his wrongdoing to counter the administrative judge's finding that such conduct was condoned was a misapplication of *Douglas*, because the truthful admission of misconduct is a mitigating, not an aggravating factor.

Asserting that the penalty should be mitigated further, the employee argued that other employees who were involved in similar misconduct received much lesser penalties. According to the Board, however, to support his argument, the employee cited actions which were not included as grounds for discipline in the proposed discipline those employees received. The Board explained, however, that a deciding official is not required to consider "the universe of conduct" that was both charged and that could have been charged when conducting a disparate penalty analysis. Agreeing with the administrative judge, the Board held that the employee's sustained misconduct justified the imposition of a penalty greater than a 14-day suspension, unlike the comparator employees cited by the employee, because of the serious nature of his misconduct, and because of his lack of candor.

The Board considered post-removal comparator evidence as well, despite "some prudential concerns about considering post-removal comparator evidence in all cases." However, due to the length of time that had passed between the employee's proposed penalty and the post-removal comparator's discipline, as well as the legitimate reasons for the imposition of different penalties, the Board did not find that there had been a disparate penalty imposed.

Finally, the Board disagreed with the administrative judge that the penalty should be mitigated to include an optional reassignment, noting that prior Board decisions which upheld reassignment have involved "factual findings that the employee cannot perform his prior position given the nature of his sustained misconduct and that there exist vacancies within the agency to which the appellant could be reassigned." Because the administrative judge made no such findings, the Board found that the agency could return the employee to his prior position, and vacated the order providing for an optional reassignment.

For the above stated reasons, the Merit Systems Protection Board canceled the employee's removal and substituted in its place a 60-day suspension and simultaneous reduction of no more than one grade, while ordering the agency to provide the correct amount of back pay, interest, and other benefits under Office of Personnel Management regulations.

You can read the full case, *Chavez v. Small Business Administration*, here.

This case law update was written by Conor D. Dirks, associate attorney, Shaw Bransford & Roth, PC.

For thirty years, Shaw Bransford & Roth P.C. has provided superior representation on a wide range of federal employment law issues, from representing federal employees nationwide in administrative investigations, disciplinary and performance actions, and Bivens lawsuits, to handling security clearance adjudications and employment discrimination cases.

EDUCATE YOURSELF

SAVE THE DATE: EEOC EXECUTIVE LEADERSHIP DEVELOPMENT TRAINING SEPTEMBER 17, 2014 | WASHINGTON HILTON

In its third year, the EEOC Executive Leadership Development Training has empowered and motivated its attendees to be better leaders and role models in their agencies. Designed for senior leaders in the EEO and HR fields, this one-day training will ensure that attendees have the necessary leadership skills to continue to excel in their careers. The training seminar will feature speakers who are industry leaders in management, professional development and personal growth skills – all of which make-up the well-rounded leader.

Program registration is open to senior EEO professionals in federal, state and local governments, EEO executives from the private sector, and those who seek to move into senior positions. HR executives who have significant responsibilities in managing and implementing an EEO program are also encouraged to attend. Registration is limited to the GS-14 and above population, and equivalents.

More information on the training will be available soon.

GEICO'S GOOD STUFF

2014 FEDS FEED FAMILIES CAMPAIGN KICKS OFF

GEICO's Good Stuff is a column series highlighting great stuff happening in the federal community.

The U.S. Department of Agriculture (USDA) and participating federal agencies have kicked off the 2014 Feds Feed Families campaign.

The Feds Feed Families campaign launched in 2009. The annual food drive, which benefits local food banks, runs this year from June 2 through August 27, 2014.

Collection boxes for non-perishable food items will be located in agency offices.

"The spirit of service runs deep across the Federal government. Feds Feed Families offers another opportunity to give back to our communities and serve our neighbors in need," said USDA Secretary Tom Vilsack. "Since the initiative began just five years ago, Federal employees have donated more than 24 million pounds of food. I am proud to serve alongside such generous individuals and I am confident that we will step up once again this year."

Follow the campaign on Twitter @FedFoodDrive or like them on Facebook for the latest updates from this season's campaign. Feds Feed Families asks participants to share their progress, stories and photos on social media using the hashtag #FedsFeedFamilies.

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HEARD INSIDE THE BELTWAY

There must be a culture of honesty and accountability within the VA and people who have lied or manipulated data must be punished. But we also have to get to the root causes of the problems that have been exposed. The simple truth is that with 2 million more veterans coming into the system in recent years there are many facilities within the VA that do not have the doctors, nurses and other personnel that they need to provide quality care in a timely way.

Senate Veterans Affairs Committee Chairman Bernie Sanders (I-VT) upon introduction of a comprehensive VA bill

WEEKLY LEADERSHIP REFLECTION

If you don't like something, change it. If you can't change it, change your attitude.

Maya Angelou (1928-2014)