**Off-Duty Misconduct**

**Overview**

Cases involving off-duty misconduct often involve unusual facts that arise in a specific context. The particular circumstances and context may be so distinctive that there are no closely analogous cases in which similar action has been taken. However, a lack of direct precedent for the action taken in a particular case does not prohibit the agency from taking adverse action if it is consistent with general principles of federal employment law. The most important aspect of taking adverse actions against employees who commit off-duty misconduct is proving a nexus between the specific misconduct and the efficiency of the service.

**Key Points**

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert, Peter Broida's, treatise *A Guide to Merit Systems Protection Board Law and Practice* (Dewey Publishing, Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

**Nexus requirement**

* Under 5 USC 7513 (a), an agency can take an adverse action against a federal employee "for such cause as will promote the efficiency of the service." There must be a nexus between the employee's misconduct and the efficiency of the service.
* The MSPB generally recognizes three independent means by which an agency may show a nexus linking an employee's off-duty misconduct with the efficiency of the service: 1) a rebuttable presumption of nexus that may arise in "certain egregious circumstances" based on the nature and gravity of the misconduct; 2) a showing by preponderant evidence that the misconduct affects the job performance of an employee or his coworkers, or management's trust and confidence in the employee's job performance; and 3) a showing by preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. *Kruger, et al. v. Department of Justice and Office of Personnel Management*, 87 FMSR 5004, 32 MSPR 71 (MSPB 1987).
* ***Broida:*** The nature of the particular job as much as the conduct allegedly justifying the action has a bearing on whether the necessary relationship obtains. The question thus becomes whether the asserted grounds for the adverse action, if found supported by evidence, would directly relate either to the employee's ability to perform approved tasks or to the agency's ability to fulfill its assigned mission. [*Broida Guide to MSPB Law*: Concept of Nexus](http://www.cyberfeds.com/CF3/servlet/CFSearchAll?searchstring=%7BConcept+of+Nexus%7D+within+doctitle&searchscreen=%2FCF3%2Fadvmspbsearch.jsp&destination=index.jsp%3Ftopic%3DMain%26results%3Dyes&db=BROIDA_MSPB&thesaurus=yes&sortorder=document&results=20&doctype=&restrictors=doctype&topic=Main).
* An agency must articulate a meaningful standard as to when private dishonesty rises to the level of misconduct that adversely affects the "efficiency of the service." Using only "clearly dishonest" as a standard inevitably risks arbitrary results, as the question would turn on the MSPB's subjective moral compass. *Doe v. Department of Justice*, 109 LRP 26438(Fed. Cir. 2009).
* In defending an indefinite suspension, an agency must show that there is a nexus between criminal charges against the employee and the efficiency of the service. The agency cannot speculate that the employee poses a danger to the workplace community or that his presence at the workplace would be disruptive. *Reed v. Department of the Army*, 108 LRP 49796 (Fed. Cir. 2008, *unpublished*).
* There may be a nexus between an employee's misconduct and the efficiency of the service even in the absence of evidence of a direct effect on the employee's job performance. *Stevenson v. Department of Justice*, 106 LRP 51550 (Fed. Cir. 2006, *unpublished*).
* Agencies that discipline employees for off-duty misconduct, particularly associational, must pay particular attention to the nexus requirement. They need to balance their policy objectives against the imposition of strict codes of conduct that permit governmental intrusions into the private activities of federal employees. *James v. Dale*, 104 LRP 4027, 355 F.3d 1375 (Fed. Cir. 2004).
* Although off-duty sexual misconduct, particularly involving minors, is usually egregious enough to presume the existence of a nexus, the underlying facts must be considered. When the misconduct involved nothing more than a low-grade criminal offense, the nexus could not be presumed. *Moten v. U.S. Postal Service*, 89 FMSR 5413, 42 MSPR 282 (MSPB 1989).

**Proximity to workplace**

* ***Broida:*** Nexus is established if an altercation between employees starts on duty and continues off duty. The agency has a right and responsibility to maintain discipline and order among its employees. [*Broida Guide to MSPB Law*: Off-Duty Actions on Agency Premises](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=+Subsection+05:+Off-Duty+Actions+on+Agency+Premises).
* There was substantial evidence of a nexus between the employee's off-duty conduct and the efficiency of the service where the incident happened at her employer's facility and involved a supervisor. *King v. Department of Veterans Affairs*, 107 LRP 53730 (Fed. Cir. 2007, *unpublished*).
* The agency demonstrated the required nexus when the appellant's misconduct against his fellow employee, in front of many coworkers at a union-sanctioned event, had a chilling effect upon relationships at the workplace, which would adversely impact the agency's ability to fulfill its mission with proper efficiency. *White v. U.S. Postal Service*, 106 LRP 23490 (Fed. Cir. 2006, *unpublished*).

**Law enforcement personnel**

* ***Broida:*** Agencies may challenge the misdeeds of a law enforcement officer because that conduct may be discovered by defense counsel in criminal proceedings and be used to impeach the officer's testimony. [*Broida Guide to MSPB Law*: Law Enforcement Officers; *Giglio* Impairment](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Subsection+10:+Conduct+Contrary+to+Agency+Mission,+Part+C:+Law+Enforcement+Officers;+Giglio+Impairment) .
* ***Broida:*** Off-duty actions of a law enforcement officer that interfere with another federal agency's criminal investigation and that disrupt relations between the employing agency and the other investigative agency support a finding of nexus. [*Broida Guide to MSPB Law*: Law Enforcement Officers; *Giglio* Impairment](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Subsection+10:+Conduct+Contrary+to+Agency+Mission,+Part+C:+Law+Enforcement+Officers;+Giglio+Impairment) .
* When an employee of the Bureau of Prisons was involved in a traffic accident and was charged with driving under the influence of alcohol or a controlled substance, the MSPB found a sufficient nexus based on the nature of the misconduct and the nature of the agency's mission of law enforcement. *Stevenson v. Department of Justice*, 106 LRP 51550 (Fed. Cir. 2006, *unpublished*).
* A nexus existed between a deputy law enforcement officer's alleged off-duty misconduct and the efficiency of the service when the LEO allegedly threw a vase at his then wife, threw her down on the floor, choked her, pointed a gun at her, and then pointed a gun at himself. *Carlton v. Department of Justice*, 104 LRP 14987, 95 MSPR 633 (MSPB 2004).
* The Immigration and Naturalization Service established the required nexus when a border patrol agent associated with a known or suspected law violator in violation of the Border Patrol Handbook. The Border Patrol is trusted to protect our nation's borders from, among other things, the influx of illegal drugs. Associations between border patrol agents and suspected criminals, especially those suspected of felony drug offenses, undermine the public's confidence in the agency's ability to fulfill its mission. *James v. Dale*, 104 LRP 4027, 355 F.3d 1375 (Fed. Cir. 2004).

**Domestic issues**

* The Department of Veterans Affairs established a nexus between an employee's violent off-duty misconduct and the VA's performance of its functions when it removed him after a domestic violence incident that involved the employee shooting the daughter of his former girlfriend. *Banks, Jr. v. Department of Veterans Affairs*, 102 LRP 30985 (Fed. Cir. 2001, *unpublished*).
* The Federal Circuit upheld the removal of an employee on a charge of "improper personal conduct having an adverse effect on the efficiency of the service." The employee engaged in an adulterous relationship with the wife of a Marine major assigned to a unit supported by the employee while the major was deployed overseas. *Brown v. Department of the Navy*, 101 FMSR 7002, 229 F.3d 1356 (Fed. Cir. 2000).

**Supervisors**

* A supervisor, while off duty, switched the price tags on merchandise, attempting to buy the goods at a reduced price. This off-duty misconduct compromised the agency's trust in her ability to function as a supervisor. *Stuhlmacher v. U.S. Postal Service*, 101 FMSR 5347, 89 MSPR 272 (MSPB 2001).
* ***Broida:*** *Fouquet v. Department of Agriculture*, 99 FMSR 5283, 82 MSPR 548 (MSPB 1999), provides an example of a nexus determination based on the appellant's position of trust in an agency (she held a high-level management position) coupled with off-duty conduct involving violations of trust. [*Broida Guide to MSPB Law*: Off-Duty Offenses](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Section+B:+Specific+Nexus+Determinations,+Subsection+07:+Fraud+and+Theft,+Part+A:+%20Off-Duty+Offenses).

**Issues involving minors**

* The MSPB did not sustain the removal of a postal carrier who pleaded guilty to having carnal knowledge of a 14 year old girl. The crime was a low-grade felony that did not involve violence or force, the carrier did not meet the victim while on the job, and the agency failed to prove he had unsupervised access to children on his route. *Moten v. U.S. Postal Service*, 89 FMSR 5413, 42 MSPR 282 (MSPB 1989).
* An employee's misconduct -- having an off-duty sexual encounter with a 12-year-old boy -- was deemed sufficiently egregious to warrant a rebuttable presumption of nexus. The MSPB found a direct relationship between the misconduct and the agency's mission and the showing that his supervisors had lost trust and confidence in him. *Allred v. Department of Health & Human Services,* 86 FMSR 7028, 786 F.2d 1128 (Fed. Cir. 1986).
* The agency was justified in removing four employees based on violations of the minimum standards of character under the Indian Child Protection and Family Violence Prevention Act, as they were either convicted of or pleaded guilty or no contest to a crime that was classified as a crime against persons. *Johnson, et al. v. Department of Health and Human Services*, 100 FMSR 5406, 86 MSPR 501 (MSPB 2000).