INTRODUCTION

This is the second edition of *Adverse Actions and Performance-Based Actions*. Our first edition was published in 2011. That was during the President Barack Obama administration and the political climate was more moderate in terms of employee and labor relations in the federal sector. It was a time when the Merit Systems Protection Board was fully staffed and consisted of two Democratic and one Republican member. The case law reflected that Democratic majority, not only in relation to adverse action case law generally but particularly in relation to mitigation and due process arguments. Those case law changes continued from 2009 to 2016. As of January 6, 2017, the MSPB has been without a quorum—there have been nominees but they have not been approved by the Senate—so that the Board cannot issue decisions on review. Of course, MSPB administrative judges can issue initial decisions and to the effect 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 (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 2019–2021 APR-APP (Feb. 10, 2010). These backlogs come at a time when new Executive Orders issued by President Trump (and corresponding OPM regulations) summarized below, and no longer enjoined and therefore in full effect—make it harder to resolve cases. *See e.g.*, EO 13839, Sect. 5, a section of the EO that 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. Moreover, there are other potential important changes on the horizon, as a result of another EO issued by President Trump on October 21, 2020. This new EO seeks to reclassify from the competitive service certain "positions of a confidential, policy-determining, policy-making, or policy advocating character" into a new schedule F. Occupants of such positions would be without certain protections as to disciplinary or adverse actions and would not be eligible for union membership. This EO, too, is summarized below.

As suggested above, and except for the occasional Federal Circuit case, the case law has been in a state of suspended animation due to the MSPB's lack of a quorum. Nonetheless, because the Obama-era case law remains in effect, we review the more substantial changes made by that Board below and which continue to fill in the gap since our first edition.

I. MITIGATION OF PENALTY

In relation to mitigation of penalty, there was a sea change by the Obama Board in connection with the analysis of disparate treatment claims. This was a more employee oriented approach to addressing disparate treatment in penalty claims. *See Portner v. DOJ*, 119 MSPR 365, 2013 MSPB 28 (2013); *Boucher v. USPS*, 118 MSPR 640, 2012 MSPB 126 (2012); *Villada v. USPS*, 115 MSPR 268, 2010 MSPB 232 (2010); *Woebcke v. DHS*, 114 MSPR 100, 2010 MSPB 85 (2010); *Lewis v. VA*, 113 MSPR 657, 2010 MSPB 98 (2010). In

effect, under the Board's new disparate treatment formulation, an employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors" and the burden then shifts to the agency to show a legitimate reason for the different treatment. *Boucher v. USPS* at 647. The cases illustrate the ease in showing "enough similarity" and the expanded nature of "similarity." E.g., *Portner*, *supra*; *Voss v. USPS*, 119 MSPR 324, 2013 MSPB 26 (2013); *Lewis*, *supra*. Despite these changes, there had not been much Board guidance on the ways in which an agency might show "a legitimate reason for the difference in treatment."

We recognize, though, beginning around 2014, while the Board continued to apply a broadened disparate treatment standard, the penalty cases seemed less employee-oriented and the Board began providing better guidance as to legitimate reasons for differences. E.g., *McNab v. Dept. of Army*, 121 MSPR 661, 2014 MSPB 79 (2014) (dissent by Vice Chair); *Ramos v. DHS*, AT-0752-13-0637-I-1 (NP 11/21/2014) (dissent by Vice-Chair); *Arellano v. DHS*, SF-0752-12-0211-I-1 (NP 11/27/2013); *Davis v. USPS*, 120 MSPR 457, 2013 MSPB 100 (2013); *see also Figueroa v. DHS*, DA-0752-12-0001-B-1 (NP 2/28/2014).

In any event, the cases during the Obama Board tenure—continuing until today—indicate that the focus is often less on proof of the charge—obviously, still quite important—but on the nature of the penalty, with the Board frequently wading through numerous comparators. E.g., *Ramos v. DHS*, AT-0752-13-0637-I-1 (NP 11/21/2014) (dissent by Vice-Chair); *Figueroa v. DHS*, DA-0752-12-0001-B-1 (NP 2/28/2014); *Arellano v. DHS*, SF-0752-12-0211-I-1 (NP 11/27/2013). Accordingly, a consequence of the Board's change in membership to a majority Democratic Board was a need for agencies to once again pay special care to the particulars of their charges and especially the consideration of reasonable penalties, with the related opportunities of employees and their representatives to arguably get more of a fair shake.

II. CHANGE OR CLARIFICATION OF CHARGE ELEMENTS AND DISTINCTIONS IN CASE LAW

The Obama Board also changed or clarified the elements of some charges. These changes include excessive leave (*McCauley v. Dept. of Interior*, 116 MSPR 484, 2011 MSPB 59 (2011)); lack of candor (*Rhee v. Dept. of Treasury*, 117 MSPR 640, 2012 MSPB 26 (2012); falsification (*Boo v. DHS*, 122 MSPR 100, 2014 MSPB 86 (2014); conduct unbecoming, responsibility for actions of subordinates (*Prouty & Weller v. GSA*, 122 MSPR 117, 2014 MSPB 90 (2014); apparent conflicts of interest (*Ryan v. DHS*, 123 MSPR 202, 2016 MSPB 7 (2016); and, suitability-based adverse actions (*Aguzie and Barnes v. OPM*, 116 MSPR 64, 2011 MSPB 10 (2011); *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015) (withdrawing 773 F.3d 1289 (Fed. Cir. 2014)).

The Obama-era Board was further quite active in making distinctions in the case law as to certain charges and actions. These have included medical inability to perform charges, distinguishing between employees subject to medical standards and those not (e.g., *Clemens v. Dept. of Army*, 120 MSPR 616, 2014 MSPB 14 (2014); *Fox v. Dept. of Army*, 120 MSPR 529, 2014 MSPB 6 (2014)); and, involuntary actions, distinguishing between enforced leave and constructive suspension actions (*Bean v. USPS*, 120 MSPR 397, 2013

MSPB 96 (2013); *Romero v. USPS*, 121 MSPR 606, 2014 MSPB 76 (2014); *Abbott v. USPS*, 121 MSPR 294, 2014 MSPB 47 (2014)).

III. DUE PROCESS AND WHISTLEBLOWER REPRISAL DEFENSES

Two defenses, due process violation claims and whistleblower reprisal, have gotten more traction since our first edition and warrant particular mention.

A. DUE PROCESS DEFENSES

Due process defenses are based on the Federal Circuit's decision in *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999) (*ex parte* communications with a deciding official must be viewed as due process rather than harmful procedural error violations). The Obama Board (and circuit, even since 2017) have set aside or remanded agency actions in numerous cases for due process violations. *See Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011); *Bennett v. DOJ*, 119 MSPR 685, 2013 MSPB 64 (2013); *Seeler v. Dept. of Interior*, 118 MSPR 192, 2012 MSPB 36 (2012) (Dissent by Member Rose); *Jenkins v. EPA*, 118 MSPR 161, 2012 MSPB 70 (2012); *Howard v. Dept. of Air Force*, 118 MSPR 106, 2012 MSPB 61 (2012); *Silberman v. Dept. of Labor*, 116 MSPR 501, 2011 MSPB 65 (2011); *Lopes v. Dept. of Navy*, 116 MSPR 470, 2011 MSPB 63 (2011); *Gray v. DOD*, 116 MSPR 461, 2011 MSPB 64 (2011); *Pickett v. USDA*, 116 MSPR 439, 2011 MSPB 58 (2011); *Do v. DHUD*, 913 F.3d 1089 (Fed. Cir. 2019); *Boss v. DHS*, 908 F.3d 1278 (Fed. Cir. 2018); *Kolenc v. DHHS*, 120 MSPR 101, 2013 MSPB 70 (2013).

Importantly, the Board's (and circuit's) *Stone* due process defense includes an agency's failure to identify aggravating factors as the basis for the imposition of a penalty, denying the employee a fair opportunity to respond to those factors before the agency's deciding official. *Lopes v. Dept. of Navy*, 116 MSPR 470, 2011 MSPB 63 (2011); and, *Silberman v. Dept. of Labor*, 116 MSPR 501, 2011 MSPB 65 (2011); *Jenkins v. EPA*, 118 MSPR 161, 2012 MSPB 70 (2012). While it is hard to look at this as a trend, the Board has given the agency the benefit of the doubt in some nonprecedential decisions, finding, in effect, that the aggravating factors relied on were implicit in the proposal. *McCook v. DHUD*, SF-0752-14-0389-I-1 (NP 8/3/2015); *see also Damewood v. VA*, DC-0752-14-1038-I-1 (NP 2/12/2016) (Board sustains 21 day suspension of a prosthetics representative for two charges, failure to comply with a supervisor's instruction and failure to follow procedures; as to failure to follow instructions, Board rejects claim that employee did not have proper training or access to a necessary computer program; as to second charge, Board very generously incorporates a "list" into the proposal to find that employee on due process notice of what he had been charged with; alternatively Board agrees with AJ that employee could have requested additional information but failed to do so).

It is noteworthy, as well, that the Board and circuit expanded the nature of its due process reviews to other aspects of the administrative process. *Nguyen v. DHS*, 737 F.3d 711 (Fed. Cir. 2013) (*Giglio* reliance); *Massey v. Dept. of Army*, 120 MSPR 226, 2013 MSPB 80 (2013) (oral reply); *Lange v. DOJ*, 119 MSPR 625, 2013 MSPB 52 (2013); *Martinez v. VA*, 119 MSPR 37, 2012 MSPB 121 (2012); *Rose v. DOD,* AT-0752-12-0063-B-2 (NP 8/10/2015) (all involving issues of unbiased decision makers; offshoot of *Stone* due process claim); and *Thome v. DHS*, 122 MSPR 315, 2015 MSPB 27 (2015) (misrepresentation of nature of action by agency).

On the other hand, the Board was reined in by the Federal Circuit and due process was limited in cases involving security clearances in *Gargiulo v. DHS*, 727 F.3d 1181, 1187 (Fed. Cir. 2013), where the court found that "the Board erred by holding that due process provides an employee with procedural rights in connection with a security clearance determination and justifies an inquiry into whether the agency had reasonable grounds for suspending or revoking the employee's security clearance."

Likewise, the Federal Circuit held that *Dept. of Navy v. Egan*, 484 U.S. 518 (1988), limits the Board's review of cases involving not only security clearance determinations, but also agency determinations that an employee is ineligible to occupy a noncritical sensitive position. The Board's jurisdiction in these instances is limited to procedural review. *Kaplan v. Conyers and Northover and MSPB*, 733 F.3d 1148 (Fed. Cir. 2013) (*en banc*).

B. WHISTLEBLOWER REPRISAL CLAIMS

A whistleblower reprisal claim—either as an affirmative defense or as an Individual Right of Action (IRA)—is the other defense besides *Stone* due process violation claims that presents significant jeopardy for agencies (and consequent opportunity for employees). This is reflected in Board, circuit and even Supreme Court case law. *DHS v. Maclean*, 574 U.S. 383 (2015); *Whitmore v. Dept. of Labor*, 680 F.3d 1353 (Fed. Cir. 2012); *Aquino v. DHS*, 121 MSPR 35, 2014 MSPB 21 (2014); *Chambers v. Dept. of Interior*, 116 MSPR 17, 2011 MSPB 7 (2011) (Rose concurring), *on remand from* 603 F.3d 1370 (Fed. Cir. 2010); *Siler v. EPA*, CH-0752-16-0564-M-1, 119 LRP 27866 (Central Reg'l Office 7/26/2019); *Elder v. Dept. of Air Force*, 124 MSPR 12, 2016 MSPB 41 (2016); *Miller v. DOJ*, 842 F.3d 1252 (Fed. Cir. 2016); *Scoggins v. Dept. of Army*, 123 MSPR 592, 2016 MSPB 32 (2016); *Smith v. GSA,* 930 F.3d 1359 (Fed. Cir. 2019).

IV. LEGISLATIVE, REGULATORY, AND EXECUTIVE ORDER CHANGES

In addition to the above case law considerations since our last edition, there have been legislative and executive order changes. Legislation includes the Whistleblower Protection Enhancement Act of 2012; the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73, 131 Stat. 1235 (Oct. 26, 2017); the All Circuit Review Act; and The Veterans Administration Accountability and Whistleblower Protection Act of 2017.

A. WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012

As to the WPEA Enhancement Act, complaints about the alleged ineffectiveness of the WPA of 1989 and the 1994 amendments continued unabated. For 13 years, several members of Congress, urged on by whistleblower advocacy groups, sought to provide greater protections. Those efforts bore fruit on November 27, 2012, when the Whistleblower Protection Enhancement Act of 2012 was signed into law by President Obama, effective on December 27, 2012 (except for coverage of TSA employees, which was effective on the date of enactment). Substantial additions and changes to existing law were made by the WPEA. The WEPA:

- Expands the definition of a protected disclosure to apply to "any" lawful

disclosure and by overturning case law that had narrowed the definition of those who were covered (Sections 101 and 102 of the WPEA, adding 5 USC 2302(f)(1) and 2302(a)(2)(D)). As evidenced by congressional history, specific cases that were overturned included: *Horton v. Dept. of Navy*, 66 F.3d 279 (Fed. Cir. 1995) (disclosures to the alleged wrongdoer are not protected); *Willis v. USDA*, 141 F.3d 1139 (Fed. Cir. 1998) (disclosure not protected if made as part of an employee's regular job duties); and, *Meuwissen v. Dept. of Interior*, 234 F.3d 9 (Fed. Cir. 2000) (disclosure not protected if information already known).

- While recognizing that disclosures made in the course of an employee's job duties can be protected, the WPEA establishes a burden of proof in such instances (Section 101, adding 5 USC 2302(f)(2)). As evidenced by the above, such disclosures are protected if the employee proves that the agency acted "in reprisal for the disclosure." The standards for judging this heightened burden are unclear, although we weigh in with our opinion in subsequent chapters.

- Defines disclosure as:

> [A] formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—
>
> (i) any violation of any law, rule, or regulation; or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(Section 102, adding 5 USC 2302(a)(2)(D)).

It is interesting here that Congress sought to exclude communications concerning "policy decisions that lawfully exercise discretionary authority *unless* the employee or applicant providing the disclosure reasonably believes that the disclosure evidences" whistleblowing. (Emphasis supplied.) This section too appears to provide an exception (i.e., heightened burden of proof) for disclosures concerning "policy decisions." In *O'Donnell v. MSPB*, 561 Fed. Appx. 926 (Fed. Cir. 2014 NP), the federal circuit found a policy discussion unprotected on the basis that the employee could not reasonably believe that the exercise of authority about benefit eligibility violated the law. Similarly, the Board in *Webb v. Dept. of Interior*,122 MSPR 248, 2015 MSPB 6 (2015), found a disclosure about a policy difference not protected.

- Provides additional rights for employees making 2302(b)(9) prohibited personnel practice claims (i.e., for exercise of any appeal, complaint, or grievance to remedy a violation of (b)(8), testimony, cooperation with IG, to include the right to OSC protection and investigation and to pursue Independent Right of Action appeals) (Section 101(b), amending 5 USC 1214(a)(3), (b)(4)(A) and (b)(4)(B)(i) and 1221(a), (e)(1), and (i), 2302(a)(2)(C)(i), and 2302(b)(9)(A) and (B).) This may be the most important WPEA change. Previously, an employee could pursue an Individual Right of Action only for 5 USC 2302 (b)(8) claims, whistleblower reprisal. Now, an

employee can go to the MSPB under the IRA procedure and after exhausting OSC processes for certain violations of 5 USC 2302 (b)(9) (for any except for 2302(b)(9)(A)(2)). The Board and circuit have begun addressing these claims. *Hooker v. VA*, 120 MSPR 629, 2014 MSPB 15 (2014); *Miller v. FDIC*, 122 MSPR 3, 2014 MSPB 83 (2014); *Colbert v. VA*, 121 MSPR 677, 2014 MSPB 80 (2014); *Rainey v. Dept. of State*, 122 MSPR 592, 2015 MSPB 49 (2015); *Alarid v. Dept. of Army*, 122 MSPR 600, 2015 MSPB 50 (2015); *Rebstock Consolidation v. DHS*, 122 MSPR 661, 2015 MSPB 53 (2015); *Salerno v. Dept. of Interior*, 123 MSPR 230, 2016 MSPB 10 (2016); and, *Carney v. VA*, 121 MSPR 446, 2014 MSPB 62 (2014). This section does not have retroactive effect. E.g., *Hooker*, *supra*. Also, importantly, the Board will not apply the union reprisal case law precedent (i.e., *Warren v. Dept. of Army*, 804 F.2d 654 (1986)). Instead, the burden-shifting framework in 5 USC 1221(e) applies (i.e., contributing factor and clear and convincing evidence). *Alarid*, *supra*.

- Provides that any presumption relating to the performance of duty by an employee whose conduct is the subject of a whistleblower disclosure may be rebutted by substantial evidence. (Section 103, amended 5 USC 2302(b), following paragraph (12)). This was a response to the federal circuit's decision in *LaChance v. White*, 174 F.3d 1378 (Fed. Cir. 1999), In *LaChance*, the circuit court added a requirement that significantly narrowed whistleblower reprisal protections. It provided that in determining objective reasonableness, an inquiry starts with the "presumption that public officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulations…. And this presumption stands unless there is 'irrefragable proof' to the contrary." *Id*. at 1381 (quoting *Alaska Airlines v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993)). As noted by both the MSPB on remand and at the Federal Circuit on later appeal, "irrefragable proof" meant that something was "impossible to refute" and a standard contrary to common sense and congressional intent. *See White v. Dept. of Air Force*, 95 MSPR 1 (2003); *White v. Dept. of Air Force*, 391 F.3d 1377 (Fed. Cir. 2004). Section 104 defines "reasonable belief" to exclude the "irrefragable proof" standard, replacing it with a rebuttable presumption by substantial evidence.

- Strengthens rules to protect whistleblowers who report wrongdoing to Congress (Section 103, amending the comments following 5 USC 2302(b)(12) (with the enactment of the WPEA, the comments amended now follow (b)(13)).

- Makes it a prohibited personnel practice to impose a nondisclosure (i.e., gag) agreement on an employee which does not explicitly state that the employee's rights under the whistleblower law supersede the terms of the agreement (Section 104), requires a specified model statement in agreements (Section 115), and requires the posting of such model statement on agency websites (Section 115) (Sections 104(a) and (b), amending 5 USC 2302(a)(2)(A)(xi) and adding 2302(b)(13) and Section115 of the WPEA). Section 104 specifies the 13th and newest PPP. The MSPB has sought to clarify the nature of this new PPP and agency obligations at its website. *See* www.mspb.gov/ppp/ppp.htm. It has also solicited *amicus curiae* briefs to determine whether this section should be applied retroactively. *Ibid*.

  As indicated, the model language that agencies are required to use in these situations is stated in section 115 of the law. Note that this language, as provided

in Section 115, is to be provided on the agency's website. This PPP may need additional clarification to determine its scope. For example, is the agency obligated to provide the model language in individual settlement agreements, to make clear that employees are not waiving the right to pursue certain communications. OSC has issued useful guidance through a "Memorandum For Executive Departments and Agencies," outlining agency obligations under these new provisions. Significantly, the guidance provides that "Agencies may distinguish between a nondisclosure policy, form, or agreement and a confidentiality clause in a settlement agreement. A confidentiality clause in a settlement agreement is generally not covered by the WPEA's notice requirements. A confidentiality clause only restricts disclosure of the terms and conditions of the settlement, and does not otherwise restrict disclosure of any other information. If a confidentiality clause in a settlement agreement extends beyond the terms and conditions of the agreement, agencies must incorporate the WPEA's statement." *Id*. at n3.

- Provides remedial authority for retaliatory investigations of whistleblowers (Section 104(c), adding 5 USC 1214(h) and 1221(g)(4)). This subsection is necessary because the applicable definition of a "personnel action" does not explicitly cover agency investigations, and those would only come within the personnel action definition if the investigation resulted in a "significant" change in duties, responsibilities or working conditions. As noted in the congressional history, an improper investigation could arguably be considered as harassment and fit within the definition of a personnel action. It is also clear from the congressional history that Congress left in place the Board's decision in *Russell v. DOJ*, 76 MSPR 317 (1997), which held that an improper investigation may be so closely connected to a "personnel action" that it may be covered.

- Recognizes that the President has the authority to make national security determinations exempting agencies from Title V coverage, where the principal function of the agency or unit thereof is the conduct of foreign intelligence or counterintelligence activities, but provides that the President's determination must be made prior to a personnel action (Section 105, amending 5 USC 2302(a)(2)(C) and inserting paragraphs (ii)(I) and (ii)(II)).

- Changes the standard of proof by making it easier for OSC to seek disciplinary actions against managers who commit whistleblower reprisal and makes clear that OSC is not responsible for paying attorney fees in unsuccessful actions against managers, if the prosecution decision was reasonable (Sections 106 and 107(a), adding 5 USC 1215(a)(3)(A) and (B) and 5 USC 1204(m)(1)). Here, Congress reversed the MSPB's decision in *Special Counsel v. Santella*, 65 MSPR 452 (1994), which had required OSC to meet a "but for" cause in a disciplinary action against managers at the MSPB. This is now replaced with a "significant motivating factor," as provided in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977).

- Strengthens available remedies for whistleblower reprisal to include compensatory damages (Section 107(b), amending 5 USC 1214(g)(2) and 1221(g)(1)(A)(ii)). At this point, there have been no MSPB cases awarding compensatory damages, so it is unclear as to the standards that will be used to judge such awards. Presumably, the standards will be akin to those applied in federal EEO discrimination cases. Please note, however, that unlike EEO discrimination

law, there is no limit to the compensatory damage amount, as long as the damages are "reasonable." Previously, (and still), successful whistleblower reprisal complainants could only gain "consequential damages." E.g., *King v. Dept. of Air Force*, 122 MSPR 531, 2015 MSPB 41 (2015).

- Allows whistleblower reprisal claimants to appeal to other circuits besides the Federal Circuit, during a two-year trial period (Section 108, by adding 5 USC 7703(b)(1)(A) and (B)). This trial period has since been made permanent, as indicated below. This section reflects Congress' view that the federal circuit had too narrowly interpreted the WPA. *Aviles v. MSPB*, 799 F. 3d 457 (5th Cir. 2015), is the first non-federal circuit decision under the all circuit review provision. This case involved whether disclosures of purely private wrongdoing are protected as well as the nonfrivolous and specific nature of another disclosure. *Ibid*. While the court found that disclosures of private misconduct are not protected (i.e., does not evidence "Government misconduct") and the second disclosure was too general and not a nonfrivolous allegation, the circuit used an approach for analyzing a "nonfrivolous "allegation that is different from the Federal Circuit. *Id*. at n.4. See recent other circuit appeals in the Chapter 1.
- Expands coverage to include employees of the Transportation Security Administration (Section 109, adding a new 5 USC 2304). This provision of the law was effective on the date of enactment of the WPEA.
- Expands the term "disclosure" to include information "that the employee or applicant reasonably believes is evidence of censorship related to research, analysis, or technical information." (Section 110 of the WPEA). As noted in the congressional history, "This definition of protected disclosures is nearly identical to the general definition of protected disclosures that do not relate to censorship. This is intended to make unmistakably clear that employees are protected for disclosing scientific censorship in the same manner as they are protected for making any other disclosure." S. 743., 2012, 112th Cong. 2d Session.
- Clarifies whistleblower rights for critical infrastructure information (Section 111, amending Section 214 (c) of the Homeland Security Act of 2002). This section bars the critical infrastructure provisions of 6 USC 133 (c) from overriding WPA free speech rights.
- Specifies that agencies, as part of their education requirements, inform employees how to lawfully make protected disclosures of classified information to the Special Counsel, an Inspector General, Congress, or any other designated agency official (Section 112, amending 5 USC 2302 (c).
- Provides OSC with the authority to file *amicus* briefs on behalf of employees challenging MSPB rulings (Section 113, adding 5 USC 1212(h)(1) and (2)).
- Restricts the MSPB from assuming a *prima facie* case and addressing only the "knew or should have known" burden of proof (Section 114, amending 5 USC 1214(b)(4)(B)(ii) and 1221(e)(2)). In effect, before the Board can consider the agencies justification for the action, it must first make a finding (not a presumption) whether the protected disclosure was a contributing factor in taking the personnel action. Even previous to this change, the Board had already

begun to limit the instances of such "bifurcations." *Herman v. DOJ*, 115 MSPR 386, 2011 MSPB 4 (2013); and, *Belyakov v. DHHS*, 120 MSPR 326, 2013 MSPB 86 (2013).

- Identifies additional reporting requirements for GAO and the MSPB regarding whistleblower reprisal claims (Section 116 of the WPEA).
- Requires each agency Inspector General to designate a Whistleblower Protection Ombudsman (Section 117, adding 5 USC App. (d)(1)–(3)).

B. DR. CHRIS KIRKPATRICK WHISTLEBLOWER PROTECTION ACT OF 2017

Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73, 131 Stat. 1235 (Oct. 26, 2017). That Act:

- Requires the head of any agency to refer to the Office of Special Counsel ("OSC") any instance "in which the head of the agency has information indicating" that an employee of the agency committed suicide after making a protected whistleblower disclosure.
- Amends existing statutory law to include a fourteenth "prohibited personnel practice," making it illegal to "access the medical record of another employee or an applicant for employment as part of, or otherwise in furtherance of, [other prohibited personnel practices]" described in the statute's statement of the prior thirteen prohibited personnel practices.
- Amends 5 USC chapter 75 and *requires* agency heads to discipline any supervisor who is found to have committed one of three specific personnel practices: the eighth (whistleblower retaliation), ninth (retaliation for the exercise of an appeal, grievance, or complaint), or fourteenth (accessing the medical records of another employee in furtherance of a prohibited personnel practice).
- Sets statutory requirements for the type of discipline, establishing a requirement that the head of the agency propose a *minimum* of a three-day suspension for a first offense of one of the three prohibited personnel practices listed above. For the second offense, if one occurs, the new legislation requires that an agency head propose the employee's removal.
- Provides that those employees (both permanent and probationary) who request and obtain a stay of a personnel action they believe is motivated by retaliatory intent receive "priority" in a request for a transfer.

C. ALL CIRCUIT REVIEW ACT (2018)

Congress also made permanent the All Circuit review provision that was part of the Whistleblower Protection Enhancement Act as a pilot provision. Public Law No: 115-195 (July 7, 2018) (codified at 5 USC 7703(b)(1)(B) and referred to above. All Circuit review allows a federal employee (or applicant for federal employment) or the Office of Personnel Management to appeal, in any federal appeals court of competent jurisdiction, a final order or decision of the Merit Systems Protection Board on a claim alleging reprisal for making a protected disclosure (i.e., whistleblowing) or for engaging

in certain protected activities (e.g., refusing to obey an order that requires a violation of law).

D. THE VETERANS ADMINISTRATION ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION ACT OF 2017

This new law established important appeal procedures concerning VA senior executives, Title V and full time hybrid VA employees. While the law specifically applies only to the VA, it is the view of these authors that it represents a model for the federal sector more generally, especially in relation to such changes as a reduction of the burden of proof for adverse actions, the movement toward accelerated timeframes and the limitations on the Board's ability to mitigate penalties. The changes in this new law are outlined below. This law also contains some new procedures for full-time permanent Title 38 employees, modifying 38 USC Sections 7462 and 7463 by shortening certain timeframes for all disciplinary and major adverse actions. Pub. L. 115-41, Title II, Sect. 208.

VA Senior Executives: Senior executives are defined at 38 USC 713(d) and includes Senior Executive Service and other senior executive positions. The law amended 38 USC 713 to provide a new process for the Secretary, VA, to take action against VA senior executives.

In sum, the law creates a new process for the reprimand, suspension, involuntary reassignment, demotion, or removal of a senior executive by the Secretary if "the performance or misconduct of the covered individual warrants such action." 38 USC 713(a)(1). While the term "performance" is not defined in the law, "misconduct includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." Section 713(d)(2). Unlike the procedures under Title V, the senior executive is not entitled to a 30-day written notice and, instead, any decision "shall be issued not later than 15 business days after notice of the action." Section 713 (b)(2)C) (i.e., Section (b)(2)(A): "The aggregate period for notice, response, and decision on an action under subsection (a) may not exceed 15 days."). The disciplined employee may grieve the action under procedures established by the Secretary, in consultation with the Assistant Secretary for Accountability and Whistleblower Protection, but the Secretary "shall ensure that the grievance process…takes fewer than 21 days." Section 713(b)(3). Any decision that is not grieved or, if grieved, after a grievance decision, is final and conclusive. Section 713 (b)(4). Nonetheless, any decision can be judicially reviewed. Section 713(b)(5).

VA Title V and Full-Time Hybrid VA Employees: The new law amends 38 USC 714 to provide for new procedures for misconduct or performance actions involving suspensions of 15 calendar days or more, demotion, or removal of Title V and full-time Title 38 hybrid employees at the VA. This applies to all VA employees except for employees appointed under 38 USC 713(d) (SES employees); Section 7306 (Secretary, Directors and Assistant Secretaries); 7401(1) (physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries); Section 7401(4) (Directors of medical centers and directors of Veterans Integrated Service Networks with certain abilities); or, 7405 (employees in part-time, intermittent, and temporary positions). On August 24, 2017, the VA issued guidance as to the adverse action procedures for the employees covered by this section. *See* Aug. 24, 2017, Human Resources Management Letter No. 05-17-05.