INTRODUCTION
CHARGES, PENALTIES, AND AFFIRMATIVE DEFENSES

This is our 12th edition of *MSPB Charges and Penalties*. As of this writing, the MSPB is still without any sitting Board members—although three nominees are pending before the Senate—and therefore there are no Board decisions; the Board last had a quorum on January 6, 2017. In sum, the Board cannot issue decisions without a quorum. Of course, AJ's can issue initial decisions and to the extent that neither party files a petition for review to the MSPB, the AJ's decision will become the final decision of the Board and may be appealed to an appropriate court or tribunal (e.g., the Federal Circuit). *See* 5 USC 7703. That remains the only way that the parties can currently gain review of MSPB initial decisions (absent review of a mixed case through the EEO process). It is noteworthy that as of the end of FY 2019, over 2,378 PFR cases were pending at the MSPB. *See* MSPB FY 2018–2020 APR-APP (Feb. 10, 2020). These backlogs come at a time when the new Executive Orders—no longer enjoined and in full effect—make it harder to resolve cases. *See, e.g.*, EO 13839, Sect. 5 (This EO and section prohibits the use of a settlement agreement providing for expungement of adverse notations from a personnel file, which makes it difficult (impossible) to settle cases for clean paper).

In this new edition, we have added what we see as current and helpful information as to today's "hot issues," namely, teleworking issues; time and attendance issues (mainly growing out of teleworking or newly implemented swipe, electronic systems for monitoring attendance); flex and compressed schedule issues, as well as others. See, e.g., Chapter 14.

Moreover, in the absence of MSPB Board decisions, we have done two things. First, we reviewed many MSPB initial decisions—primarily from the Western Regional Office, the Washington Regional Office, the Atlanta Regional Office, and the Central Regional Office. These initial decisions are not precedential and cannot be cited to, of course. But, most AJs get it right and their decisions are often more detailed than final decisions and demonstrate a learned application of the law to the facts. Additionally, these initial decisions allow us to take the "temperature" of the MSPB, to get a sense of what is actually happening on the ground in real time, so to speak. Those decisions reflect several trends: the use of the general or narrative charges (e.g., conduct unbecoming); the use of lack of candor in lieu of falsification charges; the continued failure of agencies to avoid committing due process and whistleblower reprisal violations; except for due process and whistleblower reprisal claims, the difficulty of appellants in proving affirmative defenses; more frequent charges of managerial negligence; numerous defiance of supervision actions (e.g., failure to follow, etc.); a number of Veterans Affairs 38 USC 714 cases; an uptick in sexual and racial misconduct (and other disrespectful conduct cases); the continuing effort by agencies to characterize performance-related conduct as adverse actions; the recurring problem of alcohol and drug abuse (including CBD abuse); the importance of agency deference, resulting from proof of each charge; and, the related aspect of the few cases that are mitigated.

Accordingly, we have updated sections of the text by citing to initial decisions. We have also included these summaries in a new, stand-alone Part Five, Chapter 23.

Another addition that we made, to account for missing Board cases, is a summary of relevant court (and one FLRA) decisions, mainly appellate decisions. By category, those summaries follow.

I. AGE DISCRIMINATION

Babb v. VA, No. 18-882, 120 LRP 11906 (Sup. Ct. April 6, 2020): Ms. Babb, a Clinical Pharmacist was removed from employment and she filed an action in District Court, alleging discrimination on the basis of age. In an 8-1 decision (written by J. Alito), the Supreme Court held that the federal-sector provision of the ADEA demands that personnel actions be "untainted by any consideration of age." To obtain "reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of the action," an individual must show that age was a but-for cause of the personnel action.

II. ATTORNEY FEES

AFGE Local 3599 v. EEOC, 920 F.3d 794 (Fed. Cir. 2019): The court, which reviews arbitration decisions under the same standard of review as Board decisions, vacated the arbitrator's denial of attorney fees in connection with a successful arbitration. The court explained that, although it affords "great deference to the Board (or an arbitrator standing in the place of the Board) on questions of entitlement to attorney fees," the adjudicator must provide a sufficient explanation for his decision. Here, the arbitrator failed to provide any explanation in support of his decision to deny attorney fees. The court observed that, although the entitlement to attorney fees in a particular case could be so clear that the court could affirm or reverse the denial of fees in the absence of an explanation from the adjudicator as to why he denied the fee award, such as when no application of the relevant factors could justify the opposite result, this was not such a case. Accordingly, the court remanded the attorney fee issue to the arbitrator, directing him to include "a statement of reasons for whatever decision [he] reaches." The court also noted that, although an arbitrator may not revise his merits decision as a basis for denying attorney fees, a decision on a fee award need not be limited to the factual findings and conclusions contained in the merits decision.

DHS, U.S. Citizenship and Immigration Serv. and AFGE, Local 2076, 71 FLRA 221 (2019): The FLRA vacated an arbitrator's "nearly incomprehensible" supplemental award in which he denied the union's request for attorney fees, and it remanded the case to the parties for further proceedings. The FLRA stated that on remand, either party could object to the resubmission of this matter to the original arbitrator, and that if such an objection arose, the parties were directed to mutually select a different arbitrator. Member Ernest DuBester partially concurred and partially dissented. Importantly, the FLRA will no longer follow *Lambert v. Dept. of Air Force*, 34 MSPR 501 (1987) in cases where the arbitrator mitigates a minor disciplinary action. Rather, in determining whether an award of attorney fees is warranted in the interest of justice under *Allen* category 5, arbitrators must evaluate

the nature and strength of the evidence that was available to the agency and assess whether its penalty determination was reasonable in light of that information (instead of whether the Agency knew or should have known). *See also AFGE Local 1633 and VA, Michael E. Debakey VAMC*, 71 FLRA 211 (2019) (decide on the same day; the FLRA stated that in the context of minor disciplinary actions, when determining whether an attorney fees award is warranted in the interest of justice under *Allen* factor 5 (whether the agency knew or should've known that its action wouldn't be sustained), arbitrators must evaluate the nature and strength of the evidence that was available to the agency and assess whether its penalty determination was reasonable in light of that information).

Hickey v. DHS, 766 Fed. Appx. 970 (Fed. Cir. 2019 NP): Here, the court considered a counsel fee petition appealed from the MSPB, decided that the administrative judge had imposed an unwarranted constraint on the permissible hourly rate, and discussed the *Laffey* Matrix for determining rates (although the court did not find that the MSPB could, or could not, use the Matrix as a determinant for fees). In the same decision, the court declined to set aside (and remand to increase) a compensatory damages award by the Board of $10,000 to the appellant in a successful whistleblower reprisal case. The evidence before the Board, the court concluded, did not establish that the emotional harm alleged was actually caused by harm resulting from the retaliatory activities. (Note that the *Laffey* Matrix is found at https://www.justice.gov/usao-dc/page/file/1189846/download.

III. CIVIL SERVICE EXECUTIVE ORDERS

AFGE v. Trump, 929 F.3d 748 (D.C. Cir. 2019): D.C. Circuit vacated the trial court's injunction against the three executive orders (13836, 13837, and 13839) issued by President Trump in May 2018. In a stay order released at the same time as the opinion, the court said the decision would not be immediately enforced. The circuit explained that the unions must pursue their claims through the scheme established by the statute, which provides for administrative review by the FLRA, followed by judicial review in federal appellate court. The three executive orders included significant changes to official time and collective bargaining, and excluded removal disputes from the negotiated grievance procedure and excluded ratings-of-record and incentive pay disputes from the grievance/arbitration process. While the U.S. District Court, District of Columbia had concluded that certain provisions in the orders were unlawful, and it enjoined the implementation of those provisions, the D.C. Circuit concluded on appeal that the District Court lacked jurisdiction over the challenges and vacated its judgment—paving the way for the orders' implementation.

IV. CONDUCT UNBECOMING

Martin v DHS, No. 2019-1578, 120 LRP 13153 (Fed. Cir. 2020 NP) (MSPB DE-0752-17-0341-I-2): The court affirmed the AJ's decision to sustain the appellant's removal based on charges of conduct unbecoming a Customs and Border Protection Officer, lack of candor, and failure to follow a nondisclosure warning. These charges stemmed from an investigation of Mr. Martin by the agency's Office of Inspector General (OIG), during which OIG recorded, with the consent of two employees, Mr. Martin's telephone conversations with them and made a video recording of him with one of the employees in a hotel room, and a subsequent OIG interview. Regarding the conduct unbecoming charge (the AJ had sustained the use of a racial slur against a supervisor), the court considered but rejected Mr. Martin's argument that the AJ erred in considering surveillance evidence gathered during an OIG investigation. Moreover, the court found that it was appropriate to consider Mr. Martin's off-duty conduct, particularly because it involved another agency employee and agency manager. The court also rejected Mr. Martin's contention that the Fourth Amendment's exclusionary rule applied to bar certain recorded communications because the U.S. Supreme Court has declined to extend the exclusionary rule beyond criminal trials and the recordings in question were consented to by other individuals. Likewise, the court considered Mr. Martin's ULP assertion of "a union representative-bargaining unit member privilege"; the court stated that it had not recognized such a privilege but, even if it exists, it does not protect union representatives from misconduct charges based on discussions with unit members; the privilege belongs to the employee and not to the representative. Regarding the lack of candor charge—a charge that Martin stated approximately 10 times that "I don't remember" to 10 questions in a row concerning sexual misconduct—the court found that there was substantial evidence that Mr. Martin was not credible in testifying that he does not recall whether he had made certain sexually suggestive or racially inappropriate comments towards employees because they were part of his "everyday banter." Finally, the court rejected Mr. Martin's contention that the AJ did not consider the fact that he was on medication (Bumetanide) that allegedly could cause memory loss because the record only shows that trouble concentrating, condition and memory loss could be possible side effects for people with liver disease, Mr. Martin admitted that he did not have this condition and this failure to recollect was selective, based on a review of the transcript.

V. CONSTRUCTIVE ACTIONS

Jenkins v. MSPB, 911 F.3d 1370 (Fed. Cir. 2019): The CAFC held that when an agency has rescinded an effectuated removal action during the pendency of an appeal, eliminated all references to the action from the employee's official personnel file, and substituted retirement as the reason for the separation, the appeal of the removal is rendered moot. Under these circumstances, the court held that 5 USC 7701(j) is inapplicable. Section 7701(j) provides that the Board, "in determining the appealability…of any case involving a removal from the service," may not consider "an individual's status under any retirement system established by or under Federal statute." The court reasoned that once the removal action has been fully rescinded, the case no longer involves a removal and § 7701(j) does not apply. The court found that substantial evidence supported the Board's finding that the petitioner voluntarily retired and that his retirement was not the product of misinformation or coercion.

VI. DIRECTED REASSIGNMENT

Womack v. MSPB, No. 2019-1713, 120 LRP 1962 (Fed. Cir. 1/21/2020 NP): The court affirmed, per Rule 36 judgment, (summary affirmance) the administrative judge's initial decision dismissing the appellant's constructive removal appeal for lack of jurisdiction. The appellant retired in the face of a directed reassignment, but the agency proved the legitimacy of the directed reassignment, and the appellant failed to prove that his retirement was otherwise involuntary.

VII. DISRESPECTFUL LANGUAGE

Higgins v. VA, No. 2018-2352, 120 LRP 13061 (Fed. Cir. 2020): Mr. Higgins, the appellant, was employed as a Supply Technician. In March 2017, the VAMC suspended Mr. Higgins for using disrespectful language toward a supervisor during a December 2016 interaction with his immediate supervisor and a new second-level supervisor. In June 2017, the VAMC removed Mr. Higgins based on charges of disruptive behavior and use of profane language. These charges stemmed from three incidents: (1) in February 2017, Mr. Higgins was observed to have said to the Interim

Associate Medical Director "remember I know where you live" or words to that effect; (2) during a March 2017 meeting in the equal employment opportunity office, Mr. Higgins appeared very upset and made threatening and profane statements that caused a witness to contact the VA police; (3) in April 2017, Mr. Higgins loudly confronted another VAMC employee who was escorting a veteran's family to the morgue after the employee greeted Mr. Higgins by his first name. On appeal and review, the AJ and then the Board upheld the actions, found removal reasonable and rejected the employee's whistleblower reprisal defense. In the court appeal, the employee claimed that: (1) the Board improperly discounted his medical evidence of PTSD in assessing the reasonableness of the penalty; and (2) the AJ erred by excluding the testimony of certain witnesses regarding an agency motive to retaliate against him due to his whistleblower disclosures. As to the PTSD issue, the court concluded that the Agency's Deciding Official "acknowledged Mr. Higgin's PTSD and expressly considered it as a mitigating factor in assessing the reasonableness" of the penalty, denying the employee's reliance on *Bal v. Dept. of Navy,* 729 Fed. Appx. 923 (Fed. Cir. 2018 NP) and *Malloy v. USPS,* 578 F.3d 1351 (Fed. Cir. 2009). The court also considered Mr. Higgins's argument that the AJ abused his discretion by excluding the testimony of two agency officials regarding an institutional motive to retaliate against him, but it concluded that the AJ did not abuse his discretion. As to the first witness, Mr. Higgins conceded that this witness "likely possessed no retaliatory motive," and he did not proffer this witness to testify about an institutional motive to retaliate; likewise he did not proffer the testimony of other individuals who had allegedly spoken with the witness who could have provided first-hand testimony regarding an institutional motive to retaliate. Regarding the second witness, the court noted that some of the proffered topics of testimony of the second witness overlapped with the 11 additional witnesses that Mr. Higgins was permitted to call at the hearing, and thus, the AJ did not abuse his discretion by excluding the second witness's testimony as irrelevant or redundant.

VIII. DUE PROCESS

Do v. DHUD, 913 F.3d 1089 (Fed. Cir. 2019): HUD demoted Do from the position of Director (GS-15) to Nonsupervisory Senior Auditor (GS-14) and suspended her for 14 days for negligence of duty. The notice alleged that Do was negligent in hiring Asuncion in 2006 and promoting her in 2009 because a college degree was "required for the position[s]," and "Asuncion…admitted to [Do] that she did not have her degree." Despite that language, the agency also argued that Do was culpable, even if she believed that the applicant qualified under an alternative. Thus, the court wrote, "As HUD contends, Do argued in her responses to the agency that a degree was not required for the auditor positions; that there was an alternative way to qualify; and that she believed Asuncion qualified for the positions under this alternative. But Do was not on notice that she needed to defend against a charge of negligence for allegedly failing to investigate whether Asuncion was qualified based on a combination of education and experience. The central issue was not Do's belief but whether her actions were negligent. DO did not have a meaningful opportunity to address the unstated charge of negligence of duty in this respect (i.e., whether Do should have taken other actions to verify compliance under the alternative standard). The deciding official appeared not to have addressed the issue of negligence in failing to investigate the alternative qualifications. In her formal decision, the deciding official appeared to instead address Do's contention that she believed that Asuncion was qualified under the education and experience standard, ultimately concluding that demotion and suspension were warranted because Do believed a degree was required and knew that Asuncion did not have a degree." Likewise, in the court's view, the Board erred when it "concluded that Do was guilty of 'negligence of duty' because she did not determine that Asuncion met the required qualifications, and she could not rely on human resources or her supervisors without making an independent investigation." In sum, as held by the circuit, "Do did not have the opportunity to meaningfully address negligence at the agency under the alternative standard for qualifying, and the Board's departure from the agency's decision was significant. Procedural due process guarantees are not met when the agency fails to give notice of and fails to consider the proper standard, and the Board, as it did here, departs significantly from the grounds relied on by the agency and substitutes its own alternative theory."

Hornseth v. Dept. of Navy, 916 F.3d 1369 (Fed. Cir. 2019): The agency suspended the petitioner's access to classified information and, because he could not perform the essential functions of his position without such access, indefinitely suspended him. The petitioner appealed his indefinite suspension to the MSPB, which affirmed the agency's action, and the petitioner appealed to the CAFC. The court found that the AJ properly sustained the charge, agreeing that a security clearance was required for the petitioner's position, that it was revoked, and that the procedures set forth in 5 USC 7513(b) were satisfied because the petitioner received notice, had an opportunity to respond and be represented, and was provided with a written decision with reasons. The court also agreed with the AJ that the deciding official's *ex parte* communications with HR following the petitioner's response to the proposed action did not violate the petitioner's due process rights because they were cumulative and did not introduce new information. However, the court disagreed with the AJ's determination that to comport with due process, the deciding official must be able to take or recommend alternative agency action based on the employee's reply. The court found that an employee has a right to be transferred to a non-sensitive position *only* if that right is conferred by a statute or regulation and held that, because no alternative position was authorized here, the AJ erred in finding that the deciding official was required to be able to direct or recommend alternative placement. Nonetheless, the court concluded that this error was harmless because the petitioner received all of the procedural protections provided by law. The court acknowledged that a deciding official must have the authority to act on behalf of the agency but found that the requirement was met here because, pursuant to the Navy instructions regarding adverse decisions, the designated official had authority to either make or recommend a decision on the proposed action.

Robinson v. VA, 923 F.3d 1004 (Fed. Cir. 2019): The appellant, an Associate Director of the Phoenix Veterans Administration Health Care System (Phoenix VA), was removed for (1) negligent performance of his duties (i.e., failed to use certain scheduling practices leading to thousands of veterans going unseen for medical care), (2) Failure to Ensure Accuracy of Information Provided (i.e., as to certain flowcharts and a processing checklist) and, (3) retaliation against another VA employee for making protected disclosures, which is prohibited by the Whistleblower Protection Enhancement Act. (This third charge was not sustained by the Board). In sustaining the negligence charge, the court determined that the Board and VA properly determined that the appellant had a duty as a manager to more intensely monitor efforts by subordinates to control scheduling difficulties and wrote that: "Mr. Robinson was a member of upper-level management responsible for ensuring that…personnel complied with the policies set forth in the Scheduling Directive. Instead, he took a hands-off approach to managing the scheduling problems at Phoenix VA despite knowing the severity of scheduling problems permeating the system." It is noteworthy that the court accepted the Board's analysis in *Miller v. DHHS*, 8 MSPR 249 (1981), as to the need for the agency to show that the supervisor knew, or should have known of the subordinate's misconduct and acquiesced to the improper behavior, using factors, such as: (1) the knowledge the supervisor had, or should have had, of the subordinate's misconduct; (2) the existence of policies or practices relevant to the misconduct; and (3) the extent to which the supervisor directed or acquiesced to the subordinate's misconduct. There was also an interesting due process issue. The agency had originally proposed the appellant's removal in

2014, with Kevin Hanratta named as the deciding official, alleging a failure to provide oversight. The appellant remained on administrative leave for two years. Then, by proposal from Deputy Secretary Sloan Gibson, who was also the deciding official as well, the agency rescinded the first proposal and charged the appellant with the three charges described above. One day before Mr. Robinson was served with his second notice of proposed removal, Deputy Secretary Gibson made statements in a news interview regarding the status of senior VA personnel allegedly responsible for the secret waitlist scandal. Mr. Gibson reportedly stated "he was disappointed that it took so long for the executives to be removed," and "he was confident that the latest firings would be upheld on appeal." These statements were published in the New York Times. On June 7, 2016, Mr. Gibson issued the Decision Regarding Proposed Removal, removing Mr. Robinson from his position as Associate Director of Phoenix VA. Thus, the appellant argued that Mr. Gibson and the VA violated his due process rights by determining his termination before he had the opportunity to respond to the second notice of proposed removal. He argued that Mr. Gibson's New York Times statements, other public statements presupposing the removal of VA officials, and the fact that Gibson was both the Proposing Official and Deciding Official all show that his removal was a foregone conclusion. In rejecting that defense, the court concluded that "Mr. Robinson clearly had notice and a pretermination opportunity to be heard. His response swayed Mr. Gibson to dismiss one of the original Charge 3 specifications. Mr. Robinson therefore had a meaningful opportunity to respond prior to his disciplinary action. *See Loudermill,* 470 U.S. at 546 ("The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."). We see no error in the Board's conclusion that Mr. Robinson failed to show that his removal was predetermined." Concerning the Whistleblower reprisal claim, the court made the following findings: (1) evidence supported the Board's conclusion that the VA met its burden of proving by clear and convincing evidence that it would have removed the petitioner absent his protected disclosures; (2) evidence strongly supported the agency's decision to remove the petitioner. Thus, this factor favored the VA; (3) Although the administrative judge found that the deciding official did not have a motive to retaliate because the petitioner's disclosures did not target him personally, the administrative judge failed to consider whether the deciding official nonetheless had a "professional retaliatory motive." The appellant's disclosures implicated the capabilities, performance, and veracity of VA managers and employees and implied that the VA had deceived a Senate Committee. The court has held that those responsible for the agency's performance overall may be motivated to retaliate even if they are not directly implicated by the disclosures as the criticism reflects on them in their capacities as managers and employees (4) Nonetheless, the Board's conclusion that the deciding official lacked a motive to retaliate was not unreasonable based on testimony of the deciding official, which the administrative judge found credible. The court concluded that this factor slightly favored the VA; and, (5) the record contained mixed evidence concerning whether the VA treated the appellant the same as similarly situated nonwhistleblowers. The VA removed similarly situated individuals, including the petitioner's direct supervisor, the Director of the Phoenix VA, as well as the petitioner's direct subordinate, the Chief of HAS. The administrative judge properly weighed this evidence against the petitioner's evidence that individuals at other VA centers were not removed despite their scheduling improprieties. The administrative judge's conclusion that this factor was neutral was not unreasonable.

IX. LOSS OF CREDENTIALS

Nelson v. Dept. of Transp., 776 Fed Appx. 683 (Fed. Cir. 2019 NP): The court affirmed the administrative judge's initial decision sustaining the appellant's demotion from a GS-13 Protective Service Specialist position to a GS-12 position and a 60-day suspension on the basis of the following charges: (1) conversion of government property supported by 455 instances in which the appellant used the agency's parking facilities without paying; and (2) inability to perform the essential functions of his position due to the revocation of his Special Deputation upon the initiation of the investigation into his failure to pay for parking. The court found unavailing the appellant's argument that the 60-day suspension penalty was too harsh for the unpaid parking, finding that he knew he was required to pay for the parking and thus violated 18 USC 641, which makes it is unlawful for a person to "knowingly convert[] to his use…any…thing of value of the United States" and that the administrative judge properly considered the record evidence and testimony in determining that the penalty was reasonable.

X. LACK OF CANDOR

Refer to *Martin v DHS*, No. 2019-1578, 120 LRP 13153 (Fed. Cir. 2020 NP) (MSPB DE-0752-17-0341-I-2), earlier under the heading "Conduct Unbecoming."

XI. LOSS OF DRIVING PRIVILEGES

Griffin v. Dept. of Navy, 795 Fed. Appx. 834 (Fed. Cir. 2019 NP): The court affirmed the administrative judge's initial decision sustaining the appellant's demotion from his position as a criminal investigator based on the appellant's repeated traffic violations, which resulted in his loss of driving privileges. The court found that substantial evidence supported the administrative judge's finding that there was a nexus between the appellant's misconduct and the efficiency of the service because the appellant's repeated disregard for the law adversely affected the agency's mission to enforce the law as well as management's trust and confidence in his job performance. The court also affirmed the administrative judge's conclusion that the penalty of demotion was reasonable. Finally, the court rejected the appellant's claim of bias but cautioned that administrative judges should use language in their decisions that is consistent with their role as neutral arbiters. AJ had described Griffin's arguments as "preposterous," "laughable," and "completely unconvincing."

XII. MEDICAL INABILITY TO PERFORM JOB

Davenport v. DOD, Dept. of Navy, 391 F. Supp.3d 366 (M.D. Pa. 2019): The U.S. District Court, Middle District of Pennsylvania affirmed the Merit Systems Protection Board's decision sustaining a specialist's removal from her position with the Department of Defense due to her inability to perform her job. The court also found that the MSPB properly determined that there was no reasonable accommodation that would have enabled the specialist to perform the essential functions of her job. According to this court, an agency is not required to indefinitely retain an employee who is unable to work due to a medical condition and the employee's absence from work has no foreseeable end. Further, an agency is not required to provide telework as a reasonable accommodation when the employee would not have been able to perform some of the essential functions of her job while teleworking.

XIII. MIXED CASE

Carrethers v. Dept. of Army, 119 LRP 22019 (W.D. Ky. 2019): MSPB**'s** decision upholding the plaintiff's removal in this mixed case. Plaintiff was terminated for making false complaints, which is a legitimate, nondiscriminatory reason for her removal.

XIV. OFF DUTY MISCONDUCT

Refer to *Martin v DHS*, No. 2019-1578, 120 LRP 13153 (Fed. Cir. 2020 NP) (MSPB DE-0752-17-0341-I-2) earlier under the heading "Conduct Unbecoming."

XV. PENALTY

Borza v. Dept. of Commerce, 774 Fed. Appx. 653 (Fed. Cir. 2019 NP): The court affirmed the arbitrator's decision that suspension, rather than termination, was the appropriate penalty for the petitioner's misconduct. However, the court found inadequate the arbitrator's conclusion, without explanation, that 561 days was the appropriate length of the suspension. The court vacated and remanded this portion of the arbitrator's decision for an analysis of the appropriate length of the suspension.

XVI. SECTION 714 CASES

Cerwonka v. VA, 915 F.3d 1351 (Fed. Cir. 2019): The agency employed the petitioner as a Clinical Psychologist in Louisiana, and he was licensed to practice psychology in both Louisiana and New York. After the Louisiana State Board of Examiners of Psychologists revoked his license for cause, the agency removed him from his position pursuant to 38 USC 7402(f), which provides that a person may not be employed as a psychologist if he is licensed in more than one state and any of those states terminates his license for cause. The petitioner appealed his removal to the MSPB, which affirmed the removal, and the petitioner appealed to the CAFC. The court found that 38 USC 7402(f) controlled the petitioner's removal and that the agency therefore was not required comply with 5 USC Chapter 75 standards in effecting his removal, i.e., by addressing nexus and the reasonableness of the penalty. Rather, the court found, under 38 USC 7402(f), the agency was required to remove the petitioner once one of his state licenses was removed for cause, and it was not permitted to consider other factors or to exercise any discretion. Accordingly, the court found that the agency's action here complied with 38 USC 7402(f). Regarding the petitioner's contention that his removal was unjustified because his Louisiana license has been reinstated, the court found that the express terms of 38 USC 7402(f) compelled his removal at the time his license was revoked and did not permit the agency to consider subsequent events or to impose a lesser penalty. The court found no merit to the petitioner's remaining arguments regarding his retaliation affirmative defense and procedural errors by the agency and AJ.

Hairston v. VA, 761 Fed. Appx. 1005 (Fed. Cir. 2019 NP): Federal Circuit affirmed the removal under 38 USC 714, of a VA employee for conduct unbecoming of a federal employee. The Federal Circuit rejected the petitioner's argument that the administrative judge's failure to conduct a penalty mitigation analysis violated equal protection and due process because 38 USC 714 prohibits the MSPB from mitigating a penalty if the VA's decision is supported by substantial evidence.

Mogil v. VA, 769 Fed. Appx. 920 (Fed. Cir. 2019 NP): Federal Circuit affirmed the VA's removal of the petitioner under 38 USC 714. The petitioner failed to point to any *Douglas* factor that the VA did not consider and that would have been relevant in selecting a penalty. The petitioner had argued that because the MSPB can no longer mitigate the penalty under 38 USC 714 did not excuse the agency from considering the *Douglas* factors before arriving at a decision. The VA viewed Section 714 as giving the VA secretary "essentially unfettered discretion to remove an employee for any reason, no matter how minor, provided substantial evidence shows that the employee committed the charged misconduct." The Federal Circuit declined to rule on the constitutional challenges in the case, but it did provide some clues as to how it might rule in future decisions on Section 714 actions, finding as follows: "The VA views § 714 as giving the Secretary essentially unfettered discretion to remove an employee for any reason, no matter how minor, provided substantial evidence shows that the employee committed the charged misconduct. If, for example, an employee was caught improperly using a paper clip purchased by the government for personal use, the Secretary could determine that conduct warrants removal, even if the employee up to that point received perfect evaluations and had a spotless disciplinary record. Under the VA's interpretation, the Board would have no authority to hold this penalty unreasonable and remand to the VA for a new penalty assessment. Such an interpretation would be a dramatic shift in how the Board reviews adverse actions against other federal employees and does not necessarily flow from the elimination of the Board's ability to mitigate a penalty. As to employees hired prior to the Act, the VA's interpretation also raises potential constitutional concerns with regard to the Takings Clause and Due Process Clause. *See Stone v. Fed. Deposit Ins. Corp.,* 179 F.3d 1368, 1375 (Fed. Cir. 1999) (holding that § 7513(a) created a property interest in continued employment 'unless the agency could show [the employee] needed to be removed for cause or unacceptable performance'). We need not consider, however, whether the VA's interpretation is proper here because any error in interpreting § 714 was harmless."

Sayers v. VA, No. 2018-2195, 120 LRP 11398 (Fed. Cir. 2020): After the enactment of 38 USC 714, the agency removed the employee, pursuant to section 714, from his position as Chief of Pharmacy Services based on charges arising from misconduct that occurred *prior* to the statute's enactment. On appeal, the AJ found that the agency proved its charges by substantial evidence and rejected the employee's claims that the agency had violated his due process rights and committed harmful procedural error during the removal. The administrative judge found that the Board did not have the ability to mitigate or otherwise review the reasonableness of the penalty and affirmed the removal. On appeal to the circuit—the administrative judge's decision became the final decision of the Board—the employee timely filed an appeal with the U.S. Court of Appeals for the Federal Circuit. The Federal Circuit held that (1) 38 USC 714 requires the Board to review for substantial evidence the entirety of the employee's removal decision, including the penalty; and (2) section 714 cannot be applied retroactively. On the basis of that second finding the action was reversed.

XVII: SETTLEMENT

Sanchez v. VA, 949 F.3d 734 (Fed. Cir. 2020): The appellant filed an individual right of action appeal in 2001, which the parties resolved by entering into a settlement agreement. In pertinent part, that settlement agreement provided that the agency would reassign the appellant from where he had been working, in San Juan, to a clinic much further away, in Ponce. The agreement further provided that the appellant would have a compressed work schedule of 10 hour days, four days per week, including three hours per workday for travel. The parties adhered to that agreement for 16 years. In 2017, the agency unilaterally decided that the appellant's schedule would change, requiring that he be at the Ponce clinic from 7:30 A.M. to 4:00 P.M., Monday through Friday. The appellant filed a petition for enforcement with the Board, arguing that the agency was in breach of the settlement agreement. The administrative judge denied the petition, finding that the agency permitted the compressed schedule for a reasonable amount of time and that the agreement did not bar the change in schedule. On appeal, the circuit correctly determined that 16

years of adherence was reasonable, and the appellant failed to prove a breach of the settlement agreement. When a contract contains no time limit for the agreed upon terms, those terms will ordinarily control for "a reasonable time." To determine what amounts to a reasonable time, it is appropriate to consider the underlying circumstances. Here, the parties agreed to the reassignment to alleviate any hostilities in San Juan that resulted from the appellant's whistleblowing. After the passage of 16 years, the court found it reasonable to conclude that those hostilities had dissipated, and the record contained no evidence to the contrary. The court further noted that it was highly unusual for the agency to agree to compensate the appellant for his lengthy commuting time as part of the settlement agreement, thereby suggesting that the parties did not intend for the arrangement to remain in place indefinitely.

XVIII: SUITABILITY INVESTIGATIONS TO SUPPORT ADVERSE ACTIONS

Holland v. MSPB, No. 2019-1388, 120 LRP 553 (Fed. Cir. 2020 NP): The agency terminated this special agent during his probationary period on the basis that he failed to disclose prior disciplinary action he received while working previously as a local police officer, uncovered by an OPM background investigation. The MSPB affirmed the termination. The administrative judge found that the petitioner was not an "employee" under 5 USC 7511(a)(1) and that the board lacked jurisdiction over "constructive suitability determinations." The AJ also determined that the MSPB had no jurisdiction over the petitioner's claims that he was subject to a prohibited personnel practice because there was no otherwise-appealable action. In turn, the Federal Circuit affirmed, agreeing that the MSPB lacked jurisdiction over the termination. The court rejected the petitioner's contention that the MSPB had jurisdiction over his appeal under 5 CFR Part 731 because his termination was a suitability action, concluding that the DEA did not actually find him unsuitable for the position. The Federal Circuit also rejected the petitioner's argument that the MSPB had jurisdiction over his appeal under 5 USC 7513 because he met the definition of an "employee" under the statute. He failed to show that he was an employee under 5 USC 7511(a)(1)(C)(i) because his excepted-service appointment was subject to a two-year probationary period that he had not completed. In addition, he was not an employee under 5 USC 7511(a)(1)(C)(ii) because he lacked the necessary prior service in a federal executive agency.

XIX: UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION

Freeman v. Dept. of Air Force, 771 Fed. Appx. 485 (Fed. Cir. 2019 NP): The court affirmed the administrative judge's initial decision sustaining the agency's decision to remove the appellant for unauthorized disclosure of classified information and for being absent without leave (AWOL). The court found no merit to the appellant's argument that the administrative judge erred in finding that his disclosure of classified information was not entitled to whistleblower protection because such protection is not available when the information is "specifically required by Executive order to be kept secret in the interest of national defense" unless the information is disclosed only to the designated recipients and that, in this case, it was uncontested that the appellant sent the classified information to unauthorized recipients. The court also found that the administrative judge did not err in declining to consider the appellant's argument that the agency improperly classified the information he disclosed because the Board was not the proper forum for resolving such a dispute and lacks authority to assess the propriety of national security determinations. Finally, the court found that the appellant's assertion that the administrative judge ignored his arguments about the AWOL charge was inconsistent with the thorough factual analysis in the initial decision.

XX: USERRA

Sharpe v. DOJ, 916 F.3d 1376 (Fed. Cir. 2019): The petitioner, a GS-13 Drug Enforcement Administration agent and a reservist in the Navy until 2008, applied for 14 GS-14 positions over several years and was placed on the Best Qualified List for each, but was never selected. He challenged the 14 nonselections before the MSPB, alleging that the agency discriminated against him in violation of USERRA by relying on the recommendations of his supervisor, whom he alleged was hostile toward reservists. Before the MSPB, the petitioner sought to introduce an email sent by another supervisor to a different reservist who had also filed a USERRA claim. The petitioner's supervisor was copied on this email. The email had the subject line, "You are a coward…" and the text stated, "I do not know how to phrase it any other way…. Do NOT ever contact me again." The MSPB excluded the email from the proceedings as irrelevant, and denied the petitioner's request for corrective action on the ground that he failed to show that his reservist status was a substantial or motivating factor in the nonselections. The CAFC reversed, finding that the AJ abused his discretion by excluding the email and preventing the petitioner from questioning his supervisor about it. The court held that his supervisor's response to the email was relevant, and that his supervisor should have been allowed to discuss the email as foundation for that relevant testimony.

XXI: WHISTLEBLOWER REPRISAL

Coppola v. VA, 770 Fed. Appx. 573 (Fed. Cir. 2019 NP): The court vacated the decision of the administrative judge that dismissed the petitioner's individual right of action (IRA) appeal for lack of jurisdiction as barred by a prior settlement agreement. The court found, contrary to the administrative judge's finding, that the waiver contained in the settlement agreement at issue was limited to claims that could arise from the petitioner's equal employment opportunity complaint and did not apply to his whistleblower retaliation claims. The court therefore remanded the appeal for consideration of his IRA appeal.

Eluhu v. VA, No. 18-4243, 120 LRP 7637 (6th Cir. 2020 NP) (MSPB Docket No. AT-1221-18-0237-W-1): The court affirmed the administrative judge's finding that the appellant did not prove that the February 6, 2017 letter was a contributing factor in the agency's decision to remove him because the appellant failed to provide evidence that the proposing or deciding officials knew about the letter.

Feuer v. NLRB, 786 Fed. Appx. 1014 (Fed. Cir. 2019 NP): Federal Circuit affirmed the MSPB's holding that the National Labor Relations Board did not violate the petitioner's rights under the Whistleblower Protection Act, finding that a nonselection was not a personnel action but agreed with the board's alternative conclusion that the NLRB showed that it would not have selected the petitioner for an administrative law judge position even in the absence of his protected disclosures.

Flynn v. MSPB and Dept. of Army, No. 17- 70617, 119 LRP 760 (9th Cir. 2019): The circuit affirmed the Board's decision in this individual right of action (IRA) appeal that found that the agency proved by clear and convincing evidence that it would have taken the same personnel actions in the absence of the petitioner's protected disclosures. The court also dismissed the Board as a respondent, agreeing with the Board's position that it lacked jurisdiction, in the context of an IRA appeal, to consider the petitioner's claims that the agency took personnel actions against her in retaliation for filing an equal employment opportunity complaint.

Hickey v. DHS, 766 Fed. Appx. 970 (Fed. Cir. 2019 NP): After the appellant prevailed in his individual right of action appeal, he requested damages and attorney fees. In an initial decision that became the final decision of the Board after neither party petitioned for review, the administrative judge awarded the appellant $122,132.47 in attorney fees and costs and $10,000 in compensatory damages but found that he was not entitled to consequential damages. On appeal, the court affirmed the administrative judge's compensatory and consequential damages denial. However, the court found that the administrative judge abused his discretion by capping the hourly rate for the appellant's attorneys at a rate established in an unrelated case from a different jurisdiction, without providing any explanation for such a determination, rather than applying the hourly rate agreed to in the retainer agreement. Thus, the court vacated the attorney fees determination and remanded the matter for further adjudication.

Refer to *Higgins v. VA*, No. 2018-2352, 120 LRP 13061 (Fed. Cir. 2020), earlier under the heading "Disrespectful Language."

Hiller v. DHS, 767 Fed. Appx. 957 (Fed. Cir. 2019 NP): The court affirmed the Board's decision in this individual right of action appeal. The court found that the administrative judge did not abuse his discretion by denying the petitioner's requested witnesses or by declining to postpone the hearing. On the merits, the court found that substantial evidence supported the administrative judge's finding, based on the *Carr* factors, that the agency showed by clear and convincing evidence that it would have reassigned the petitioner even absent her whistleblowing activity.

Ingram v. Dept. of Army, 776 Fed. Appx. 687 (Fed. Cir. 2019 NP): The court affirmed the administrative judge's initial decision denying corrective action in this individual right of action (IRA) appeal, in which the appellant, a computer/systems engineer, argued that the agency retaliated against him for his protected whistleblowing activity by giving him unfairly low performance appraisals in 2014 and 2015 and by moving him from his position as a lead engineer to a non-lead engineer on a different project. The court found no error in the administrative judge's determinations that the appellant failed to show that his transfer to a different position constituted a covered personnel action under the Whistleblower Protection Act (WPA) and failed to show that his prior protected activity contributed to his 2014 performance appraisal. The court further found no error in the administrative judge's determination that the agency established by clear and convincing evidence that it would have issued the appellant the same 2015 performance appraisal in the absence of his prior protected activity.

Klar v. MSPB, No. 2019-1108, 119 LRP 38700 (Fed. Cir. 2019 NP): The court affirmed, per rule 36 judgment, the administrative judge's initial decision dismissing the petitioner's individual right of action appeal for lack of jurisdiction. The petitioner's claimed personnel action, revocation of a security clearance, is not covered under the Whistleblower Protection Act.

Knowles v. VA, 796 Fed. Appx. 1026 (Fed. Cir. 2020 NP): The court affirmed the administrative judge's initial decision denying the appellant's request for corrective action under the Whistleblower Protection Act. The appellant challenged several personnel actions, including two suspensions and a notice of proposed removal. The appellant made protected disclosures that were contributing factors in the personnel actions, but the agency proved by clear and convincing evidence that it would have taken the same actions notwithstanding the appellant's protected disclosures. The court found substantial evidence to support the administrative judge's application of the *Carr* factors, i.e. that the agency presented strong evidence in support of its actions, there was little to no retaliatory motive on the part of the responsible officials, and there was no evidence concerning the agency's treatment of similarly situated non-whistleblowers.

Kuriakose v. VA, No. 2019-1274, 120 LRP 1734 (Fed. Cir. 2020): The court affirmed the administrative judge's initial decision denying the appellant's request for corrective action under the Whistleblower Protection Enhancement Act. The appellant made one protected disclosure that was a contributing factor in a personnel action, i.e., reduction in professional development time. However, the agency proved by clear and convincing evidence that it would have taken the same personnel action notwithstanding the disclosure largely because the limit on professional development time applied to all physicians. The appellant alleged other retaliatory personnel actions, including hostile work environment and constructive removal, but she failed to make a prima facie case for these claims. Specifically, the appellant failed to show that her working conditions rose to the level of a hostile work environment, and she failed to show that her resignation was involuntary.

Lehr v. MSPB, No. 2019-1677, 120 LRP 4621 (Fed. Cir. 2020 NP): The court affirmed the administrative judge's decision, which dismissed the appellant's individual right of action appeal for lack of jurisdiction. Although the appellant responded to the administrative judge's jurisdictional order, that response provided insufficient information about the nature of any disclosures she may have exhausted before the Office of Special Counsel. To the extent that the appellant argued that she had additional information to meet her jurisdictional burden, the court found no basis for excusing the appellant's failure to present such information below.

Mohammed v. Dept. of Army, 780 Fed. Appx. 870 (Fed. Cir. 2019 NP): The court affirmed the administrative judge's initial decision denying corrective action in this IRA appeal, in which the appellant, who served as an assistant professor at the Defense Language Institute Foreign Language Center, argued that the agency retaliated against her for filing a prior IRA appeal and for disclosing that her supervisors retaliated against her and subjected her to a hostile work environment by generating a red flag notification reporting negative student comments about her class, issuing her a memorandum of counseling, transferring her to a different school, changing her duties, denying her requests to conduct oral proficiency interview tests and to teach study hall, placing her on administrative leave, and by not renewing her contract. The court found no basis to disturb the administrative judge's determination that the red flag notification and informal memorandum of counseling were not covered personnel actions under the WPA. The court further agreed with the administrative judge that, although the appellant made one protected disclosure that contributed to the personnel actions that were covered under the WPA when she redisclosed the retaliation at issue in her previous IRA appeal, the agency proved by clear and convincing evidence that it would have taken the same covered personnel actions in the absence of that disclosure. The court considered, but found no merit to, the appellant's arguments that the administrative judge abused her discretion in crediting the hearing testimony of several agency witnesses, that collateral estoppel or res judicata precluded the agency from punishing her twice for the same act, and that the agency deprived her of due process.

Mount v. DHS, 937 F.3d 37 (1st Cir. 2019): The 1st Circuit, as had the 7th Circuit in *Delgado v. MSPB*, 880 F.3d 913, 915–22 (7th Cir. 2018) (i.e., "bureaucratic rigidity to a dysfunctional level"), rejected hypertechnical application by MSPB of OSC exhaustion requirements. Mount's supervisor provided him an e-mail to give to a coworker that the supervisor thought would aid that coworker's whistleblower case. The circumstances of the procurement and transmittal of the email were investigated, Mount was found innocent of any wrongdoing, but Mount believed he'd been retaliated against through nonpromotion and a lowered performance appraisal. After going first to OSC, Mount then appealed to the Board, contending that he was the victim of reprisal for aiding a whistleblower and for being perceived as having aided a whistleblower. The Board's AJ declined to consider the "perception" assertion because it was not first raised with OSC, and the AJ ruled that the assistance (carrying a copy of an

e-mail to the appellant's colleague) was too minimal to constitute protected assistance. On the "perception" claim, the court sent the case back to the Board, finding that its construction of the statutory exhaustion requirement was hypertechnical, incorrect (the statute does not dictate a stringent exhaustion requirement-it just states that the employee will seek corrective action from OSC and does not require presentation to OSC of a "perfectly packaged case ready for litigation."). In the court's view, the legislative history of the statute did not show congress intended to impose a legally technical exhaustion requirement. A requirement of technically exact pleading to OSC imposes too great a burden on employees without counsel and the burden is unrealistic because the full scope of reprisals is not exposed until the complaint is investigated or otherwise pursued, the court opined. Thus, the allegations of Mount's OSC complaint, although not specifying a "perception" claim, supported the core element that management appeared to believe he engaged in whistleblowing activity. Rejecting "MSPB's hypertechnical application of the exhaustion requirement," the court remanded the case for Board reconsideration.

Pamintuan v. Dept. of Navy, No. 2019-2232, 120 LRP 3799 (Fed. Cir. 2020 NP): The court affirmed the administrative judge's initial decision, which denied the appellant's request for corrective action under the Whistleblower Protection Enhancement Act. Although the appellant presented a prima facie case of reprisal concerning a disclosure that preceded his letter of reprimand, a detail assignment, and the denial of his request for reinstatement of a Contracting Officer warrant, the agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the disclosure. While the appellant argued that his retirement was involuntary and constituted another relevant personnel action, he failed to prove that claim. The court confirmed that the strength of any retaliatory motive is a proper consideration in determining whether the agency met its burden, despite the appellant's suggestion to the contrary. The court also declined to reweigh the evidence and credit the appellant's positions concerning both the involuntariness of his retirement and his explanation for the conduct that precipitated the other alleged retaliatory personnel actions. Finally, the court considered the effect of a decision by the California Unemployment Insurance Appeals Board (CUIAB), which awarded the appellant unemployment benefits based on its determination that he was subjected to an illegal discriminatory act and had good cause to leave his position. The CUIAB decision had no preclusive effect on the Board, and its reference to illegal discrimination did not clearly implicate a type of discrimination that would require treating the appellant's Board appeal as a mixed case, outside of the court's jurisdiction.

Potter v. VA, 949 F.3d 1376 (Fed. Cir. 2020): The appellant filed an individual right of action appeal with the Board, alleging that she was subjected to retaliation for engaging in protected whistleblowing activities. In particular, the appellant alleged that she made four protected disclosures and cooperated with the Office of Inspector General (OIG), resulting in four retaliatory personnel actions. The administrative judge found that the appellant proved that her disclosures were protected, but failed to prove that her cooperation with OIG was protected. He then determined that the appellant proved that these disclosures were a contributing factor in only the first of the alleged retaliatory personnel actions, i.e. a change in her title from Chief Nurse Manager to Nurse Manager. Finally, the administrative judge concluded that the appellant was not entitled to corrective action for that remaining personnel action because the agency met its burden of proving that it would have taken the same action in the absence of the appellant's whistleblowing. On appeal, the circuit determined that the AJ incorrectly found that the appellant failed to prove that her second disclosure was a contributing factor in a subsequent personnel action. Because the error necessitated additional findings of fact, remand was required.

Rutila v. Dept. of Transp., No. 2019-1712, 120 LRP 4933 (Fed. Cir. 2020 NP): The court affirmed the administrative judge's decision, which denied the appellant's request for corrective action in an individual right of action appeal. The administrative judge found that the appellant failed to prove that he engaged in protected whistleblowing activity. She further found that, even if the appellant had met that burden, the agency proved that it would have taken the same removal action in the absence of that activity. Although the appellant argued that the administrative judge erred by relying on 5 USC 2302(b)(9)(A)(i) rather than section 2302(b)(8), the court found it unnecessary to rule on this issue. The court noted that the Board has jurisdiction over individual right of action appeals under both sections and that the appellant did not show how he was prejudiced by the administrative judge's reliance on § 2302(b)(9). The court also found it unnecessary to rule on whether the appellant's activity was protected. Instead, the court agreed with the administrative judge's alternative conclusion—that the agency proved by clear and convincing evidence that it would have removed the appellant in the absence of the alleged protected activity. The court found the appellant's remaining arguments unavailing, including ones concerning additional alleged disclosures, discovery, and the right to a hearing.

Simon v. DOJ, No. 2019-1982, 120 LRP 4227 (Fed. Cir. 2020 NP): The court affirmed the administrative judge's initial decision, which denied the appellant's request for corrective action under the Whistleblower Protection Enhancement Act. Although the appellant presented a prima facie case of reprisal concerning his prior Board appeals and a non selection that followed, the agency proved by clear and convincing evidence that it would have taken the same action in the absence of the appellant's protected activities. Among other things, the record established that, while the agency posted its vacancy announcement for two geographic locations, it had a strong preference for filling the vacancy at the location for which the appellant chose not to apply. Further, the agency offered the position to an individual who both applied to the preferred location and previously represented the appellant in his prior Board appeal, which suggested that the agency did not harbor strong retaliatory animus.

Smith v. GSA, 930 F.3d 1359 (Fed. Cir. 2019): The appellant filed an appeal challenging his removal and asserting that the agency retaliated against him for his disclosures of gross mismanagement and waste. In the initial decision, the administrative judge upheld the appellant's removal based on charges of failure to comply with IT policy, failure to comply with instructions, and frequent disrespectful conduct towards his supervisors, charges he found had an "obvious nexus" to the efficiency of the service. The administrative judge also found that the appellant had shown that he was a whistleblower based on a December 2015 disclosure in a report to upper management and, based on the knowledge-timing test, that his disclosure contributed to the decision to remove him. However, the administrative judge found "based on the strength of the agency's evidence" that the agency proved by clear and convincing evidence that it would have removed him absent any disclosure. Importantly, the administrative judge found that "the defiantly disrespectful misconduct described…alone would have justified his removal, especially in light of his previous suspension for similar misconduct." The appellant sought judicial review. The court, though, found that the administrative judge erred in finding the appellant's misconduct alone justified the agency's action because the merits of a whistleblower defense do not turn on the strength of the agency's evidence alone. The proper inquiry, it stated, is whether the agency would have acted in the same way in the absence of the whistleblowing. The court noted that the administrative judge did not analyze the second and third factors described in *Carr v. SSA*, 185 F.3d 1318 (Fed. Cir. 1999), in the clear and convincing analysis. In particular, the court noted the following evidence, among other evidence, which relates to these factors, including the appellant's large number of disclosures of management failures, some of which embarrassed agency managers, the communication restrictions and other actions imposed against him by his managers, and his punishment for working over a weekend when the

record did not show whether another employee working on that same weekend was punished. The court accordingly vacated the administrative judge's whistleblower analysis and remanded for application of the proper standard and consideration of relevant evidence. The court also reviewed the three sustained charges on which the appellant's removal was based. With respect to the failure to comply with IT policy charge, the court noted that the policy required users to remove PIV cards from their laptops, the appellant was trained in the IT policy, and he did not remove his PIV card. However, the court concluded that the record lacked substantial evidence to show that this policy was applicable to the appellant, who was a quadriplegic and could not physically remove a PIV card. Therefore, the court reversed the administrative judge's decision to sustain this charge. The court also addressed one of the specifications of the failure to follow instructions charge, involving the appellant's decision to send a short e-mail on a weekend after his supervisor instructed him not to work on a weekend. The court noted that the administrative judge failed to discuss the propriety of the no weekend work instruction, particularly since the agency introduced no formal policy forbidding weekend work, no evidence that other employees had been instructed not to work on the weekend, and no supporting rationale for imposing the ban on the appellant alone. The court therefore reversed the administrative judge's decision to sustain this specification. The court affirmed the administrative judge's decision to sustain the remaining specifications of this charge, but it remanded for a determination of whether the charge as a whole could be sustained. The court also affirmed the administrative judge's decision to sustain the disrespectful conduct charge. Finally, in light of the charge and specification that were not sustained and the decision to vacate the whistleblower analysis, the court also vacated the penalty decision and remanded to reassess the appropriate penalty, which should include consideration of the mitigating circumstances cited by the appellant and the propriety of the breadth of his supervisors' communication bans.

As always, we thank you for expressing an interest in this manual. Please feel free to contact us with any suggestions or comments.

PART ONE

The Agency Charge

CHAPTER 1
THE BASICS, THE ESSENTIALS—ADVERSE ACTIONS

I. INTRODUCTION

This text deals with the charges and penalties that are brought against employees (with appeal rights) in adverse actions. The adverse action is the most significant remedial tool for regulating work-related conduct, e.g., misconduct and related problems (such as inability to perform).

The penalty is the objective of the adverse action, but the charge is the centerpiece. We start by briefly reviewing the adverse action and its technical and legal requirements. In the following chapters, we turn to the essentials of charging and imposing penalties; how charges and penalties are won and how charges and penalties are lost. At the end of this text, one very simple thing will be apparent: employees do not win adverse actions; agencies lose adverse actions.

Appealable adverse actions fall under the jurisdiction of the MSPB, the quasi-judicial forum created by the Civil Service Reform Act to hear, among other things, federal employee appeals on major disciplinary actions.

Before focusing on appealable adverse actions and more specifically on the charges and penalties in those actions, some comment on MSPB jurisdiction is necessary. MSPB jurisdiction is considerably broader than adverse actions.

A. JURISDICTION

The MSPB has both original jurisdiction and appellate jurisdiction. 5 CFR 1201.1. Its original jurisdiction is spelled out in 5 CFR 1201.2:

> The Board's original jurisdiction includes the following cases:
>
> (a) Actions brought by the Special Counsel under 5 U.S.C. 1214, 1215, and 1216;
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> (b) Requests, by persons removed from the Senior Executive Service for performance deficiencies, for informal hearings; and
>
> (c) Actions taken against administrative law judges under 5 U.S.C. 7521.

The MSPB's appellate jurisdiction depends on the nature of the action (what is appealed) and the type of employee (who is appealing). Appellate jurisdiction is spelled out in 5 CFR 1201.3:

> (a) *Generally*. The Board's appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule or regulation. The Board's jurisdiction does not depend solely on the label or nature of the action or decision taken or made but may also depend on the type of federal appointment the individual received, e.g., competitive or excepted service, whether an individual is preference eligible, and other factors. Accordingly, the laws and regulations cited below, which are the source of the Board's jurisdiction, should be consulted to determine not only the nature of the actions or decisions that are appealable, but also the limitations as to the types of employees, former employees, or applicants for employment who may assert them. Instances in which a law or regulation authorizes the Board to hear an appeal or claim include the following:
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> (1) *Adverse Actions. Removals (terminations of employment after completion of probationary or other initial service period), reductions in grade or pay, suspension for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; an involuntary resignation or retirement is considered to be a removal (5 U.S.C. 7511-7514; 5 CFR part 752, subparts C and D)* (emphasis added)*;*
>
> (2) *Retirement Appeals*. Determinations affecting the rights or interests of an individual under the federal retirement laws (5 U.S.C. 8347(d)(1)-(2) and 8461(e)(1); and 5 U.S.C. 8331 note; 5 CFR parts 831, 839, 842, 844, and 846);
>
> (3) *Termination of Probationary Employment*. Appealable issues are limited to a determination that the termination was motivated by partisan political reasons or marital status, and/or if the termination was based on a pre-appointment reason, whether the agency failed to take required procedures. These appeals are not generally available to employees in the excepted service. (38 U.S.C. 2014(b)(1)(D); 5 CFR 315.806 & 315.908(b));
>
> (4) *Restoration to Employment Following Recovery from a Work-Related Injury*. Failure to restore, improper restoration of, or failure to return following a leave of absence following recovery from a compensable injury. (5 CFR 353.304);
>
> (5) *Performance-Based Actions Under Chapter 43*. Reduction in grade or removal for unacceptable performance (5 U.S.C. 4303(e); 5 CFR part 432);
>
> (6) *Reduction in Force*. Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901); Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011);
>
> (7) *Employment Practices Appeal*. Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104);
>
> (8) *Denial of Within-Grade Pay Increase*. Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 U.S.C. 5335(c); 5 CFR 531.410);