

WALTER LOEWEN v. DEPARTMENT OF THE INTERIOR
Docket # DE-0752-22-0051-I-1
Agency Motion in Limine to Preclude Testimony of Nada Culver
Summary Page

Case Title : WALTER LOEWEN v. DEPARTMENT OF THE INTERIOR

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Pleading Title : Agency Motion in Limine to Preclude Testimony of Nada Culver

Filer's Name : Sean Joseph Allen

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

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Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE**

WALTER LOEWEN,

Appellant,

v.

U.S DEPARTMENT OF THE INTERIOR,

Agency.

DOCKET NUMBER
DE-0752-22-0051-I-1

Samantha J. Black
Administrative Judge

MOTION IN LIMINE TO PRECLUDE THE TESTIMONY OF NADA CULVER

Pursuant to the 5 C.F.R. § 1201.55, Rule 104(a) of the Federal Rules of Evidence, and the Administrative Judge's February 4, 2022, Order and Summary of Telephonic Prehearing Conference, the Agency respectfully submits this Motion in Limine to Preclude the Testimony of Nada Culver in this matter. Appellant has not articulated any reason why the testimony of Nada Culver, Deputy Director of Policy and Programs, is relevant or necessary for this proceeding. Indeed, Appellant has failed to identify any information that he believes Ms. Culver alone possesses that is relevant to this case. The strong consensus among the courts that have considered the matter is that a high-ranking government official should not be compelled to testify absent a showing that the official personally possesses unique, relevant knowledge and that the information cannot be obtained through less intrusive means. Thus, the Agency respectfully requests that Ms. Culver is precluded from testifying in the hearing in this matter because she is a high-ranking government official, and her testimony is not relevant or otherwise duplicative to the issues before the Board.

Background

Effective November 16, 2021, the Agency removed Walter Loewen (“Appellant”) from his position as a GS-12 Planning and Environmental Specialist at the Agency’s Wyoming State Office, located in Cheyenne, Wyoming. *See* Agency Response File (“ARF”), Tab 4a. Appellant was removed from federal service based on his unacceptable performance and failure to follow instructions. ARF, Tab 4b.

On February 1, 2022, Appellant filed Appellant’s Prehearing Statement. Appellant requested that Nada Culver, Deputy Director of Policy and Programs, testify as a witness at the hearing scheduled for February 15, 2022. Initial Appeal File (“IAF”), Tab 10, p. 26-27. In support of Ms. Culver’s testimony, Appellant described Ms. Culver’s anticipated testimony as follows:

She is expected to testify consistent with the contents of the July 25, 2019, comment letter to BLM Wyoming on the Converse County Oil and Gas Project that she co-authored with John Rader, Conservation Advocate, Wyoming Outdoor Council, **Exh. A** hereto. Her testimony will establish the NEPA and MBTA violations associated with the Converse County project and will directly support that Walter Loewen disclosed actual legal violations within the WY SO and to Ms. Fleuret associated with that project.

Id.

On February 4, 2022, the parties held a telephonic prehearing conference to discuss prehearing matters, including potential witnesses to be approved to testify at hearing. In the Order and Summary of Telephonic Prehearing Conference, the Board approved Ms. Culver to testify and held as follows:

I approve Culver to testify. The agency objected to her testimony on various bases, including that she was not employed by the agency at the time, had no role in the appellant’s removal, there is no evidence in the record that the appellant actually utilized or relied on the comment she drafted in making any alleged protected disclosures, and the agency is essentially calling her as an expert witness. As part of his whistleblowing affirmative defense, the appellant bears the burden of proving that he made a protected disclosure. A protected disclosure is a communication the individual reasonably believes evidences any violation of law, rule, or regulation,

gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health and safety. *See* 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). The proper test for determining whether an employee had a reasonable belief his disclosures evidenced one of the categories of wrongdoing listed in 5 U.S.C. § 2302(b)(8)(A) is whether a disinterested observer with knowledge of the essential facts known to, and readily ascertainable by, the employee could reasonably conclude the actions evidenced one of the categories of wrongdoing listed in 5 U.S.C. § 2302(b)(8)(A). *See Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (Feb. 22, 2000). Regardless of whether the appellant actually relied on any portion of the comment Culver authored, the existence of the comment and its contents could be evidence to support whether a disinterested observer could reasonably conclude the matters the appellant disclosed were within one of the categories of wrongdoing.

See IAF, Tab 12, p. 5-6.

In the Order and Summary of Telephonic Prehearing Conference, the Board also provided that, “Any exceptions or objections to the above prehearing conference summary, or any ruling made herein, must be submitted in writing and received in this office by **February 11, 2022**, or be deemed waived.” *See* IAF, Tab 12, p. 9. Subject to this Order, the Agency is requesting the Court reconsider its previous ruling and preclude Ms. Culver from testifying based on her lack of relevance to this proceeding and because the testimony of high-ranking Agency officials is discouraged.

Legal Argument

A. High-Ranking Government Officials Cannot be Called to Testify Absent Extraordinary Circumstances

Even apart from the objections discussed above, Appellant failed to make a showing that Ms. Culver, as a high-ranking government official, should be required to testify before the Board in his appeal. As the D.C. Circuit has made clear, “top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.” *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)

(citing *United States v. Morgan*, 313 U.S. 409,422 (1941)); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008)(“the duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere”). *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993)(“the practice of calling high officials as witnesses should be discouraged”); *In re Office of Inspector Gen.*, 933 F.2d 276, 278 (5th Cir. 1991)(“exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted”).

Ms. Culver is a high-ranking government official. In her position at the Deputy Director of Policy and Programs, Ms. Culver shares the Director of BLM’s responsibility for all BLM functions. She addresses policy concerns associated with the Bureau’s wide variety of multiple use activities; works closely with external stakeholders including State and local governments; and facilitates efforts to coordinate the Bureau's work within the Department of the Interior (DOI) and with other Federal agencies and Congress. *See* Attachment 1 (Departmental Manual, Chapter 3, Office of the Director, 135 DM 3). Appellant has made no showing that the testimony of Ms. Culver, as a high-ranking official, is necessary to their presentation of any issue related the removal of Mr. Loewen or his affirmative defense that he is a whistleblower. For example, the description of expected testimony found in Appellant’s Witness List merely reads, “[s]he is expected to testify consistent with the contents of the July 25, 2019, comment letter to BLM Wyoming on the Converse County Oil and Gas Project.” The contents of the letter referenced by Appellant are self-evident and can be introduced into the hearing record by Appellant’s own testimony rather than that of Ms. Culver’s. “establish the NEPA and MBTA violations associated with the Converse County project and will directly support that Walter Loewen disclosed actual legal violations” Further, Appellant seeks Ms. Culver’s testimony to support his whistleblower clam to “establish the NEPA and MBTA violations associated with the Converse County project and will directly

support that Walter Loewen disclosed actual legal violations.” IAF, Tab 10, p. 26-27. However, Appellant’s requested testimony from Ms. Culver is nothing more than her regurgitating her own statements in a letter already part of the record evidence of this case. Ms. Culver regurgitating her statements in a letter is a far cry from demonstrating that she “possess[es] information essential to [Appellant’s] case which *is* not obtainable from another source.” *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999); see also *Alexander v. FBI*, 1999 WL 270022, at *2 (D.D.C. Apr. 21, 1999) (“Litigants should ordinarily be required to depose those individuals with the most knowledge of the relevant facts before taking the depositions of high-ranking government officials”). In short, the information Appellant seeks from Ms. Culver is barely related to Appellant’s whistleblower defense, let alone “essential” to it.

B. Lack of Relevance and Duplicative Testimony

“An administrative judge has wide discretion under 5 C.F.R. §§ 1201.41(b)(8), (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious.” *Browning v. U.S. Postal Serv.*, No. DA-0752-10-0305-I-1, 2011 WL 12514745 (M.S.P.B. Feb. 22, 2011) (excluding witness testimony which was not probative of the appellant’s claim). In exercising this discretion, Administrative Judges have appropriately excluded the witness testimony where the testimony of the witness is not relevant, material, is duplicative. See *Wright v. Dep’t of Veterans Affairs*, 164 F. App’x 973, 974 (Fed. Cir. 2005); *Guise v. Dep’t of Justice*, 330 F.3d 1376, 1379 (Fed. Cir. 2003); *Thurston v. Dep’t of Veterans Affairs*, 254 F. App’x 811, 814 (Fed. Cir. 2007) (finding that the Administrative Judge appropriately excluded the testimony of a witness would be duplicative or repetitious); *Haver v. Dep’t of Agric.*, 53 F. App’x 112, 115 (Fed. Cir. 2002) (appropriately excluded testimony which was “believed the testimony to be duplicative of earlier testimony about the same incident.”); *Ferguson v. United*

States Postal Serv., No. 2019-1403, 2019 WL 5806895, at *4 (Fed. Cir. Nov. 7, 2019) (upholding decision to exclude witness testimony where there is no showing of the relevance or materiality of the excluded testimony).

In this case, Appellant has not indicated that Ms. Culver was involved in the Agency's decision to remove Appellant from federal service in any way. Further, Appellant has not proffered any evidence that Ms. Culver has ever met, spoken to, or otherwise interacted with Walter Loewen, or otherwise have any firsthand or direct knowledge to support the Appellant's affirmative defense that he is a whistleblower. As such, she is unable to provide any relevant testimony on these subjects. *See Monk v. Potter*, 723 F. Supp. 2d 860, 885 (E.D. Va. 2010), *aff'd sub nom. Monk v. Donahoe*, 407 F. App'x 675 (4th Cir. 2011) (determining that a proposed witness who did not have direct knowledge of facts related to the appellants claim of retaliation was properly excluded as a witness). Nothing in Appellant's prehearing submissions or statements during the prehearing conference contradict these points.

Appellant additionally bases his request for Ms. Culver's testimony on a July 25, 2019 letter Ms. Culver authored when she was employed as the Vice President of Public Lands for the National Audubon Society. *See* IAF, Tab 10, p. 36-44 (Appellant's Exhibit A). The subject of the letter was the National Audubon Society's comments on the Converse County Oil and Gas Project. *Id.* Any testimony from Ms. Culver concerning her recollection of this letter would not be material or relevant to this matter. There is zero probative value to any additional testimony she could provide regarding the letter, since it was authored by Ms. Culver in her capacity as an employee of the National Audubon Society, not the Department of the Interior. *See* IAF, Tab 10, p. 36-44 (Appellant's Exhibit A). Thus, having Ms. Culver attend this hearing to provide testimony

concerning her recollection of letter is not material or relevant to this matter, and would be unnecessarily duplicative.

Conclusion

Based on the foregoing, the Agency is respectfully requesting that the Administrative Judge issue an Order Granting the Agency's Motion in Limine to Preclude the Testimony of Deputy Director Nada Culver.

Respectfully submitted,

/s/ Sean J. Allen
Sean J. Allen
Attorney Advisor
U.S. Department of the Interior
Direct Line: 303-445-0623
Email: sean.allen@sol.doi.gov

Department of the Interior
Departmental Manual

Effective Date: 07/26/2016

Series: Organization

Part 135: Bureau of Land Management

Chapter 3: Office of the Director

Originating Office: Bureau of Land Management

135 DM 3

3.1 Office of the Director. The Director, as Chief Executive of the Bureau of Land Management (BLM), formulates BLM policy and directs all activities of BLM. The Director advises and assists the Assistant Secretary – Land and Minerals Management in overseeing national public land and resource management issues and all programs within the purview of BLM's responsibilities. The Director maintains relationships with other Federal agencies, Congress, Native American authorities, state and local governments, and private entities. The Director carries out the programs and functions of the Bureau with assistance from Deputy Directors; a Chief of Staff; the Director, Office of Law Enforcement and Security; Assistant Directors; the Director, National Operations Center; and State Directors.

3.2 Deputy Director, Operations. The Deputy Director, Operations shares the Director's responsibility for all BLM functions. In the absence of the Director, the Deputy Director, Operations is the First Assistant and acts as the Director. The Deputy Director, Operations provides executive direction and management continuity for all BLM programs and activities; oversees BLM-wide issue management; directs policy activities; and oversees the Assistant Directors; the Director, Office of Law Enforcement and Security; the Director, National Operations Center; and the State Directors. (Functional descriptions for the National Operations Center and the State Directors are provided in 135 DM 4 and 135 DM 5 respectively.)

3.3 Deputy Director, Policy and Programs. The Deputy Director, Policy and Programs shares the Director's responsibility for all BLM functions. The Deputy Director addresses policy concerns associated with the Bureau's wide variety of multiple use activities; works closely with external stakeholders including State and local governments; and facilitates efforts to coordinate the Bureau's work within the Department of the Interior (DOI) and with other Federal agencies and Congress.

3.4 Chief of Staff. The Chief of Staff provides counsel, advice, technical expertise, and assistance to the Director in formulating and evaluating policy for significant and politically sensitive or urgent issues; maintains close review and coordination on items of a sensitive policy nature between the Director and high level officials throughout DOI; represents the Director and acts as the Director's liaison in contacts with the White House staff, Congress, and other departments and agencies, the public, and government officials; and develops, coordinates,

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resolves, and implements a variety of special projects which are often highly sensitive and/or confidential.

3.5 Director, Office of Law Enforcement and Security (OLES). The Director, OLES is responsible for establishing, implementing, and monitoring policies and programs for managing BLM's law enforcement and security program and maintaining functional oversight of BLM's law enforcement program activities.

A. The Directorate provides national level leadership for the protection of public land resources, visitors, and employees; conducts and oversees the investigation of crimes involving public land resources and criminal misconduct by BLM employees; provides functional oversight of field level law enforcement programs; develops, coordinates, implements, and monitors law enforcement program policy and standards; provides technical advice and coordinates activities for security related matters; and serves as a principal liaison with all DOI law enforcement entities, and other Federal, state, and local agencies regarding law enforcement matters affecting the BLM.

B. The Directorate includes the Director, Deputy Director, Policy Division, Programs Division, five regional Special Agents-in-Charge staffs, Special Investigations Staff, and Professional Responsibility Staff.

3.6 Assistant Director, Fire and Aviation (AD, FA). The office of the AD, FA, is located in Boise, Idaho, with liaison staff in Washington, DC. The directorate is responsible for establishing national policy, guidance, and standards; and maintains functional oversight and interagency coordination for all fire, aviation, and hazard activities.

A. The Directorate develops national partnerships with organizations and agencies to foster a collaborative approach to mitigating risks to communities and the environment while promoting economic opportunities. The AD, FA provides operational wildfire protection and support services for all cooperating wildland fire fighting agencies. The AD, FA provides leadership in protecting life, property, and ecosystems from damage by wildfires, and assists in enhancing ecosystem health, integrity, and diversity through the use of fire. The Directorate also oversees BLM's national aviation management services. The Directorate provides a unit manager to the National Interagency Fire Center Governing Board for the management and operation of the National Interagency Fire Center (NIFC). The NIFC is a physical facility located in Boise, Idaho, at which a number of Federal agencies, including BLM, maintain offices and operational entities. Day-to-day supervision of the NIFC unit manager is the responsibility of the AD, FA. The NIFC includes cooperating fire related units from the U.S. Forest Service, National Park Service, U.S. Fish and Wildlife Service, and the Bureau of Indian Affairs; a fire weather support unit from the National Weather Service; representatives from other wildland fire partner organizations such as the U.S. Fire Administration, the National Association of State Foresters, and the National Law Enforcement and National Radio program management staff.

B. The Directorate includes six divisions: Division of Support Services; Division of Fire Operations and Safety; Division of Budget and Evaluation; Division of Aviation; Division of Fire Planning and Fuels Management; and Division of External Affairs.

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3.7 Assistant Director, Resources and Planning (AD, RP). The AD, RP is responsible for establishing policy and guidance for BLM's planning, natural, cultural and fossil resources, restoration, use allocation, collaborative action, environmental compliance, recreation, science, and geographic information systems programs.

A. The AD, RP provides national leadership and develops and maintains processes and standards for all planning, environmental analysis, natural resource management and protection activities, including physical, biological, ecological, cultural, social, and economic components. The Directorate develops national partnerships with organizations and agencies to foster collaborative engagement and to prevent or reduce litigation, appeals, and protests, or to mitigate the impacts of such formal filings.

B. The Directorate includes seven divisions: Division of Decision Support, Planning and NEPA; Division of Forest, Rangeland, Riparian and Plant Conservation; Division of Fish and Wildlife Conservation; Division of Cultural, Paleontological Resources and Tribal Consultation; Division of Recreation and Visitor Services; Division of Wild Horses and Burros; and Division of Environmental Quality and Protection.

3.8 Assistant Director, Energy, Minerals, and Realty Management (AD, EMR). The AD, EMR is responsible for establishing and coordinating policy and guidance for BLM's energy, renewable energy, and non-energy minerals programs, realty management, and the Public Land Survey System.

A. The Directorate develops policy and guidance for the renewable energy program including wind, solar, hydropower and geothermal energy resources; the fluid minerals programs including oil, gas, and helium; solid minerals programs including mining law, coal, oil, shale, and salable minerals; the lands and realty programs, including all land adjustments such as land exchanges, sales, disposals and acquisitions, withdrawals, transmission, rights-of-way, and the Public Land Survey System. The Directorate provides national leadership and develops national partnerships with organizations interested in energy, minerals, and realty management; and provides leadership for BLM's trust management for Indian minerals operations, surveys, and trust patent preparation.

B. The Directorate includes a National Renewable Energy Coordination staff and three Divisions: Division of Fluid Minerals; Division of Solid Minerals; and Division of Lands, Realty and Cadastral Survey.

3.9 Assistant Director, National Conservation Lands and Community Partnerships (AD, NCL-CP). The AD, NCL-CP is responsible for establishing and coordinating national policy and guidance for managing components of the NCL-CP and for implementing Bureau-wide programs in environmental and heritage education, interpretation, partnerships, volunteers, and youth.

A. The AD, NCL-CP provides national leadership to conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values

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for the benefit of current and future generations. These nationally significant landscapes include: National Monuments, National Conservation Areas and similar designations, Wilderness Areas, Wilderness Study Areas, National Wild and Scenic Rivers, and National Scenic and Historic Trails. The AD, NCL-CP also provides national leadership in developing Bureau-wide programs in environmental and heritage education, interpretation, partnerships, volunteers, and youth.

B. The Directorate includes two divisions: Division of the National Conservation Lands; and Division of Education, Interpretation, and Partnerships.

3.10 Assistant Director, Communications (AD, COM). The AD, COM, develops and coordinates policy and guidance for BLM external communications (print, written, oral and electronic) with the media, Members of Congress, various Federal, state and local agencies, interest groups, and members of the public concerning the programs, policy, and activities of BLM. The AD, COM develops policy, as needed to effectively implement its functional areas.

A. The Directorate provides strategic direction and oversight in the areas of public affairs, legislative affairs, regulatory affairs, correspondence, international affairs, intergovernmental affairs, citizen advisory committees, new media, and carries out BLM responsibilities under the Freedom of Information Act. The AD, COM also oversees, provides strategic direction, and assists in the development of policy regarding the Agency's electronic communications function, including internet/intranet management and policy, web pages, applications, video, new media; and the development and maintenance of information and content for distribution through these means. Additionally, the Directorate provides guidance and strategic direction regarding internal communications, since internal messages are closely linked to external messages.

B. The Directorate includes the News Media staff and the Division of Public Affairs; Division of Legislative Affairs; Division of Regulatory Affairs, and Division of Intergovernmental and External Affairs.

3.11 Assistant Director, Human Capital Management (AD, HCM). The AD, HCM establishes, coordinates, and evaluates implementation of national policies and programs for management of BLM's workforce, including personnel administration, workforce planning, civil rights, employee training and career development, special employment programs, occupational safety, health and emergency management, and ethics.

A. The AD, HCM prepares and maintains BLM's current and future plans and strategies for workforce management and monitors program implementation in order to support management in attaining BLM's programmatic goals and objectives. The AD, HCM develops policy and guidance to support human capital management practices throughout BLM; coordinates programs for subordinate organizations; and serves as consultant and primary resource person to the BLM Director, the executive staff, and State and Center Directors on matters related to the management of human capital.

B. The Directorate includes the Recruitment and Retention, and Human Resources Services staffs and the Division of Human Resources Policy and Programs; Division of Civil

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Rights; Division of Safety, Health and Emergency Management; and Division of Training and Employee Development.

3.12 Assistant Director, Business, Fiscal and Information Resources Management (AD, BFIRM). The AD, BFIRM, serves as BLM's Chief Financial Officer and Information Technology (IT) Strategic Advisor. The AD, BFIRM manages contracting activities, and is responsible for establishing and coordinating policy for BLM's business, fiscal, and information resource management programs.

A. The Directorate is responsible for budget related activities that include strategic planning and coordination, performance measurement, budget development and execution, fund control systems, management of fiscal assets, and accounting principles and standards. The Directorate is also responsible for business process related activities such as: management controls and evaluations, strategic planning, coordination with the Office of Inspector General and the Government Accountability Office audits. The Directorate is responsible for acquisition, property, and engineering management policies such as: acquisition of goods and services, real and personal property management, and construction/maintenance of assets. The AD develops policy and guidance on the management, integration, and use of information resource management (IRM) and IT systems; information dissemination; data and records administration; and information access and security.

B. The Directorate includes six divisions: the Division of Evaluations and Management Services, Division of Business Resources, Division of Budget, Division of Investment Management, Division of Information Technology Policy and Programs, and Division of Information Technology Security.

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Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties.

Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Denver Field Office	Agency Motion in Limine to Preclude Testimony of Nada Culver	e-Appeal / e-Mail
Walter Loewen Appellant	Agency Motion in Limine to Preclude Testimony of Nada Culver	e-Appeal / e-Mail
Peter T. Jenkins Appellant Representative	Agency Motion in Limine to Preclude Testimony of Nada Culver	e-Appeal / e-Mail
Kevin Bell Appellant Representative	Agency Motion in Limine to Preclude Testimony of Nada Culver	e-Appeal / e-Mail