**Agencies can rein in employees when outside conduct hits home**

*This is the first in a two-part series on employee conduct.*

By Christine Cave  
*cyber*FEDS® Washington Bureau

WASHINGTON -- If an employee's misdeeds resonate in the workplace, agencies should not hesitate to take action. Even if the behavior is outside work, HR should work with the appropriate managers to address the issue.

The high-profile case of former **NASA** astronaut Lisa Nowak, who was charged in an alleged scheme to murder a perceived romantic rival, raises questions as to what agency officials can do if they fear an employee's conduct could hurt the agency's mission.

Since Nowak is a Navy officer, NASA terminated her detail. When determining an appropriate penalty for a civilian employee, you must consider the actual conduct, its impact on the agency, and the employee's position.

**Gary** **Koca**,vice president of **GRA Associates**, said the conduct does not have to be illegal to be actionable by an agency. If the employee's off-duty actions violate an agency policy, then it should be addressed. "In the Nowak case, it garnered so much public attention that it became a violation of the agency's conduct [policy]**.**"

How the incident is addressed depends on the impact on the agency, the employee's ability to do his job, and on how widely witnessed the incident was, Koca said.

For example, public drunkenness could warrant action.

"If the incident takes place in a small group and few coworkers witnessed it, then there are few consequences. However, if it is in a large group and could embarrass the agency," there could be more damaging consequences, Koca said. "If an employee is drunk publicly and no one knew who he worked for, it is a small incident. However, if the employee mentioned he was from a particular agency and this is how they act off duty, the agency would have grounds for action."

**Nexus**

An agency must establish a nexus between the outside conduct and the efficiency of the service as outlined in the Lloyd LaFollette Act,said **Marilyn Mattingly**, a former **Department of Navy** labor and employee relation specialist.

In cases of off-duty conduct, it becomes more difficult to prove the three nexus principles. The **Merit Systems Protection Board**, she said, asserts that agencies can meet that nexus when the off-duty misconduct affects:   
1. The employee's ability to do his job.   
2. A coworker's ability to do his job, such as a supervisor's ability to have confidence in the employee.   
3. The efficient accomplishment of the agency mission.

A good example, Mattingly said, is a federal agent with the **Immigration and Naturalization Service** who harbors an illegal alien family member. His behavior is opposed to the mission of the INS and interferes with his ability to do his job, Mattingly said.

**Egregious conduct**

In egregious misconduct cases such as murder, rape, arson, and spouse or child abuse, the board assumes a nexus, Mattingly said.

The MSPB most often will uphold a removal based on this presumption, but the employee can rebut the nexus by getting favorable testimony from fellow employees or personal character witnesses, she said.

Then there are incidents similar to the Nowak case, such as if someone harassed a coworker or beat up his supervisor while off duty.

In *Biddle v. Dept. of Treasury,* [63 MSPR 521](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=63+MSPR+521) (1994), an appellant was fired for two charges, one of which was sexual harassment.

In this case, an employee began stalking a coworker at her home after she broke up with him. The employee was removed from the agency, and the removal was sustained on appeal, she said.

**Criminal activity**

If an employee is indicted for a crime and could be imprisoned, the agency has to decide whether to allow him to continue working. If the employee is out on bail for an alleged felony, the agency can put the employee on administrative leave until there is an indictment from a grand jury, Mattingly said.

Once indicted, the agency must proceed with adverse action proceedings in order to put an employee on an indefinite suspension without pay. If the jury reaches a guilty verdict or if the employee pleads to a lesser offense, the agency can then take action to remove the employee. However, if the employee is found not guilty, the agency must place the employee back at work immediately.

If the employee is found guilty, the charge in the removal document must match the exact charge so that the criminal conviction papers prove the charge in the event of an appeal, Mattingly said.

If the employee goes to jail for criminal behavior, the easiest thing for the agency to do is to remove him for absence without leave. When this happens, the agency does not have to grant leave as long as the agency establishes that it needs the employee at work.

*Post your comments in* ***cyber*** **FEDS®** [Online Conferences](http://webboard2.lrp.com/~cyberFEDS) .

**March 19, 2007**

Copyright 2007© LRP Publications