

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

JEFFREY LEWIS,)	DOCKET NUMBER
)	SF-0752-09-0139-I-1
APPELLANT,)	
)	
v.)	
)	
DEPARTMENT OF TRANSPORTATION,)	DATE: March 4, 2009
AGENCY.)	

MOTION IN LIMINE

The Department of Transportation (agency), asserted in its Narrative Response, dated, that Mr. Lewis (hereinafter “appellant”) was not previously “admonished” for the misconduct currently at issue in the above captioned appeal. Recent responses to the appellant’s discovery demands suggests otherwise and renders the inclusion of any and all reference to the Appellant’s alleged use of racial slurs inapposite for purposes of this appeal. *See*, Attachment “A.”

By pre-hearing order summary, dated February 27, 2009, the Board approved the following witnesses’ testimony for the hearing, scheduled to commence on March 4, 2009, who must be excluded: Jason Swanson; John Crabtree Marks; and, James Austin. The Appellant moves to exclude the aforementioned witnesses because the Agency is barred from taking an adverse action against an employee and then subsequently taking another adverse action for the same reason. *DeJoy v. Department of Health and Human Services*, 3 MSPB 96 (1980); *Cf. Pixler v. Veterans Administration*, 3 MSPB 63, 2 MSPR 542; *Adkins v. Hampton*, 586 F.2d 1070 (5th Cir. 1978); *McGhee v. Johnson*, 420 F.2d 445 (10th Cir. 1969); *Jenkins v. May*, 357 F.2d 62 (8th Cir. 1966).

The prohibition against double jeopardy applies to criminal charges, not to administrative disciplinary cases. *Stevenson v. United States*, 155 Ct. Cl. 592, 597 (1962) (“Double jeopardy” applies to criminal charges and these [insubordination] were in no sense charges of a criminal nature. In any event, it is not unusual in cases where a procedural error is committed, for the agency to begin again and take final valid action.”); *Urogy v. Dept. of Army*, 53 MSPR 342, 347 (1992) (“The concept of double jeopardy does not apply to administrative actions. *See, e.g., Dejoy v. DHHS*, 2 MSPR 577, 580, 3 MSPB 96 (1980).”); *Cabral v. DHHS*, 7 MSPR 372, 373 (1981) (“The prohibition against double jeopardy applies to criminal charges only.”). Without characterizing the issue as double jeopardy, if an agency has imposed disciplinary or adverse action because of an employee’s misconduct, it is barred from taking another adverse action for the same reason. As *Adamek v. USPS*, 13 MSPR 224, 226 (1982), explained:

“Where an agency has imposed disciplinary or adverse action because of an employee’s misconduct, it is barred from subsequently taking another adverse

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action for the same reason. *DeJoy v. Department of Health and Human Services*, 3 MSPB 96 (1980); Cf. *Pixler v. Veterans Administration*, 3 MSPB 63, 2 MSPR 542; *Adkins v. Hampton*, 586 F.2d 1070 (5th Cir. 1978); *McGhee v. Johnson*, 420 F.2d 445 (10th Cir. 1969); *Jenkins v. May*, 357 F.2d 62 (8th Cir. 1966). Since the agency action in the instant case is based solely upon two incidents of misconduct for which appellant had previously been suspended, the agency is barred from combining the two actions under a new charge and taking a more severe adverse action based on those two incidents. See, *Westbrook v. Dept. of Air Force*, 77 MSPR 149, 155 (1997) (the agency improperly issued a second suspension, at the suggestion of an arbitrator, based on the same misconduct leading to the issuance of the less severe suspension that was reviewed in arbitration); *Wigen v. USPS*, 58 MSPR 381, 383 (1993) (“The constitutional prohibition against double jeopardy applies only to defendants in criminal cases...[h]owever,...an agency cannot impose disciplinary or adverse action more than once for the same misconduct”; the appellant was not disciplined twice for the same offense when he was reprimanded for an unscheduled absence and removed for the falsification of a medical document in connection with that absence); *Littlejohn v. USPS*, 25 MSPR 478, 481 (1984) (when the appellant was suspended for the same act of misconduct that led to removal, removal was barred because the agency had already imposed adverse action, i.e., suspension, for the same misconduct charged in removal); *Anderson v. USPS*, 24 MSPR 488 (1984) (relying upon *Adamek v. USPS*, 13 MSPR 224, 226 (1982)); *Banks v. FAA*, 10 MSPR 3, 7 (1982).

Here, the Appellant already received a formal reprimand for the use of inappropriate language, which he has already acknowledged, that while taken out of context for purposes of the Agency’s investigation, was nevertheless an inappropriate and regrettable action. The Agency cannot re-discipline the Appellant after it already elected to give Mr. Lewis a formal reprimand for the same behavior.

Based on the foregoing, the Appellant’s motion should be GRANTED.

Date: March 4, 2009

Respectfully submitted,

Ariel Solomon

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ATTACHMENT "A"

7/16/2007



U.S. Department
of Transportation
Federal Aviation
Administration

Federal Aviation Administration
Concord Air Traffic Control Tower
201 John Glenn Drive
Concord, CA 94520

Jeffery Lewis
5321 Sonoma Drive Apt #3
Pleasanton, CA 94566

Mr. Lewis,

This letter is to formally provide you with feedback stemming from the ROI report regarding your alleged use of a derogatory and racially offensive slur in the work place.

Based upon my review of the contents of the investigative report, and contrary to your signed declaration, I find that you did in fact use a racially insensitive term in the work place and then provided a false statement during your interview with Special Agent, James Austin.

You are hereby formally reprimanded for your inappropriate conduct and violation of the agency's Model Work Environment Standards. Any further substantiated inappropriate conduct on your part will be addressed with progressive disciplinary action in accordance with ER-4.1, STANDARDS OF CONDUCT.

Jason Ralph
Air Traffic Manager, CCR ATCT

Acknowledge Receipt _____ Date _____
Jeffrey Lewis, CPC

Cc: NATCA SFO / Dave Caldwell

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Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB only.

Name & Address	Documents	Method of Service
MSPB: Western Regional Office	Other Motion in limine	e-Appeal / e-Mail

I agree to send a printed copy of the electronic pleading with attachments to all parties by the end of next business day, as follows:

Name & Address	Documents	Method of Service
Jeffrey N. Lewis Appellant 28242 S. Salo Road Mulino, OR 97042 USA	Other Motion in limine	Personal Delivery/Courier
Naomi Tsuda, Esq.	Other Motion in limine	US Postal Mail

Agency Representative Department of Transportation Office of the Regional Counsel AWP-7 P.O. Box 92007 Los Angeles, CA 90009-2007		
Don Bobertz, Esq. Agency Representative Department of Transportation Office of the Regional Counsel, AWP-7.7 P.O. Box 92007 Los Angeles, CA 90009-2007 USA	Other Motion in limine	US Postal Mail