LACHANCE V. ERICKSON - THE SUPREME COURT OVERRULES WALSH AND ITS PROGENY

Employees who have been charged with misconduct cannot lie to their supervisors when questioned about that misconduct, according to the United States Supreme Court. In Lachance v. Erickson, et. al., 118 S. Ct. 753 (1998), the Supreme Court addressed the issue of whether the Due Process Clause of the Fifth Amendment to the Constitution or the Civil Service Reform Act, 5 United States Code (ìU.S.C.î) ß 1101 et. seq., preclude a Federal agency from disciplining an employee for making false statements to the agency regarding employment-related misconduct. In holding that they do not, the Court reversed a line of cases, including Walsh v. Veterans Affairs, 62 M.S.P.R. 586 (1994), which, since 1994, had been controlling how agencies deal with employees who make false statements during investigations/inquiries into employee misconduct.

Since Walsh was decided in 1994 until it was overruled this year, an Agency could not discipline an employee charged with misconduct for making false statements with regard to that misconduct. Walsh involved a GS-6 social services assistant with the Department of Veterans Affairs who was removed from the Federal service for engaging in an intimate sexual relationship with a patient, engaging in improper financial dealings with patients, and making false statements to the agency concerning the relationship. The Merit Systems Protection Board (ìMSPBî) upheld the first two charges but determined that the charge of making false statements was improper and mitigated the penalty to a 90-day suspension. The MSPB relied on the decision of the U.S. Court of Appeals for the Federal Circuit in Grubka v. Department of the Treasury, 858 F.2d 1570 (Fed. Cir. 1988), in which the court found that,

It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge.

In Walsh, the MSPB not only found the charge of making false statements to be an improper basis for discipline, but also held that false statements in response to an agency inquiry may not be considered by the agency in determining the appropriate penalty to impose.

The decision in Walsh was appealed to the U.S. Court of Appeals for the Federal Circuit. King v. Erickson, et. al., 89 F.3d 1575 (Fed. Cir. 1996). The Court of Appeals held that charging an employee with misconduct and also charging falsification in the course of the agencyís investigation of the misconduct deprives the employee of his/her right to due process as set forth in 5 U.S.C. ß 7513. The court distinguished between merely denying the charge and making up a false explanation. The court reasoned that an employee who was not permitted to deny a charge of misconduct might be coerced into admitting misconduct, whether guilty of the misconduct or not, in order to avoid more serious discipline, and therefore found such a denial not to be an actionable charge. Making up a false explanation, however, was found to constitute an actionable charge, independent of the charge of misconduct.

Subsequent to the King decision, the MSPB decided Kirkpatrick v. U.S. Postal Service, 74 M.S.P.R. 583 (1997). In Kirkpatrick, the MSPB once again addressed the issue of providing false information in an official investigation, this time in light of the decision in King. The MSPB found that the charge of providing false information in an official

investigation should have been sustained, citing the courtís decision in King that false statements made during an investigation could be charged as additional offenses of misconduct as long as they went beyond mere denials. Mr. Kirkpatrick was found to have removed aluminum scrap from a maintenance facility and sold it to a recycling plant, although, during the agency investigation, he stated that a vendor with a contract to remove scrap from the facility had taken the aluminum. Subsequently, the appellant admitted that he had lied about the vendor picking up the aluminum. The MSPB found that the appellantís false story was more that a mere denial, and therefore the charge of obstructing an investigation should not have been dismissed.

In Lachance, the Supreme Court addressed the rights of employees outlined in 5 U.S.C. ß 7513(b), and found that the section contains no right to falsely deny charged misconduct. The Court then examined the Fifth Amendment of the Constitution, and found that an employee may remain silent in the face of an agency investigation, if answering the question could expose the employee to criminal prosecution. However, the employee does not have the right to make false statements during the investigatory process.

The Supreme Court also addressed the issues raised by the Court of Appeals in King. The Court of Appeals distinguished Walsh and the other related cases from the Supreme Courtís decisions in perjury cases [cases which involve making false statements while under oath], on the basis that the employees in Walsh and the other related cases were not under oath. The Supreme Court rejected the argument, finding that although the employees could not be charged with perjury, they were actually charged with making false statements during agency investigations, a charge which does not require the employees to have been under oath when the statements were made. Another assertion of the Court of Appeals was that employees might be ìcoerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge.î The Supreme Court rejected this argument as being frivolous.

The outcome of the litigation on this issue, which culminated in the Supreme Courtís decision in Lachance, is that, when an agency is investigating possible misconduct by an employee and questions the employee about the misconduct, the employee may not provide false information, either in the form of an outright denial that the employee engaged in the misconduct, or in the form of a false explanation. To do so creates an independent charge of falsification for which the employee may be disciplined.