

*Appendix A*

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

PAUL DOUGLAS GAMMILL,  
Appellant,

DOCKET NUMBER  
DC-1221-10-0478-W-1

v.

DEPARTMENT OF EDUCATION,  
Agency.

DATE: December 23, 2010

**THIS FINAL ORDER IS NONPRECEDENTIAL**

Paul Douglas Gammill, Crofton, Maryland, pro se.

Tracey Sasser, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

The appellant was terminated while he was a probationer. The administrative judge gave him comprehensive notice of his burden to establish Board jurisdiction over such an appeal. *See* Initial Appeal File (IAF), Tab 3 at 2; *Id.*, Tab 8, Subtabs 4D-4F. However, the appellant did not pursue his appeal on that basis. *See* IAF, Tab 10, Initial Decision (ID) at 4-5. The administrative judge correctly held that the appellant was not an “employee” as the term is defined by 5 U.S.C. § 7511(a), and that he had not alleged that his termination was based on any of the regulatory bases for appealing a probationary termination set forth in 5 C.F.R. § 315.806. ID at 3. Therefore, the administrative judge correctly dismissed the appellant’s probationary termination claim for lack of jurisdiction. The appellant does not address the issue in his petition for review.

We find that the administrative judge correctly found that, at the time she issued her initial decision, 120 days had not elapsed since the appellant alleged that he filed his complaint with the Office of Special Counsel (OSC). ID at 5. An appellant filing an IRA appeal from a probationary termination has not exhausted his OSC remedy unless he has filed a complaint with OSC and either OSC has notified him that it was terminating its investigation of his allegations or 120 calendar days have passed since he first sought corrective action. 5 U.S.C. § 1214(a)(3); *Simnitt v. Department of Veterans Affairs*, 113 M.S.P.R. 313, ¶ 8 (2010); *Garrison v. Department of Defense*, 101 M.S.P.R. 229, ¶ 6 (2006); 5 C.F.R. § 1209.5(a). However, because 120 days have now passed since the appellant filed his OSC complaint, we REMAND the appellant’s IRA appeal for further adjudication. *See Jundt v. Department of Veterans Affairs*, 113 M.S.P.R. 688, ¶ 9 (2010); *Baggan v. Department of State*, 109 M.S.P.R. 572, ¶ 12 (2010).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's

final decision regarding the appellant's probationary termination. 5 C.F.R. § 1201.113. However, because the appellant's IRA appeal is now ripe, we REMAND the IRA appeal to the regional office for further adjudication.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.

Appendix B

Paul Douglas Gammill  
Appellant,

Docket Number DC-1221-10-0478-B-1

v.

Department of Education  
Agency

January 19, 2011

MSPB Discovery

Before the Merit Systems Protection Board  
Washington Field Office

Paul Gammill,  
Appellant,  
V,  
The Department of Education,  
Agency,

Docket No 1221-10-0478-W-1

#### Applicants Request for Discovery

Pursuant to 5 CFR 1201.73, the Appellant, Paul Gammill, hereby serves his second request that the Agency respond to said discovery request within Twenty (20) calendar days. Each interrogatory and document request should be fully responded to on the basis of information which is reasonably available or subsequently becomes available. Each request for admission should be responded to on the basis of information which is reasonably available and should be amended if appropriate, or when other information subsequently becomes available. This is a continuing request, and the Agency should continue to supplement its responses up to and at the hearing to be requested by the appellant.

All documents are to be produced at 1710 Tipton Dr Crofton Md. 21114.

#### Definitions

- a) The words "you" and "your(s)" refer to the Agency.
- b) The word "Agency" refers to the Department of Education.
- c) The word "Appellant" refers to Paul Gammill.
- d) The word "person(s)" means any natural person, private or public corporation, partnership (limited or general), agent, principal, group, firm, association, or any other type of entity or organization.
- e) The word "date" means the month, day and year, if ascertainable, or if not, the best approximation thereof.

- f) The word “communication” means any statement by a person that is either written or oral.
- g) The word “document” means any tangible thing, which constitutes or contains matter within the scope of Fed. R. Civ. P. 34(a) and means the original ( or duplicate, identical copies when originals are not available), and any non-identical copies (whether different from the originals because of notes made on such copies or otherwise) of writings of every kind and description whether inscribed by hand or by mechanical, facsimile, electronic, magnetic, microfilm, photographic or other means, as well as phonic or visual reproductions of oral statements, conversations or events, and including, but not limited to, and manual, book, pamphlet, periodical, letter, report, memorandum, notation, message, telegram, cable, facsimile, study, working paper, accounting paper, computer disk, computer tape, telephone log, computer mail, computer printout, teletype message, chart, graph, index, tape, minutes, contract, lease, invoice, record of purchase or sale, correspondence, electronic or other transcription of taping of telephone or personal conversations or conferences, or any and all written, printed, typed, punched, taped, filmed or graphic matter however produced or reproduced. The word “document” also included the file, folder Exhibits and/or containers and labels appended thereto associated with each aforesaid original and/or copy.
- h) Where an interrogatory call for you to “identify” an communication, please include the following information as to each oral communication.
  - a. the means of communication (e.g. telephone, personal conversation, or otherwise);
  - b. Where the communication took place;
  - c. Actual date, or if unknown, approximate date;
  - d. Identify each person who was a party to, overheard, or may have overheard the communication;
  - e. The substance of what was said, who said it, and to whom;
  - f. Whether the communication or any part thereof is recorded, described or referred to in any document and if so identify such document according o the above definition of “identity”.
- i) Where an interrogatory calls for you to “identify” or “state the identity” of a document or written communication, your answer should include the date of the document, its title (if any) and the subject matter, its author(s), addressees, recipient, parties, the nature of the document(e.g. memorandum, letter), the individual or other source from who or which you obtained it, and if it is not in your possession, the identity of its last known custodian and location. “Identify,” when used in reference to any data, means to state the software and/or operating system under which the data was created, title and author, the type of data (e.g. word processing document, spreadsheet, database, application program, etc), and all other means of identifying it with sufficient particularity to meet the requirements for ins inclusion in a Request for Production pursuant to the Federal Rules of Civil Procedure, and its present or last knows location or custodian. If any such data was, or no longer is in the possession of subject to your control, state what disposition was made of it and the reason for such disposition?

- j) Where an interrogatory calls for you to “identify” or “state the identity” of a person, please include that person’s full and legal name, business title or position, grade, series, dates of employment in that position , and most recent business address and telephone numbers.
- k) Where an interrogatory calls for you to “state the legal basis” of a particular claim, assertion, or legal contention please:
  - a. Identify each document and where pertinent, the section, article, and /or subparagraph thereof which forms, constitutes, evidences, related or refers to, directly or indirectly, any part of the source of your information regarding the alleged facts and/or claims and/or legal contentions referred to by the interrogatory.
  - b. Identify each oral communication which forms any part of the source of your information regarding the alleged facts and/or contentions and/or earlier answer referred to by the interrogatory;
  - c. State separately the acts and or omissions to act on the part of any person which, directly or indirectly constitutes, forms the basis of , evidences. Relates or refers to your information regarding the alleged facts and or claims and/or earlier answers referred to in the interrogatory;
    - i. For each interrogatory, identify each person who furnished information in preparing the answer thereto and indicate which interrogatories or sections thereof, each person is providing information towards.
    - ii. For each document, identify each person who provided it to you.

#### Introduction

- A. Each interrogatory and document request should be fully responded to on the basis of information which is reasonably available or subsequently becomes available.
- B. This discovery request shall be continuing in nature. Therefore, you are required to supplement your responses if and when new or supplemental information is obtained. All documents are to be produced at 1710 Tipton Dr Crofton Maryland 21114.
- C. Any objection or claim of privilege or confidentiality asserted in response to any discovery should be stated with sufficient specificity so as to permit an informed ruling by the Administrative Judge, if necessary. It should be noted that OPM has issued regulations under which information about specific persons contained in Federal agency personnel records, such as Official Personnel Files (OPF), may be disclose by Federal agencies: 1) to another “party in ... an administrative proceeding being conducted by a Federal agency, when the Government is a party to the ... administrative proceedings;” and /or 2) “in response to a request for discovery” When the information requested “is relevant to the subject matter involved in a pending administrative proceeding.” As routine use exceptions to the Privacy Act. 5 USC 552a. See 61Fed. Reg. 3,6919,36921-22 (July 15, 1996) (final regulations as of Sept 13 1996).

- D. In any instance where you deny knowledge or information sufficient to answer an interrogatory or any part thereof, identify each person, if any, known, who should know, is believed to know, may know or possess such knowledge and/or information.
- E. If any documentation responsive to this discovery request is no longer in your position or subject to your control or no longer exists, please identify whether such document is: a) missing or lost; b) destroyed (by any means); c) transferred to others; and/or d) otherwise disposed of. In any of the above instances, please describe in detail the circumstances surrounding and any reason, authorization, and/or approval of such disposition, and state the actual and/or appropriate date of such disposition.

Interrogatories

1. Identify each person who the Agency believed has or may have, relevant information regarding the claims and allegations in the Appellant's appeal. For each such person, identify the following: (a) name; (b) current business and home address and work and home telephone numbers; (c) current (or last known) title and grade; and (d) a detailed description of the information the person possesses concerning the appeal.
2. Explain in detail the reasons for removing Paul Gammill from his employment with the Agency. Include in this explanation how these actions are compliant with the agencies personal document (referred to in the Termination letter) PMI 351-1.
3. Identify each action by Paul Gammill considered by the Agency to be neglect of duty and/or insubordination after Mr. Gammill's positive performance review of November 1 2009. Stating for each: a) the nature of the action; b) the date the action occurred; c) whether the action constituted neglect of duty, insubordination or both; d) how the action constituted neglect of duty and/or insubordination per any established Agency guidelines/definitions of such the U.S. DEPARTMENT OF EDUCATION. PERSONNEL MANUAL INSTRUCTION. PMI 351-1.
4. Identify all persons who had any input whatsoever into the decision to remove Paul Gammill from his position with the Agency. Your response should describe when such discussions or consultations took place and the input provided by each participant to the discussion or consultation.
5. For any admission that was not unequivocally admitted, please explain in detail the reason for the denial (partial or full) Identify all the evidence relied upon by the Deciding Official to support the charge of Termination for performance when his supervisor had only indicated that the performance of Mr. Gammill was satisfactory or better.
6. Identify all the evidence relied upon by the Deciding Official to justify the penalty of removal. Include that date the Deciding Official determined to terminate Mr. Gammill's employment.
7. Explain why the Deciding Official failed to notify Paul Gammill of any alleged deficiencies and failed to follow the established and published personnel rules for termination of employment as explained in U.S. DEPARTMENT OF EDUCATION. PERSONNEL MANUAL INSTRUCTION. PMI 351-1.
8. Explain in detail why Paul Gammill was not permitted to question or provide any defense against the termination by the Deciding Official.

9. Identify the duties of Paul Gammill's position.
10. Explain specifically how each of the Douglas factors were analyzed by the Deciding Official when making the termination determination.
11. Identify all reasons why the Agency assigned Paul Gammill the duties he allegedly refused to perform.
12. Identify all employees in Agency who were assigned duties similar to the duties Paul Gammill allegedly refused to perform.
13. Identify any communication and documents referring to the attempt to issue new regulations concerning the Family Educational Rights and Privacy Act, occurring in the latter half of 2009. This should include any communications with staff in the Executive Office.
14. In particular, identify any communication, the content of that communication and the dates of that communication that may have originated from members or staffers of the United States House Committee on Education and the Workforce also know as the Committee on Education and Labor, that concerned Mr. Gammill, Mr. Rooker (the former Director of the Office) or the Family Educational Rights and Privacy Act.
15. Identify all other Department of Education, employees terminated because of identical or similar misconduct in the last five (5) years. Your answer should include the following information:
  - a. What the specific charges were;
  - b. What penalty the Agency proposed;
  - c. Whether the charges were sustained;
  - d. What penalty was imposed, if any;
  - e. Whether the decision was the subject of grievance or appeal;
  - f. The disposition of any such grievance or appeal;

### Document Requests

1. Copies of all documents relied upon or referenced in responding to the interrogatories above.
2. Copies of all documents which support the Agency's contention that the Appellant engaged in unsatisfactory performance or duties he allegedly refused to perform..
3. All evidence and material relied upon in removing the Appellant.
4. Copies of any written communication by, between and/or among the Proposing and/or Deciding Officials and any other individual in which Paul Gammill was discussed.
5. Copies of any notes, minutes of meetings , memoranda for files, supervisors "drop files" and/or any other recordation regarding Paul Gammill.
6. Copies of all drafts of the Proposed Removal issued to Paul Gammill.
7. Copies of all drafts of the Notice of Removal issues to Paul Gammill.
8. Copies of all prior discipline (if any) issued to Paul Gammill.
9. Copies of all documents reviewed by the Deciding Official.
10. Copies of all documentation relied upon by the Deciding Official to sustain the charges.

11. Copies of all documentation relied upon by the Deciding Official to justify the penalty of termination.
12. Copies of all documents which reflect how each of the Douglas factors were analyzed by the Deciding Official when making the Termination determination.
13. Copies of all discipline proposed or issued identified in the response to Interrogatory No XX above.
14. A copy of Paul Gammill's official position description.
15. A copy of Paul Gammill's Official Personnel Files.

Appendix C

Paul Douglas Gammill  
Appellant,  
v.

Docket Number DC-1221-10-0478-W-1

Department of Education  
Agency

The legal issue I exposed was an attempt to change by regulation, language in the FERPA law that was established by statute.

While the legal issue I disclosed may seem to be a nuance of the law, you should consider these facts:

1. The Department abandoned the proposed regulatory changes when news of my termination for questioning these regulatory changes become public. (I included an article to this effect in my complaint)
2. My office attorneys and the Office of the General Counsel career attorneys familiar with the FERPA Law expressed concerns with the legality of these proposed regulatory changes until there were silenced by the political attorneys. (I included a reference to this in my complaint)
3. John Kline, the leading republican on the Education and Labor committee has written at least three public letters to the Secretary of Education asking about my termination. The legal counsel to this committee, Amanda Schaumburg, has long and close relations with LeRoy Rooker, with whom I discussed the legal problems of the proposed regulation change. When I later spoke with Amanda, she seemed very well informed of details that should have only been know inside the department but where the same details that I shared with Mr. Rooker.
4. Carmel Martin, my supervisor, is known to have a large ego and had a big political stake in overriding the FERPA law in favor of the Recovery Act language. Carmel was also very sensitive to any criticism from Capitol Hill. Carmel had interrogated me earlier to identify who on my staff had been talking with staff on the Hill about her and the proposed regulatory changes to the FERPA law.
5. There is precedent for this concern of the legality of changing by regulation what was established by statute. See the 2003 memorandum from Deputy Secretary of Education William D. Hansen. <http://www2.ed.gov/print/policy/gen/guid/secletter/030130.html>. Part of that memorandum is included in this document.

### **The legal issue:**

The original FERPA statutory law as passed by the Senate, only identified only four entities that could be identified as an "authorized representative" these are"

- Comptroller General of the United States,
- the Secretary,
- the Attorney General
- State or local educational authorities

The proposed regulatory change (not statutory change) would vastly expand on the term of an authorized representative well beyond these four entities.

My FERPA attorneys as well as the Department of Education's attorneys familiar with FERPA informed me that the proposed changed required a statutory change in the law and that the proposed regulatory change was not legal.

This legal issue is nicely explained in a 2003 memorandum from Deputy Secretary of Education William D. Hansen. <http://www2.ed.gov/print/policy/gen/guid/secletter/030130.html>. Additionally Secretary Hanson emphasized the additional requirement of "direct control" of these authorized representatives. Highlights from that memorandum are below

"in light of the full text of the statutory language of FERPA and congressional statements as to its meaning and purpose. Specifically, in authorizing disclosure to authorized representatives, § 1232g(b)(1)(C) limits such disclosures to "the conditions set forth in paragraph (3)," which pertinently provides:

Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials...(Emphasis added.) 20 USC § 1232g (b)(3). The multiple references to "officials" in paragraph (b)(3) reflect a Congressional concern that the authorized representatives of a State educational authority be under the direct control of that authority. This conclusion is supported by the Joint Statement presented by Senators Buckley and Pell while enacting important amendments to FERPA late in 1974. Specifically, in explaining the meaning and effect of what is now § 1232g(b)(1)(C), the Joint Statement provides: Section 438(b)(1) of existing law restricts transfer, without the consent of parents or students, of personally identifiable information concerning a student to ... auditors from the General Accounting Office and the Department of Health, Education, and Welfare ...

120 Cong. Rec. at 39863 (December 13, 1974). Plainly, the sponsors of FERPA did not view the concept of "authorized representatives" in an expansive manner; rather, their vision was closely tied to employees and officials of, for example, the Comptroller General and the Secretary.

We conclude, therefore, that for the purposes of FERPA, an "authorized representative" of a State educational authority must be under the direct control of that authority, *e.g.*, an employee or a contractor of the authority. Thus, the State educational authority could not, for example, designate a State department of labor to perform an audit or evaluation because the department of labor is not under the educational agency's direct control. However, the following guidance would permit State educational authorities to work with other State agencies to obtain information necessary to comply with Perkins III and AEFLA reporting requirements, while at the same time maintaining FERPA privacy protections. "

Even after months of aggressive pressure by Assistant Secretary Carmel Martin to change the FERPA law to allow this greatly expanded list of individuals and groups that could be considered authorized representatives the attorneys at the Department of Education knowledgeable with the FERPA law continued to express legal concerns.

To show how there was disagreement even in the Department of Education I included a email stream in my complaint from

**Conclusion:**

The bottom line was that I expressed concern with this legal issue with the former Director of the Family Policy Compliance Office LeRoy Rooker on December 1st 2009. Mr. Rooker told me at that time that Carmel had to be stopped in her effort to change the FERPA law illegally. Word of my disclosure of the expressed legal concerns can reasonably be expected to have reached my supervisor Carmel Martin and her termination of my employment was retaliation for these disclosures.