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# RIGHTS ACCORDED FEDERAL EMPLOYEES AGAINST WHOM ADVERSE PERSONNEL ACTIONS ARE TAKEN

*William P. Berzak\**

## Introduction

This article will briefly trace the development of procedures accorded federal employees against whom removal or other adverse action is taken by agencies and the channels available for appealing from such actions.<sup>1</sup>

The author hopes that this article will stimulate the study and understanding of the many facets and ramifications involved in personnel actions of the federal government, our country's largest employer.<sup>2</sup> The adverse action procedures and appellate processes represent an important part of the total federal personnel system. This is necessarily so, since the procedures and appellate processes have a significant impact on the security, morale, and well-being of employees, which in turn have an important bearing on how well our Government functions. It follows that adverse action procedures and the appellate processes are of vital concern in the area of labor-management relations which have had and will continue to have an increasingly significant role in shaping policies and procedures affecting the conditions of employment. Also, in addition to the Civil Service Commission, management, and unions, as will become evident, the President, Congress, and the courts have added direction and thrust to the development of our adverse action and appellate systems. It goes without saying that each employee should be accorded all of the rights to which he is entitled under the Constitution, as well as under the laws and civil service regulations. Since our Government operates on the basis of lawful authority stemming from the same Constitution which protects employees' rights, there is a need, within the framework of the Constitution, to balance competing rights of our Government which must carry out its responsibilities in the public interest, and its employees. A sensible accommodation to the rights of employees and the rights of the Government as an employer calls for maturity, good judgment, tolerance and restraint.

## The Lloyd-LaFollette Act

Generally speaking, federal employees had very little protection from arbitrary

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1 Adverse actions referred to herein are discharge, suspension for more than thirty days, furlough without pay, and reduction in rank or compensation. 5 C.F.R. Part 752-B (1970) contains the procedures governing adverse actions. Federal Personnel Manual Supplement 752-1, ADVERSE ACTIONS BY AGENCIES, formerly, ADVERSE ACTION-LAW AND REGULATIONS, ANNOTATED contains a detailed analysis of the law and regulations pertaining to adverse actions. See also Personnel Methods Series No. 18, ADVERSE ACTION APPEALS PROCEDURE, for sale by the Superintendent of Documents, U. S. Government Printing Office, Washington, D.C.

2 At the end of August, 1971, worldwide federal civilian employment numbered 2,881,247. BUREAU OF MANPOWER INFORMATION SYSTEMS, U. S. CIVIL SERVICE COMMISSION, FEDERAL CIVILIAN MANPOWER STATISTICS (October, 1971).

rary personnel actions prior to the passage of the Lloyd-LaFollette Act.<sup>3</sup> Although Civil Service Rule 8 promulgated by President William McKinley on July 27, 1897, provided that removals from the competitive classified service should not be made except for just cause and for reasons given in writing, employees had no administrative appeal rights from actions taken in violation of the Rule. Moreover, courts were not prone to grant relief in the absence of constitutional or statutory restriction on the power of removal. As noted by the Civil Service Commission in the Twenty-ninth Report for the fiscal year 1912 (ended June 30, 1912), courts declined to take cognizance of Civil Service Rule 8<sup>4</sup> on the ground that the assessment of a penalty for violation of the Rule rested solely with the President. In fact, the United States Supreme Court dismissed a writ of error on December 10, 1906, on the ground that it did not have jurisdiction to review the judgment of the Court of Appeals of the District of Columbia where a government employee did not deny the authority of the President or his representative to dismiss him, but only contended that this dismissal was illegal because certain rules and regulations of the civil service were not observed.<sup>5</sup> However, the Lloyd-LaFollette Act appears to have set the stage for increased emphasis on both procedural and substantive rights of employees.

Section 6 of the Lloyd-LaFollette Act provided "[t]hat no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; . . ."<sup>6</sup>

The Lloyd-LaFollette Act contained no provisions for the issuance of regulations, enforcement, or acceptance of appeals by the Civil Service Commission. Although employees were not granted a right of administrative appeal under the Act, the statutory restriction which the Act placed on the power of removal afforded employees a legal basis for appealing arbitrary removal to the courts.

Shortly after the Lloyd-LaFollette Act was enacted, the Post Office Department asked the Civil Service Commission whether Section 6 of the Act applied to employees who were serving a probationary period. The Commission determined "that probationary period required by law preliminary to permanent appointment is an essential part of the examinations held by the Commission to ascertain the fitness of applicants, . . . and a probationer may be separated from the service at any time during or at the expiration of the probationary period without further formality than a written notification setting forth the reasons in full."<sup>7</sup> The Commission's determination that Section 6 of the Lloyd-

3 Act of August 24, 1912, 37 Stat. 555, as amended, 5 U.S.C. §§ 7101, 7102, 7501.

4 UNITED STATES CIVIL SERVICE COMMISSION, ANNUAL REPORT 22 (1912).

5 United States *ex rel.* Taylor v. Taft, 203 U.S. 461 (1906).

6 Pub. L. No. 80-623 (June 10, 1948) extended coverage of this section to suspension of employees in the classified service.

7 Minutes of the United States Civil Service Commission, March 28, 1913.

LaFollette Act was not applicable was confirmed by subsequent court decisions.<sup>8</sup>

Section 6 of the Act also provided "that membership in any society, association, club or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike . . . against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said postal service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service . . . ." This provision is an important milestone in the development and expansion of unions in the federal government, which have been growing at an accelerated pace in recent years, and whose impact will be increasingly felt not only in areas of adverse actions and employee appeals, but also in many facets of personnel administration and employment practices in which employees have a keen interest.<sup>9</sup>

Subsequent to the passage of the Lloyd-LaFollette Act, the Attorney General of the United States stated that a person in the classified civil service cannot be deprived of his status except by removal as provided in Section 6 of the Act, and "[i]t is for the head of a department and not the Civil Service Commission to determine when there exists proper cause for removal."<sup>10</sup> As previously indicated, the Lloyd-LaFollette Act contained no provisions for the issuance of regulations, enforcement, or acceptance of appeals by the Commission.

#### Veterans' Preference Act of 1944

The Veterans' Preference Act of 1944<sup>11</sup> granted preference employees a substantial degree of protection against arbitrary or erroneous adverse actions. Section 14<sup>12</sup> of the Act provided that "[n]o permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service . . . shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation . . . except for such cause as will promote the efficiency of the service and for reasons given in writing . . . ." Section 14 also provided for ". . . at least thirty days' advance written notice . . . , stating any and all reasons, specifically and in detail, for any such proposed action, . . . a reasonable time for answering the same personally and

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8 United States *ex rel.* *Kenny v. Morgenthau*, (D.D.C. Feb. 28, 1937) (unreported). See also *Nadelhaft v. United States*, 131 F. Supp. 930 (Ct. Cl. 1955); *Bander v. United States*, 158 F. Supp. 564 (Ct. Cl. 1958).

9 "It is clear that unions are here to stay, to grow, to become involved in more and more public personnel activities. Their influence is exerted now in many different ways but will increasingly be felt through formalized collective bargaining ending in written agreements . . ." Stanley, *What Are Unions Doing to Merit Systems?* 108 PUBLIC PERSONNEL REV. (April 1970).

10 30 OP. ATT'Y GEN. 79 (1913).

11 Act of June 27, 1944, 58 Stat. 387.

12 5 U.S.C. §§ 7511, 7512, 7701 (1964).

in writing, and for furnishing affidavits in support of answer." Preference eligibles were specifically granted a right of appeal to the Civil Service Commission from an adverse decision of an administrative officer so acting.

Section 14 also provided that "such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative. . . ." <sup>13</sup> With respect to the provision for "a personal appearance, or an appearance through a designated representative," the Commission has in fact provided for a right to a hearing (granted at the initial appellate level of a two-level appellate system) since it first issued regulations promulgating the provisions of Section 14 of the Veterans' Preference Act. As might be expected, since the appeals were limited to preference eligibles, veterans' organizations generally represented those who appealed. Attorneys were seldom used and union representation was practically unknown. There was a decided shift in the practice and custom with respect to the use of representatives by the appellants subsequent to the issuance of Executive Orders 10987 and 10988 which will be discussed in some detail below.

Neither the Lloyd-LaFollette Act nor the Veterans' Preference Act as originally enacted contained a provision to pay an employee for time lost from work as a result of an erroneous suspension or separation. In its 62nd Annual Report for the Fiscal Year 1945, ending June 30, 1945, the Civil Service Commission recommended legislation to correct this shortcoming:

Where a veteran's appeal of his dismissal is upheld by the Civil Service Commission, and the head of the agency, acting on the recommendation of the Commission, restores the veteran to his position, the head of the agency should have the authority to compensate the veteran for the time lost from work. Also, where a veteran or a nonveteran employee is suspended by the head of the agency pending action on charges, and the employee is later restored to his position, the head of the agency should have the right to authorize back pay for the time lost.<sup>14</sup>

The Commission's recommended legislation came to fruition in Public Law 623, approved June 10, 1948, which amended Section 6 of the Lloyd-LaFollette Act to provide that any person removed or suspended without pay under Section 6 of the Act,

who, after filing a written answer to the charges as provided under such

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<sup>13</sup> Pub. L. No. 80-325 (Aug. 4, 1947) amended Section 14 of the Veterans' Preference Act to provide that ". . . it shall be mandatory for such administrative officer to take such correction action as the Commission finally recommends." A companion bill, Pub. L. No. 80-741 (June 22, 1948), included the following provision in Section 19 of the Veterans' Preference Act: "[a]ny recommendation by the Civil Service Commission, submitted to any Federal agency, on the basis of the appeal of any preference eligible employee or former employee, shall be complied with by such agency."

<sup>14</sup> UNITED STATES CIVIL SERVICE COMMISSION, ANNUAL REPORT 5 (1945).

subsection or after any further appeal to proper authority after receipt of an adverse decision on the answer, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period.

Public Law 623 also provided that:

Any person who is discharged, suspended, or furloughed without pay, under section 14 of the Veterans' Preference Act of 1944, as amended, who, after answering the reasons advanced for such discharge, suspension, or furlough or after an appeal to the Civil Service Commission, as provided under such section, is reinstated or restored to duty on the ground that such discharge, suspension, or furlough was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such discharge, suspension, or furlough for the period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. . . .

The provisions cited above added immeasurably to the morale and security of preference eligibles covered under Section 14 of the Veterans' Preference Act, as amended, and to the employees covered under Section 6 of the Lloyd-LaFollette Act, who were removed or otherwise disciplined in violation of the pertinent sections of the Acts.

As was true with respect to Section 6 of the Lloyd-LaFollette Act, employees serving a probationary period were not covered under Section 14 of the Veterans' Preference Act.

#### Impact of Executive Orders 10987 and 10988 on Adverse Action Procedures and Administrative Appeals

As is apparent from the above, nonpreference employees were accorded no rights under the Veterans' Preference Act. This disparity in treatment ended with the Commission's implementation of Section 14 of Executive Order 10988 dated January 17, 1962, which provided for the extension to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligibles under Section 14 of the Veterans' Preference Act of 1944, as amended. It further provided employees in the competitive service with the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be processed in an identical manner to that provided for appeals under Section 14 of the Veterans' Preference Act. The Commission's regulations equalizing the procedural protections and appeal rights of nonpreference and preference employees in adverse action cases became effective as to all adverse actions commenced by issuance of a notification of a proposed action on and after July 1, 1962.

In addition to giving nonpreference employees in the competitive service

rights identical to those given to preference eligibles under Section 14 of the Veterans' Preference Act, Executive Order 10988 reflected recognition of the fact that participation of employees in the formulation and implementation of personnel policies affecting them contributes to the effective conduct of public business. The Order provided the encouragement and the groundwork for dynamic growth of unionism in the federal service.<sup>15</sup>

The implementation of Section 14 of Executive Order 10988 gave coverage in adverse action procedures and appeal rights to approximately one million nonpreference employees. As union membership increased, more employees turned to unions for guidance and representation in adverse action cases and appeals.<sup>16</sup>

In light of better pay and other benefits accruing to federal employees in recent years making federal jobs more desirable than previously, there has been an upward trend in the number of appeals to the Commission from agency adverse actions, reaching a record number during fiscal year 1971.<sup>17</sup>

Executive Order 10987, dated January 17, 1962, directed the head of each department and agency, with certain exceptions, to establish a system for the reconsideration of administrative decisions to take adverse action against employees. The Executive Order was not applicable to the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Atomic Energy Commission, and the Tennessee Valley Authority. The Civil

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15 Section 1(a) of Executive Order 10988 reads as follows: "Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity. Except as hereinafter expressly provided, the freedom of such employees to assist any employee organization shall be recognized as extending to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress or other appropriate authority. The head of each executive department and agency (hereinafter referred to as 'agency') shall take such action, consistent with law, as may be required in order to assure that employees in the agency are apprised of the rights described in this section, and that no interference, restraint, coercion or discrimination is practiced within such agency to encourage or discourage membership in any employee organization." See also Executive Order 11491, Labor-Management Relations in the Federal Service, dated October 29, 1969, and Executive Order 11616, Executive Order 11491 as amended dated August 26, 1971.

16 According to the latest annual recognitions and agreements census compiled by CSC's Office of Labor-Management Relations, labor organizations extended their exclusive coverage in the non-postal Federal work force by 9 percent—to a record level of 916,381 employees. This record is particularly impressive in view of the fact that there was a 5 percent decrease in employment among this group of employees during the period covered by the census. At the same time, the number of postal workers in exclusive units declined by 1 percent.

The 9 percent gain in the reporting year ending November 1970 marked renewed acceleration in the spread of exclusive representation, following 2 years of dramatic braking during which the non-postal growth rate slowed from 45 percent to 27 percent in 1968, and from 27 percent to 6 percent in 1969.

In Government as a whole—including the postal service—a 4 percent gain in the number of employees in exclusive units pushed the grand total over the 1.5 million mark (1,542,111), to 58 percent of the work force as against 54 percent a year earlier. *Spotlight on Labor Relations*, 11 CIVIL SERVICE JOURNAL 4 (1971).

17 In fiscal year 1971 the first level offices of the Commission issued decisions on 5,712 appeals, 1,561 of which were adverse action cases. The Board of Appeals and Review received 986 adverse action appeals from decisions issued by first level offices and issued decisions on 777 adverse action cases. In fiscal year 1971 the Board processed 3,175 appeals, which included in addition to adverse action cases the following appeals: Reduction-in-force 1,147; Retirement 233; Discrimination complaints 347; and Miscellaneous 671.

Service Regulations implementing the Order are contained in Part 771 of the Civil Service Regulations.<sup>18</sup>

The Commission strengthened employee appeal rights under Part 771 of the Civil Service Regulations, effective April 1, 1971. Among other things, Part 771 was revised to provide that (1) the employee and his representative, if otherwise in an active duty status, are entitled to a reasonable amount of official time to prepare the appeal, (2) an examiner who meets the standards of experience and training prescribed by the Commission must conduct the hearing, (3) if the agency determines that it is not administratively practicable to produce certain employees requested as witnesses by the examiner, and if the examiner determines that a full and fair hearing cannot be held without those witnesses, he may postpone the hearing until the agency complies with his request, (4) the hearing must be recorded and transcribed verbatim, (5) the examiner must make a written report of findings and recommendations in all cases, (6) the official authorized to decide the appeal must accept and act on the examiner's recommendations unless (a) he is the head of the agency, (b) he desires to take a less severe action than that recommended by the examiner, or (c) he determines that the recommendations are unacceptable. If the official authorized to decide the appeal determines that the recommendations are unacceptable, he must refer the appeal file to a higher level of authority for decision with a specific statement of the reasons for his determination.

#### Civil Service Regulations Governing Adverse Actions

The Commission's current regulations<sup>19</sup> governing adverse actions are grounded, for the most part, on the provisions of Section 14 of the Veterans' Preference Act of 1944, as amended, which now appear in 5 U.S.C. 7511, 7512, 7701. The cited regulations will not be set forth in detail here, but some highlights will be touched on. The most recent changes in adverse action procedures which became effective November 1, 1970, provide, in substance, that: (1) the material relied on by the agency to support its reasons for the proposed adverse action, including statements of witnesses, documents, and investigative reports or excerpts therefrom, shall be assembled and made available to the employee for his review; (2) material which cannot be disclosed to the employee may not be used by an agency to support its action; (3) the employee is entitled to a reasonable amount of official time to prepare his answer if he is otherwise in an active duty status; and (4) the agency's notice of adverse decision shall inform the employee which of the reasons in the notice of proposed adverse action were found sustained and which were found not sustained. The aforementioned changes inure to the employees' benefit since they insure a greater degree of objectivity, fairness, and due process in adverse action proceedings.

Section 752.202 of the Civil Service Regulations<sup>20</sup> provides, with certain

18 5 C.F.R. Part 771 (1971).

19 5 C.F.R. Part 752-B (1971).

20 5 C.F.R. § 752.202 (1971).



exceptions,<sup>21</sup> that an employee against whom adverse action is sought is entitled to "at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action." Failure to give the required advance notice constitutes reversible error. Twenty-nine days will not suffice. Also, when the 30th day of a 30-day notice period falls on a Saturday, a Sunday, or a legal holiday, the action may not be effected earlier than the next business day.<sup>22</sup>

The requirement that "any and all reasons" must be stated in the advance notice means that the agency cannot rely on any reasons which are not specifically set forth in the notice of proposed adverse action. If the removal is based on any reasons not specified in the advance notice, the action is fatally defective.

With respect to the regulatory requirement for specificity and detail, the reasons given in the notice of proposed adverse action must be stated with sufficient clarity and detail to afford the employee a full and fair opportunity to defend against the proposed action. The employee is entitled to answer the notice of proposed adverse action both orally and in writing. If he requests an opportunity to answer orally, the agency representative designated to hear the answer must be a person who has authority either to make a final decision or to recommend what the final decision should be. The agency is required to consider the employee's answer before making a final decision. As previously indicated the notice of adverse decision must inform the employee which of the reasons contained in the notice of proposed adverse action were found sustained and which were found not sustained.

### Cause as Will Promote the Efficiency of the Service

The Lloyd-LaFollette Act, the Veterans' Preference Act, and Civil Service Regulations promulgated relative thereto, all provide that none of the specified actions shall be taken against any of the covered employees "except for such cause as will promote the efficiency of the service." A question which often arises is "What constitutes such cause as will promote the efficiency of the service?" Generally a "cause" for adverse action is a recognizable offense against the employer-employee relationship, including inefficient performance of duties and improper conduct on or off the job. Section 731.201 of the Civil Service Regulations<sup>23</sup> lists "Reasons for disqualification" which often constitute sufficient reason or "cause" for disciplinary or adverse action.

<sup>21</sup> The exceptions are contained in Section 752.202(c) of the Civil Service Regulations, 5 C.F.R. § 752.202(c) (1971).

<sup>22</sup> For more details see subchapter S2-3 of Federal Personnel Manual Supplement 752-1, ADVERSE ACTIONS BY AGENCIES, formerly, ADVERSE ACTION-LAW AND REGULATIONS, ANNOTATED.

<sup>23</sup> Section 731.201 of the Civil Service Regulations provides the following:

Subject to subpart G of this part, the Commission may deny an applicant examination, deny an eligible appointment, and instruct an agency to remove an appointee for any of the following reasons:

- (a) Dismissal from employment for delinquency or misconduct;
- (b) Criminal, infamous, dishonest, or notoriously disgraceful conduct;
- (c) Intentional false statement or deception or fraud in examination or appointment;
- (d) Refusal to furnish testimony as required by section 5.3 of this chapter;

However, it is important to note that an identifiable "cause" may or may not warrant adverse action. What constitutes a sufficient reason or "cause" depends upon numerous factors including, but not limited to, the nature of the offense, the type position involved, elements of provocation, if any, and mitigating circumstances.

In the light of the above, let us dwell briefly on the subject of "immoral conduct" which may or may not constitute a proper basis for removal or other adverse action. Recent court decisions reflect the desirability, if not the necessity, of considering the employee's conduct vis-à-vis its effect on the efficiency of the service, and stating this connection on the record along the way to determining whether or not adverse action is appropriate under the circumstances. In the case of *Norton v. Macy*,<sup>24</sup> the court held that the employing agency must demonstrate some rational basis for concluding that a discharge promotes the efficiency of the service. The court went on to say that a finding that an employee has done something immoral, indecent, or disgraceful will support a dismissal only if the acts of the employee have an ascertainable deleterious effect on the efficiency of the service. In the cases of *Frank v. Hampton*,<sup>25</sup> and *Dorais v. Snell*,<sup>26</sup> the respective courts set aside removals for alleged immoral conduct (homosexuality). Both decisions were based on *Norton v. Macy*. To dismiss an employee for immoral conduct, without acting arbitrarily or capriciously, the agency must state how the alleged conduct relates to occupational competence or fitness.

In *Mindel v. United States Civil Service Commission*,<sup>27</sup> the court held that plaintiff's termination for living with a young lady without the benefit of marriage violated due process since it was arbitrary and capricious, and that it violated his right to privacy as guaranteed by the ninth amendment. The court stated that "[e]ven if Mindel's conduct can be characterized as 'immoral,' he cannot constitutionally be terminated from government service on this ground absent a rational nexus between this conduct and his duties as a postal clerk..."

It is evident from the above that immoral or other conduct generally will not constitute "cause as will promote the efficiency of the service" unless a rational nexus is shown between the alleged conduct and the efficiency of the service.

### Appeals to the Civil Service Commission

As previously indicated, Section 14 of the Veterans' Preference Act specifically granted preference eligibles the right to appeal to the Civil Service Commission, and nonpreference employees were granted identical appeal rights as a result of Section 14 of Executive Order 10988. The Commission's appellate

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- (e) Habitual use of intoxicating beverages to excess;
  - (f) Reasonable doubt as to the loyalty of the person involved to the Government of the United States; or
  - (g) Any legal or other disqualification which makes the individual unfit for service.

24 417 F.2d 1161 (D.C. Cir. 1969).

25 No. 6908999 (N.D. Ill., Oct. 27, 1970).

26 No. S-1012 (E.D. Calif., Nov. 25, 1970).

27 312 F. Supp. 485 (N.D. Calif. 1970).

system pertaining to adverse actions consists of two levels of appeal.<sup>28</sup> The appeal must be in writing, but no particular form is required. The appellant is entitled to a hearing. The formal, judicial rules of evidence are not strictly observed. It is well established that evidence in administrative proceedings appeals need not be tested by court standards. The general rule appears to be as stated by the United States Court of Appeals for the D. C. Circuit in *Sisto v. Civil Aeronautics Board*: "The admission of irrelevant or incompetent matter before an administrative agency does not constitute reversible error, if there is substantial evidence in the record to sustain the agency's determination."<sup>29</sup> Some designated representatives of employees have expressed the opinion that courtroom procedures and rules of evidence should be observed strictly as in criminal trials. However, it should be borne in mind that the adverse action proceedings are administrative in nature. The cause of action generally involves an alleged offense against the employer-employee relationship, and justice often would not be served by converting the administrative process to a judicial one. More often than not employees have won their cases with evidence, although having probative value, which would have been excluded had it been necessary to "meet the courtroom test." Keeping in mind that agencies are called upon to perform certain functions in the public interest with a limited number of employees and limited funds, the administrative system should not become bogged down by overly formalized procedures.

The decisions of the Commission's first level offices contain an analysis of the evidence and findings. If a determination is made that the adverse action was improper, the decision will contain a recommendation that the agency cancel the action. Under the law<sup>30</sup> the recommended corrective action is mandatory.

Generally an agency or individual who is dissatisfied with an initial appellate decision issued within the Civil Service Commission may appeal to the Board of Appeals and Review.<sup>31</sup> The case is adjudicated on the basis of the entire appellate file, including the record developed by the Commission's office having initial appellate jurisdiction, in addition to any further representations made by the parties to the Board. Decisions of the Board exhaust the appellant's administrative remedies, and there is no further right of appeal within the Commission. However, the Civil Service Regulations<sup>32</sup> provide that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

- (1) New and material evidence is available that was not readily available when the previous decision was issued;

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28 Generally speaking, the Directors of the Commission's Regional Offices have initial appellate jurisdiction over adverse action appeals from employees working within their respective regional boundaries, and the Commission's Appeals Examining Office in Washington, D. C., has initial appellate jurisdiction in adverse action cases from employees working within the metropolitan area of Washington, D. C., and in certain areas outside the continental limits of the United States.

29 179 F.2d 47, 51 (D.C. Cir. 1949).

30 5 U.S.C. §§ 7511, 7512, 7701 (1964).

31 See note 17, *supra*, for statistics on appeals for fiscal year 1971.

32 5 C.F.R. § 772.308 (1971).

- (2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or
- (3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

### Judicial Review

Not infrequently, inquiries are received from appellants or their representatives as to whether they can go to court after exhausting their administrative remedies within the Commission, indicating an unawareness concerning the extent to which federal courts have jurisdiction in their cases or the scope of judicial review. There is no specific statutory provision governing judicial review of adverse personnel actions taken against federal employees.<sup>33</sup> However, when an appellant has exhausted his administrative remedies,<sup>34</sup> he generally has the choice of proceeding in a United States district court for back pay up to the amount of \$10,000 or for reinstatement or both, or proceeding in the Court of Claims for monetary relief. The jurisdictional basis for appealing in federal courts will not be discussed herein.

With respect to the scope of judicial review, there has been a gradual movement from unreviewability early in the century to something approximating review in accordance with the substantial evidence rule, although the development in the various circuits has been somewhat uneven.<sup>35</sup> Court decisions during recent years reflect that judicial review of administrative action involving government employees is generally limited to a determination (1) whether there has been substantial compliance with statutory and regulatory requirements; and (2) upon review of the administrative record, whether the challenged action was arbitrary, unreasonable, or capricious, and was supported by substantial evidence.<sup>36</sup>

### Where to from Here?

The Commission is never in the position of saying that all is well in the adverse action and appellate area. The need is for the Commission con-

33 This is a matter which the Civil Service Commission, the Administrative Conference of the United States, the Civil Service Law Committee of the Bar Association of the District of Columbia and other organizations are devoting effort to and which may result in recommended legislative action granting the statutory right to appeal to courts from Commission final administrative appellate decisions.

34 Where Congress has imposed an administrative tribunal between claimant and the court, the claim does not accrue until the executive body has acted or declined to act. *Friedman v. United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert. denied*, 373 U.S. 932 (1963). *See also* *Kandall v. United States*, 186 Ct. Cl. 900, *cert. denied*, 396 U.S. 837 (1969).

35 *See* K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.07 (Supp. 1970).

36 *Meehan v. Macy*, 392 F.2d 822 (D.C., Cir. 1968); *Dabney v. Freeman*, 123 D.C. App. 166, 358 F.2d 533 (D.C. Cir. 1966); *Pelicone v. Hodges*, 116 D.C. App. 32, 320 F.2d 754 (1963); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Halsey v. Nitze*, 390 F.2d 142 (4th Cir. 1968), *cert. denied*, 392 U. S. 939; *Taylor v. United States Civil Service Commission*, 374 F.2d 466 (9th Cir. 1967); *Burka v. Carpenter*, 387 F.2d 259 (9th Cir. 1967); *Charlton v. United States*, 412 F.2d 390 (3d Cir. 1969).

stantly to keep abreast of changes and refinements in the courts' notions of what due process and permissible managerial authority includes. The Commission solves one set of problems and new ones arise.<sup>37</sup>

Consistent with the above quotation was an announcement made by the Commission's Executive Director, Bernard Rosen, on August 5, 1971, to the Interagency Advisory Group<sup>38</sup> that the Commission's recently established top-level planning body known as the Executive Planning Group has identified adverse actions and appeals as one of the areas for early study,<sup>39</sup> and this has been approved by the Commissioners. It almost goes without saying that revisions will continue to be made in adverse action procedures and the appellate system. Changes, as they occur, must meet the requirements of fairness and due process and at the same time enable the Government to carry out effectively the responsibilities entrusted to it.

### Summary and Conclusions

Prior to the 20th century, federal employees had very little protection from arbitrary dismissal from the service. In 1912 the Lloyd-LaFollette Act set the stage for increased emphasis on both procedural and substantive rights of employees. However, the Act did not provide a right of administrative appeal for violation of the provisions contained therein. It did provide a legal basis for appealing arbitrary removal to the courts. In 1944 veterans were granted (1) substantial procedural and substantive protections from arbitrary adverse actions and (2) the right of appeal to the Civil Service Commission. The same protections were accorded to nonpreference employees in the competitive civil service with the implementation of Section 14 of Executive Order 10988 in 1962. The Order also reflected recognition of the fact that participation of employees in the formulation of personnel policies affecting them contributes to the effective conduct of public business, and the Order provided the encouragement and the groundwork for dynamic growth of unionism in the federal service. The President, Congress, the courts, the Civil Service Commission, agencies, and unions have all played roles in the development of our adverse action and appellate systems. Revisions will continue to be made in adverse action procedures and the appellate systems which will not only assure due process and fairness to employees, but at the same time enable our Government to carry out effectively the responsibilities entrusted to it.

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<sup>37</sup> Nammack & Dalton, *Notes on Appropriateness of the Current Adverse Action and Appeals System*, 19 AM. U. L. REV. 385 (1970).

<sup>38</sup> The Interagency Advisory Group is composed of personnel directors of federal departments and agencies.

<sup>39</sup> The Administrative Conference of the United States is currently reviewing the appellate process, and will render a published report when its review and analysis have been completed—expected to be in late 1972.