

OBEY NOW AND GRIEVE LATER. A PRIMER ON INSUBORDINATION

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I know what you have been saying to yourself at work in front of your computer on an EBay auction, bidding furiously against *Goodevil* to win a reconditioned 20 gig iPod™.

“Here I am *five* years into the new millennium and I am still working for someone else,” you whine as you increase your bid to \$171.25.

“How can noble I still have a boss? Didn’t they abolish involuntary servitude centuries’ ago?” *Goodevil* has increased his bid to \$185.75, and you decide to drop out of the bidding.

“The morning’s early, and auctions for other MP3 players will close in an hour or so,” you conclude as you concede to *Goodevil* and navigate the hyperlinks to other EBay auctions.

“I’ll readily grant that others deserve to have bosses, but certainly not I. Doesn’t anyone acknowledge my pedigree?”

As you make your opening bid on a factory-sealed Creative Labs Nomad II™ (40 gigs!), your boss enters your cubicle, looking distraught. You ignore his apparent unease.

“Finish cataloguing your clip art collection into the Excel spreadsheet yet?” you ask snidely.

“Cut out the crap,” he snaps back. “You’re in trouble,” and with that he thrusts into your hands a memorandum from him entitled, “Proposed 14-day suspension. Misuse of a government computer.”

“Sign it,” he orders.

“I am not signing this (feces),” you snarl. “Everyone surfs the web here. What else is there to do?”

“Sign it,” he orders again.

“Shove it,” you state as you toss the notice back to him.

One hour later he returns with a notice of proposed 21-day suspension. Your boss charges you with insubordination for refusing to sign the notice of proposed suspension.

This article contains no legal advice. It is meant only to stimulate the reader’s interest in legal issues which I find of interest. If you need legal advice about your job, get it from someone qualified to dispense it.

You get suspended for 21-days, and you appeal to MSPB where I was an administrative judge. Who wins on the insubordination charge?

Obey now and grieve later. A principle to live by.

To receive the “fair day’s pay” to which you are entitled under the Fair Labor Standards Act, you must give to your employer in return a “fair day’s work.”ⁱ And it is your employer’s sole prerogative to determine what work you must perform, when you must perform it by, and how you must perform it.ⁱⁱ The Court of Claims said it all in 1975:

It is appropriate to observe at the outset that the prime duty and foremost obligation of any employee is to exert effort and energy in the accomplishment of assigned tasks. It is not too much to ask to require a person to function in the job he or she was hired to do. Those in the working force certainly have a legitimate interest in seeking to better their working conditions, and to that end an employee has a right to express his dissatisfactions to those in positions of higher authority. But he is assuredly not free to simply drop assigned work in order to protest management policies; nor is an employee permitted to devote all of his labor--at the expense of his normal duties--to convince superiors that his approach to management techniques is more enlightened than theirs. This court has admonished Government employees in the past that they may not refuse to do work merely because of disagreements with management, and that if they fail to perform their duties, they do so at the risk of being insubordinate.ⁱⁱⁱ[Internal citations omitted.]

If you have a right to express your dissatisfaction with the order you have received, but you don’t have the right to simply drop assigned work to express that dissatisfaction does that mean that in the *sequence of events* you are supposed to obey first and grieve later? Yes, with few exceptions, that’s precisely what it means.

As a rudimentary tenet of labor law, “obey and grieve” has been around for a long time,^{iv} but first applied by MSPB in *Gragg v. U.S. Air Force*.^v Gerald Gragg, an Equipment Cleaner with the Air Force, was removed from his position for failure to obey an order requiring all employees who wear respirators to be clean shaven. MSPB’s Administrative Judge affirmed the removal, and Gragg petitioned for review of that decision. Gragg argued that he had a right to disobey the policy to shave his beard off because the agency had imposed that requirement without first bargaining about it with the union. While noting that the FLRA had invalidated that policy as an unfair labor practice, the Board nonetheless held that Gragg did not have the right to disobey the policy even though it was invalid:

We now turn to the issue of what obligation, if any, did appellant have to obey an order based on an invalid policy. In *Walker v. Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210, the Supreme Court held that "petitioners ... could not bypass orderly judicial review of the injunction to prohibit parades, etc., before disobeying it in spite of the injunction being overbroad and arguably unconstitutional." The case stands for the proposition that individuals do not have the unfettered right to disregard a law, rule or regulation merely because substantial reason exists regarding the constitutionality or validity of that law, rule or regulation. Applying the foregoing to the present case, appellant was obliged to obey the agency's order while taking whatever necessary steps he thought appropriate to challenge the ultimate validity of the order and policy. To find otherwise would have the effect of undermining the statutory scheme established to preserve employee rights without unreasonably preventing agencies from carrying out their missions. It should be noted that in certain limited circumstances employees may disobey an order which would place them in a clearly dangerous situation. However, appellant presented no claim other than the allegation of an unfair labor practice that would show that he had more than a cosmetic interest in maintaining his beard. We must assume therefore, that only a *de minimus* harm would have befallen appellant had he shaved pursuant to the order and then appealed the alleged unfair labor practice to an appropriate forum. The agency established a rational basis for the change in working conditions, that is, to insure greater safety for employees working in an enclosed area. We, therefore, find that appellant was unjustified in disobeying the agency's order to be clean shaven on five consecutive working days, from April 30, 1980 through May 5, 1980.

(The Board reduced Gragg's removal to a thirty-day suspension.)

Gragg remained as the Board's version of "obey and grieve" until 1994 when the Board was called upon to decide whether an employee had to comply with an agency order that required him to turn over documents which contained the privileged of his attorney. In *Fleckenstein v. Dept. of Army*,^{vi} Debra Conboy had proposed to suspend her subordinate, Peter Fleckenstein, for five days. Fleckenstein hired a lawyer to assist him in preparing a response to the proposed suspension. Before he responded, Conboy took from Fleckenstein's desk some documents on which his attorney had written some notes. Fleckenstein took the documents back from Conboy; Conboy demanded them back; but Fleckenstein disobeyed that order. The agency then suspended Fleckenstein for thirty

days for among other things insubordination. On appeal to the Board's New York Regional Office where I served as an Administrative Judge, Fleckenstein argued that the documents which Conboy demanded back from him contained his lawyer's privileged work product, as a consequence of which he was justified in disobeying her order. Inexplicably, the judge did not consider this argument, but the Board did when Fleckenstein filed a petition for review from the judge's initial decision which mitigated the 30-day suspension to a 10-day suspension. The Board reversed the initial decision, did not sustain the suspension, and partially overruled *Gragg*. In one fell swoop, the Board turned "obey and grieve" on its head:

The record shows clearly that the appellant has maintained throughout the adjudication of his appeal that he was not insubordinate because Ms. Conboy's order was not proper. Specifically, he has alleged that the documents in question were rightfully his; that they included his and his attorney's notes regarding his defense to the June 27, 1991, proposal to suspend him; and that he believed Ms. Conboy's retention of these documents could prejudice his defense. In light of these allegations, we find that the charge of insubordination cannot be sustained in the absence of a showing that Ms. Conboy was entitled to have her order obeyed. (Internal citations to the record omitted.)

Hold on a minute, MSPB. You said that the Department of the Army had no right to have Jerry Gragg shave off his beard, but when he refused to shave it off, you found him guilty of insubordination. Have you changed your mind? The Board said it had not:

In sustaining the charge of insubordination [against Fleckenstein], the administrative judge relied on *Gragg v. U.S. Air Force*, 11 MSPB 546, 13 M.S.P.R. 296, 299 (1982), *dismissed*, 717 F.2d 1343 (Fed.Cir.1983). In that decision, the Board held that an employee did not have the unfettered right to disregard an order merely because there was substantial reason to believe that the order was not proper, and that the employee was required to comply with the order except in certain limited circumstances where obedience would place him in a clearly dangerous situation. *Id.* This Opinion is not inconsistent with that holding. We note, however, that the Board concluded in *Gragg* that the employee could be disciplined for his failure to obey an order even though the order was based on a policy that later was found to be improper. *Id.* at 298-301. To the extent that *Gragg* can be interpreted as indicating that an employee can be disciplined for a refusal to obey an order that the agency is not entitled to have obeyed, we hereby overrule that decision. *See Gende v. Department of Justice*, 35

M.S.P.R. 518, 523 (1987) (decisions by the Court of Appeals for the Federal Circuit constitute precedent that is binding on the Board).

Ultimately, the Board found that Conboy had no right to demand back the documents which Fleckenstein had taken from her because those documents were covered by the work-product privilege. Accordingly, the Board found that the agency had failed to prove that Conboy had a right to have her order obeyed. The Board left unanswered whether an agency's order to an employee is presumed to be valid or whether the agency had to prove that it was valid.

The Republican member of the Board understandably went nuts. In his dissent, Member Amador correctly accused the majority of "eradicate[ing] a principle of civil service law which has been a pillar of federal sector employer-employee relations."^{vii}

Within a year, the Board buried *Fleckenstein* and breathed life back into *Gragg*. In *Cooke v. U.S. Postal Service*, the agency removed Curtis Cooke for AWOL after he twice refused to accept reassignment.^{viii} In his appeal to the Board's Dallas field office, Cooke argued that he was justified in refusing to accept the reassignments because they should have but were not done in accordance with RIF regulations. The Board's Administrative Judge agreed and reversed Cooke's removal. The Postal Service petitioned the Board to review and argued among other things that even if Cooke's reassignments were procedurally defective, his only legitimate option was to report to the new positions and then protest his reassignments thereto. The Board agreed:

The Board recently modified *Gragg* "to the extent that [it] can be interpreted as indicating that an employee can be disciplined for a refusal to obey an order that the agency is not entitled to have obeyed." *Fleckenstein v. Department of the Army*, 63 M.S.P.R. 470, 474 n. 3 (1994). That holding, we find, does not allow the appellant to disobey the instant assignment order. In *Fleckenstein*, in the course of preparing a reply to the agency's proposal to suspend him, the appellant was ordered to turn over to his supervisor certain documents that constituted his attorney's work product. Based on that refusal, the agency proposed and effected a more severe disciplinary action. On appeal from the latter action, the Board held that the appellant was entitled not to obey. The attorney work product privilege protects such documents from disclosure by Rule 26(b)(3) of the Federal Rules of Civil Procedure. And, importantly, their disclosure while a proposed disciplinary action was pending against the appellant would have caused him irreparable harm, such as if they contained information related to his culpability in matters other than those already charged. Such harm would not readily be cured during the

course of the appeal of any effected disciplinary action because it could have been very broad and deep, and beyond the scope of the pending disciplinary action. To the extent that our decision in *Fleckenstein* did not reflect the significance of the avoidance of irreparable harm as an underpinning for our holding, we hereby clarify it.^{ix}

In cases after *Cooke*, the Board carelessly reformulated “obey and grieve” as: “An employee must first comply with an order and then, if he disagrees with the order, register his complaint or grievance later, except in certain limited circumstances, such as where obedience would cause him irreparable harm.”^x Under this iteration of the rule, an employee could disobey a *valid* order if it put her in harms way. Take, for example, my case, *Weston v. DHUD*.^{xi} In that case, Ruby Weston appealed to the Board’s New York Regional Office the decision of the Department of Housing and Urban Development to remove her for refusing to cooperate in internal agency investigation. I assigned myself to her case.

Before she was reassigned to Newark, NJ as an equal opportunity specialist, Ms. Weston was employed with HUD as a realty specialist in its New York Area Office. After she was reassigned, HUD received information tending to show that Weston’s son was the actual buyer of real property in Brooklyn, New York, sold by HUD when she was serving as a realty specialist exercising certain responsibilities toward the property and, further, that she subsequently received and endorsed a check from an insurance company in settlement of a claim for fire damage to the property. HUD launched a criminal investigation into this possible conflict of interest, and Weston refused to answer questions, invoking her privilege against self incrimination. Subsequently, HUD dropped the criminal investigation and instituted an administrative investigation. Once again, on the bad advice she received from her lawyer who was also her daughter, Weston refused to cooperate in the investigation. I found that Weston had a duty to cooperate in the administrative investigation because the agency threatened to fire her if she did not. See *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). I mitigated Weston’s removal to a ten-day suspension because the agency had not sustained the conflict of interest charges against her and because: what is a mother to do? Ignore the advice she received from her daughter, the lawyer? In that regard, I noted that Weston had cooperated with the administrative investigation until her daughter stupidly told her not to until the U.S. Attorney issued a declination of prosecution. The Board and the Federal Circuit agreed with me that Weston should have cooperated in the investigation, but, heartlessly, they affirmed her removal, holding that she was vicariously liable for her daughter’s ignorance. (This would not be the last time the Board would reverse me for ruling in favor of an employee in a high-profile case.)

Query: what if Weston had sold HUD property to her son? If the HUD investigator had asked her if she had and if she admitted that she had, would not she have suffered even greater “irreparable harm” than the hypothetical harm Fleckenstein would have suffered if he gave back to Conboy the documents he had taken from her? Of course she would have. What distinguishes Fleckenstein from Weston is that HUD gave Weston a valid

order whereas the Department of Army did not give a valid one to Fleckenstein. Let's us on our own revise *Cooke's* statement of the rule to reflect this important distinction: an employee must obey first an agency's order even if it is invalid and then grieve it later unless obeying the order would cause her/him irreparable harm. The Board leaves to future cases the types of harms which it will regard as irreparable.

It goes without saying, however, that an employee does not have to risk serious bodily injury to comply with an agency order or procedure. In *Whirlpool Corp. v. Marshall*,^{xii} the Supreme Court ruled that an employee of a private employer may refuse an assignment which he reasonably believes will subject him to death or serious injury. The Department of Navy thought that Dennis Haymore, a pipefitter, was being cute when he refused to remove a lead ballast from a submarine allegedly out of fear of being poisoned by the lead.^{xiii}

Haymore was assigned to repair the normal fuel oil (NFO) tank on a submarine. On May 12, 1980, he was informed that the NFO repair required the removal of a lead ballast. Haymore requested a Shipyard Process Instruction on proper lead handling procedures. After reading the first paragraph of the instructions, which described the potential dangers associated with lead, he informed his supervisor that he could not work lead because it was harmful to his health. When Haymore reported for work the next day, his supervisor ordered him to remove the lead ballast. At this time, the supervisor also attempted to discuss with him the safety precautions, such as protective clothing, to be taken when working with lead and to convince Haymore that the job was safe. However, Haymore declared that he was not going to remove the lead ballast, that he had never removed lead before, and would not do it in the future. Haymore's supervisor then informed him that if he continued to refuse a direct order he would be putting himself in a nonpay status. Haymore still refused to work with lead and his supervisor removed him from duty. The agency removed Haymore for insubordination; Haymore appealed to MSPB; the Administrative Judge affirmed the removal; and Haymore petitioned the Board to review.

Citing *Whirlpool, supra*, Haymore claimed that he had a legal right to refuse such an assignment. Raising the question whether *Whirlpool* even applied to federal employees, the Board held that Haymore's alleged concerns about lead poisoning were unreasonable:

The record reveals that the agency explained its safety procedures to appellant and demonstrated to him that working lead could not have created any danger to his health. In addition, appellant has failed to demonstrate that his refusal to work lead *under any circumstances* was reasonable. There was no showing that any of his coworkers had ever damaged their health by working lead. Appellant's sole basis for his claim that working lead would be hazardous to his health was the first paragraph of the Shipyard's Instructions concerning lead handling procedures, in which the agency warned of the dangers of

excessive intake of lead. Appellant made no effort to show that the job he was asked to perform would result in an "excessive intake of lead." In fact, an industrial hygienist testified that even with no controls and no protective clothing, the job appellant was ordered to perform would subject him to such a limited amount of lead that it would not constitute a health hazard. Under these circumstances, there is no basis for the appellant's contention that he had a legal right to refuse the assignment, since there was no risk of life or health.^{xiv}

Before I delve into *Larson v. Department of the Army*, a progeny of *Haymore*, I want to issue a warning to the very few of you, who like the EBay bidder, are constitutionally incapable of working for anyone other than yourself: don't use *Larson* or any precedent to fence with management. You're only dueling with yourself; and when the match stops, management will stab you through your heart.

I am going to forego *Larson's* complex procedural history and discuss only the facts which implicate "obey and grieve." Larson is employed as Warehouse Worker with the agency's Dugway Proving Ground. One of his duties is the maintenance and cleaning of storage facilities known as "igloos" which are located on the base and contain ammunition and/or explosives. On October 23, 1997, Larson's supervisor, William Diel, asked him to assist an electrician in removing a damaged light fixture from an igloo which contained explosives. Believing that removing the light fixture in the presence of explosives violated safety regulations and standard operating procedures, Larson contacted a Safety Specialist or about October 29, 1997, to inform him that he felt that explosives needed to be removed from the igloo before maintenance of the igloo was done, but that Diel had told him to do the work without removing the explosives. The Safety Specialist then spoke a Safety and Occupational Health Specialist who researched removal of ammunition and explosives and discovered that explosives must be removed in some circumstances but not in others. He in turn contacted the Larson and told him what actions could take place inside the igloo without removing explosives although he does not recall making any determination regarding the specifics of the proposed removal of the light fixture. On November 5, 1997, an electrician called Larson and told him that he would be arriving shortly to remove the light fixture, pursuant to Diel's orders. Still believing that removing the fixture in the presence of the explosives violated a safety regulation, Larson called the Chief of Safety at the base's Safety Office, who informed him that he would look into the safety regulations and get back to him. Meanwhile, later in the morning of November 5, the electrician arrived at the base and Diel asked Larson to retrieve the key to the igloo so that the electrician could perform the scheduled work on the light fixture. Larson refused, telling Diel that if Diel wanted the key, he would have to get it himself. Diel asked Larson if he knew what insubordination was, and Larson replied that he did. The agency suspended Larson for one-day, and Larson filed an IRA appeal with the Board alleging that the agency suspended him in reprisal for protected whistleblowing. On remand from the federal circuit, the Board found among many other things that Larson was justified in refusing to obey Diel's order:

We have considered such evidence as well as the remainder of the record and find that the appellant's refusal to obey Diel's order was protected under the "irreparable harm-exception" to the "obey now, grieve later" rule. Not only did the appellant reasonably believe, at the time he refused to obey Diel's order, that removing the light fixture under the circumstances violated a safety regulation but he also reasonably believed that he was required and authorized to stop the planned removal of the light fixture from proceeding.

Larson testified that he believed that he was required by an Army regulation to stop the removal of the light fixture, which provided in pertinent part that an operator or team member has the authority to stop operations or practices which, if allowed to continue, could reasonably be expected to result in death or serious physical harm to personnel, major system damage, or endanger the installation's ability to accomplish its mission, immediately or before the imminence of such danger can be eliminated through regular channels. I mention this because the Board's decision only makes sense if the risk of physical injury or death were imminent. If the risk were off in the distant future, Larson ought to have obeyed first and then grieved, as a result of which, hopefully, the danger would have been eliminated well before any untoward consequences occurred.

Stuffy but trite lawyers like to talk about some cases as being "fact sensitive," as if the doctrine of *stare decisis*^{xv} did not make all cases sensitive to their own peculiar set of facts. Let me sensitize you to those facts on which I believe *Larson* turns: 1. Larson did everything he could to check out his concern about removing the light fixture before he actually refused Diel's order. 2. Some agency safety specialists actually agreed with Larson that removing the light fixture without first removing the ammunition posed a safety hazard. 3. AMMUNITION=BOOM !!!!. We are not talking about the purely hypothetical possibility of lead poisoning; we are talking BOOM. 4. The Chief of Safety, according to the Board, advised Larson after he had disobeyed Diel's order that the fixture could be removed without first removing the ammunition without violating any safety regulation.

So if you are a warehouse worker who handles ammunition and if the agency gives you an order which if fulfilled might cause you to detonate the ammunition, give me a call if you have enough time and for two hundred bucks I will tell you what to do.

I guess you have figured out by now that if, short of blowing up the base, you have to obey first and grieve later, then surely you were guilty of insubordination in refusing to sign the notice of proposed suspension which your supervisor served on you. All your signature signifies is that you *received* the document; it hardly means that you *concurred* with its contents. Worse still, you are guilty not merely of insubordination but of the more egregious offense of "insubordinate defiance of authority" for flinging the proposal back to your supervisor and telling him to shove it.^{xvi}

Hey, but you showed him who was boss, right?

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Act appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB LITIGATION TECHNIQUES*

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Endnotes

ⁱ Fair Labor Standards Act was designed to give specific minimum protection to individual worker and to insure that each employee covered by Act would receive a fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay. Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. § 141 et seq.; Fair Labor Standards Act of 1938, § 1 et seq. as amended 29 U.S.C.A. § 201 et seq. *Barrentine v. Arkansas-Best Freight System, Inc.* 450 U.S. 728 (1981)

ⁱⁱ 5 U.S.C.A. § 7106 provides:

a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

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- (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
- (C) with respect to filling positions, to make selections for appointments from--
- (i) among properly ranked and certified candidates for promotion; or
- (ii) any other appropriate source; and
- (D) to take whatever actions may be necessary to carry out the agency mission during emergencies

ⁱⁱⁱ *Boyle v. U. S.* 515 F.2d 1397, *1401 -1402 (Ct.Cl. 1975)

^{iv} Rather than follow the *time-honored* principle of industrial relations that--with few exceptions--an employee must "obey now and grieve later," Crider chose to exercise "self-help" and simply refused to obey Damsgaard-Brand's order. *Crider v. Spectrulite Consortium, Inc.* 130 F.3d 1238, *1242 (C.A.7 (Ill.),1997)

^v *Gragg v. U.S. Air Force*, 11 M.S.P.B. 546

^{vi} *Fleckenstein v. Dept. of Army*, 63 MSPR 470, 475 (1994),

^{vii} *Id at* 63 M.S.P.R. 470, 477

^{viii} 67 M.S.P.R. 401(1995)

^{ix} *Cooke v. U.S. Postal Service* 67 M.S.P.R. 401, *407 -408

^x *Larson v. Department of Army* 91 M.S.P.R. 511, *519

^{xi} *Weston v. U.S. Dept. of Housing and Urban Development* 724 F.2d 943 (C.A.Fed.,1983)

^{xii} 444 U.S. 823, 100 S.Ct. 43, 62 L.Ed.2d 29 (1980)

^{xiii} *Haymore v. Department of Navy* 9 M.S.P.B. 133, *136, 9 M.S.P.R. 499

^{xiv} *Haymore v. Department of Navy* 9 M.S.P.B. 133, *136-137, 9 M.S.P.R. 499, **504 – 505.

^{xv} STARE DECISIS - Lat. "to stand by that which is decided." The principal that the precedent decisions are to be followed by the courts. To abide or adhere to decided cases. It is a general maxim that when a point has been settled by decision, it forms a precedent which is not afterwards to be departed from. The doctrine of stare decisis is not always to be relied upon, for the courts find it necessary to overrule cases which have been hastily decided, or contrary to principle. Many hundreds of such overruled cases may be found in the American and English books of reports. An appeal court's panel is "bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989).

^{xvi} The Board's cases involving a charge of "insubordinate defiance of authority," construe it as the intentional failure to obey an order combined with defiant behavior. *See, e.g., Smith v. Department of the Air Force*, 48 M.S.P.R. 594, 596 (1991); *Winner v. Department of the Air Force*, 9 MSPB 432, 10 M.S.P.R. 177, 178 (1982). Although "insolence" has been brought as a separate charge together with a charge of "insubordinate defiance of authority," *e.g., Smith*, 48 M.S.P.R. at 596, insolent behavior can be properly considered as a factor in determining whether insubordinate conduct amounted to a "defiance of authority," *see Ballew v. Department of the Army*, 36 M.S.P.R. 400, 401-02 (1988) (upholding a charge of "defiance of authority" based on an allegation of "insolent behavior"); *see also* WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 379 (1989) (listing "insolent" as synonym for "defiant"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 687 (2d ed.1957) (defining *137 "defiant" as insolent).