CHAPTER 1
FUNDAMENTALS OF A WINNING CASE

Our purpose in this book is to provide a concise go-to text that recaps the fundamentals of building a winning case and revisits the needed skills to convincingly present that case. This text cuts to the essentials and is intended to be a "don't leave home without it" guide to getting it right. It provides the basic how-to-do-it, when-to-do-it, and the essential whys.

I. CARDINAL POINTS

Keep nine principles in mind.

One: Issue identification is 90% of litigation.

The complaint or the proposal notice is the "indictment."

Two: Some discovery or informal investigation is needed in every case.

Document requests are paramount.

Three: Build the case on the timeline, the documents.

Documents, "undisputables," and "givens" dictate the result.

Four: What witnesses conceal (don't say) is as important, if not more so, than what they convey (say).

At a minimum witnesses exaggerate and downplay.

Five: Cases are circumstantial and inferences are often not what they seem and must be strengthened.

Trust experience: what usually happens—especially when; be skeptical of logic.

Six: Statutes, rules, regulations, and case law provide an analytical framework.

Facts, namely documents, are more important than case law.

Facts, not string cites, win cases: put the decisions down and interview witnesses, read the documents.

Seven: Have a direct case or settle.

In cross, we do not trust.

Eight: Be mindful of the "elephant" in the room.

> The pejoratives and emotives are the silent, missing elements and must be identified and accounted for.

Nine: The government wins whenever the right thing is done.

II. THE ANALYTICAL FRAMEWORK: KEY LAWS, RULES, REGULATIONS

This book is a pocket guide on advocacy. A detailed explanation of the front-end choices, options, and forums that may be available or implicated in employee relations matters (misconduct, adverse actions, performance actions, discrimination, reprisal for protected activity, and whistleblowing) is not possible here. For a detailed explanation, read Vitaro, Sam, *Federal Sector Process, Appeal, & Review Rights* (Dewey Publications, Inc.).

The following offers a fairly comprehensive list of the statutes, regulations, and guidance establishing our analytical framework:

Equal Employment Opportunity Commission:

- 29 CFR 1614—Federal Sector Equal Employment Opportunity
- 29 CFR 1630—Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act
- 29 CFR 1635—Genetic Information Nondiscrimination Act of 2008
- EEO MD-110—Federal Sector Complaints Processing Manual
- EEO MD-715—Management Directive 715, Model Agency Title VII and Rehabilitation Act Programs
- EEOC Administrative Judges' Handbook
- 29 USC 791–794e—Vocational Rehabilitation and Other Rehabilitation Services, Subchapter V-Rights and Advocacy
- 42 USC 2000e-17—Equal Employment Opportunities
- 42 USC 2000ff-11—Prohibiting Employment Discrimination on the Basis of Genetic Information
- 42 USC 12101–12213—Equal Opportunity for Individuals with Disability
- Rehabilitation Act of 1973 Sections 501 and 505
- ADA of 1990
- ADA Amendments 2008

- Age Discrimination in Employment Act of 1967
- The Genetic Information Nondiscrimination Act of 2008
- Title VII of the Civil Rights Act of 1964

Federal Labor Relations Authority:

- 5 CFR 2411–2473 Chapter XIV Federal Labor Relations Authority, General Counsel of the Federal Labor Relations Authority and Federal Service Impasses Panel
- 5 USC 7101–7135—Chapter 71 Labor-Management Relations
- Unfair Labor Practice Manual
- Federal Labor Relations Authority Arbitration Appeal Procedural Checklist
- Federal Labor Relations Authority Negotiability Appeals Process
- Guide to Dispute Resolution Procedures Used by the Federal Service Impasses Panel
- Negotiability Determinations by the Federal Labor Relations Authority

Office of Special Counsel:

- 5 USC 1211–1219 Office of Special Counsel (Subchapter II)
- 5 USC 2301, 2302, 2304, & 7703 Merit System Principles, Prohibited Personnel Practices, Prohibited Personnel Practices Affecting the Transportation Security Administration, and Judicial Review of Decisions of the Merit Systems Protection Board
- 5 CFR 1201.122–1201.148—Subpart D–Procedures for Original Jurisdiction Cases
- 5 CFR 1209 Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing or Other Protected Activity
- 5 CFR 1800 Filing of Complaints and Allegations
- Whistleblower Protection Enhancement Act of 2012
- Whistleblower PPD-19 Presidential Policy Directive
- The Whistleblower Protection Act of 1989
- The No Fear Act

Office of Personnel Management:

- 5 CFR Part 752 Adverse Actions
- 5 CFR Part 432 Performance Based Reduction Grade and Removal Actions

Merit Systems Protection Board:

- 5 CFR 1200 Board Organization
- 5 CFR 1201 Practices and Procedures
- 5 CFR 1202 Statutory Review Board
- 5 CFR 1203 Procedures for Review of Rules and Regulations of the Office of Personnel Management
- 5 CFR 1204 Availability of Official Information
- 5 CFR 1205 Privacy Act Regulations
- 5 CFR 1206 Open Meetings
- 5 CFR 1207 Enforcement of Nondiscrimination on the Basis of Disability in Programs or Activities Conducted by the Merit Systems Protection Board
- 5 CFR 1208 Practices and Procedures for Appeals Under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act
- 5 CFR 1209 Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing or Other Protected Activity
- 5 CFR 1210 Practices and Procedures for an Appeal of a Removal or Transfer of a Senior Executive Service Employee by the Secretary of the Department of Veterans Affairs
- 5 CFR 1215 Debt Management
- 5 CFR 1216 Testimony by MSPB Employees Relating to Official Information and Production of Official Records in Legal Proceedings
- Laws Relating to MSPB (5 USC Chapters 73, 75, 77; 5 USC 4303)
- *Judges' Handbook*
- Whistleblower Protection Enhancement Act of 2012
- Whistleblower PPD-19 Presidential Policy Directive

A critical point is that front-end choices (coupled with controlling case law) usually dictate the analytical model to resolve the critical issues. Three examples make the point.

At EEOC, the action at issue (nonselection) coupled with the complainant's allegations of discrimination (the basis, theory: protected class, knowledge, disparate treatment, similarly situated comparators) dictate the issues.

With individual right of action appeals involving alleged whistleblowing reprisal (5 USC 2302(b)(8) & (b)(9)), after exhausting at the Office of Special Counsel (OSC), the scope of the appeal is limited to allegations of protected activity. For instance, even if the employee has an action that is directly appealable to MSPB but elects to go first to OSC, the post-exhaustion appeal will be limited to the issue of reprisal. *But see Kammunkun v. DOD*, 800 Fed. Appx. 916 (Fed. Cir. 2020) (the election limitation on issues does not apply to managers and supervisors).

An adverse action appeal to MSPB will involve these typical issues: the charge (the reasons, the merits); nexus (e.g., typically does the misconduct satisfy the standard of service efficiency, including a sufficient linkage to off-duty misconduct); and penalty-reasonableness. 5 USC 7513(a); *Otero v. USPS*, 73 MSPR 198 (1997) (the reason); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (service efficiency); *Merritt v. DOJ*, 6 MSPR 585 (1981) (nexus, off-duty conduct); *Douglas v. VA*, 5 MSPR 280 (1981) (penalty reasonableness). The agency bears the burden on these issues. The reason and the proposed penalty will be stated in the proposal notice; that notice is the indictment and the most important document in an adverse action appeal.

Continuing with an MSPB action, as an example, the employee bears the burden of proving: jurisdiction, timeliness, and any affirmative defense, e.g., harmful error (*Parker v. Defense Logistics Agency*, 1 MSPR 505 (1980)); denial of due process (*Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999)); a prohibited personnel practice (e.g., discrimination, reprisal for protected activity or whistleblowing). 5 USC 7701(c)(2); 5 CFR 1201.56. If the appellant prevails on her affirmative defense, the agency action will be set aside.

Most adverse actions turn on whether the agency can prove its charge. Although MSPB case law opines that charges are not technically construed, most agencies would not agree. Ideally, charges should be tested against due process considerations, but considerable case law has developed on charge interpretation: no lesser included offenses; elements of a charge must be proven or the entire charge falls. For a detailed look at Board charging law and penalty-reasonableness refer to Fowler & Vitaro, *MSPB Charges and Penalties, A Charging Manual* (Dewey Publications, Inc). That text includes sections on each charge, its elements, the common defenses,

and examples of cases won and lost. Representatives must understand the nuances of drafting charges:

A. THE ESSENTIAL CASES ON CHARGING

- *Gottlieb v. VA*, 39 MSPR 606, 609 (1989) (the only charge at issue is the charge brought).
- *Burroughs v. Dept. of Army*, 918 F.2d 170, 172 (Fed. Cir. 1990) (the Board may not split a charge, reformulate a new charge, or find a lesser included offense).
- *King v. Nazelrod*, 43 F.3d 663, 666–67 (Fed. Cir. 1994) (absent specific notice, there are no lesser-included offenses).
- *Diaz v. Dept. of Army*, 56 MSPR 415, 417, 420 (1993); *Hicks v. Dept. of Treasury*, 62 MSPR 71 (1994) (the agency is not required to prove the specification in its entirety; only so much of the specification as necessary to sustain the essence of the charge need be proven).
- *Otero v. USPS*, 73 MSPR 198, 202–04 (1997) (there is no requirement to label a charge; misconduct may be noticed in a narrative description and anything properly noticed and satisfying service efficiency will meet the agency's burden).
- *Cross v. Dept. of Army*, 89 MSPR 62, 67–68 (2001) (the agency is entitled to use a general, generic charge and, absent more, not have its charge recharacterized *vis-à-vis* buzz words or terms of art used in the specification or penalty analysis); *LaChance, OPM [Crouse] v. MSPB*, 147 F.3d 1367 (Fed. Cir. 1998).

Appellants never win; agencies lose. If the charge is wrong, it's a loser: there is no first aid kit for a defective charge.

III. THE AGENCY INVESTIGATION: FACTS, NOT CASES, WIN

Get out of the library, get off the computer, get the documents, and interview the protagonist.

Given our preliminary take on the nature of the action (misconduct, unacceptable performance, medical inability to perform), the potential issues, and the theory of what happened, we should be positioned to move forward with an initial investigation. This is usually informal and done by the IG, a management-appointed employee, or an HR staff member.

Whatever the forum, a decision to file or move forward with an action, or on a complaint cannot be made without a reliable understanding of the facts. In an adverse action, an appellant has no pre-decision discovery rights and

is wholly dependent on the proposal and the materials relied upon (MRUs). If either the proposal notice or the MRUs fail to provide adequate notice of the charges and supporting facts, there is a due process issue.

The facts dictate the charge. But too often, agencies charge first and then use post-appeal discovery at the Board to find supporting facts.

Even if the notice is satisfactory, an inadequate investigation will often result in incorrect specifications.

The heart of any adequate investigation is document review and witness interviews: who to interview and what documents to review. Although our investigation is based on our preliminary assumptions, it is critical that we investigate with an open mind and maintain flexibility.

To that end, we offer the following checklist.

Checklist

The Essentials of a Thorough Investigation

1. Witness Interviews
   - ✓ Explain the witness's obligations;
   - ✓ If necessary, provide rights, *inter alia*, *Kalkines v. United States*, 473 F.2d 1391 (Fed. Cir. 1973) (where the employee has a reasonable belief that statements could be used against him in a criminal matter);
   - ✓ Use open questions but narrow enough for corroboration and leads, and use follow-up questions;
   - ✓ Document each witness's statement as promptly as possible, allow the witness to make changes and corrections, and require the witness to sign (and provide an explanation for any substantive changes).
2. Document Review
   - ✓ Immediately place a hold on all potentially relevant documents so they are not deleted from paper and electronic records;

Checklist

The Essentials of a Thorough Investigation (continued)

- ✓ Provide detailed instructions on the scope of the document search;
  - We need all documents—favorable and unfavorable: the goal is not to win the case but to decide if there is a case;
- ✓ Take custody of all documents, assemble them, index them, and serially number them.

Based on our witness statements and document review, the two next steps are imperative. We need to put together a timeline, a chronology, with references to witness statements or documents. This is a work in progress and must be updated as new information comes in.

The facts (referenced to the record) must be assembled in a useful fashion.

We suggest, for one thing, that one make a good facts/bad facts "T ledger."

We also suggest that one make a proof grid for each charge, element, and issue, and identify all the pertinent facts, good and bad.

The facts should be identified as not disputed, disputed, or corroborated by documents.

The case should be built on documents, givens, and indisputable facts.

With that, we turn to the essentials of a winning presentation.

IV. CONSIDER THE EVIDENTIARY HURDLES

We prove our case with documents and testimony, but try the case, if you can, on the documents. But neither documents nor testimony are any help unless they get into the record. Someone must testify under oath to the validity of the facts and the source, and possibly the authenticity, of the documents.

A. WITNESS CREDIBILITY

Witness testimony turns on credibility. To assess credibility, the Board applies the following factors:

> To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or

she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors, which will be considered in more detail below, must be considered in making and explaining a credibility determination. These include: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

Hillen v. Dept. of Army, 35 MSPR 453 (1987).

B. HEARSAY

The Board allows hearsay and testimony often is hearsay.

> In sum, the judicial precedents examining the weight to be given hearsay evidence, particularly documentary evidence such as an administrative record, included the following factors in considering the probative value of the hearsay evidence:
>
> (1) the availability of persons with firsthand knowledge to testify at the hearing;
>
> (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing;
>
> (3) the agency's explanation for failing to obtain signed or sworn statements;
>
> (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made;
>
> (5) consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other;
>
> (6) whether corroboration for statements can otherwise be found in the agency record;
>
> (7) the absence of contradictory evidence;
>
> (8) credibility of declarant when he made the statement attributed to him.

Borninkhof v. DOJ, 5 MSPR 77, 87 (1981).

C. CIRCUMSTANTIAL EVIDENCE

Most cases turn on circumstantial evidence; restated, most cases turn on the strength of the inferences to be drawn from the circumstantial evidence proven on the record. Inferences are often wrong, even if logical. The critical point in dealing with inferences is to reinforce and strengthen them: (1) is the inference logical and does it conform to common experience, what usually happens when?; (2) can we shore up the inference by pointing to "especially when" circumstances, and are there facts that make the inference more probable?; (3) can the circumstantial evidence be clustered or linked?

D. CHARACTER, HABIT, PRIOR BAD ACTS

Here is an area often confusing for representatives. Proof of character evidence cannot usually prove that a person acted in conformity with the proffered evidence. That someone did something before does not prove that he did it again.

> …Although there is nothing improper in considering the appellant's prior misconduct in determining the appropriateness of the current penalty, *see, e.g.*, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981); *McKenzie v. Department of Health & Human Services*, 22 M.S.P.R. 75, 77 (1984), *aff'd*, 776 F.2d 1061 (Fed. Cir. 1985) (Table), or in impeaching her credibility, if the misconduct had anything to do with her propensity for telling the truth, *see, e.g.*, *Christensen v. U.S. Postal Service*, 51 M.S.P.R. 681, 688 (1991), *aff'd*, 979 F.2d 216 (Fed. Cir. 1992) (Table); *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 459 (1987), the administrative judge's reliance on evidence of the appellant's previous discipline for sleeping on the job as proof that she slept on the job on this occasion was error.…

Carrick v. USPS, 67 MSPR 280 (1995).

But:

> The Federal Rules of Evidence permit evidence of an accused's character to be offered by the accused as an exception to the general rule prohibiting use of character evidence to prove or disprove a particular act. Fed. R. Evid. 404. Evidence of habit is also clearly permitted. Fed. R. Evid. 406. Character and habit are closely akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance or peacefulness. "Habit" in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. Agreement is general that habit evidence may be highly persuasive as proof of conduct on a particular occasion. McCormick, Evidence 340–41 (2d ed. 1972).…