



SEPTEMBER 2, 2014

TOP NEWS STORIES

50th ANNIVERSARY OF WILDERNESS ACT, 98th BIRTHDAY OF NATIONAL PARK SERVICE CELEBRATED

Federal land management agencies are celebrating two milestones.

September 3 will mark the [50th anniversary of the signing of the Wilderness Act](#) into law by President Lyndon Johnson. The National Park Service (NPS) also marked its 98th birthday this year, and has begun planning for its 2016 centennial.

The Wilderness Act created the legal definition of wilderness in the United States, and protected 9.1 million acres of federal land. More lands have since been added into the [National Wilderness Preservation System](#), which protects natural and unique ecosystems.

Three Department of Interior (DOI) agencies, the NPS, the U.S. Fish and Wildlife Service (USFWS), and the Bureau of Land Management (BLM), as well as the U.S. Department of Agriculture (USDA) Forest Service, are responsible for management of wilderness areas.

Secretary of the Interior Sally Jewell will mark the Wilderness Act anniversary at an [event](#) at Great Swamp National Wildlife Refuge in New Jersey, along with USFWS Director Dan Ashe, leaders from the Wilderness Society and the Student Conservation Association (SCA), and New Jersey congressional representatives.

The [NPS was created](#) by President Woodrow Wilson on August 25, 1916.

“Today, we reflect on almost a century of preserving some of the most spectacular and meaningful places for the benefit of all Americans,” [said](#) NPS Director Jonathan B. Jarvis. “As the countdown begins to the [National Park Service’s Centennial in 2016](#), we want to introduce a new generation of park visitors and advocates to their national parks. These national treasures collectively tell the story of our country – who we are and what we value as a society.”

“The National Park Service manages 401 national parks and memorials, which supported 238,000 jobs and pumped more than \$26 billion into local economies last year. In fact, for every \$1 we invest in our national parks, our economy sees \$10 in return,” [the White House said in a statement](#) in celebration of the NPS’ 98th birthday.

The White House statement also includes several spectacular photos from around the nation, which are frequently posted on the [National Park Service](#) and the [U.S. Department of Interior](#) Twitter pages.

Do you have a favorite federal park, forest, or refuge? Share with us on [Facebook](#) and [Twitter](#).

PRESIDENT ANNOUNCES EXECUTIVE ACTIONS FOR SERVICE MEMBERS & VETERANS

While [speaking](#) last week at the American Legion's convention, President Obama [announced](#) 19 new executive actions to serve the military and veteran community, and their families.

The White House released a [full fact sheet](#) detailing the executive actions, which fall into six categories. Brief descriptions are provided below.

Category 1: Improving Service Members' Transition from DOD to VA and Civilian Health Care Providers

- Supporting service members with mental health conditions in making the transition from DOD to VA care
- Ensuring continuity of mental health medications during the transition from DoD to VA
- Coordinating care between DoD and VA

Category 2: Improving Access and Quality of Mental Health Care at DoD and VA

- Integrating peer specialists into primary care
- Supporting TRICARE mental health parity
- Enhancing mental health care where service members work

Category 3: Continuing the Commitment to Improve Treatments for Mental Health Conditions Including PTSD

- Harnessing the efforts of researchers from DoD, VA, the National Institutes of Health (NIH) and academia
- Advancing cutting edge PTSD research
- Early detection of suicidality and PTSD
- New investments in suicide prevention

Category 4: Raising Awareness About Mental Health and Encouraging Individuals to Seek Help

- Promoting Vet Centers as a counseling resource for combat Veterans and their families
- Training DoD and VA employees to recognize the signs and symptoms of mental health conditions and help connect people in need to help
- Expanding mental health awareness campaigns
- Providing mental health awareness training more broadly

Category 5: Improving Patient Safety and Suicide Prevention

- Expanding access to opiate overdose reversal kits
- Providing new opportunities for service members, Veterans, and their families to give back unwanted medications
- Supporting suicide prevention

Category 6: Strengthening Community Resources for Service Members, Veterans, and Their Families

- Expanding cultural competency training
- Supporting construction of medical facilities in communities with large veteran populations

WHITE HOUSE NOMINATES ICE DIRECTOR, DHS MANAGEMENT UNDERSECRETARY

Last week President Obama [nominated individuals to fill top leadership](#) roles at Immigration and Customs Enforcement (ICE) and the Department of Homeland Security (DHS), as well as other key administration officials.

U.S. Attorney for the Northern District of Texas, Sarah R. Saldaña, was nominated for the ICE Director position. Russell Deyo, a former Johnson & Johnson executive who also spent seven years as an assistant U.S. Attorney for the District of New Jersey, was nominated for the position of DHS undersecretary for management.

Saldaña has been the U.S. Attorney for the Northern District of Texas for about three years. Her nomination for that position was [supported](#) by Texas' Republican senators, but [opposed](#) by some Democrats in the Texas congressional delegation. She is currently engaged in a high profile public corruption case against Dallas County Commissioner John Wiley Price.

If confirmed by the Senate, Saldaña would be the first Hispanic woman in charge of ICE.

Jon Adler, National President of the Federal Law Enforcement Officers Association (FLEOA), stated "While we heard positive things about the ICE Director nominee from unofficial sources, I find it disconcerting that the White House yet again opted not to advise national law enforcement stakeholder organizations in advance in consideration of our input. This "father knows best" approach only serves to undermine the rank and files' confidence in the decisions made by the administration."

Deyo, if confirmed for the job, [would fill the role](#) of Rafael Borrás, who left the government in February. The current DHS deputy undersecretary for management, Chris Cumiskey, has been acting in Borrás' role since his departure.

Both Saldaña and Deyo must have their nominations confirmed by the Senate.

FROM THE HILL

REP. ISSA QUESTIONS "FRIVOLOUS" SPENDING AT LABOR DEPARTMENT

The Chairman of the House Oversight and Government Reform Committee, Darrell Issa (R-CA) has [sent a letter](#) to Labor Secretary Thomas Perez about alleged wasteful spending and mismanagement by Labor's Office of Public Affairs (OPA).

Rep. Issa raises questions about "a pattern of frivolous spending, including \$600,000 spent on informational elevator posters, \$25,000 in entry fees for public relations contests, and \$100,000 to promote a book club," [according to a committee press release](#) on the inquiry.

Senator Tom Coburn (R-OK), ranking member of the Senate Homeland Security and Governmental Affairs Committee, had in February 2014 written to the Labor Department's Office of Inspector General about the same topic. Sen. Coburn, as well as House Oversight Committee ranking member Rep. Elijah Cummings (D-MD) were copied on Chairman Issa's letter.

"This questionable activity has been going on for some time," wrote Chairman Issa in the letter. "As my staff has learned, in 2009, DOL began producing weekly elevator posters for the 23 passenger elevators at DOL's headquarters in Washington, D.C. According to documents obtained by the Committee, since 2009, DOL has spent \$2,637 per week producing new posters, for a total of over \$600,000. According to DOL, the posters represent an effective method of communicating with employees. Media reports indicate that DOL deploys up to three communications specialists or artists to produce designs each week. DOL has also reportedly used taxpayer money to hire the Washington Nationals mascot for an agency event and spent over \$100,000 to promote a book club. Likewise, DOL employees reportedly spend an inordinate amount of time and money on an internal publication called 'Frances Mag.' If this information is accurate, it raises serious questions about the lack of internal agency spending controls in a time of considerable budget constraints."

Chairman Issa also expressed concerns about approximately \$25,000 spent on entry fees for public relations contests between fiscal years 2010 and 2014. Those fees were used to submit 168 entries to PR contests.

The Labor Department won 83 awards based on those entries.

THIS WEEK ON FEDTALK

INSIDE LOOK: POSTAL SERVICE

This week on FEDtalk, John Hegarty, National President, [National Postal Mail Handlers Union](#), and Mark Dimonstein, President, [American Postal Workers Union](#), join FEDtalk to discuss current issues for the postal service and upcoming postal reform.

The show will cover the current state of the Postal Service, including challenges facing USPS such as how competitors like FedEx have affected the postal service, and how the Internet has changed USPS. Additionally, the show will take a look at the closure of rural offices and processing plants, as well as legislative proposals for reform.

The radio show airs this Friday, September 5th, at 11:00 a.m. Eastern time. [Click here on Friday](#) to listen or tune in to 1500 AM in the Washington, DC area.

FEDtalk is a live radio talk show produced by [Shaw Bransford & Roth P.C.](#), a federal employment law firm. Bringing you the insider's perspective from leaders in the federal community since 1993.

CASE LAW UPDATE

MSPB CLARIFIES DUE PROCESS STANDARDS REGARDING INDEFINITE SUSPENSIONS BASED ON SUSPENDED OR REVOKED SECURITY CLEARANCES

An Assistant Federal Security Director at the Grand Junction Regional Airport had her security clearance suspended by the agency after making statements to the local police on January 26, 2011. Thereafter, the agency proposed the employee's indefinite suspension on February 1, 2011. The proposal cited the suspension of her security clearance "based on allegations regarding [her] mental health and personal conduct" which were outlined in the letter which suspended the employee's security clearance. When the employee requested the materials relied upon, the agency claimed that it had only relied on the notice from the Personnel Security Division that the employee's security clearance had been suspended. After amending a pending EEO complaint to include a challenge to her suspension, and the passage of 120 days from that amendment, the employee filed her appeal with the Board challenging her indefinite suspension and her intervening decision to retire after the agency revoked her security clearance in August 2011. The MSPB administrative judge, in applying the Board's then-controlling case law, found that the agency had satisfied the employee's due process right to notice of the reasons for the suspension of her clearance and to reply to the official who had authority to change the outcome, and affirmed the indefinite suspension. The employee filed a petition for review to the full Board. On August 27, 2014, the Board affirmed the initial decision to sustain the employee's indefinite suspension, with modifications to the decision reflecting changes in analysis due to the existence of new precedent.

Although the Board agreed with the administrative judge's ultimate conclusion sustaining the employee's indefinite suspension, it opened its opinion by conducting a different analysis than the administrative judge, who did not have the benefit of two decisions that reframe the standard. The first case, *Gargiulo v. Department of Homeland Security*, 727 F.3d 1181 (Fed. Cir. 2013), was a case that held that employees have "no due process rights with respect to the procedures used to determine whether to suspend or revoke [a] security clearance," and also explained that while employees have due process rights to contest the indefinite

suspensions which often follow the suspension of a security clearance, those rights “[do] not include the right to contest the merits of the decision to suspend [their] security clearance.”

The second case, *Buelna v. Department of Homeland Security*, 121 M.S.P.R. 262 (2014), reaffirmed the holdings in *Garguilo* and further held that due process “does not demand that the deciding official consider alternatives to the proposed adverse action that are prohibited, impracticable, or outside management’s purview. According to the Board in *Buelna*, due process in connection with an adverse action based on the suspension or revocation of a security clearance is limited to “invok[ing] the discretion of a deciding official with authority to change the outcome of the proposed action to the extent that may have been feasible.” According to the Board in this case, this new *Buelna* standard differed from the standard applied by the administrative judge in that the earlier standard held that due process required the deciding official to have authority to change the outcome of the proposed adverse action by either reinstating the employee’s access to classified information or by reassigning her to a position not requiring such access.

The employee argued, citing pre-*Garguilo* decisions, that her due process rights were violated because the deciding official did not have the authority to impose a penalty other than her proposed indefinite suspension. The Board, based on *Buelna*, concluded that due process does not demand that the deciding official have the unfettered discretion to take any action he or she believes is appropriate, only those actions that are not prohibited, impracticable, or outside management’s purview. According to the Board, the employee’s contention that the deciding official had limited authority to impose an alternate penalty was unsupported. The Board cited the deciding official’s testimony, which included a statement that he had the authority to consider reassignment, but exercised his discretion in declining to reassign her under the facts of the case. Although the employee argued that the deciding official’s decision was in error, the Board stated that it “does not have the authority to review the feasibility of reassignment in the absence of an additional agency regulation or policy statement providing for such a transfer.”

The employee also argued that the deciding official improperly considered the alleged factual reasons supporting the suspension of her security clearance in making a penalty determination, constituting a violation of her due process rights under *Ward/Stone*.

The Board recalled the *Ward/Stone* line of authority cited in *Buelna*, which references *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011), and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368. These cases state that the only information material to an agency’s charge involving the suspension or revocation of a clearance is whether the employee’s position required a security clearance and whether the clearance was suspended or revoked. In *Buelna*, however, the Board stated that under *Ward/Stone*, an employee is entitled to advanced notice of all of the information a deciding official may rely on in considering the employee’s proposed suspension or removal, including information concerning the extent to which the deciding official’s penalty determination may be influenced by the facts which are referenced in the security clearance suspension or revocation which forms the basis for the adverse action.

In analyzing whether a due process violation occurred, the Board cited the *Ward/Stone* cases for the position that “not all ex parte communications rise to the level of due process violations; rather, only ex parte communications which introduce new and material information to the deciding official are constitutionally infirm.”

Based “on the language and scope of information cited in the proposed indefinite suspension,” the Board found that the deciding official did not consider new and material information when he wrote that the suspension was being proposed based on the suspension of her security clearance due to allegations regarding the employee’s mental health and personal conduct. Furthermore, the Board stated, the employee specifically addressed and refuted the underlying reasons for the security clearance determination in her reply to the proposed suspension, thereby placing those reasons “into controversy before the deciding official.”

As a final matter, the Board responded to the employee's argument that the decision to suspend her clearance and place her on an indefinite suspension left her no realistic alternative but to retire by finding that the employee's allegations failed to meet the demanding legal standard required to demonstrate coercion. According to the Board, because the agency had not yet reached a final decision to permanently revoke the employee's security clearance at the time of the employee's retirement, it remained possible that she would be reinstated to employment if her clearance was reinstated. However, the Board concluded, due to jurisdictional issues, the Board could not consider whether the agency committed any improper acts in connection with the security clearance determination itself.

For the above stated reasons, the Merit Systems Protection Board affirmed as modified the initial decision sustaining the employee's indefinite suspension, affirmed the administrative judge's decision not to adjudicate the employee's disability discrimination affirmative defense, and affirmed the initial decision dismissing the employee's involuntary retirement appeal for lack of jurisdiction.

[You can read the full case, *Putnam v. Department of Homeland Security*, 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.

GEICO'S GOOD STUFF

USDA, UNIVERSITY RESEARCHERS EXAMINE ALL-NATURAL MOSQUITO REPELLENTS

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

Scientists are researching ways to capture the secrets of a traditional folk remedy insect repellent used in Mississippi for over a century.

The scientists are with the U.S. Department of Agriculture, Agriculture Research Service and the University of Mississippi, which houses the [National Center for Natural Products Research](#).

The researchers are studying the American beautyberry plant (*Callicarpa americana*), the leaves of which can ward off insects like mosquitoes, ticks, and ants when rubbed on the skin, according to a [Science Daily article](#). Researchers are examining ways to extract the insect repellent chemicals from the plants.

"Traditional folklore remedies many times are found to lead nowhere following scientific research," Charles Cantrell, an ARS chemist told the *Science Daily*. "The beautyberry plant and its ability to repel mosquitoes is an exception. We actually identified naturally occurring chemicals in the plant responsible for this activity."

At the time of the publication of the *Science Daily* article in 2006, the researchers had filed a patent application for some of the chemicals they synthesized, but it was stressed that more research and testing was necessary before the chemicals could be brought to market. Environmental Protection Agency (EPA) review and developing a cost-effective manufacturing procedure also are barriers to cross before any products based on the research can be found in stores.

A [November 2013 article](#) from Ole Miss's School of Pharmacy highlighted how the research is being applied to protect deployed U.S. soldiers from insect and disease threats.

The National Center for Natural Products Research (NCNPR) is the nation's only university research center devoted to improving human health and agricultural productivity through the discovery, development and commercialization of pharmaceuticals and agrochemicals derived from plants, marine organisms and other natural products. University of Mississippi researchers at the center are studying hundreds of natural products that show promise to help treat a broad range of human illnesses, including cancer, AIDS, malaria, fungal infections, tuberculosis and emerging tropical diseases.

For more information about research at NCNPR, [click here](#).

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HEARD INSIDE THE BELTWAY

Agencies need to fix the supervisory selection process. The good news is that everything that needs to be done is within the control of agencies.

From the [ChiefHRO.com blog post](#) by former DHS Chief Human Capital Officer (CHCO) Jeff Neal – They Picked Who?? Selecting People to be Supervisors

WEEKLY LEADERSHIP REFLECTION

The decision-making style of outstanding executives may differ from others not in vigilance but in decisiveness.

From the paper [“Tell it like it is”: Groupthink, Decisiveness, and Decision-Making Among U.S. Federal Subcabinet Executives](#) by Harvard Kennedy School of Government's Steve Kelman, and Booz Allen Hamilton's Ronald Sanders, Gayatri Pandit, and Sarah Taylor