

Happy Wednesday, Everyone!

Hopefully, we all learned early in life (and without too much pain involved )that we should always think before we speak. If we are to successfully navigate the matrix of electronic information that permeates today's professional environment, then we need to magnify that principle a thousand-fold.

In the management-employee relations arena, it is especially important to remember that e-mails, though paperless, are permanent. Under the applicable federal rules and regulations, all non-privileged e-mail communications between agency officials about disciplinary matters concerning individual employees are discoverable in appeals to the Merit Systems Protection Board (MSPB) and to the courts. To that end, key individuals have an affirmative obligation under Army policy to preserve any electronically stored information (ESI) that is likely to contain information relevant to the parties' claims and defenses, in any case where litigation is reasonably anticipated. Courts have held that this duty of preservation can be triggered by informal complaints made prior to the onset of litigation, such as a complaint made to a supervisor in an employment matter. Failure to protect, preserve, and/or produce pertinent ESI may result in an adverse inference, monetary sanction, or even reversal of a favorable decision.

Earlier this year, the U.S. Circuit Court of Appeals, Federal Circuit, "deleted" an MSPB decision upholding the removal of an Army hospital employee because the Army had failed to comply with the petitioner's legitimate discovery request. See *Baird v. Dept. of the Army*, 108 LRP 11477 (Fed. Cir. 2/26/08). The request sought all documents related to the disciplinary action, including all non-privileged e-mails between the supervisor(s), proposing official(s), deciding official(s) and upper-management official(s) who discussed the proposed adverse action. In remanding the case, the Federal Circuit noted that "virtually the whole discussion concerning the petitioner's punishment and who ordered it, took place via e-mail." *Id.*

In disputes over adverse personnel actions, cyber-discussions can become the threads that bind. Managers and commanders should be mindful that the information they exchange and opinions they express amongst themselves in this context may very well end up memorialized in an evidentiary record.

If you have any questions concerning these issues, we encourage you to contact your labor counselor or management-employee relations specialist.