JUDGEMENT CALLS

FEDS AND THE COURTS

Actions by the president and Congress affecting the federal civil service and federal benefits have long been the focus of federal employees' and retirees' interest and scrutiny. But there is, of course, a third branch of government that matters a great deal when it comes to the federal civil service: the federal court system.

Court cases involving federal employees and their agencies are as old as the country. For example, in 1803, in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, the U.S. Supreme Court issued a decision establishing the principle of judicial review in the United States, meaning that American courts have the power to strike down congressional laws, statutes, and some government actions that contravene the Constitution. The Court held that newly elected President Thomas Jefferson was wrong to prevent William Marbury, a civil servant appointed by outgoing political President John Adams, a Jefferson rival, from taking office as a justice of the peace in the District of Columbia.

At present, a highly assertive administration is taking actions that interpret the powers of the executive branch broadly in a number of areas, including actions that affect employee rights, leading to conflicts with some in Congress and some employee groups who assert that the moves diminish and/or bypass statutory worker protections.

"There is an increasing effort by the Trump administration to remove the employment rights of federal employees across the board," says John P. Mahoney of John P. Mahoney, Esq., Attorneys at Law, a Washington, D.C.-based federal government employment lawyer and former federal administrative judge who has represented many federal employees in adverse action proceedings. "There is a struggle right now between the executive branch, the judiciary and Congress over the direction of federal employment law."

And some say there are likely more court challenges for them to follow, given Trump administration successes in appointing new judges and Supreme Court justices who may look favorably on administration actions and interpretations of its powers and laws on the books.

"I think it is certainly true that the administration wants to appoint judges who are skeptical of the administrative state," says David Eric Lewis, a professor of political science at Vanderbilt University. "There is a dislike of regulations, bureaucracy and enforcement and a skepticism of delegations of authority to agencies. I think the administration is willing to break the machinery of government to stop it from doing things they don't like."

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However, the status quo has proven resilient in a number of cases. According to a Brookings Institution tally of court challenges to Trump-era deregulatory rules through early March 2019, the administration has prevailed in two cases and either lost or abandoned its position in 32 cases. The Brookings Institution analysis said that this "win rate" is far below the normal agency win rate, which averaged 69 percent across 11 studies.

The reason for this, says Debra D'Agostino, a partner at Washington, D.C.-based law firm, the Federal Practice Group, is that legislation and due process protects the jobs and benefits of federal employees. "The bottom line is that the Civil Service Reform Act is still good law and agencies have to comply with it, although we fear there will eventually be a replacement that doesn't provide as much protection to the civil service workers," D'Agostino says. "The Supreme Court also long ago clearly established that the Constitution requires due process before federal employee employment or benefits are removed, finding that federal employees have a property interest in their jobs.

EXECUTIVE ORDERS CHALLENGES

Exhibit A in the current court battles over federal civil service protections is a federal court challenge to three executive orders signed in May 2018 under which President Trump made it easier to fire federal workers and reduce the bargaining authority of federal employee unions. On August 24, 2018, U.S. District Court Judge Ketanji Brown Jackson struck down many of their provisions, finding that nine of the provisions in the three executive orders conflicted with the original intention Congress had in drafting and passing the Civil Service Reform Act and Federal Service Labor-Management Relations Statute back in 1978. However, the Justice Department appealed that court decision to the U.S. Court of Appeals for the D.C. Circuit, where in early April it remained pending.

A similar reform enacted by Wisconsin's state legislature ended up in state court. A Wisconsin statute enacted in 2011, Wisconsin Act 10, dramatically reduced civil service protections for state employees in a variety of areas, including collective bargaining, compensation, retirement, health insurance, and the sick leave of Wisconsin public-sector employees. That law was challenged and ultimately was ruled to be constitutional by the Wisconsin Supreme Court in July 2014, after three years of litigation, in *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014), Mahoney notes.

LIMITS TO COURT VICTORIES

In many cases, court legal victories for federal employees can be temporary ones. Even if they are not overturned on appeal, they can sometimes be circumvented. Congress can just pass another statute, or the president can just issue another executive order that steers clear of the precise practices that a court found to be problematic.

For example, despite the District Court Executive Orders' decision, federal agencies are nonetheless seeking to curtail worker protections, in part by insisting upon renegotiating provisions that in previous years had been included in collective bargaining agreements and would not have been controversial or by refusing to negotiate on key points, says Sarah E. Suszczyk, deputy general counsel of the National Association of Government Employees, a labor union, and co-chair of the Federal Workers Alliance.

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"We are seeing four to five times the number of [bargaining] contracts being renegotiated by the administration at any given point in the year because agencies are choosing to open them up rather than renew them," Suszczyk says. "[The Office of Personnel Management] is calling upon agencies to use disapproved sections of the executive orders as bargaining positions in negotiations. We are seeing agencies seeking to limit what they will negotiate over and attempt to limit employees' rights to challenge performance-based adverse actions, raise grievances and have unions able to represent them."

Agencies also appear to be moving faster to discipline employees for alleged misconduct or sub-standard performance, some say. "I think we are seeing more efforts by agencies to accelerate progressive discipline," says Greg T. Rinckey, a founding partner at law firm Tully Rinckey, PLLC. "I think cases are moving from a letter of reprimand to a proposed suspension faster than they did in the past. That is why it is important to realize that if you are a federal employee and you get a letter of reprimand or a notice proposing a brief, say three-day, suspension, the agency is progressively disciplining you, and you need to quickly speak to a union representative or to a lawyer. If you get a letter of reprimand and you are able to successfully counter that, you can knock it out. But next could come suspension and removal. After each level of discipline takes place, it is harder to knock out actions against you because you have strikes against you."

A July 2013 *NARFE Magazine* article described how federal employees can challenge adverse agency actions. It notes that there are prescribed deadlines for certain actions that employees must take to pursue their claims. In some cases, since that article's publication, those deadlines have been accelerated by new agency procedures and a 2017 federal statute applicable to Department of Veterans Affairs (VA) employees, but which D'Agostino said appears to be a test case before the same changes are implemented across the federal government.

The statute shortened the appeal time for VA employees protesting their dismissals and expanded VA leadership's ability to remove most workers, including senior executives, for misconduct or poor performance.

"The law had several reforms that make it really hard for VA employees to defend themselves against allegations of misconduct or poor performance," says D'Agostino. "Data shows suspensions and demotions are down, and firings are up."

FEDERAL EMPLOYEE GRIEVANCES

Many federal employees have probably never heard of the Merit Systems Protection Board (MSPB). However, it plays an outsized role in determining cases affecting federal employee grievances, such as discrimination and adverse actions. It is a quasi-judicial federal agency that functions in large part like a court, with administrative judges deciding cases that can be appealed to a three-person Board.

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A major problem in federal employment law is that the MSPB has lacked a quorum of presidential-appointed members for the entire duration of the Trump administration. Consequently, petitions for review in thousands of employee appeals are stayed and backlogged, with more than 1,900 petitions for review pending.

"Without confirmed MSPB members, federal employee termination appeals can drag on for years while the affected former employees remain unemployable," Mahoney says. "A lack of a MSPB quorum undermines the constitutional and statutory due process rights of federal employees to be able to defend against proposed disciplinary actions that are unsupported by sufficient evidence of misconduct or unacceptable performance, are unreasonably harsh in terms of their penalties, and that constitute prohibited personnel actions (PPP), such as EEO

discrimination, retaliation for political affiliation, and whistleblower retaliation," Mahoney added.

In addition, given performance metrics, MSPB administrative judges are under great pressure to process cases more rapidly than in the past leading to less time extensions for federal employees, Rinckey says. Further, now many agencies cannot offer employees accused of misconduct the option to leave their agency with a clean record if they agree to resign, a compromise in adjudications before the MSPB that was acceptable to both sides in some situations, Rinckey says.

That leaves federal employees with a grievance with unenviable choices. They can either wait in a queue in hopes that the quorum will be restored at the body and the backlog rapidly whittled down, or they can bring an action in federal court. Federal court, however, is a more costly venue and one where self-representation is difficult and perilous for those unfamiliar with court rules, Mahoney and Rinckey note.

FEDERAL BENEFITS

Federal pensions are increasingly out of step with the private sector, which has largely eliminated such defined benefit plans. Many executive and legislative branch proposals center around reducing such benefits.

KEY FEDERAL DECISIONS AFFECTING FEDERAL EMPLOYEES

1. ***Cleveland Board of Education v. Loudermill,*** 470 U.S. 532 (1985): Recognizes that tenured government employees have a Constitutionally protected property right to their continued employment that cannot be taken away without due process.

2. ***McDonnell Douglas Corp. v. Green,*** 411 U.S. 792 (1973): Sets up the typical burden shifting analysis in an EEO complaint, *i.e.*, the employee has the initial burden of establishing a prima facie case; the agency may rebut that case by articulating a legitimate nondiscriminatory reason for the challenged personnel action; and the employee may then attempt to establish that the "legitimate reason" was pretextual.

3. ***Navy v. Egan,*** 484 U.S. 518 (1988): Recognizes that federal security clearances are privileges, not rights, in that they can be granted and revoked solely by the president in interests of national security, and that not even EEO discrimination is an affirmative defense to the revocation of a security clearance.

4. ***Douglas v. Veterans Administration,*** 5 M.S.P.R. 280 (1981): Holds that the MSPB will review an agency-imposed penalty only to determine if the agency considered all the relevant mitigating factors and exercised management discretion within tolerable limits of reasonableness.

5. ***Meritor Savings Bank, FSB v. Vinson,*** 477 U.S. 57 (1986) and ***Faragher v. Boca Raton,*** 524 U.S. 775 (1998): Recognizes that harassment is actionable under the Civil Rights Acts.

6. ***NLRB v. Weingarten, Inc.,*** 420 U.S. 251 (1975): Recognizes the public policy that supports the rights of unionized employees to be represented by a union representative during employer investigations likely to result in discipline.

7. ***Garrity v. New Jersey,*** 385 U.S. 493 (1967): Recognizes that an employee's refusal to answer questions in a criminal investigation may not be used against him in taking disciplinary action.

8. ***Kalkines v. United States,*** 473 F.2d 1391 (Ct. Cl. 1973): Requires employee to answer all employer questions in a purely administrative, noncriminal investigation or when criminal prosecution is declined.

9. ***Giglio v. United States,*** 405 U.S. 150 (1972): Requires that investigative agencies turn over to prosecutors potential impeachment evidence with respect to the federal law enforcement agents involved in the case.

10. ***Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics,*** 403 U.S. 388 (1971): Finds immunity from tort liability for federal officials acting within the scope of their employment.

— JOHN MAHONEY

For many types of statutory benefits actions that could harm federal rights, legal challenges are unlikely to be successful. For example, few doubt Congress can lawfully decide to make new federal employees pay more toward their annuities, as did federal legislation signed into law by President Obama in 2012 that was not challenged in court. Whether other presidential or statutory actions to reduce federal employee and annuitant benefits can successfully be challenged in court could depend on how benefits were reduced and for which classes of employees.

A more challenging set of scenarios, moving along the continuum of more difficult to dispute to potentially more actionable, is whether federal law could require existing federal employees to contribute more to their federal annuities prospectively, such as increasing the employee's contribution so that employers and employees each pay half of the normal cost and eliminate the FERS supplement benefit for those who retire prior to 62; requiring increased contributions for past periods for the same annuity benefits; or reducing benefits under existing pensions already promised, such as by, as proposed by the current administration, eliminating the cost-of-living adjustment for FERS retirees. This kind of action essentially would reduce existing pension payouts to annuitants. In some cases, bankruptcy courts have allowed states and cities to set aside pension commitments. Most observers, however, think this would be politically unlikely, particularly since statutory action would be required but control of the two houses of Congress is now divided between the two major parties, and these proposals failed to advance when Congress and the White House was entirely controlled by one party.

AGENCY OPERATIONS AND FUNCTIONS

One contested practice that is appearing before the courts is that there are efforts to restructure federal agencies or challenge agency functioning. On January 14, 2019, the U.S. Supreme Court allowed the Consumer Financial Protection Bureau (CFPB) to continue operating by refusing to hear a challenge that had argued the agency, which was set up after the 2008 financial collapse, was unconstitutional because it was not accountable to the president. However, other cases challenging the CFPB's structure are winding their way through lower courts and may eventually be decided by the Supreme Court on the merits, Mahoney says.

Agency policy shifts are common between presidential administrations. Some question whether a line can be breached where an agency is effectively being stifled from achieving its statutorily established purpose or not following statutory requirements, as critics of the administration have alleged with respect to Environmental Protection Agency (EPA) and the CFPB, given that Trump Administration policy shifts have defined their mandates more narrowly than in the past under the Trump Administration. "We have never seen people at the helm of agencies that have vigorously opposed them," D'Agostino notes. Former EPA Administrator Scott Pruitt, for example, brought lawsuits against the EPA on behalf of states before he was appointed to be secretary of that agency. A number of the successful challenges of Trump's deregulatory efforts tallied above by the Brookings Institution, as noted earlier, reflected such assertions.

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At the employee level, according to Mahoney, under the Civil Service Reform Act, it is a prohibited personnel practice for the federal government to take a personnel action against a federal employee for partisan political reasons. See 5 U.S.C. §§ 2302(b)(1)(E), (3).

Some lawsuits have also targeted alleged failure of federal agency to adequately protect federal employees. The American Federation of Government Employees and the National Treasury Employees Union filed lawsuits over harm to their members and other federal employees resulting from OPM's 2015 data breaches. In November, the two unions argued before the D.C. Circuit Court of Appeals that their lawsuits against OPM over the data breaches were wrongfully dismissed by a lower court on grounds they lacked sufficient standing to bring the lawsuits.

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