

CHAPTER 1

INTRODUCTION AND OVERVIEW

This book is about adverse actions and performance-based actions—both appealable to the Merit Systems Protection Board. Now, that may not rival the great opening lines of the classics (such as “Call me Ishmael,” from *Moby Dick*; or “Many years later, as he faced the firing squad, Colonel Aureliano Buendía was to remember that distant afternoon when his father took him to discover ice,” from *One Hundred Years of Solitude*), but it is a shorthand description of what we cover in the pages that follow.

[Chapter 2](#) provides a brief explanation of the Civil Service Reform Act of 1978 (CSRA). That statute refashioned and modernized the federal civil service system and remains the framework for discussion of federal sector adverse and performance actions. We also discuss the constitutional origin of the federal civil service system and describe the role of the several agencies created or reformulated by the 1978 Reform Act: the Office of Personnel Management (OPM), the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), the Federal Labor Relations Authority (FLRA), and the Office of Special Counsel (OSC).

In [Chapters 3](#) and [4](#), we discuss adverse actions under Chapter 75 of the CSRA. [Chapter 3](#) examines the basics of adverse actions: the structure and language of the law and regulations; the inquiry or investigation into allegations of misconduct; the appellate function of the MSPB as to adverse actions; the “who” and the “what” of MSPB jurisdiction; election of remedies; proof requirements for adverse actions (reason, nexus, penalty); and affirmative defenses as specified in law and regulations.

[Chapter 4](#) addresses the mechanics of the employing agency’s administrative processing of an adverse action. In big picture terms, the process begins with a claim of misconduct, an inquiry sometimes informal and sometimes more deliberate; a proposal to take an action; the employee’s response; and the agency’s decision. We review the ways that information is gathered to seek to support an adverse action; some restraints on that fact gathering (e.g., Privacy Act); representation issues; the kinds of adverse actions that are typically taken by agencies; the way that charges or reasons are framed; the roles of the various agency officials (e.g., proposing and deciding officials); the particulars of the proposal, response, and decision; the constitutional, statutory, and regulatory due process foundations for the important employee rights in the administrative process; the agency penalty; and pitfalls in the adverse action process. In this chapter readers become familiar with the several terms that are the second language of this area of practice: burden and standard of proof, efficiency of the service, mixed cases, nexus, constructive actions, and affirmative defenses. We also briefly distinguish between adverse actions and performance actions, noting the differences between Chapter 75 (misconduct cases) and Chapter 43 (performance cases) of the CSRA.

We change direction in [Chapters 5](#) and [6](#), and focus on performance-related actions under the CSRA. In [Chapter 5](#), we address first the distinction between performance cases and adverse action (misconduct) cases. We also note that an agency may choose to bring a performance action under the Chapter 75 procedures, which normally apply to adverse actions, or under Chapter 43, the process typically used to bring performance actions. Just as with adverse actions, we then set out the statutory and regulatory provisions that define performance actions. We discuss the performance appraisal system as a whole, and then those aspects of that system that are the focus of performance-based actions—critical elements, performance standards, rating levels, notices of unacceptable performance, and a performance improvement plan (PIP). We end this chapter with a brief discussion of performance-based actions taken against Senior Executive Service employees.

In [Chapter 6](#), just as with [Chapter 4](#) for adverse actions, we describe the agency's administrative process for taking an action under Chapter 43, from the notice of unacceptable performance to an agency final decision against an employee for performance reasons. Discussion in this chapter includes the procedural differences between Chapter 43 and Chapter 75 actions and the pluses and minuses in going one direction or the other. Also considered are employee rights and agency responsibilities, the information properly relied upon, and the mechanics of Chapter 43 actions.

CHAPTER 2

THE CIVIL SERVICE REFORM ACT: WHERE DID IT COME FROM AND WHAT DOES IT DO

Paying our respects to tradition, we describe here the background to the 1978 Civil Service Reform Act.

Our journey begins with The Pendleton Act in 1883, which established the Civil Service Commission (CSC). At the time, this law was a remarkable political reform—partially eliminating the spoils system. While it only covered approximately 10% of the government’s civilian employees, it required selection of employees on the basis of merit rather than patronage. Selection was to be through competitive examination. The law prohibited political contributions in return for federal employment. In 1897, President McKinley issued an Executive Order that required that classified civil service employees be removed only for “just cause.” Additional protections for the civil service process and civil servants were added by the Lloyd-La Follette Act of 1912, the Veterans Preference Act of 1944, the Back Pay Acts of 1948 and 1966, and several other Executive Orders (Nos. 10988 of 1962 and 11491 of 1969). In 1976, the Federal Employee Appeals Authority was established as part of the CSC.

By the 1970s, there was considerable concern about eradication of discrimination and reprisals against whistleblowers in the civil service. Employees had the right to appeal certain actions to hearing officers at the Civil Service Commission. But the Commission was management’s personnel advisor. Moreover, at that time, the responsibility for labor relations was spread throughout several agencies, with no independent, impartial agency to oversee labor relations. There were further concerns that it was nearly impossible to remove poor performers. In response to these criticisms, President Jimmy Carter established the President’s Personnel Management Project, which submitted findings to Congress. Following hearings, Congress enacted the Civil Service Reform Act of 1978.

In his signing statement on October 13, 1978, President Carter provided that the “legislation will bring fundamental improvements to the Federal personnel system,” specifying:

It puts merit principles into statute and defines prohibited personnel practices.

It establishes a Senior Executive Service and bases the pay of executives and senior managers on the quality of their performance.

It provides a more sensible method for evaluating individual performance.

It gives managers more flexibility and more authority to hire, motivate, reward, and discipline employees to ensure that the public’s work gets done. At the same time, it provides better protection for employees against arbitrary actions and abuses and contains safeguards against political intrusion.

The act assures that whistleblowers will be heard, and that they will be protected from reprisal.

It moves Federal labor relations from Executive order to statute and provides a new agency, the Federal Labor Relations Authority, to monitor the system.

And it provides for systematic research and development in personnel management to encourage continuing improvements of the civil service system.

The CSRA became effective on January 9, 1979. It abolished the Civil Service Commission and established three agencies to administer federal sector labor relations and civil service functions: the Federal Labor Relations Authority (FLRA) to adjudicate labor relations issues, the Office of Personnel Management (OPM) to issue government-wide regulations on personnel matters, and the Merit Systems Protection Board (MSPB) to adjudicate certain personnel disputes. At about the same time, Reorganization Plan Number 2 was adopted, which transferred certain functions and responsibilities relating to equal employment opportunity in the civil service from other agencies to the Equal Employment Opportunity Commission (EEOC). The CSRA also established the Office of Special Counsel (OSC) as a part of the MSPB. OSC was later made a separate agency by the Whistleblower Protection Act of 1989. OSC investigates certain improper personnel actions and has the authority to initiate corrective or disciplinary cases with the MSPB or to authorize employees to initiate whistleblower reprisal cases with the MSPB.

While it may be a stretch to think of managers standing in the shoes of our founding fathers, there is a constitutional basis for much of the CSRA, particularly in relation to adverse actions and performance actions. Stated another way, once a law provides that employees will not be removed except for cause (i.e., efficiency of the service), those federal employees cannot be removed except in compliance with the due process provision of the Fifth Amendment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972); and *Arnett v. Kennedy*, 416 U.S. 134 (1974). These due process considerations underscore many of the Chapter 43 and 75 protections.

There were several agencies created or reformulated by the CSRA, as well as a new process—grievance arbitration. Even though the MSPB is most central to any discussion of adverse actions and performance actions, it is important to understand the other agencies or processes that were created or reorganized by this new law and the way in which these agencies and processes intersect with or are separated from the MSPB. Keep in mind that Congress was attempting to ensure that employees got one bite at the apple and that cases were not proceeding simultaneously in more than one venue. So let us discuss each element briefly.

I. MERIT SYSTEMS PROTECTION BOARD

The MSPB can review and rule on (i.e., has appellate jurisdiction) over certain decisions made by federal agencies. More than 50% of MSPB appeals involve reviews of more significant discipline decisions made by agencies; these generally include appeals from employees concerning removals, demotions, and suspensions of more than 14 days. The MSPB also reviews within-grade increase denials, performance-related demotions and removals, and actions taken during a reduction in force. The MSPB will also get involved in EEO and whistleblower reprisal cases and review decisions under new rights given to veterans and preference eligibles (veterans who served at particular times). In turn, cases decided by the MSPB can be reviewed by the Federal Circuit Court of Appeals (with OPM going to bat for the agency in taking an appeal), except for EEO cases, which are ultimately appealed to a federal district court.

The MSPB rules and decides through its three Board members in Washington, DC, who have delegated hearing authority to administrative judges. AJs are located at the Board's six regional offices: Falls Church, Virginia (referred to as the "Washington Regional Office"); Philadelphia; Chicago; San Francisco; Dallas; and Atlanta. There are also two field offices, one in Denver and one in New York. Denver is a part of the San Francisco region, and New York is part of the Philadelphia region.

II. FEDERAL LABOR RELATIONS AUTHORITY

The Civil Service Reform Act created the FLRA. It is vested with jurisdiction over labor-management relations for non-postal employees. The FLRA supervises or conducts elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit, resolves complaints of unfair labor practices, and adjudicates exceptions to certain arbitration awards. The FLRA was modeled on the National Labor Relations Board (NLRB), which is responsible for private sector and Postal Service labor relations.

The jurisdiction of the FLRA and the MSPB are mutually exclusive. MSPB cannot resolve unfair labor practice claims. FLRA cannot resolve cases that could be appealed to the MSPB (or heard by an arbitrator) covered by 5 USC Sections 4303 (performance) and 7512 (adverse actions).

Pop Quiz

Question: An employee has been suspended for 14 days. Through his union, he goes to arbitration. Can he appeal the arbitrator's decision to the FLRA.

Answer: Yes.

Question: How about the MSPB?

Answer: No. The MSPB only has direct jurisdiction over suspensions of more than 14 days.

[If you got this wrong, please go back to page 1].

III. GRIEVANCE-ARBITRATION

Under the CSRA, a union and agency can agree that certain matters, normally within the jurisdiction of the MSPB (e.g., RIF, WIGI actions), will be exclusively decided through the negotiated grievance-arbitration process. (Obviously, there are many other things that are covered by a typical negotiated agreement.)

Some actions, however, within the MSPB's jurisdiction, cannot be exclusively limited to grievance-arbitration. These matters include actions covered by Section 4303 (performance), Section 7512 (adverse actions), and any appealable action involving a claim of prohibited discrimination. If such an action falls within the coverage of a grievance procedure negotiated under 5 USC Section 7121, the aggrieved employee, at his option, may raise the matter *either* under the appellate procedures to the Board *or* under the negotiated grievance procedure as an arbitrable matter. (Just as with some other CSRA sections, this election procedure does not apply to Postal Service employees.) The employee must elect which course of action he or she wishes to pursue. This is done by timely filing a notice of appeal or timely filing a grievance in writing under the negotiated grievance procedure. If the employee attempts to do both, he or she is bound by whichever was filed first. See 5 USC § 7121.

Pop Quiz

Question: Edna Spinelli is a competitive service employee covered by a collective bargaining agreement that allows her to grieve suspensions. She was suspended for 30 days by the VA on May 2, 2010. Three days later on May 5, 2010, she filed a formal written grievance and on May 6, 2010, she filed an appeal with the Board. Will her suspension be heard by the MSPB?

Answer: No. She elected to first appeal her suspension to in the grievance-arbitration process and is bound by that choice.

Question: But what if the union decides not to invoke arbitration on this employee's appeal?

Answer: Most likely the employee is out of luck. (Though, theoretically, she could show that she was misled in her election.)

Once an arbitrator decides a case, there is one instance in which the MSPB will review that decision. If the employee has alleged prohibited discrimination and it is a case that could have been appealed to the MSPB (e.g., adverse action), the employee can seek review before the full Board.

A significant limitation on the authority of arbitrators is that in actions that could have been appealed to the Board but for which arbitration is elected, an arbitrator has an obligation to follow the same "substantive" rules as the Board does in reviewing an agency action. See *Cornelius v. Nutt*, 472 U.S. 648 (1985); and *Horner v. Lucas*, 832 F.2d 596 (Fed. Cir. 1987).

Important Case: *Cornelius v. Nutt*, involved an agency's appeal of an arbitrator's decision to the Supreme Court. The arbitrator, while finding that falsification-related wrongdoing normally would justify removal, also found that the GSA had committed procedural errors in violation of the bargaining agreement by failing to give the employees an opportunity to have a union representative present during interrogation and by unreasonably delaying issuance of the notices of proposed removal. While the errors did not prejudice the employees, the arbitrator ruled that the removals were not for just cause and reduced the penalties to two weeks suspension without pay. The Supreme Court disagreed, finding that this was a case that could have gone to the MSPB and therefore the arbitrator was required to apply the same substantive law that the MSPB would have applied and viewed the error under the Board's definition of "harmful procedural error." Under that strict definition (discussed [later](#)), the two errors were not "harmful."

IV. OFFICE OF PERSONNEL MANAGEMENT

OPM was another new agency created by the Civil Service Reform Act. Under the CSRA, OPM is assigned the lead in the personnel administration area. As such, it issues regulations that flesh out actions appealable to the Board (e.g., 5 CFR, Part 432 performance regulations) and which the Board will frequently interpret. Additionally, OPM has authority to take actions, which themselves are appealable to the Board and for which OPM is consequently the party defending the appeal (e.g., Part 731 Suitability appeals, Part 831 Disability Retirement appeals).

As the representative of the United States government (as well as personnel head), OPM is authorized to intervene as a matter of right in any Board proceeding that involves the interpretation of an OPM rule or regulation. See 5 USC § 7701 (d)(1); 5 CFR § 1201.34 (b). Similarly, OPM has been given authority to appeal Board initial decisions and to

ask the full Board to reopen or reconsider decisions. This authority includes cases in which the OPM Director is of the opinion that an MSPB decision is erroneous and will have a substantial impact on civil service law, rule, or regulation. See 5 USC §§ 7701 (e) and 7703 (d). Likewise, OPM (but not the agency party) is provided authority to appeal Board decisions to the Federal Circuit Court of Appeals. 5 USC § 7703(d).

As you will see throughout this volume, OPM has issued useful guidance, particularly in relation to Chapter 43 actions.

V. OFFICE OF SPECIAL COUNSEL (OSC)

The CSRA established the Office of Special Counsel but made it a part of the MSPB. The 1989 Whistleblower Protection Act established OSC as a separate agency.

The CSRA (and the Whistleblower Protection Act of 1989, and its 1994 amendments) authorized OSC to investigate claims of prohibited personnel practices (e.g., whistleblower reprisal), as well as to perform other functions not directly related to the topic at hand (e.g., safe channel for whistleblowers, Hatch Act investigations). Consistent with its prohibited personnel practice (PPP) responsibility, OSC will sometimes intervene in Board proceedings, seek disciplinary action against employees who have allegedly committed PPPs, seek stays and corrective actions to protect employees from PPPs, and serve as a first step for employees who want a hearing before the MSPB on certain claims of whistleblower reprisal (i.e., Independent Right of Action). These authorities and responsibilities in connection with the MSPB—mostly involving whistleblower reprisal actions—are discussed more fully in [Chapter 3](#).

VI. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION EEOC

The EEOC is responsible for administering and interpreting the federal discrimination laws, which prohibit employment discrimination within the federal sector on the bases of race, color, religion, national origin, age, disability, reprisal, equal pay, and genetic information. The EEOC was already in existence at the time of the CSRA. However, pre-CSRA federal employee claims of discrimination were not addressed by the EEOC, as they are today, but instead by the CSC hearing officers. This changed with Reorganization Plan Number 2, enacted along with the CSRA, which transferred certain functions and responsibilities relating to equal employment opportunity in the federal civil service from other agencies to the EEOC. Because the EEOC also has responsibility for the private sector, the Office of Federal Operations (OFO) was established within the EEOC and given responsibility for federal employment.

When Congress established the MSPB to handle civil service issues in the CSRA, it was faced with a problem—how will cases be handled where the employee raises a discrimination issue coupled with a civil service issue (i.e., a case that falls within the jurisdiction of both the MSPB and the EEOC)? For example, consider a case involving a competitive service nonprobationary employee who is fired for insubordination and claims that the firing was due to sex discrimination. Congress could have allowed separate appeals and hearings, but that would risk duplication and inconsistent results. Instead, Congress established special processing procedures for so-called “mixed cases,” which allows both the EEOC and the MSPB to weigh in on the discrimination issue. See 5 USC § 7702.

In mixed cases, if the employee files a formal complaint of prohibited discrimination with the agency before filing an appeal to the Board, the Board cannot exercise its jurisdiction until the agency has issued a decision or otherwise resolved the complaint. If neither has occurred within 120 days, the employee may file an appeal to the Board at any time thereafter, or an employee can go directly to the MSPB without going through the agency’s EEO process and raise the EEO claim as an “affirmative defense.” We will