

# TABLE OF CONTENTS

<b>ADVERSE ACTIONS</b> .....	<b>1</b>
A.    ACTIONS AGAINST ALJs.....	1
B.    ADVERSE ACTIONS RELATED TO DISABILITY.....	3
1.    Evidence of Recovery Between Date of Removal and MSPB Decision.....	4
C.    ARBITRATION REVIEW.....	4
D.    CANCELLATION OF APPOINTMENTS; PROMOTIONS.....	4
E.    CONSTRUCTIVE ADVERSE ACTIONS .....	5
1.    Board Authority .....	6
2.    Evidence of Coercion; Involuntariness.....	6
3.    Involuntary Downgradings .....	9
4.    Involuntary Resignations .....	9
5.    Involuntary Retirement.....	15
6.    Jurisdictional Showing.....	21
7.    Settlement-Related .....	21
8.    Suspensions.....	23
a.    Evaluating Justification for Absences .....	27
b.    Light Duty .....	27
c.    Pleading Standards .....	28
d.    Suspension of Certain Privileges .....	28
9.    Time Limits.....	28
F.    ENFORCED LEAVE.....	28
G.    INDEFINITE SUSPENSIONS .....	30
H.    REMOVAL .....	33
I.    SUITABILITY DETERMINATIONS .....	33
<b>APPOINTMENTS</b> .....	<b>35</b>
A.    GENERALLY.....	35
B.    INTERMITTENT .....	37
C.    SEASONAL APPOINTMENTS.....	37
D.    TEMPORARY APPOINTMENTS .....	38
<b>ARBITRATION/COLLECTIVE BARGAINING-RELATED ISSUES</b> .....	<b>39</b>
A.    ARBITRAL V. APPEAL CONTEXT .....	39
B.    ATTORNEY FEES.....	40
C.    AWARDS.....	40
D.    BOARD JURISDICTION .....	41
E.    ELECTION OF REMEDIES .....	41
F.    HARMFUL ERROR .....	43
G.    INTERPRETATION OF CONTRACT .....	43
H.    NEGOTIABILITY .....	45
I.    PROCEDURE.....	45
J.    REVIEW AUTHORITY OF MSPB .....	46
1.    Collateral Estoppel.....	51
2.    EEO and Prohibited Personnel Practices Allegations.....	52
3.    Standard of Review .....	52
K.    REVIEW BY FEDERAL CIRCUIT .....	53
L.    REVIEW OF ARBITRATION AWARDS.....	53
1.    Contract Interpretation.....	53
2.    Discrimination Issues.....	53
3.    Penalty Determinations.....	53
4.    Postal Service Employees.....	54

5.	Procedural Issues .....	54
6.	Submissions to the MSPB.....	54
M.	STANDARD OF REVIEW .....	54
N.	UNION REPRESENTATION UNDER § 7114 .....	55

**ATTORNEY FEES ..... 57**

A.	AGE DISCRIMINATION.....	57
B.	AMERICAN JOBS CREATIONS ACT.....	57
C.	ATTORNEY’S RIGHT TO FEES.....	57
D.	AUTHORITY TO AWARD .....	57
E.	BACK PAY.....	60
F.	BURDEN OF PROOF.....	60
G.	CLEARLY WITHOUT MERIT .....	60
H.	COSTS .....	60
I.	CREATION OF ATTORNEY CLIENT RELATIONSHIP .....	61
J.	ENFORCEMENT PROCEEDINGS.....	61
K.	EQUAL ACCESS TO JUSTICE ACT .....	61
L.	GROSS PROCEDURAL ERROR .....	62
M.	INCURRED .....	62
N.	INTEREST OF JUSTICE .....	62
O.	KNEW OR SHOULD HAVE KNOWN .....	64
P.	OSC CASES.....	64
Q.	PREVAILING PARTY .....	65
1.	Catalyst Theory .....	66
R.	PROCEDURE .....	67
S.	PROHIBITED PERSONNEL PRACTICES .....	68
T.	REASONABLENESS .....	68
U.	SETTLEMENT-RELATED ISSUES .....	71
V.	SUBSTANTIAL INNOCENCE .....	72
W.	TIME IN COURT.....	73
X.	USE OF COUNSEL; LICENSURE.....	73
Y.	USERRA .....	73

**BOARD PROCEDURES/AUTHORITY ..... 75**

A.	ADVISORY OPINIONS .....	75
B.	ASSISTANCE TO MENTALLY INCOMPETENT APPELLANTS; <i>FRENCH</i> PROCEDURES .....	76
C.	ATTORNEYS.....	76
D.	AUTHORITY OF ADMINISTRATIVE LAW JUDGES; BOARD .....	76
E.	BIAS .....	78
1.	Case-Related Rulings.....	78
2.	<i>Ex Parte</i> Communications .....	78
3.	Generally.....	79
4.	Recusal.....	80
F.	CONFIDENTIALITY .....	81
1.	Anonymous Appeals .....	81
G.	CONTINUANCES .....	81
H.	CRITERIA FOR BOARD REVIEW (FACT FINDINGS) .....	82
I.	DELAYS IN PROCESSING.....	84
J.	DISMISSALS .....	85
1.	120-Day Adjudication Standard .....	85
2.	Appeals From OSC.....	85
3.	Designation of Representative.....	85
4.	Disability Retirement.....	85
5.	Disposition of Criminal Charges.....	85
6.	Failure to Prosecute.....	85

7.	Failure to State a Claim .....	87
8.	OPM Recision.....	87
9.	Recision .....	87
10.	Request for Reconsideration.....	87
11.	Sanctions.....	87
12.	Settlements.....	88
13.	Timeliness .....	88
14.	With Prejudice .....	88
15.	Without Prejudice .....	91
16.	USERRA .....	94
K.	FORWARDS .....	96
L.	INITIAL DECISION—CONTENTS .....	96
M.	INTERLOCUTORY APPEALS .....	97
N.	JUDICIAL REVIEW.....	99
O.	MERITS OF THE CASE.....	100
P.	PETITION FOR REVIEW .....	100
	1. Factual and Credibility Findings .....	101
Q.	POSTHEARING ACTIVITIES .....	101
	1. Close of the Record .....	101
R.	PREHEARING PROCEDURES.....	102
	1. Discovery .....	103
	2. Pleadings.....	106
	i. Intervention; <i>Amicus</i> Filings .....	106
	ii. Joinder; Consolidation .....	108
	iii. Motion for Protective Orders .....	111
	iv. Motion for Summary Judgment .....	111
	v. Motion to Strike .....	111
	vi. Motion to Substitute; Survival of Claims .....	112
	vii. Pleading Procedure .....	112
	viii. Pleadings, Generally.....	113
	ix. <i>Pro Se</i> Appellants.....	113
	3. Prehearing Conference .....	114
	4. Suspension of Case Processing .....	114
S.	PRESERVATION OF ERROR .....	114
T.	PRESERVING THE RECORD .....	115
U.	<i>PRO SE</i> APPELLANTS .....	116
	1. Role of the AJ.....	117
V.	PROPER PARTIES .....	118
W.	RECAPTIONING APPEALS .....	118
X.	RECISION .....	118
Y.	REGULATION REVIEW REQUEST.....	118
Z.	REMAND .....	119
AA.	REOPENING AND RECONSIDERATION .....	119
	1. Annuity Errors .....	119
	2. Board Authority .....	119
	3. Case Processing Errors .....	121
	4. Change in Board Precedent .....	121
	5. Change of Law .....	122
	6. Diligence Requirement.....	122
	7. Election of Remedies .....	122
	8. Errors Below .....	123
	9. Federal Circuit Precedent.....	124
	10. Good Cause.....	124
	11. Interest of Justice .....	124

12.	Jurisdictional Issues .....	124
13.	Law of the Case.....	125
14.	New and Material Evidence; Unusual Circumstances.....	125
15.	Premature Filings .....	128
16.	<i>Pro Se</i> Appellants.....	128
17.	Public Interest .....	129
18.	Remedies .....	129
19.	Retirement Cases .....	129
20.	Settlement Agreements .....	129
21.	<i>Sua Sponte</i> Reopening .....	130
22.	Supreme Court Precedent.....	130
23.	Timeliness Issues.....	130
24.	To Review Evidence.....	133
BB.	REQUEST FOR EXTENSION .....	133
CC.	SANCTIONS .....	133
1.	Agency Compliance.....	136
DD.	STAYS .....	137
EE.	STIPULATIONS .....	139
FF.	USERRA .....	139
GG.	VEOA .....	141
HH.	WITHDRAWAL .....	141

**COMPLIANCE ..... 147**

A.	BACK PAY .....	147
B.	BOARD AUTHORITY .....	148
C.	DEMOTION OF SUPERVISORS .....	148
D.	DISMISSAL ON PROOF .....	148
1.	Full; Light Duty .....	149
E.	ENFORCEMENT OF MSPB DECISIONS .....	149
F.	KNOWLEDGE OF BREACH .....	149
G.	PROCEDURES .....	149
H.	REHIRING.....	153
I.	RETURN TO DUTY .....	153
1.	Collective Bargaining Agreements .....	153
2.	Delay in Restoration .....	153
3.	Demotions .....	153
4.	Interim Relief .....	154
5.	Leave .....	154
6.	Priority Consideration .....	154
7.	Promotions .....	155
8.	Relocation .....	155
9.	<i>Status Quo Ante</i> .....	155
10.	Term Appointment .....	157
11.	Work Schedule .....	157
J.	SETTLEMENT-RELATED .....	157
1.	Back Pay .....	157
2.	Board Authority .....	158
3.	Breach .....	158
4.	Compliance Standard .....	159
5.	Contract Law Controls .....	159
6.	Damages for Breach .....	159
7.	Disability Retirement .....	159
8.	Effect of Breach .....	159
9.	Enforcement .....	160
10.	Interpretation of Terms .....	160

11.	Knowledge of Breach .....	161
12.	Last Chance Agreements .....	161
13.	Materiality of Breach .....	162
14.	Personnel File .....	163
15.	Petition for Enforcement .....	163
16.	Petition for Review .....	163
17.	Priority Consideration .....	163
18.	Procedures .....	163
19.	Recision .....	166
20.	Remedies .....	166
21.	Restoration .....	167
22.	Validity .....	167
23.	Waiver .....	167

**CONSTITUTIONAL ISSUES/DUE PROCESS ..... 169**

A.	ACCESS TO CLASSIFIED INFORMATION .....	169
B.	CONSTITUTIONAL CHALLENGES, GENERALLY .....	169
C.	DOUBLE JEOPARDY .....	169
D.	DUE PROCESS .....	170
1.	Actions Against ALJs .....	170
2.	Board Authority to Review Due Process Challenges .....	170
3.	Deciding Officials: Scope of Authority .....	170
4.	Department of Defense .....	170
5.	"Employee" .....	171
6.	<i>Ex Parte</i> Contacts .....	171
7.	Exceptions to Due Process .....	172
8.	Federal Aviation Administration.....	172
9.	Failure to Provide .....	173
10.	Fairness of Regulations .....	173
11.	Harmful Error vs. Due Process Challenge .....	173
12.	Hearings .....	173
13.	Minimum Due Process .....	174
14.	Notice of Appeal Rights .....	177
15.	Notice of Charges .....	177
16.	Property Right .....	178
17.	Statutory Construction .....	178
18.	Underlying Reason for Adverse Action .....	179
19.	Veterans Preference .....	179
20.	Waiver .....	179
21.	Zero Tolerance Policy .....	179
E.	EQUAL PROTECTION .....	180
F.	<i>EX PARTE</i> CONTACTS .....	180
G.	FIFTH AMENDMENT .....	181
H.	FIRST AMENDMENT .....	181
I.	SEARCH AND SEIZURE .....	183
J.	SELF INCRIMINATION .....	183
K.	SUPREMACY CLAUSE .....	184
L.	"UNDER COLOR OF STATE LAW" .....	184

**COURT REVIEW ..... 185**

A.	ANTHRAX VACCINATION IMMUNIZATION PROGRAM .....	185
B.	ATTORNEY FEES AND COSTS .....	185
C.	DISCRIMINATION ISSUES .....	185
D.	DISMISSALS .....	186
E.	ELECTION OF REMEDIES .....	186

F.	EXHAUSTION OF REMEDIES .....	186
G.	HEARINGS .....	187
H.	INTERLOCUTORY APPEALS .....	187
I.	JURISDICTION .....	187
J.	NON-PRECEDENTIAL DECISIONS .....	188
K.	PENALTY DETERMINATIONS.....	189
L.	PRECEDENTIAL DECISIONS .....	189
M.	<i>PRO SE</i> APPELLANTS .....	189
N.	PROCEDURE .....	189
O.	PROPER PARTY .....	190
P.	REVIEW AUTHORITY .....	190
Q.	RIPENESS .....	191
R.	SETTLEMENTS .....	192
S.	STANDARD OF REVIEW .....	192
T.	STATUTE OF LIMITATIONS .....	195
U.	STATUTORY AND REGULATORY INTERPRETATION .....	196
V.	TIME LIMITS AND TOLLING .....	196
W.	TUCKER ACT JURISDICTION .....	197
X.	UNION STANDING .....	197
Y.	WITNESS CREDIBILITY .....	197

**DEFENSES ..... 199**

A.	COLLATERAL ESTOPPEL .....	199
B.	DISPARATE PENALTIES; TREATMENT .....	202
C.	DUE PROCESS CHALLENGES .....	203
D.	EQUITABLE ESTOPPEL.....	203
E.	EQUITABLE TOLLING .....	204
F.	ESTOPPEL, GENERALLY .....	204
G.	FAILURE TO STATE A CLAIM .....	205
H.	INCAPACITY; INCOMPETENCE .....	206
I.	JUDICIAL ESTOPPEL .....	206
J.	LACHES .....	207
K.	LAW OF THE CASE .....	207
L.	MARITAL STATUS DISCRIMINATION .....	208
M.	NOT IN ACCORDANCE WITH LAW .....	209
N.	PARTISAN POLITICAL REASONS .....	209
O.	PRIVILEGE .....	209
P.	PROHIBITED PERSONNEL PRACTICES .....	210
Q.	REPRISAL .....	210
R.	<i>RES JUDICATA</i> .....	213
S.	SELF-DEFENSE .....	217
T.	USERRA VIOLATIONS.....	217

**DISCRIMINATION ..... 219**

A.	AGE DISCRIMINATION .....	219
B.	BURDEN OF PROOF; <i>PRIMA FACIE</i> CASE .....	221
C.	CONSTRUCTIVE AGENCY ACTIONS.....	224
D.	DISABILITY: PHYSICAL; MENTAL .....	224
1.	Accommodation .....	224
2.	Burden of Proof.....	229
3.	Case-by-Case Determinations.....	229
4.	Defenses.....	229
5.	Direct Threat Defense.....	230
6.	Effects of Medication; Mitigating Measures.....	230
7.	Essential Functions of the Position.....	230

8.	Handicapped .....	231
9.	Individuals Regarded as or Perceived as Disabled .....	231
10.	Interactive Process.....	232
11.	Major Life Activity .....	232
12.	Medical Examinations and Inquiries .....	233
13.	Qualified Individual With a Disability .....	233
14.	Rehabilitation Act .....	235
15.	Remedies .....	235
16.	Specific Disabilities.....	235
	a. Stress.....	235
17.	Standard of Review .....	235
18.	Substantially Limited.....	235
19.	USERRA .....	237
E.	DISPARATE IMPACT; TREATMENT .....	237
F.	EVIDENCE OF DISCRIMINATION.....	239
	1. Disclosure; Use of Confidential Information .....	239
G.	EXHAUSTION OF REMEDIES .....	239
H.	HOSTILE WORK ENVIRONMENT .....	240
I.	MIXED CASE PROCEDURES .....	240
	1. Appeals from Final Agency Decisions .....	240
	2. Appeals from Grievances .....	241
	3. Binding Effect of EEO Rulings; Regulations .....	241
	4. Civil Actions .....	241
	5. Court Review .....	241
	6. Duty to Resolve Issues and Inform Appellant of Elements of Proof .....	242
	7. Effect of Discipline Pending Before the EEOC .....	242
	8. Election of Remedies .....	242
	9. Error .....	243
	10. Estoppel.....	243
	11. Forced Retirement; Resignation .....	243
	12. IRAs .....	243
	13. Jurisdiction.....	244
	14. Mootness .....	245
	15. Multiple Filing Options .....	245
	16. Non-Mixed Matters .....	245
	17. Notice of Appeal Rights.....	246
	18. OPM .....	246
	19. Precedential Effect of Prior Decisions; Special Panel .....	246
	20. Proposing Officials.....	247
	21. Relief.....	247
	22. Retirement Related Appeals .....	247
	23. Review Authority .....	247
	24. Review of Arbitration Decisions .....	248
	25. Settlement Agreements .....	248
	26. Standing.....	248
	27. Time Limits and Tolling.....	249
	28. USERRA .....	251
	29. Veteran's Rights.....	251
	30. Waiver; Abandonment of Discrimination Claims .....	251
J.	NATIONAL ORIGIN DISCRIMINATION .....	252
K.	RACE DISCRIMINATION .....	252
L.	RELIGIOUS DISCRIMINATION .....	252
M.	REMEDIES .....	253
N.	REPRISAL .....	255

O.	SEX DISCRIMINATION .....	256
P.	SEXUAL HARASSMENT; SEX-BASED HARASSMENT .....	257
Q.	SEXUAL ORIENTATION .....	257
R.	SPECIAL PANEL PROCEEDINGS .....	258
<b>EVIDENCE</b>	<b>.....</b>	<b>259</b>
A.	ADMISSIBILITY .....	259
B.	ADMISSIONS .....	259
C.	CIRCUMSTANTIAL; DIRECT EVIDENCE .....	259
1.	Circumstantial Evidence .....	260
2.	Substitutes for Direct Evidence .....	260
a.	Presumptions .....	260
i.	Delivery of Mail .....	260
ii.	Judicial Notice .....	260
iii.	Public Officers .....	260
b.	<i>Res Judicata</i> .....	261
i.	OPM Annuity Determinations .....	261
D.	CONFIDENTIALITY .....	261
E.	CREDIBILITY; IMPEACHMENT .....	261
F.	EVIDENCE IN DISABILITY CASES .....	265
G.	EXCLUDED .....	265
H.	EXPERT TESTIMONY .....	266
I.	EXPLANATORY MATERIAL .....	266
J.	HEARING CONDUCT AS EVIDENCE .....	266
K.	HEARSAY .....	266
L.	IMPEACHMENT EVIDENCE .....	267
M.	MEDICAL EVIDENCE .....	267
N.	NEW AND MATERIAL .....	268
1.	Board Authority .....	268
2.	Error Below .....	268
3.	Evidence Previously Available .....	268
4.	Evidence Submitted After Close of the Record .....	269
5.	Impeachment Evidence .....	273
6.	Issues; Arguments Not Raised Below .....	274
7.	Jurisdictional Issues .....	274
8.	Relevance .....	274
9.	Reopening .....	274
10.	Subsequent Medical Evidence, OWCP Determinations .....	274
11.	Test of Due Diligence .....	276
12.	Timeliness of Filings .....	277
13.	What Constitutes New and Material Evidence .....	278
O.	POLYGRAPH .....	279
P.	PREPONDERANCE .....	279
Q.	PRESUMPTIONS .....	279
R.	PRIOR ACTS .....	279
S.	PRIVILEGE .....	280
T.	PROBATIVE VALUE .....	280
U.	PROPOSAL NOTICE AS EVIDENCE .....	280
V.	REBUTTAL EVIDENCE .....	280
W.	RELEVANCE .....	281
X.	STATEMENTS BY REPRESENTATIVES .....	281
Y.	STATEMENTS IN PLEADINGS .....	281
Z.	SUBSTANTIAL EVIDENCE .....	281
AA.	SWORN STATEMENTS .....	282
BB.	TESTIMONY .....	282

**HARMFUL ERROR .....283**

- A. BURDEN OF PROOF ..... 283
- B. CHARGES ..... 283
- C. DUE PROCESS ..... 283
- D. ERRORS IN PROPOSAL NOTICE AND REPLY PROCESS ..... 285
  - 1. Agency Decisional Procedures..... 285
  - 2. Charge Splitting ..... 285
  - 3. Estoppel; Double Jeopardy ..... 286
  - 4. Framing of Charges..... 286
  - 5. Multiple Specifications Supporting a Single Charge ..... 287
  - 6. Notice of Charges ..... 288
  - 7. Procedural or Regulatory Errors ..... 288
  - 8. Shortened Notice Period..... 288
  - 9. Stale Charges; Laches ..... 288
  - 10. Technical Deficiencies ..... 288
- E. *EX PARTE* CONTACT ..... 289
- F. HARMFUL ERROR, GENERALLY ..... 290
- G. HARMLESS ERROR ..... 291
- H. INDEFINITE SUSPENSION ..... 291
- I. PERFORMANCE BASED ACTIONS ..... 292
- J. PROCEDURE ..... 292
- K. PROPOSING; DECIDING OFFICIALS ..... 292
- L. STATUTORY AND REGULATORY VIOLATIONS ..... 293

**HEARINGS .....295**

- A. CONDUCT OF THE HEARING; RESPONSIBILITIES OF THE JUDGE ..... 295
  - 1. Ensuring Record Development..... 295
    - a. Duty of Judge to Inform an Appellant of the Governing Law;  
Assistance of *Pro Se* Appellants; Liberal Construction of Pleadings ..... 295
- B. RIGHT TO A HEARING ..... 295
  - 1. Agency Actions ..... 295
  - 2. *Amicus Curiae* ..... 295
  - 3. Compliance Matters ..... 295
  - 4. Constructive Agency Actions ..... 295
  - 5. Denied as Sanction ..... 296
  - 6. Disability Retirement ..... 297
  - 7. Disputes of Material Fact ..... 297
  - 8. Documentary Submissions in Lieu of Hearing ..... 297
  - 9. Evidentiary Hearings ..... 297
  - 10. Generally ..... 298
  - 11. In-Person Hearings ..... 298
  - 12. IRAs ..... 298
  - 13. Jurisdictional Matters ..... 299
  - 14. Minimum Due Process ..... 300
  - 15. Petitions for Enforcement ..... 301
  - 16. Probationary Periods ..... 301
  - 17. Requests for Oral Argument ..... 301
  - 18. Restoration Appeals ..... 301
  - 19. Sanctions ..... 302
  - 20. Settlement Agreements ..... 302
  - 21. Statutory Rights ..... 302
  - 22. Suitability ..... 303
  - 23. Timeliness ..... 303
  - 24. Video Conference Hearings ..... 303

C.	TELEPHONIC HEARINGS .....	303
D.	TRANSCRIPT .....	304
E.	WAIVER.....	304
1.	Untimely Hearing Request .....	306
F.	WITNESSES; PARTICIPANTS AND TESTIMONY .....	306
<b>INTERIM RELIEF .....</b>		<b>309</b>
A.	AGENCY COMPLIANCE .....	309
B.	AVAILABLE RELIEF .....	310
C.	ENTITLEMENT .....	311
D.	EFFECT OF RETIREMENT .....	311
E.	PROCEDURE .....	311
F.	RETURN TO DUTY .....	313
G.	UNDUE DISRUPTION .....	314
H.	VEOA .....	314
<b>JURISDICTION .....</b>		<b>315</b>
A.	APPELLATE JURISDICTION .....	315
B.	ARBITRATION; COLLECTIVE BARGAINING AGREEMENT-RELATED ISSUES .....	315
1.	Collective Bargaining Agreement.....	316
2.	Effect of Collective Bargaining Agreement; Grievance Procedures.....	316
3.	Unfair Labor Practice Charges.....	317
C.	AUTHORITY OF AJs; BOARD .....	317
D.	BURDEN OF PROOF .....	319
E.	COMPETITIVE SERVICE.....	321
F.	CONSENT OF PARTIES .....	321
G.	CURRENT CONTINUOUS SERVICE .....	321
H.	DEMONSTRATION PROJECTS .....	323
I.	DISCRIMINATION COMPLAINTS; MIXED CASES .....	323
J.	ELECTION OF REMEDIES .....	324
K.	“EMPLOYEES” .....	325
L.	EVIDENCE OF JURISDICTION .....	326
1.	Obligation to Produce Evidence Bearing on Jurisdiction .....	326
M.	EVIDENTIARY HEARINGS .....	326
N.	EXCEPTED SERVICE .....	327
1.	Appointments.....	327
2.	Derivative Preference Eligible Status.....	327
3.	Disabled Veteran .....	327
4.	Nonpreference Eligible .....	328
5.	Postal Supervisors.....	328
6.	Preference Eligible Employees.....	328
7.	Probationary Period .....	331
8.	“Same or Similar Positions” Test.....	331
9.	Temporary Appointments .....	332
10.	Veterans Preference .....	332
O.	FAMILY AND MEDICAL LEAVE ACT .....	333
P.	FEDERAL EMPLOYEES’ COMPENSATION ACT .....	333
Q.	FEDERAL EMPLOYEES’ GROUP LIFE INSURANCE ACT .....	333
R.	GRADE AND PAY RETENTION .....	333
S.	JUDGE’S RESPONSIBILITIES .....	333
T.	LOSS OF APPEAL RIGHTS BY CHANGE IN POSITION .....	334
U.	NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY (FORMERLY NATIONAL IMAGERY AND MAPPING AGENCY) .....	335
V.	NATURE OF PERSONNEL ACTION APPEALED TO THE MSPB .....	335
1.	Adverse Actions.....	335

2.	Appointments .....	337
a.	Temporary and Term Appointments.....	337
3.	Classification Appeals.....	337
4.	Constructive Adverse Actions .....	338
5.	Furlough .....	339
6.	Offers of Employment .....	340
7.	OWCP Benefits; Insurance Programs .....	340
8.	Pay and Classification .....	340
a.	Debt Collection .....	340
b.	Pay Correction .....	340
9.	Prohibited Personnel Practices .....	341
10.	Promotion Issues.....	341
11.	Proposed Adverse Actions.....	341
12.	Reassignment; Transfers; Details and Nonselections.....	342
13.	Reduction in Force.....	342
14.	Reduction in Pay; Rank; Grade .....	342
15.	Restoration Appeals.....	349
W.	NON-FRIVOLOUS ALLEGATIONS .....	353
X.	OPM DETERMINATIONS .....	354
Y.	PERSONNEL ACTIONS .....	356
Z.	PETITIONS FOR ENFORCEMENT .....	357
AA.	PRIORITY CONSIDERATION.....	357
1.	Reemployment Priority Lists.....	357
2.	TSA .....	359
BB.	PRIVACY ACT VIOLATIONS .....	359
CC.	PROBATIONERS; 5 USC § 7511(A)(1)(A) .....	359
1.	Application of <i>McCormick v. Air Force</i> .....	359
2.	Appointments .....	361
3.	Calculating Probationary Period .....	362
4.	Current Continuous Service .....	362
5.	"Employee" .....	365
6.	Partisan Political Reasons; Marital Status .....	365
7.	Preappointment Conditions; Postappointment Reasons .....	366
8.	Prior Competitive and Excepted Service; Tacking.....	367
9.	Probationary Supervisors.....	367
10.	Procedure.....	367
11.	Suitability Actions.....	368
12.	Suitability Disqualification; Debarment Action .....	368
13.	Waiver of Appeal Rights .....	369
DD.	REEMPLOYMENT PRIORITY LISTS.....	369
EE.	REGULATION REVIEW .....	370
1.	Employment Practices .....	374
FF.	REMEDIES.....	376
GG.	RETIREMENT.....	377
HH.	RIPENESS FOR REVIEW.....	377
II.	SECURITY CLEARANCE DETERMINATIONS.....	377
JJ.	SETTLEMENT RELATED ISSUES .....	377
KK.	STANDARD OF REVIEW: JURISDICTION .....	378
LL.	STATE ACTIONS.....	378
MM.	STATUS OF EMPLOYEE WHO APPEALS TO THE MSPB .....	378
1.	Agriculture.....	378
2.	Annuitants.....	378
3.	CIA; Defense Department Intelligence .....	379
4.	Contractors.....	379

5.	Department of Veterans Affairs .....	379
6.	Dependents Schools Personnel.....	379
7.	Federal Aviation Administration.....	380
8.	Judicial Branch Employees .....	381
9.	Library of Congress; Congressional Employees .....	381
10.	National Guard Technicians; Military Reserve Members .....	381
11.	Nonappropriated Fund Employees.....	381
12.	Others.....	382
13.	Postal Service Employees.....	382
14.	Student .....	384
15.	Temporary; Intermittent.....	384
16.	Tennessee Valley Authority Retirees Association .....	385
17.	Transportation Security Administration.....	385
18.	World Bank Employees .....	386
NN.	SUITABILITY DETERMINATIONS .....	387
OO.	TIMELINESS .....	390
PP.	WESTFALL ACT.....	390
QQ.	WITHDRAWAL.....	390
RR.	WRITTEN RECORD .....	391

**LEAVE .....393**

A.	ACCRUED LEAVE .....	393
B.	ADMINISTRATIVE LEAVE .....	393
C.	ANNUAL LEAVE .....	393
D.	EVIDENCE.....	393
E.	LEAVE WITHOUT PAY .....	393
F.	MILITARY LEAVE .....	394
G.	OWCP .....	394
H.	REQUIRED TIME OFF .....	395

**MITIGATION .....397**

A.	AGENCY CONSIDERATION OF PAST DISCIPLINE.....	397
B.	ARTICULATION OF RELEVANT FACTORS .....	397
1.	By the MSPB .....	397
C.	DEPARTMENT OF HOMELAND SECURITY .....	398
D.	DOUGLAS FACTORS .....	398
E.	EMPLOYEE JOB LEVEL .....	400
1.	Official Duty Station .....	400
F.	FACTORS NOT CONSIDERED MITIGATING.....	401
G.	NOT ALL CHARGES SUSTAINED .....	401
1.	Remand to Agency .....	403
H.	NOT ALL SPECIFICATIONS SUSTAINED .....	404
I.	SPECIFIC MITIGATING FACTORS .....	405
1.	Disparate Penalties.....	405
2.	Physical; Mental Illnesses .....	405
3.	Progressive Discipline .....	406
4.	Rehabilitation Potential .....	406
a.	Position of Trust; Fiduciary Duty; Loss of Trust .....	406
b.	Repeated Conduct; Last Chance Agreements .....	407
5.	Severity of the Conduct .....	407
6.	Years of Service .....	408
J.	STALENESS OF CHARGES .....	408
K.	TABLE OF PENALTIES .....	408
L.	TIME SERVED .....	408

<b>MOOTNESS .....</b>	<b>409</b>
A. ACTION FOR DAMAGES .....	409
B. ANNUITIES .....	409
C. APPELLANT RESIGNS PRIOR TO DECISION; TERMINATION .....	409
D. CANCELLATION; RESCISION OF ACTION APPEALED .....	410
E. COMPLETE RELIEF RECEIVED .....	411
F. EFFECT OF MOOTNESS .....	412
G. EFFECT OF RESIGNATION .....	412
H. EFFECT ON ENFORCEMENT PETITIONS .....	412
I. INTERIM RELIEF .....	412
J. PROCEDURE FOLLOWED IF ACTION NOT COMPLETELY RESCINDED .....	413
K. PROMISES TO PAY .....	413
L. RELIEF REQUESTED .....	413
M. RESTORATION OF <i>STATUS QUO ANTE</i> .....	414
N. RETIREMENT APPEALS.....	415
O. SETTLEMENT INDEPENDENT OF MSPB APPEAL .....	415
P. STANDARD FOR MOOTNESS .....	416
Q. USERRA .....	417
R. VACATUR .....	419
S. WHISTLEBLOWER PROTECTION ACT .....	419
<b>NEXUS .....</b>	<b>421</b>
A. AGENCY LOSS OF CONFIDENCE .....	421
B. INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION ACT .....	421
C. <i>MERRITT</i> ; BURDEN OF PROOF .....	421
D. SPECIFIC NEXUS DETERMINATIONS .....	422
1. Absences.....	422
2. Adverse Publicity .....	422
3. Conduct Contrary to Agency Mission .....	422
a. Employees' Tax Problems .....	422
4. Failure to Pay Debts .....	423
5. Lack of Candor .....	423
6. Law Enforcement Officers; <i>Giglio</i> Impairment.....	423
7. Off Duty Conduct .....	423
8. On Premises Misconduct .....	424
<b>PAY ISSUES .....</b>	<b>425</b>
A. COMMUTING TIME .....	425
B. CORRECTION OF PAY .....	425
C. DEMOTIONS .....	425
D. HIGH THREE .....	425
E. OVERTIME .....	426
F. PAY REDUCTION .....	426
G. PORTAL-TO-PORTAL ACT .....	426
H. STANDBY DUTY; ON CALL STATUS .....	426
I. VOLUNTARY SERVICES .....	426
<b>PENALTIES .....</b>	<b>427</b>
A. AGENCY CONSIDERATION OF PAST DISCIPLINE .....	427
1. Pending Challenge to Past Discipline .....	428
B. DISPARATE PENALTIES .....	430
C. RULES FOR BOARD REVIEW OF PENALTY .....	431
<b>PERFORMANCE-BASED ACTIONS—CHAPTER 43 .....</b>	<b>433</b>
A. ALOC; WIGI DENIALS .....	433

B.	DEFENSES.....	434
C.	JURISDICTION .....	434
D.	MAINTENANCE OF PERFORMANCE APPRAISALS .....	434
E.	NECESSARY PROOF: SUBSTANTIAL EVIDENCE TEST .....	435
F.	OPPORTUNITY TO IMPROVE .....	436
G.	PERFORMANCE STANDARDS .....	437
	1. ABSOLUTE .....	437
	2. OBJECTIVITY; REASONABLENESS .....	437
<b>POSITION CLASSIFICATION ISSUES .....</b>		<b>439</b>
<b>PRECEDENTIAL EFFECT—BINDING/PERSUASIVE AUTHORITY .....</b>		<b>441</b>
A.	AGENCY RULES AND REGULATIONS .....	441
B.	COURTS.....	441
	1. Binding Effect of Precedential Decisions on the Board .....	441
	2. Courts Other Than Reviewing Court .....	443
	3. Disability Retirement .....	444
	4. Discrimination Issues .....	444
	5. Non-Precedential; Unpublished Decisions .....	444
	6. Review of Agency Interpretation of Statutes .....	444
C.	<i>DICTUM</i> .....	444
D.	EEOC .....	445
E.	FEDERAL RULES OF CIVIL PROCEDURE .....	445
F.	FLRA .....	445
G.	INITIAL DECISIONS .....	445
H.	JUDGES’ HANDBOOK .....	446
I.	OPM .....	446
J.	OWCP .....	448
K.	SSA .....	451
L.	STATE AND LOCALITIES .....	451
<b>PRIVACY ACT .....</b>		<b>453</b>
<b>PROHIBITED PERSONNEL PRACTICES .....</b>		<b>455</b>
A.	BURDEN OF PROOF IN REPRISAL CASES .....	455
	1. Analysis for Prohibited Practice Not Covered by Whistleblower Protection Act .....	455
	a. Disciplinary Cases .....	455
	2. Analysis Under Whistleblower Protection Act.....	455
	a. Agency’s Clear and Convincing Evidence .....	455
	b. Civil Rights Cases.....	460
	c. Contributing Factor Analysis.....	460
	i. Disclosures Following the Personnel Action .....	461
	ii. Knowledge By Agency Managers of Appellant’s Whistleblowing; Constructive Knowledge .....	462
	iii. <i>Per Se</i> Timing Test .....	464
	iv. Reprisal Without Unlawful Motivation: Reprisal by Investigation— The Atypical Case .....	466
	v. Sequential Proof Not Required.....	466
	d. Otherwise Appealable Actions .....	467
	e. Reprisal as an Affirmative Defense .....	467
	i. TSA Employees .....	467
B.	CASES BROUGHT BY OSC .....	467
	1. OSC Corrective Actions.....	467
	a. Board Authority .....	468
	b. Procedure.....	468

	i.	Permissive Intervention .....	468
2.		OSC Disciplinary Actions .....	468
	a.	Disciplinary Penalties.....	468
	i.	Hatch Act Violations .....	468
	b.	Limits on Prosecutorial Authority .....	469
	i.	Employees Who Take or Recommend Personnel Actions .....	469
	c.	Political Activity and Speech; Hatch Act Violations .....	470
C.		INDIVIDUAL RIGHT OF ACTION.....	470
1.		Covered and Excluded Personnel Actions .....	471
	a.	Classification Matters.....	471
	b.	Constructive Adverse Actions .....	471
	c.	Decisions Concerning Leave; Pay; Changes in Duties; Idling; Overtime.....	472
	d.	Failure to Renew Appointment.....	473
	e.	Failure to Take Personnel Action.....	473
	f.	Memorandum of Warning .....	474
	g.	Nonselection.....	474
	h.	Other Actions .....	474
	i.	Performance Appraisals.....	475
	j.	Performance Improvement Periods .....	475
	k.	Probationary Termination .....	476
	l.	Promotions.....	476
	m.	Reassignments, Transfers, and Details.....	476
	n.	Referrals to Employee Assistance Programs; Orders for Psychiatric Testing.....	477
	o.	Security Clearance Suspension or Revocation; Other Certifications.....	477
	p.	Suspensions .....	477
	q.	Termination .....	478
	r.	Threatened Personnel Actions .....	478
	s.	Training .....	478
	t.	WIGI Denial.....	478
2.		Jurisdictional Issues .....	478
	a.	Election and Preclusion of Remedies.....	479
	i.	Exhaustion of OSC Processes; Direct Appeal to MSPB of Otherwise Appealable Actions .....	480
	ii.	Grievance or MSPB Appeal .....	480
	b.	Exhaustion of Remedies .....	480
	c.	Jurisdiction Over Discrimination Claims Presented in IRA Appeals.....	484
	d.	Jurisdictional Analysis Prior to <i>Rusin</i> .....	484
	e.	<i>Rusin</i> Model: Nonfrivolous Allegations Establish Jurisdiction .....	485
	i.	Hearing .....	488
	ii.	Written Record .....	488
	f.	Standing .....	489
	g.	Status of Particular Agencies and Employees.....	489
	i.	Department of Veterans Affairs; Title 38 Employees .....	489
	ii.	Federal Aviation Administration .....	490
	iii.	Foreign Intelligence; Counterintelligence Agencies; Foreign Nationals.....	490
	iv.	Former Employees .....	491
	v.	NAF Employees .....	491
	vi.	National Guard Technicians.....	491
	vii.	Postal Service.....	492
	viii.	Private Sector Employees; Applicants for Employment.....	492
	ix.	Transportation Security Agency .....	492
	h.	Variations on Order of Proof.....	492
3.		Pleading Requirements .....	493
	a.	Duty of Judge to Inform Appellant of Jurisdictional Requirements.....	493

b.	Pleading to MSPB.....	493
c.	Pleading to OSC.....	494
i.	Classification or Labeling of Disclosures Not Required.....	494
ii.	OSC Closeout Letter.....	494
iii.	Proof of Scope of Complaint Made to OSC.....	494
d.	Specificity of Underlying Whistleblower Disclosure.....	494
4.	Time for Initiating IRA Appeal.....	495
a.	Laches.....	496
5.	Time Limits for Filing.....	496
D.	MIXED CASE PROCEDURES.....	496
E.	PROHIBITED PRACTICES OTHER THAN WHISTLEBLOWING REPRISAL.....	496
1.	Improper Preferences and Promotions; 5 USC 2302(b)(6).....	496
F.	SIGNIFICANCE OF DISCOVERY.....	496
G.	STAYS OF PERSONNEL ACTIONS.....	497
1.	Stays Through Individual Appeals.....	497
a.	MSPB Review of Regional Stay Decision.....	497
2.	Stays Through OSC Proceedings.....	497
a.	Initial Stays.....	498
i.	Proof Supporting Stay Applications.....	498
ii.	Stay Extensions.....	498
b.	Nature of Relief.....	499
H.	WHISTLEBLOWING REPRISAL.....	500
1.	Disputes Over Form of Whistleblowing.....	500
a.	Communications Indirectly Involving the Government.....	500
b.	Communications to News Media/Congress.....	500
c.	Complaints to Wrongdoers; Internal Disagreements.....	500
d.	Disclosure of Information Already Known or Public.....	501
e.	Disclosures to Officials Who Cannot Directly Remedy the Matters Disclosed.....	501
f.	Information Disclosed Through Ordinary Duties; Disclosure Through Extraordinary Means.....	502
2.	Personnel Treated as Whistleblowers.....	504
a.	Individual's Perceived as Whistleblowers.....	504
3.	Protected Disclosures.....	504
a.	Belief of Other Employees; Disinterested Observer.....	504
b.	Filing Appeals; Testifying.....	505
c.	Presumed Agency Good Faith; Irrefragable Proof Standard.....	505
d.	Reasonableness of Allegations; False Statements; Motivation.....	505
e.	Response of Agency to Disclosure.....	508
4.	Statutory Definitions.....	508
a.	Abuse of Authority.....	509
b.	"Gross" Waste or Mismanagement.....	510
c.	Threats to Public Health and Safety.....	512
d.	Violations of Law, Rule, or Regulation.....	513
5.	Unprotected Disclosures.....	517
a.	Appeals, Grievances, and Complaints.....	517
b.	EEO Complaints.....	518

**REDUCTION IN FORCE ..... 519**

A.	ACTIONS APPEALABLE AS RIF.....	519
1.	Pay Rate Changes; Demotion; Grade and Pay Retention.....	519
2.	Reassignments.....	519
B.	ASSIGNMENT RIGHTS.....	519
1.	Qualifications Assessment.....	521
C.	AVAILABLE REMEDIES.....	521
D.	<i>BONA FIDES</i> .....	521

E.	CHANGE TO LOWER GRADE .....	522
F.	CLASSIFICATION .....	522
G.	COMPETITIVE AREA; LEVEL .....	523
1.	Veterans Administration .....	523
H.	CREDIT FOR PERFORMANCE .....	523
I.	FURLOUGH .....	523
J.	JURISDICTION .....	524
K.	PROCEDURES .....	527
L.	REEMPLOYMENT PRIORITY LISTS .....	527
M.	REORGANIZATION .....	529
N.	RIF AS AN ADVERSE ACTION .....	529
O.	RIF DEFENSES .....	529
P.	VETERANS PREFERENCE .....	529
Q.	VOLUNTARY DOWNGRADE.....	530

## **REEMPLOYMENT RIGHTS .....531**

A.	AGENCY REGULATIONS.....	531
B.	LACK OF NOTICE CONCERNING RESTORATION RIGHTS AND REEMPLOYMENT APPEAL RIGHTS.....	531
C.	MILITARY RETURN RIGHTS .....	531
D.	RECOVERY FROM A COMPENSABLE INJURY.....	533
E.	REHABILITATION ACT; AMERICANS WITH DISABILITIES ACT .....	539
F.	REMEDIES.....	539
G.	RESTORATION TO DUTY .....	540
H.	VETERANS PREFERENCE ACT .....	540

## **REMEDIES .....541**

A.	ALJ EXAMINATION.....	541
B.	AMERICAN JOBS CREATION ACT .....	541
C.	BACK PAY .....	541
1.	Administrative Leave .....	541
2.	Agency Compliance .....	541
3.	Board Authority .....	542
4.	Deductions From and Adjustments to Back Pay .....	543
5.	Entitlement .....	543
6.	Interest.....	546
7.	Maximum Recovery Period .....	547
8.	Method of Calculation .....	547
9.	Outside Work.....	550
10.	Overtime; Holiday Pay.....	551
11.	Premium Pay.....	551
12.	Promotions.....	551
13.	Ready, Willing and Able.....	551
14.	<i>Status Quo Ante</i> .....	552
15.	Tax Consequences .....	552
16.	Timeliness of Claim .....	552
17.	Work-Related Disabilities .....	552
D.	BOARD AUTHORITY .....	552
E.	COMPENSATORY DAMAGES .....	553
F.	CONSEQUENTIAL DAMAGES .....	554
G.	FRONT PAY .....	555
H.	MEDICAL COSTS INCURRED .....	555
I.	MIXED MOTIVE CASES .....	556
J.	NONPECUNIARY DAMAGES .....	556
K.	NONTRADITIONAL REMEDIES .....	556
L.	PROMOTIONS .....	556

M.	PUNITIVE DAMAGES .....	556
N.	RECISION OF AGENCY ACTION .....	557
O.	RECONSTRUCTING THE PERSONNEL ACTION .....	557
P.	REEMPLOYMENT RIGHTS .....	557
Q.	REINSTATEMENT; <i>STATUS QUO ANTE</i> REMEDY .....	558
	1. Demotions.....	558
R.	RETURN TO DUTY.....	558
S.	SOVEREIGN IMMUNITY.....	558
T.	STAY REQUESTS .....	559
U.	SUITABILITY DETERMINATIONS .....	559
V.	SURVIVOR ANNUITIES.....	560
W.	USERRA .....	560
X.	VEOA .....	561
Y.	WHISTLEBLOWER PROTECTION ACT .....	561

**REPRESENTATION .....563**

A.	APPELLANT IS RESPONSIBLE FOR THE ACTIONS OF HIS REPRESENTATIVE.....	563
	1. Exceptions .....	563
B.	AUTHORITY TO ACT .....	564
C.	CONFLICTS OF INTEREST .....	564
D.	DESIGNATIONS .....	565
E.	FAILURE TO PROSECUTE.....	565
F.	MISCONDUCT.....	565
G.	MOTION TO DISQUALIFY .....	565
H.	NON-ATTORNEYS.....	565

**RETIREMENT .....567**

A.	AGENCY COMPLIANCE .....	567
B.	ANNUITIES .....	567
	1. Alternative Forms of Annuity .....	567
	2. Annuity Overpayment .....	568
	a. Disputes Over Amount of Overpayment .....	568
	b. Particular Cases of Waiver .....	569
	c. Procedure .....	571
	d. Waiver Procedure .....	571
	3. Applications.....	575
	4. Board Authority; Jurisdiction.....	575
	5. Computation of Benefits .....	575
	a. COLAs .....	576
	b. Disability Retirement .....	577
	c. Effect of Court Order .....	578
	d. Material Misinformation from Agency .....	580
	e. Offsets to Annuity.....	580
	f. Significance of Individual Retirement Record .....	580
	g. Withdrawals .....	581
	6. Effective Date .....	581
C.	APPLICATION, RECONSIDERATION, APPEALS.....	581
	1. Effect of Misleading Advice.....	581
	2. MSPB Appeals .....	582
D.	ATTORNEY FEES .....	582
E.	DEATH BENEFITS .....	583
F.	DISABILITY RETIREMENT .....	584
	1. Accommodation .....	584
	2. Applications .....	584
	a. Agency-Initiated .....	584

b.	Incapacity .....	585
c.	Incomplete Applications .....	586
d.	Time Limits for Filing; Agency Obligation of Notice of Eligibility .....	586
e.	Withdrawal of Application .....	588
3.	Board Jurisdiction .....	588
4.	Compliance .....	589
5.	Computing Benefits .....	589
6.	Contract; Nonappropriated Fund Employees .....	590
7.	Deposits .....	590
8.	DVA Decisions .....	590
9.	Entitlement .....	590
10.	Evidence of Disability; Burden of Proof .....	590
a.	Absences .....	591
b.	<i>Bruner and Chavez</i> .....	591
c.	Disability Accommodation; <i>Bracey</i> .....	596
d.	<i>Mullins-Howard</i> Exception .....	599
e.	Procedure .....	599
f.	SSA Decisions; <i>Trevan</i> .....	600
11.	Hearings .....	602
12.	Involuntary Disability Retirement .....	602
13.	Qualifying Service .....	603
a.	Disability Retirement .....	603
b.	Military Service .....	603
c.	Reemployed Annuitants .....	607
d.	Regular Employment .....	607
14.	Recovery from Disability; OWCP; Restoration of Earning Capacity .....	608
15.	Specific Ailments .....	610
a.	Back, Neck, and Shoulder Problems .....	610
b.	Diabetes .....	611
c.	Neurological .....	611
d.	Psychiatric Problems .....	611
e.	Pulmonary Disease .....	614
f.	Visual Problems .....	614
16.	Termination of Disability Retirement .....	614
a.	Burden of Proof .....	614
b.	Medical Recovery .....	614
c.	Recurrence of Disability .....	614
17.	Time Limits for Filing .....	615
18.	Withdrawal of Contributions .....	615
G.	DISCONTINUED SERVICE RETIREMENT .....	615
H.	DISCRIMINATION CLAIMS AGAINST OPM .....	616
I.	FERCCA .....	616
J.	FERS .....	617
K.	FOREIGN RELATIONS AUTHORIZATION ACT .....	617
L.	HEARINGS; EVIDENCE; PETITIONS FOR REVIEW .....	617
M.	INDIVIDUAL RETIREMENT RECORD .....	618
N.	MSPB APPEALS .....	618
O.	OPTIONAL RETIREMENT .....	620
1.	Conversion To and From FERS .....	620
2.	Creditable and Covered Service .....	621
3.	Refunds; Deposits; Offsets .....	621
4.	Retirement Benefits .....	622
P.	PROCEDURES.....	623
1.	Authority; Governing Law .....	623

	2. Board Authority .....	623
Q.	QUALIFYING COURT ORDER .....	623
R.	RECONSIDERATION BY OPM .....	625
	1. Failure to Seek Timely Reconsideration .....	625
	2. Procedure .....	626
S.	REFUNDS .....	626
T.	SERVICE CREDIT .....	626
	1. Coverage .....	630
U.	SPECIAL RETIREMENT PROVISIONS .....	633
	1. Air Traffic Controller and Air Traffic Control Specialist Retirement .....	633
	2. Early Voluntary Retirement and Discontinued Service Retirement .....	634
	3. Firefighters .....	634
	4. Law Enforcement Officers .....	635
	5. National Guard Technicians .....	641
V.	SURVIVOR ANNUITY .....	641
	1. Allotments; Assignments .....	641
	2. Children .....	641
	3. Deposits .....	642
	4. Election Options .....	642
	5. Health Benefits .....	648
	6. Marital Status .....	649
	7. Review of OPM Decisions.....	653
	a. Intervenors .....	653
	8. Waiver .....	653
W.	WORKER'S COMPENSATION .....	653

**SETTLEMENTS ..... 655**

A.	ACCEPTANCE INTO RECORD FOR PURPOSES OF ENFORCEMENT OR COMPLIANCE .....	655
B.	AGREEMENT PROVISIONS .....	655
	1. Back Pay Act .....	655
	2. Board Enforcement .....	656
	3. Confidentiality; Nondisclosure Provisions .....	656
	4. Jurisdiction .....	657
	5. OWBPA .....	657
	6. Waiver of Appeal Rights .....	658
C.	BOARD REVIEW AUTHORITY .....	662
D.	BREACH .....	663
	1. Materiality .....	663
	2. Procedure .....	664
	3. Remedies for Breach .....	664
	a. Damages .....	664
	b. Enforcement or Rescission .....	664
	c. Reinstatement .....	665
	d. Specific Performance .....	665
	4. Substantial Performance .....	666
E.	COMPLIANCE AND ENFORCEMENT .....	666
F.	CONDITIONAL SETTLEMENTS; LAPSED OFFERS.....	666
G.	CONSTRUCTION; INTERPRETATION .....	667
	1. Ambiguous Language .....	667
	2. Avoiding Absurd Results .....	667
	3. Contract Law Governs .....	668
	4. Defining Terms .....	668
	5. Integrated Agreements .....	668
	6. Language Controls .....	669
	7. Parol Evidence.....	670

H.	EX PARTE COMMUNICATIONS .....	670
I.	IMPLIED GOOD FAITH .....	670
J.	LAST CHANCE AGREEMENTS .....	670
	1. Agency Compliance .....	670
	2. Appellant's Compliance .....	671
	3. Board Review Authority .....	672
	4. Pleading Standards .....	672
	5. Public Policy Considerations .....	673
	6. Underlying Misconduct.....	673
	7. Waiver of Appeal Rights .....	673
K.	MUTUAL MISTAKE .....	674
L.	ON PFR; PFE .....	675
M.	PROCEDURE .....	676
	1. Challenging the Validity of an Agreement .....	676
	2. Conditional Dismissals .....	677
	3. Dismissals .....	677
	5. Effect of Settlement Agreement.....	677
	4. Parties Bound .....	677
	5. <i>Res Judicata</i> .....	678
	6. Settlement Reached Outside Board Record .....	678
	7. Settlement; Settlement Offers Treated as Evidence .....	678
	8. Time Limits for Challenges .....	678
N.	SETTING ASIDE A SETTLEMENT; VALIDITY OF THE AGREEMENT .....	679
	1. Coercion; Fraud; Bad Faith .....	679
	2. Error or Lack of Authority of Agency's Counsel .....	680
	3. Error or Lack of Authority of Appellant's Counsel .....	681
	4. Mental Incapacity .....	681
	5. Misleading Information .....	682
	6. Mutual Mistake .....	682
	7. Noncompliance .....	683
	8. Oral Agreements .....	683
	9. Returning Parties to <i>Status Quo Ante</i> .....	683
	10. Unlawful .....	683
O.	SETTLEMENT DISCUSSIONS .....	684
P.	SUITABILITY DETERMINATIONS .....	684
Q.	SPECIFIC TERMS OF AN AGREEMENT .....	684
	1. Absence-Related .....	684
	2. Applying for Positions .....	684
	3. Demotion .....	685
	4. Disability Retirement .....	685
	5. Fitness for Duty Exams .....	685
	6. Integration Clauses .....	685
	7. Intergovernmental Personnel Act .....	686
	8. Mitigated Penalties .....	686
	9. Official Personnel File; Employment Inquiries .....	686
	10. OWCP Claims .....	687
	11. Priority Consideration .....	687
	12. Provisions Effecting Jurisdiction .....	687
	13. Reinstatement .....	687
	14. Resignation .....	687
	15. Retirement; Annuities .....	688
	16. Retroactive Appointments .....	688
	17. Withdrawal From Agreement .....	688

<b>STATUTORY/REGULATORY CONSTRUCTION .....</b>	<b>689</b>
A. AGENCY HANDBOOKS .....	689
B. AGENCY INTERPRETATIONS OF REGULATORY STATUTES .....	689
C. ATTORNEY FEE PROVISIONS .....	693
D. CIVIL SERVICE REFORM ACT .....	693
1. Jurisdiction .....	693
E. CONSTITUTIONAL CHALLENGES .....	694
F. COURT REVIEW OF STATUTORY INTERPRETATION .....	694
G. "EMPLOYEES" UNDER 5 USC § 2105 .....	694
H. "EJUSDEM GENERIS"; STATUTORY INTERPRETATION .....	694
I. EXEMPTIONS; EXCEPTIONS UNDER STATUTES; REGULATIONS .....	694
J. FAMILY MEDICAL LEAVE ACT .....	695
K. FEDERAL EMPLOYEES RETIREMENT SYSTEM .....	695
L. FEDERAL WORKFORCE FLEXIBILITY ACT .....	695
M. INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION ACT .....	695
N. INTERPRETATION OF LABOR AGREEMENTS .....	695
O. LAW ENFORCEMENT AVAILABILITY PAY ACT .....	695
P. MANDATORY SEPARATION OF AIR TRAFFIC CONTROLLERS; 5 USC § 8335(A) .....	695
Q. "NOTWITHSTANDING ANY OTHER PROVISION OF LAW" .....	696
R. "ORDINARY MEANING" .....	696
S. PRINCIPLES OF STATUTORY AND REGULATORY INTERPRETATION .....	696
1. Avoidance of Absurd Conclusions .....	696
2. Changes in the Law .....	696
3. Consideration of Statutory Scheme .....	697
4. Language Controls .....	697
5. Legislative History .....	704
6. Retroactivity .....	705
7. Statements of Legislators .....	705
T. RELIANCE ON STATE STATUTES .....	705
U. SOCIAL SECURITY ACT .....	706
V. SOVEREIGN IMMUNITY .....	706
W. <i>STARE DECISIS</i> .....	706
X. USERRA .....	706
1. Attorney Fees .....	707
Y. VACATUR .....	707
Z. VEOA .....	707
AA. WAIVER OF STATUTORY RIGHTS .....	707

**SUBSTANTIVE OFFENSES .....** **709**

A. ABSENCE-RELATED .....	709
B. ASSAULT; AGGRESSIVE AND/OR VIOLENT CONDUCT .....	714
C. CARELESSNESS; NEGLIGENCE .....	715
D. CONFLICT OF INTEREST .....	717
E. CRIMINAL MISCONDUCT .....	717
1. Suitability Determinations .....	719
F. DRUG; ALCOHOL-RELATED .....	719
G. EXCEEDING AUTHORITY .....	720
H. FAILURE TO MAINTAIN OR OBTAIN CONDITION OF EMPLOYMENT .....	721
1. Security Clearance Determinations.....	722
I. FALSIFICATION; FRAUD .....	723
1. Suitability Determinations .....	728
J. FINANCIAL ISSUES.....	729
K. INATTENTION TO DUTY; SLEEPING ON THE JOB .....	729
L. INSUBORDINATION; FAILURE TO FOLLOW INSTRUCTIONS; DISRESPECTFUL CONDUCT .....	729

1.	Refusal to Take Fitness Examination .....	735
M.	MANDATORY PENALTIES .....	736
N.	MISREPRESENTATION .....	736
O.	NEPOTISM .....	737
P.	OFF DUTY MISCONDUCT .....	737
Q.	OUTSIDE WORK .....	737
R.	PATIENT ABUSE .....	738
S.	PERFORMANCE-BASED ACTIONS .....	738
T.	PHYSICAL INABILITY TO PERFORM .....	739
U.	PROFANE; OFFENSIVE LANGUAGE .....	740
V.	REFUSAL TO ACCEPT A REASSIGNMENT .....	740
W.	REPRISAL .....	740
X.	SEXUAL MISCONDUCT; HARASSMENT .....	740
Y.	SPECIAL CATEGORIES OF EMPLOYEES .....	742
1.	Fiduciaries; Positions of Trust .....	742
2.	Immigration Officers .....	743
3.	Law Enforcement .....	743
4.	Supervisors .....	743
Z.	THEFT; MISUSE; MISAPPROPRIATION OF GOVERNMENT PROPERTY; FUNDS .....	744
1.	Accessing Government Information or Official Records .....	747
2.	Suitability Determinations .....	747
AA.	THREATS .....	747
BB.	UNACCEPTABLE CONDUCT .....	748
CC.	UNAUTHORIZED DISCLOSURE OF INFORMATION .....	749
DD.	UNBECOMING CONDUCT .....	749

**TIMELINESS .....751**

A.	CALCULATING TIMELINESS .....	751
B.	CONSTRUCTIVE ADVERSE ACTIONS .....	751
C.	CONTENTS OF APPEAL .....	751
D.	EQUITABLE TOLLING.....	751
E.	EXCUSES FOR LATE FILING.....	752
1.	Appeals Lost in the Mail .....	752
2.	Appeals Misdirected Within MSPB, to OPM or OSC.....	752
3.	Appeals To or From Congressional Offices .....	753
4.	Change in Controlling Law .....	753
5.	Change of Address .....	753
6.	Fear of Retaliation; Harassment.....	754
7.	Financial Difficulties .....	754
8.	Holidays.....	755
9.	Ignorance of the Law .....	755
10.	Inadequate Representation .....	755
a.	Excused: Inconsequential Delays .....	755
b.	Excused: Obstruction or Misrepresentation by Counsel.....	756
c.	Not Excused .....	757
11.	Incarceration; Criminal Proceedings .....	759
12.	Informal Attempts to Resolve Issue.....	760
13.	Lack of, Interference With, or Incorrect Notice of MSPB Appeal Rights .....	760
a.	Belated Receipt of Adverse Action Decision or MSPB Initial Decision.....	760
b.	Constructive Action Without Agency Notice .....	760
c.	Constructive Receipt.....	760
d.	Enforced Leave.....	761
e.	Lack of Notice Concerning Restoration Rights and Reemployment Appeal Rights ....	761
f.	Misinformation .....	761
g.	Mixed Case Notice Problems .....	762

h.	Notice of Appeal Rights to Appellant’s Representative .....	762
i.	Obligation to Provide Notice .....	762
j.	Problems With Receipt of Mail; Certified Mail; International Mailings.....	765
k.	Proof Concerning Delivery of Notice of Appeal Rights .....	765
14.	Military Service .....	766
15.	Need to Obtain Documentation .....	766
16.	Other Problems .....	767
17.	Other Proceedings.....	768
18.	Problems Caused by Adjudicators’ Misdirected Appeals .....	770
a.	MSPB.....	770
b.	OPM.....	771
19.	Sickness or Hospitalization.....	771
a.	Caring for Family Member .....	772
b.	Effect of Continuing Disorder on Filing Deadline .....	772
c.	<i>Lacy</i> Standard of Proof for Medical Incapacity .....	772
d.	Mental Impairment .....	774
e.	Of Counsel .....	777
f.	Supporting Evidence .....	777
20.	Uncertainty as to Outcome of a Related Case; Pending Settlement Negotiations.....	781
a.	EEOC .....	781
b.	Grievance .....	781
c.	MSPB.....	782
d.	Use of Alternate Forum.....	782
21.	Unfamiliarity With MSPB Procedures.....	782
a.	Inability to Obtain Counsel.....	784
b.	Language Difficulties.....	785
c.	Miscalculation of Time for Appeal.....	785
d.	Misdirected Appeals .....	786
e.	<i>Pro Se</i> Appellants.....	787
F.	EXTENSION REQUESTS .....	789
G.	METHOD OF FILING; CORRESPONDENCE.....	789
1.	E-Appeal .....	789
2.	Facsimile.....	790
3.	Mail.....	791
a.	Presumption of Delivery; Receipt.....	792
H.	MIXED CASES; DISCRIMINATION COMPLAINTS .....	793
I.	MOTION FOR ATTORNEY FEES .....	796
J.	MOTION FOR DISQUALIFICATION.....	797
K.	ON PFR; PFE.....	797
L.	PREMATURE FILINGS .....	797
M.	PROHIBITED PERSONNEL PRACTICES .....	799
N.	REOPENING IN THE INTEREST OF JUSTICE .....	800
O.	REQUESTS FOR RECONSIDERATION.....	800
P.	RETROACTIVITY OF RULES.....	800
Q.	SETTLEMENT RELATED .....	800
R.	TIME FOR FILING THE APPEAL .....	803
1.	Jurisdiction or Timeliness as Alternate Bases for Dismissal of Appeal.....	803
2.	Negative OPM Reconsideration Decision Appeals .....	805
3.	USERRA .....	805
4.	VEOA.....	806
S.	TIMELINESS AS A DEFENSE.....	806
T.	TIMELINESS ISSUES .....	806
U.	TIMELINESS OF APPEALS.....	807
1.	Due Diligence.....	807

2.	Good Cause for Delay .....	809
3.	Responsibilities of the Judge and the Parties in Appeals Involving Timeliness Issues .....	809
a.	Duty of Agency and Judge to Produce and Develop Evidence .....	809
b.	Duty of Appellant to Produce Evidence Concerning Timeliness .....	811
i.	Failure to Respond; Silence .....	813
ii.	Late Response to Show Cause Order .....	815
iii.	New Evidence .....	815
iv.	Sworn Statements .....	818
v.	Unsworn Statements .....	818
c.	Mental or Physical Illness; <i>Lacy</i> Notice .....	819
4.	Waiver; <i>Alonzo</i> Good Cause Standard .....	820
i.	Prejudice to Respondent .....	822

**USERRA .....823**

A.	BOARD JURISDICTION .....	823
B.	COVERED EMPLOYEE .....	823
C.	COVERED PERSONNEL ACTIONS .....	823
1.	Dismissal From Employment; Demotion .....	823
2.	Constructive Adverse Actions .....	824
3.	Education Benefits .....	824
4.	Failure to Appoint; Nonselection; Burden of Proof .....	824
5.	Failure to Promote .....	824
6.	Harassment; Hostile Work Environment .....	825
7.	Military Leave; <i>Butterbaugh</i> .....	825
8.	Nonselection .....	832
9.	Reassignments .....	832
10.	Retirement Plans .....	832
11.	Suspensions .....	832
D.	DISMISSAL OF APPEALS .....	832
E.	EMPLOYMENT PRACTICE CHALLENGES .....	834
1.	Passover Determinations .....	834
F.	GOVERNING REGULATIONS .....	835
1.	Hearings .....	835
2.	Nonfrivolous Jurisdictional Challenges .....	836
G.	INTERVENING RIF .....	836
H.	POSTAL SERVICE .....	836
I.	RECOVERY PERIOD FOR A USERRA CLAIM .....	837
J.	RIGHT TO APPEAL .....	837
K.	TIME FOR USERRA APPEALS .....	837
L.	USERRA STATUTORY STRUCTURE .....	839
1.	Burden of Proof .....	839
2.	Covered Personnel; Agencies .....	842
3.	Disability Incurred While in Military Service .....	843
4.	Discrimination Because of Military Service .....	844
5.	Intervening RIF .....	844
6.	Liberal Construction of Pleadings; Jurisdictional Allegations; Avoidance of Summary Disposition .....	844
7.	Related EEO Violations; Prohibited Personnel Practices Allegations .....	845
8.	Scope of USERRA .....	845

**VEOA .....847**

A.	AGE LIMITS ON EMPLOYMENT .....	847
B.	GOVERNING REGULATIONS .....	847
1.	Hearings .....	847
C.	NOTICE TO LABOR DEPARTMENT OF INTENT TO APPEAL .....	848

D.	PERSONNEL ACTIONS CHALLENGED .....	848
1.	Excepted Service .....	848
2.	Federal Career Intern Program .....	848
3.	Manipulation of Appointments; Passover Process; Medial Suitability Determinations .....	848
4.	Merit Selection; Reassignment; Promotions .....	850
5.	Related EEO Violations .....	854
6.	Veterans Readjustment Authority Appointments .....	854
E.	PROCEDURE .....	854
F.	RETROACTIVITY .....	854
G.	VEOA STATUTORY STRUCTURE .....	855
1.	Board Standard of Review .....	855
2.	Exclusions .....	855
3.	Exclusivity of VEOA Remedy .....	855
4.	Exhaustion of Remedies; Timeliness; Equitable Tolling.....	856
5.	Jurisdictional Allegations.....	859
6.	Protection of Individuals With Veterans’ Preference Status; Postal Service; Foreign Service.....	860
7.	Remedial Structure; Reconstruction of Selection Actions; Damages .....	861
H.	VETERANS BENEFITS IMPROVEMENT ACT .....	863