ADVERSE ACTIONS

A. ACTIONS AGAINST ALJS

1. CONDUCT UNBECOMING

Abruzzo v. SSA, 489 F. App'x 449 (Fed. Cir. 2012 NP) (affirming the Board's decision authorizing removal of an ALJ and approving the standard applied by the Board describing conduct unbecoming as "conduct that revealed a temperament that detracted from character or reputation."; "Abruzzo admits that the events of April 2009 amounted to conduct unbecoming an ALJ, but argues that removal was excessive. Here, the ALJ conducted a very thorough analysis of the factors outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981), and found the misconduct intentional, frequent, disruptive, and incompatible with his ability to adequately perform his judicial duties. *See Abruzzo*, 2010 MSPB LEXIS 5624, at *91–97. The Board's findings that Abruzzo cannot effectively serve as an ALJ due to his sustained misconduct does not amount to an abuse of discretion. Accordingly, we uphold the Board's penalty of removal.")

2. CONSTRUCTIVE ADVERSE ACTIONS; *TUNIK*

Jarboe v. DHHS, 2023 MSPB 21 (2023) (confirming the regulatory overruling of *In re Doyle*, 29 MSPR 170 (1985), and clarifying "that a sitting ALJ may not bring a constructive removal complaint under 5 U.S.C. § 7521"; denying jurisdiction over an ALJ's appeal from placement on administrative leave while DHHS prosecuted a complaint seeking removal of the ALJ.)

Mahoney v. Donovan, 721 F.3d 633 (D.C. Cir. 2013) (construing the term "working conditions" under 5 USC 2302 to include actions alleged to interfere with an ALJ's decisional independence; "it is entirely consistent with the language and structure of the Act to treat an action alleged to interfere with an administrative law judge's decisional independence as a personnel action subject to investigation by the Office of Special Counsel. To do otherwise would 'impermissibly frustrat[e]' the 'exhaustive remedial scheme' of the Act by permitting, for such actions, 'an access to the courts more immediate and direct than the statute provides with regard to major adverse actions,' such as removal, suspension, and reduction in pay or grade, *Carducci*, 714 F.2d at 174—more serious actions that are subject to pre-approval by the Merit Systems Protection Board because of their potential to compromise the independence of an administrative law judge."; "We think these actions affect 'working conditions' and thus fall within the scope of a 'personnel action' under the Civil Service Reform Act: (1) the selective assignment of cases on the basis of political considerations or the Secretary's perceived interests; (2) the failure to provide docket numbers necessary for the administrative law judges to manage their cases, as well as to provide access to legal-research resources; (3) unauthorized *ex parte* communications between his supervisor and a litigant appearing before him; and (4) the practice of providing the Justice Department with advance warning of notices of election in certain cases."; concluding that the district court lacked jurisdiction over these claims)

Tunik, et al. v. MSPB & SSA, 407 F.3d 1326 (Fed. Cir. 2005) (the Board is delegated authority under 5 USC § 1305 to administer section 7521 through both rulemaking and adjudication, and so is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); the Board's new interpretation of 5 USC § 7521 in *Tunik v. SSA,* 93 MSPR 482 (2003), to preclude appeals based on a constructive removal theory, is reasonable, and the Federal Circuit's precedent does not preclude adoption of such a new interpretation; however, 5 CFR § 1201.142 is substantive, and it therefore could only be repealed through the notice and comment procedures of section 553(b); the Board erred in overturning that regulation in its decision in *Tunik*; the dissent would have held that 5 CFR § 1201.142 and the Board decision on which it was based are inconsistent with 5 USC § 7521)

Schloss v. SSA, 100 MSPR 408 (2005) (reinstates appeal of ALJ's constructive removal claim, under *Tunik v. MSPB*, 407 F.3d 1326 (Fed. Cir. 2005), which held that the Board violated the APA by attempting to use adjudication to overturn 5 CFR § 1201.142 that provides that an ALJ who alleges that an agency interfered with his qualified decisional independence so as to constitute an unauthorized action under 5 USC § 7521 may file a complaint with the Board)

Dethloff, et al. v. SSA, 100 MSPR 340 (2005) (sets out history of *Tunik*, and concludes that two appellants and an intervenor settled their jurisdictional claims, and that the remaining appellants did not meet the review criteria as to the ALJ's finding that they did not raise jurisdictional issues of constructive removal; the criteria for review under 5 CFR § 1201.115 apply under 5 CFR § 1201.140(a)(2) to actions involving ALJs)

Dethloff, et al. v. SSA, 93 MSPR 574 (2003) (a prerequisite for the Board's jurisdiction over a removal appeal brought under 5 USC § 7521 is that the appellant no longer occupies an ALJ position; the Board so held in *Tunik v. SSA*, immediately above)

Tunik v. SSA, 93 MSPR 482 (2003) (a prerequisite for the Board's jurisdiction over a removal appeal brought under 5 USC § 7521 is that the appellant no longer occupies an ALJ position; the ordinary meaning of "removal" in the context of a personnel action is to be separated from one's position of record or not to have a continuing appointment to that position; the Board adopted that meaning for the term in 5 USC § 7521 in lieu of the "constructive removal" actions it has recognized from *In re Doyle*, 29 MSPR 170 (1985), until now; the Board overruled *In re Doyle*, 29 MSPR 170 (1985))

Schloss v. SSA, 93 MSPR 344 (2003) (ALJs have a qualified right of decisional independence; a careful balance must be struck between judicial independence and judicial accountability; the proof needed to make a *prima facie* case of constructive removal was set out; showing that the agency reassigned an ALJ's case in an effort to manipulate or control the outcome of the case, or to punish him for his whistleblowing and/or EEO activity, could constitute a constructive removal via "active intervention"; a constructive removal via "cumulative administrative action" was distinguished; where the record written submissions are insufficient to decide the jurisdictional issues, the Board "may hold a hearing" under 5 USC § 7521)

3. FAILURE TO FOLLOW PERFORMANCE-RELATED DIRECTIVES

Cooperman v. SSA (Fed. Cir. No. 2022-1915 2023 NP) (removal sustained for failure to follow SSA adjudication guidelines, among other charges)

SSA v. Levinson, 2023 MSPB 20 (2023) (discipline authorized for ALJ's failure to abide by management's directives concerning contact with expert witnesses and other directives and intemperate references of managing ALJ)

Abrams v. SSA, 703 F.3d 538 (Fed. Cir. 2012) (finding good cause for removal of ALJ where managing ALJs issued appellant a series of performance related directives to complete certain work and the ALJ failed to comply with all of them; finding that, even though ALJs cannot be subjected to performance standards, they may be given performance-related orders designed to move cases through adjudication and failure to comply could result in sustainable discipline based on failure to follow instructions; rejecting appellant's argument that his removal was for poor performance)

4. FURLOUGHS

Berlin et al. v. Dept. of Labor, 772 F.3d 890 (Fed. Cir. 2014) (ALJ furlough: "good cause" should be defined in a case-by-case manner; the Board reasonably interpreted "good cause" in this context to focus on whether the Department had sound business reasons for the challenged furlough and, relatedly, whether the furlough resulted from disparate treatment of ALJs or from a reason inconsistent with decision-making independence; a difference in furlough lengths alone does not constitute an improper outcome under the good-cause standard; no evidence exists that the difference resulted from any determination that relied on ALJ status to impose a longer furlough or aimed at or causing an impairment of decision-making independence)

Dept. of Labor v. Avery, 120 MSPR 150 (2013) (Vice Chair Wagner dissenting) (involving the law governing ALJ furloughs; an agency may furlough an ALJ only for "good cause" as determined after a hearing by the Board; the agency must show by preponderant evidence that it had sound business reasons behind its decision to furlough the ALJ employee; a decision to furlough may not be made for an improper reason or interfere with an ALJ's qualified judicial independence)

5. "GOOD CAUSE" STANDARD

Shapiro v. SSA, 800 F.3d 1332 (Fed. Cir. 2015) (allowing productivity statistics to support removal of an underperforming ALJ; "Congress intentionally failed to define 'good cause' leaving it 'to be given meaning through judicial interpretation.'…Because Mr. Shapiro does not contest that 'unacceptable performance' or a lack of production can constitute good cause for removal, we need only determine whether substantial evidence supports the Board's conclusion that the Agency showed by a preponderance of the evidence that this charge was met.…Charge I, labeled 'Unacceptable Performance,' plainly put Mr. Shapiro on notice that his 'performance has been unacceptable, in that… [i]n or about FY2008–2010, [he] did not acceptably manage his cases.' And Mr. Shapiro testified that he understood this to mean that the Agency was seeking to remove him from his position due to his perceived mismanagement of cases, including his failure to 'produce very many decisions.' The Board, on the presiding ALJ's recommendation, found good cause for removal because Mr. Shapiro was unable to effectively manage his docket. There is no indication

that this did not comply with the governing regulations. …Mr. Shapiro next argues that the Board erred in its good cause determination by relying on a comparison of his production statistics to regional averages, in contravention of the rule announced by the Board in *Social Security Administration v. Goodman*, 19 M.S.P.R. 321, 331 (1984). Although *Goodman* was decided over thirty years ago, we have not yet had occasion to review its rule beyond noting that we are not bound by it. …And we do not adopt it today. We agree with *Goodman* to the extent that it requires a proper foundation for the type of comparative statistics employed here. But to the extent *Goodman* requires some type of heightened evidentiary proof before an agency can rely upon comparative production statistics to prove good cause for removal, we decline to follow it. When an agency establishes that an individual ALJ's case disposition rate is so significantly lower than the rate of similarly situated ALJs in his own region, that evidence, absent some contradictory showing that the statistics do not present a valid comparison, can support a finding of good cause.")

Long v. SSA, 635 F.3d 526 (Fed. Cir. 2011) (discussing "good cause" in the context of 5 USC 7521 (adverse actions against ALJs) and an off-duty incident involving an ALJ and "physical altercation with his domestic partner, resulting in the involvement of neighbors and the intervention of police officers"; upholding the Board's interpretation of "good cause to encompass conduct that 'undermines public confidence in the administrative adjudicatory process"; "We do not agree with the ALJ's assertion that the Board's interpretation of 'good cause' prohibits ALJs from acting with the independence required by the APA [Administrative Procedures Act]. The APA does indeed have provisions to ensure the 'decisional independence' of ALJs and prohibits 'substantive reviews and supervision of an ALJ's… quasi-judicial functions.' *Brennan,* 787 F.2d at 1562. Yet the Board's interpretation of 'good cause' to cover conduct that 'undermines public confidence in the administrative adjudicatory process' is not inconsistent with or in conflict with such independence."; further rejecting the argument that a "separate analysis of nexus" is required to assess "good cause"; noting the characteristics essential to an ALJ position—judicial temperament, demeanor, control, and judgment—the Board found that appellant ALJ's physical abuse of his partner undermined public confidence in the administrative adjudicatory process; also rejecting appellant's argument that an ALJ's misconduct must "receive negative publicity, e.g., through the newspaper, television, or the Internet, in order to raise concerns regarding public confidence in the administrative adjudicatory process.")

SSA v. Long, 113 MSPR 190 (2010) (on appeal from ID mitigating an ALJ's removal to a 45 day suspension where the ALJ assigned to the case found the evidence supported specification #1 but not #2 of a conduct unbecoming charge related to an alleged off-duty battery of the ALJ's live in girlfriend and child; the Board does not conduct a separate nexus determination in ALJ cases; instead, the Board considers evidence that relates to nexus under the "good cause" standard; "While there is no precise definition of the term good cause, the Board has made clear that it is not equivalent to the efficiency of the service standard under 5 U.S.C. § 7513 for adverse actions against other federal employees. *Mills,* 73 M.S.P.R. at 468 (citing *Social Security Administration v. Goodman,* 19 M.S.P.R. 321, 330 n.8 (1984)). Cases under chapter 75, however, can provide some guidance for determining what is good cause for an action against an ALJ. *Social Security Administration v. Carr,* 78 M.S.P.R. 313, 338 (1998), *aff'd*, 185 F.3d 1318 (Fed. Cir. 1999); Mills, 73 M.S.P.R. at 468."; finding removal appropriate where charge of conduct unbecoming an ALJ was supported by evidence of the ALJ's "physical altercation with his domestic partner resulting in the involvement of neighbors and the intervention of police officers, [which] clearly violated generally accepted rules of conduct. His conduct was inconsistent with maintaining respect for the administrative adjudicatory process. Accordingly, we find that the petitioner has shown good cause for disciplinary action against the respondent.")

Slattery v. Dept. of Labor, 87 MSPR 528 (2000) (Table) (separate opinions on whether agency had good cause to indefinitely suspend where a bar Board recommended that respondent's law license be suspended)

6. JURISDICTION

McDougall v. SSA, 114 MSPR 534 (2010) (involving an adverse action taken against an ALJ; "The appellant's appeal was adjudicated by the administrative judge as an adverse action appeal under Chapter 75, Subchapter II. This was error because those provisions do not apply to adverse actions taken against administrative law judges, *see* 5 U.S.C. § 7512(E), and the administrative judge lacked authority to adjudicate the administrative law judge's appeal, *see* 5 U.S.C. § 556(b). Furthermore, given the special procedural rules which apply to actions against administrative law judges, a complaint should have been filed with the Clerk of the Board, rather than with a regional office, for special handling. *See* 5 C.F.R. §§ 1201.137(b), 1201.142. Thus, it was error to assign the appellant's case to an administrative judge, and the appeal must be adjudicated anew by an administrative law judge under the APA. After the administrative law judge prepares an initial decision, the appellant can seek further review before the full Board. 5 C.F.R. § 1201.140(a)(2).")

SSA v. Harty, 96 MSPR 65 (2004) (under 5 USC § 7521(a), an agency may not take a covered action against an ALJ unless it first proves to the Board that there is good case for taking the action; under 5 USC § 7521, the Board only has jurisdiction over a removal action if the employee no longer occupies an ALJ position because the agency has separated or reassigned him from his position as an ALJ, or the ALJ establishes that a separation which he requested, such as a resignation, was actually involuntary and therefore should be treated as a removal; a reassignment or detail, in which the ALJ retains an ALJ position is not one of the covered actions listed in 5 USC § 7521(b))

Hiltbrand v. SSA, CB-7521-02-0031-T-1 (2004 NP) (an ALJ may appeal a "removal" under 5 USC § 7521(b); a prerequisite for the Board's jurisdiction over a removal under § 7521 is that the appellant no longer occupy an ALJ position; eliminating an ALJ's duties as Chief ALJ and assigning him as a "line" ALJ, is not appealable where it does not affect his grade or pay and because it is not a removal under § 7521)

Butler v. SSA, 331 F.3d 1368 (Fed. Cir. 2003) (the reassignment of an ALJ that does not reduce his or her pay or grade is not appealable to the Board under 5 USC § 7521, by analogy to 5 USC § 7512; 5 CFR § 930.214(a), which defines "removal" as including the "discharge of an administrative law judge from the position of administrative law judge or involuntary reassignment, demotion, or promotion to a position other than that of administrative law judge" does not provide for Board jurisdiction where the agency takes away the managerial and administrative duties of a Hearing Office Chief ALJ; 5 CFR § 930.205, under which an ALJ may be reassigned to another ALJ position only with the prior approval of OPM, does not give the Board jurisdiction to hear the appeal from the loss of Hearing Office Chief duties because a "Hearing Office Chief" is not a separate "administrative law judge position" as contemplated by section 3105)

Meeker v. MSPB, 319 F.3d 1368 (Fed. Cir. 2003) (the Board has jurisdiction under Part 300 to consider the challenge to the 1996 scoring formula for the ALJ examination; the Board's authority under Part 300 does not extend to determining if a challenged employment practice is not in accordance with law (here, the Veterans Preference Act) under 5 USC § 7701(c)(2)(C); because almost any change to the grading system would likely have some effect on the impact of preference points, only if such a change virtually displaced the competitive system would it be invalid; relevant experience has always played an important role in the selection of ALJs)

7. PROCEDURE

Price v. SSA, 398 F.3d 1322 (Fed. Cir. 2005) (where a suspension was effected against an ALJ without prior Board approval, the court declined to hold that the denial of a due process hearing necessarily constitutes a prohibited personnel practice; attorney fees therefore were not awarded on the basis of a PPP)

8. STATUS DURING REMOVAL PROCEEDINGS

SSA v. Price, 94 MSPR 337 (2003) (5 CFR § 930.214(b) provides alternatives to placing an ALJ on AWOL only where it has already proposed the ALJ's removal when it did so; even if the regulation applies where the agency proposed the appellant's removal after it placed her on AWOL, the situation in this case would qualify under it as an "exceptional case" where her retention in her position "would be detrimental to the interests of the Government" because her law license was suspended, so that she could not perform the normal duties of her position; pursuant to 5 USC § 3105, ALJs "may not perform duties inconsistent with their duties and responsibilities as" ALJs)

B. APPOINTMENTS; PROMOTIONS, CANCELATION

Avalos v. DHUD, 963 F.3d 1360 (Fed. Cir. 2020) (rejecting the government's position that the employee's appointment was barred by law, thereby depriving him of a right to appeal his removal where, according to the government, "'HUD could not certify that [the appointment] was not free from political influence or in accordance with statutory merit system principles,' and OPM 'did not and never could have approved Mr. Avalos's appointment.'"; "Mr. Avalos's status as a former political appointee cannot fairly be considered an absolute statutory bar to his selection. We can only speculate about whether Mr. Avalos would have been appointed as HUD's Albuquerque Field Office Director had HUD strictly followed the correct competitive hiring practices. But the government does not dispute that Mr. Avalos would have been eligible for the position under proper hiring practices. *See* Resp. Br. 29 (arguing merely that Mr. Avalos was subject to an absolute statutory prohibition because OPM could not certify that his appointment was free from political influence). The government correctly notes that Mr. Avalos's appointment violated several statutory prohibitions, *id*. at 24–25, but these prohibitions on Mr. Avalos's selection because of improper selection practices do not rise to the level of an 'absolute statutory prohibition' barring his appointment. OPM did not refuse to approve Mr. Avalos's appointment because he was categorically ineligible to be HUD's Albuquerque Field Office Director. It refused

to approve his appointment because HUD could not certify that his selection was free from political influence."; also noting that OPM has the authority to correct an appointment made through a regulatory error)

Kim v. Dept. of Army, 119 MSPR 429 (2013) (appellant made a nonfrivolous allegation that his promotion took effect before the agency canceled it where the authorized official appointed appellant to a supervisory position, appellant took action indicating acceptance of the position, the promotion became effective in February 2009 before the agency issued the paperwork canceling the promotion in November 2009 and "the appellant alleged that the agency demoted him to the GS-13 Electrical Engineer position and forced him to repay the $7,050.00 pay increase he received in the YF-2 Supervisory Electrical Engineer position from February 15, 2009, to November 1, 2009, when his promotion was cancelled."; "We find those allegations, if true, typically would be sufficient to establish Board jurisdiction over the revocation of his promotion as an appealable reduction in grade, regardless of whether the appellant actually performed any duties in the higher-level position. There is, however, an exception if the appellant was required to serve a supervisory probationary period. *See Levy*, 118 M.S.P.R. 619, ¶¶ 11–12. In that case, the Board still may not have jurisdiction. *Id.*")

Levy v. Dept. of Labor, 118 MSPR 619 (2012) (finding appellant entitled to a jurisdictional hearing where the agency selected appellant for promotion, appellant accepted the position, HR confirmed appellant's start date, which was the day before appellant went on annual leave, and when he returned from annual leave he was told that his promotion was being held in abeyance pending an OIG investigation; "Although the court in *National Treasury Employees Union v. Reagan* [663 F.2d 239 (D.C. Cir. 1981)] held that an appointment cannot properly be revoked once the appointee has entered onto duty, we do not read the court's decision as requiring the actual performance of duties in a position in every case in order for an appointment or promotion to become irrevocable.…[I]n cases like the present one, where the appellant alleges that he was promoted and immediately went on annual leave, the effective date of the action precedes the date on which the appellant technically enters onto duty in the higher graded position. In such cases, we find that the effective date of the action is the point at which the promotion is no longer revocable. We therefore modify the Board's jurisdictional test as follows: To establish jurisdiction in an appeal from the cancellation of a promotion as a reduction in grade, the appellant must show that: (1) the promotion actually occurred; that is, that it was approved by an authorized appointing official aware that he or she was making the promotion; (2) the appellant took some action denoting acceptance of the promotion; and (3) the promotion was not revoked before it became effective.…As stated above, an agency official selected the appellant, who was in a nonsupervisory GS-14 position, for the supervisory GS-15 position, and the appellant accepted the position. Further, another agency official indicated that the agency assigned the appellant to the position effective July 3, 2011.The appellant alleges that his promotion went into effect on July 3, 2011, and that he was on annual leave for 3 weeks before the agency informed him that it was holding his promotion in abeyance. We find that those allegations, if true, are sufficient to establish Board jurisdiction over the revocation of his promotion as an appealable reduction in grade, regardless of whether the appellant actually performed any duties in the higher level position, as long as the appellant was not required to serve a supervisory probationary period or completed such a probationary period before he was returned to the GS-14 position.")

Deida v. Dept. of Navy, 110 MSPR 408 (2009) (explaining the burden of proof in an appeal asserting an improper cancelation of a promotion, closely intertwined with an allegation concerning an improper reduction in pay and determining that it is the agency's burden to demonstrate the propriety of the cancelation if the appellant makes nonfrivolous allegations that he or she was promoted and accepted the promotion)

Robinson v. Dept. of Army, 266 F. App'x 948 (Fed. Cir. 2007 NP) (the appellant was, at best, in probationary status at the time her appointment was revoked and was not an "employee" under section 7511, where appellant held a series of temporary appointments, each not exceeding a year, then received a permanent appointment in error, resigned when the agency proposed readvertising the permanent appointment and then appealed from what she asserted was an improper termination of her permanent position)

Martin v. Dept. of Commerce, 106 MSPR 23 (2007) (finding jurisdiction over an appeal from an employee who successfully challenged a discharge from a position that the agency claimed she held through nepotism; the cancelation of appellant's allegedly illegal appointment constituted an adverse action)

Scott v. DOJ, 105 MSPR 482 (2007) (as to an employee who entered on duty before receiving notice that her appointment was canceled, the Board held "the appellant suffered no actual loss in pay or grade when she was moved back to her previous position. Any loss that she claims would be based on speculative future earnings, rather than an immediate loss of basic pay. The Board thus lacks jurisdiction over this appeal as an adverse action.")

Lloyd v. Dept. of Army, 99 MSPR 342 (2005) (the Board is obliged to review the agency's charge solely on the grounds invoked by the agency)

C. ARBITRATION REVIEW

Adeleke v. DHS, 551 F. App'x 1003 (Fed. Cir. 2014 NP) ("an arbitrator has considerable discretion in determining whether an award of attorney fees is warranted in the interest of justice and we accord great deference to such a decision")

Wallace and Martin v. Dept. of Commerce, 106 MSPR 23 (2007) (finding jurisdiction over an appeal from an employee who successfully challenged a discharge from a position that the agency claimed she held through nepotism; there was no absolute statutory bar to the appointment; the matter was with the adverse action appellate jurisdiction of the Board)

Scott v. DOJ, 105 MSPR 482 (2007) (where an employee, who entered on duty before receiving notice that her appointment was canceled, the Board lacked jurisdiction to review the cancelation because appellant suffered no loss in pay or grade when she was moved back to her previous position)

D. CHARGES

1. INTENT ELEMENT

Porzillo v. DHHS, 369 F. App'x 123 (Fed. Cir. 2010 NP) (involving the removal of a program support specialist for, among other things, improperly approving child care subsidy payments; commenting on the element of intent and necessity for its proof, the court noted "[i]ntent or willfulness is not necessarily an element of every charge of misconduct against an employee; it is only required to support particular types of charges."; where the specification suggests that appellant "possessed sufficient knowledge to realize that the payment she approved were erroneous, those specifications do not require a showing of intent or willfulness; rather, that language of the charge would encompass even inadvertent or careless error.")

2. MERGER

Powell v. USPS, 122 MSPR 60 (2014) (the Board will "merge" charges if they are based on the same conduct and proof of one charge automatically constitutes proof of the other charge; delay of mail charge merged with charge of failure to follow instructions)

E. CONSTRUCTIVE ADVERSE ACTIONS

Trinkl v. MSPB, 809 F. App'x 947 (Fed. Cir. 2020 NP) (affirming the AJ's totality of circumstances approach to a determination of whether an employee felt compelled to resign; the AJ properly considers the evidence from the perspective of a reasonable person, unless there is evidence of diminished mental capacity)

Savage v. Dept. of Army, 122 MSPR 612 (2015) ("Although various fact patterns may give rise to an appealable constructive suspension, all constructive suspension claims (and indeed all constructive action claims), have two things in common: (1) the employee lacked a meaningful choice in the matter; and (2) it was the agency's wrongful actions that deprived the employee of that choice.")

Bean v. USPS, 120 MSPR 397 (2013) (reviewing the evolution of the law of constructive adverse actions by way of the principal decisions; concluding that the decisions set forth a two-part jurisdictional unifying principle for analysis of constructive adverse actions: "(1) the appellant lacked a meaningful choice, and (2) this was because of the agency's improper actions.")

Jones v. Dept. of Treasury, 107 MSPR 466 (2007) (in the context of a resignation appeal, but applicable to involuntary retirements or downgradings, "[g]enerally, the Board's jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined. In most cases, if an appellant establishes that his resignation was involuntary, he not only establishes Board jurisdiction, but the appellant also wins on the merits. *Schultz*, 810 F.2d at 1136; *Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 895 (Fed. Cir. 1986). Thus, the jurisdictional question and the merits of the appeal may rise and fall together.")

Goodwin v. Dept. of Transp., 106 MSPR 520 (2007) (synopsizing the Board's post-*Garcia v. DHS*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (*en banc*), approach to jurisdictional allegations in constructive adverse action appeals; "To constitute an appealable action, though, a reduction in grade or pay must be involuntary…. If the action is not initiated by an employee, then the action is not presumed to be voluntary…. The phrase 'initiated by' does not mean that the change must be suggested, in the first instance, by the employee, but rather, redundantly indicates that the employee must voluntarily accept an agency's proposal.… The Board will grant a hearing to determine whether an appellant

involuntarily accepted an agency's proposal or action only if the appellant nonfrivolously alleges her acceptance was the result of duress, coercion, or misrepresentation by the agency…. Non-frivolous allegations of Board jurisdiction are allegations of fact, which if proven, could establish a *prima facie* case that the Board has jurisdiction over the matter at issue….To meet the non-frivolous standard, an appellant need only plead allegations of fact which, if proven, could show jurisdiction, though mere *pro forma* allegations are insufficient to satisfy the non-frivolous standard. *Id*. In determining whether the appellant has made a non-frivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate *prima facie* showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive.…The appellant has the burden of proof, by a preponderance of evidence, with respect to issues of jurisdiction.")

Garcia v. DHS, 437 F.3d 1322 (Fed. Cir. 2006) (jurisdiction under 5 USC § 7512 is established when a claimant shows that he or she is a covered employee as required by the statute and that the agency took one of the enumerated actions in § 7512; the test to establish involuntariness on the basis of coercion was set out; nothing in 5 USC § 7512 or the legislative history of the Civil Service Reform Act of 1978 suggests that the Board should apply a nonfrivolous allegation test to determine its jurisdiction over an adverse action; 5 CFR 1201.56, written pursuant to the Board's statutory authority to issue regulations to carry out the purpose of 5 USC § 7701, is neither "arbitrary, capricious, or manifestly contrary to the statute," and is therefore entitled to deference and is lawful; jurisdiction is always a substantive concern, and if at any time a court determines that it lacks jurisdiction, it cannot decide the merits of the case; to the extent that *Walley v. VA*, 279 F.3d 1010 (Fed. Cir. 2002), suggests interpreting 5 CFR 1201.56 to apply a preponderance standard only after jurisdiction has attached, that suggestion was rejected; the court overruled *Dorrall v. Dept. of Army*, 301 F.3d 1375, 1380 (Fed. Cir. 2002); *Dick v. VA*, 290 F.3d 1356, 1362 (Fed. Cir. 2002), to the extent they are inconsistent with *Cruz v. Dept. of Navy*, 934 F.2d 1240, 1251–53 (Fed. Cir. 1991) (*en banc*); under 5 USC §§ 7701 and 7512, once a claimant makes nonfrivolous claims of Board jurisdiction, then the claimant has a right to a hearing at which he or she must prove jurisdiction by a preponderance of the evidence; if the claimant fails to do so, then the Board does not have jurisdiction and the case is dismissed for lack of jurisdiction; a nonfrivolous allegation is a claim that, if proven, establishes the Board's jurisdiction)

[Refer to heading entitled "Constructive Adverse Actions" in the "Jurisdiction" chapter.]

1. BOARD AUTHORITY

Miller v. OPM, 449 F.3d 1374 (Fed. Cir. 2006) (the Federal Circuit held that the Board lacked jurisdiction over the petitioner's claim that the Office of Personnel Management improperly reduced her retirement annuity payments to collect back premiums for coverage under the Federal Employees' Group Life Insurance program; because the petitioner's claim was properly characterized as one founded on the Federal Employees' Group Life Insurance Act, not on the Federal Employees' Retirement System Act, jurisdiction lay in the district court or the Court of Federal Claims, not in the Board; when OPM seeks to offset an employee's salary or retirement benefits to collect a debt, the Board does not have jurisdiction over the merits of the underlying dispute that gave rise to the debt)

Tunik, et al. v. MSPB & SSA, 407 F.3d 1326 (Fed. Cir. 2005) (5 USC § 7701(j) prohibits taking retirement status into account in determining the appealability of any removal, and applies to claimed involuntary retirements, but not voluntary ones; a statute can not confer authority on the court to hear a case where that authority is constitutionally lacking, such as here, where by his voluntary retirement, the appellant mooted his appeal; under 5 USC § 1204(h) the Board shall not issue advisory opinions; it issued such an opinion where it decided an appeal in which an appellant who had voluntarily retired sought only prospective relief)

2. COERCION; INVOLUNTARINESS

McLane v. Burgum (D.C. Cir. No. 23-5205 2025 NP) (an employee's separation from the National Park Service (NPS) constituted a voluntary abandonment of employment rather than an involuntary constructive removal; "[A] plaintiff cannot establish involuntariness merely by alleging that the abandoned position was 'unpleasant' or 'unattractive.' *Staats v. U.S. Postal Serv*., 99 F.3d 1120, 1124 (Fed. Cir. 1996); *see also Lawson v. U.S. Postal Serv*., 68 M.S.P.R. 345, 350 (M.S.P.B. 1995) ('the fact that an employee is faced with an inherently unpleasant situation or that his choices are limited to unpleasant alternatives does not make his decision involuntary').… Fourth, McLane contends that the abandonment doctrine is moribund. On her telling, agencies' authority to deem positions abandoned came from the Federal Personnel Manual (FPM), which the government rescinded in 1993. But the abandonment doctrine is grounded in statutory text limiting the kinds of personnel actions that trigger employee protections, *see* 5 U.S.C. §

7512, so the MSPB has continued to apply the doctrine. *See, e.g.*, *Carroll v. Dep't of Interior*, 2014 WL 6791369 (M.S.P.B. Dec. 3, 2014). Moreover, the successor manual permits agencies to separate employees who have 'abandoned' their positions, and it defines abandonment in roughly the same way that the FPM did: '[w]hen an employee fails to report for duty and does not submit a resignation.' Off. of Personnel Mgmt., Guide to Processing Personnel Actions (2017), Ch. 35 at 1; *see also id*., Ch. 31 at 25.")

Kuriakose v. VA, 800 F. App'x 889 (Fed. Cir. 2020 NP) (reiterating that resignations are presumed to be voluntary; petitioner bears the burden of proving otherwise; the question is whether the resignation was the result of agency misinformation, deception, or coercion)

Loredo v. Dept. of Treasury, 118 MSPR 686 (2012) (noting that where appellant alleges discrimination in connection with a claim of involuntariness, "evidence of discrimination goes [only] to the ultimate question of coercion")

Brown v. MSPB, 455 F. App'x 982 (Fed. Cir. 2011 NP) (affirming Board's finding that appellant failed to allege facts which, if proven, could establish the Board's jurisdiction over an involuntary retirement claim; noting as significant that appellant continued to work for the agency "during a nine-year span of alleged hostility and discrimination, and the two and a half year period after the Agency denied her light duty request" and that there was no evidence that appellant was entitled to a light duty assignment or that her supervisors saw her doctor's note describing her diagnosis or knew of the seriousness of her condition)

Brown v. USPS, 115 MSPR 609 (2011), *aff'd*, *Brown v. MSPB*, 455 F. App'x 982 (Fed. Cir. 2011 NP) (noting intolerable working conditions in a forced retirement case must go beyond job-related stress; "The appellant has failed to allege that any event occurred relatively close in time to her retirement that could have given a reasonable employee no choice but to retire. Even viewed in light of her claims of a continuing pattern of harassment dating back many years, the events that the appellant describes as having occurred in 1999 and 2000 could not, if proven, rise to the level of coercion necessary to overcome the presumption that her retirement was voluntary.")

Smart v. MSPB, 342 F. App'x 595 (Fed Cir. 2009 NP) (appellant's contention that he "had no choice but to retire because an indefinite suspension would have placed him 'in a situation of no income, no health or life insurance whatsoever'" was rejected as sufficient to render his retirement involuntary)

Loggins v. USPS, 112 MSPR 471 (2009) (discussing actions that are "initiated by" the employee versus those initiated by the agency; "initiated by" the employee does not require that the employee first suggest the change, rather the employee may initiate an action by voluntarily accepting the agency's proposal even where the employee is faced with undesirable options; noting "under duress" or "signed under protest" on the action paperwork does not establish that the employee's acceptance of an agency action was involuntary)

Taber v. Dept. of Air Force, 112 MSPR 124 (2009) (declining to find involuntary the removal of appellant for physical inability to perform his job; "the appellant's involuntariness claim is based solely on his objections to the agency's finding that he was unable to perform the duties of his job, to its decision to remove him for that reason, and to its failure to accommodate his medical conditions, 'if the agency is able to show that it properly decided to remove the appellant based on physical inability to perform, then he could not establish that his retirement was involuntary.' *See Scaleese,* 68 M.S.P.R. at 249. Because, as discussed below, we find no error in the administrative judge's determination that the agency properly decided to remove the appellant based on physical inability to perform, the appellant cannot establish that his retirement was involuntary, and the Board therefore lacks jurisdiction over his constructive removal appeal.")

Aldridge v. USDA, 111 MSPR 670 (2009) (originally remanding case for hearing, 110 MSPR 21 (2008), on the question of whether appellant's retirement was involuntary based on an agency's threat that if she did not retire immediately she would lose all retirement benefits upon termination (the appellant would, even if terminated, have had the right to appeal the termination and claim a deferred annuity at age 62); following remand, on another PFR, the Board found that appellant was misled and that her retirement was involuntary)

Baldwin v. VA, 111 MSPR 586 (2009) (as was the case here, where the Board has jurisdiction, appellant wins on the merits of an constructive adverse action case which usually involves an allegedly forced retirement or resignation; resignation reversed when the appellant was given incorrect information that led him to believe that he could defer his retirement and still carry federal health insurance benefits; back pay ordered retroactive to the date of the appellant's discharge decision)

Miller v. DHS, 111 MSPR 325 (2009), *aff'd, Miller v. MSPB,* 361 F. App'x 134 (Fed. Cir. 2010 NP) (an employee's

disappointment in not securing a discontinued service annuity did not make his FERS early retirement involuntary since the agency did not mislead the appellant or improperly take action resulting in the retirement)

Vazquez v. MSPB, 296 F. App'x 20 (Fed. Cir. 2008 NP) ("A resignation is either voluntary or involuntary on the date it was submitted, and jurisdiction must be determined as of that date." *Cruz v. Dep't of the Navy*, 934 F.2d 1240, 1244 (Fed. Cir. 1991). As such, the period of time between the allegedly coercive act and the resignation is "the most probative evidence" of involuntariness. *Terban v. Dep't of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000). The longer the time between the coercive acts and the resignation, the less involuntary. *Id.*")

Brown v. DOD, 109 MSPR 493 (2008) (although we classify the bases for constructive adverse actions by the type of coercion (time pressure, misrepresentation) and the type of action (resignation, retirement), actions may become constructively adverse through a combination of factors that must be evaluated as a whole; "…to invoke the Board's jurisdiction over involuntary retirement appeals generally, the appellant must present sufficient evidence to establish that the action was obtained through duress or coercion or show that a reasonable person would have been misled by the agency…. The touchstone of the "voluntariness" analysis is whether, considering the totality of the circumstances, factors operated on the employee's decision-making process that deprived him of freedom of choice…. An appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an alleged involuntary resignation or retirement only if he makes a nonfrivolous allegation casting doubt on the presumption of voluntariness.")

Petric v. OPM, 108 MSPR 342 (2008) (if the appellant reasonably and materially relied on misinformation from the agency to his detriment, regardless of whether the misleading information was intentionally, negligently or innocently provided, his retirement is considered involuntary; here, "the appellant failed to submit a sworn statement that the agency told him that he would be granted workers' compensation benefits in lieu of disability retirement if he voluntarily applied for and accepted disability retirement. Thus, he has not shown that the Board should remand this case for further proceedings on the issue.")

Rethaber v. MSPB, 233 F. App'x 1001 (Fed. Cir. 2007 NP) (a demotion was not invalid for lack of a reasonable time to consider the options when the appellant was given until the end of the next business day to make her decision and she was able to meet with a union representative between the time she received the removal proposal and making her decision)

Fonseca v. USPS, 151 F. App'x 948 (Fed. Cir. 2005 NP) ("The AJ is a finder of fact, not an advocate; we do not expect him to raise additional claims *sua sponte*, particularly where, as here, a petitioner is represented by a third party"; the AJ did not err in not finding that the appellant was raising a claim of mental incapacity where the evidence on that point in the record was a letter he wrote to the agency accompanied by a record of hospitalization two months after his resignation)

Barnes v. GPO, 142 F. App'x 443 (Fed. Cir. 2005 NP) (test for involuntariness and burden of proof set out; not met where the appellant referred only to the agency's failure to promote him to the position to which he had been temporarily assigned, which agency regulations did not allow, to verbal counseling and written reprimands which he did not show were improper, and to a work environment that he did not show was sufficiently hostile to justify his departure)

Lloyd v. SBA, 96 MSPR 518 (2004) (for a resignation or retirement after the agency proposes an employee's removal to be considered involuntary, she must establish that the agency did not have reasonable grounds for its proposal; the appeal was reopened "to address divergent lines of cases on the question of when Board jurisdiction over an alleged constructive removal appeal attaches"; "5 USC § 1221 confers jurisdiction over a certain kind of *claim*, while appeals governed by 5 USC § 7701 are within the Board's jurisdiction only if the appellant was affected by an *action* that is appealable to the Board under some law, rule, or regulation"; Board jurisdiction over a constructive removal appeal is established only upon proof of a constructive removal, and not merely by the assertion of a nonfrivolous constructive removal claim; in his concurring opinion, Acting Chairman McPhie agreed that binding precedent requires this decision, but he wrote separately "to explain why this approach is ripe for revision")

Herrin v. Dept. of Air Force, 95 MSPR 536 (2004) (the proper party respondent in an appeal where the issue is whether the appellant's action was involuntary based on misinformation is the agency that allegedly misinformed her; misinformation from the agency, even if it did not intend to deceive or mislead, can be the basis for a finding of involuntariness if the appellant materially relied on it to her detriment; the test requires an objective evaluation of the circumstances; the Board distinguished *Paszek v. DOD*, 50 MSPR 534 (1991), and found that this appellant failed to show that under the circumstances of this case, as of the date of the action that gave rise to her complaint, her reliance on the misinformation was to her detriment)

Hall v. Dept. of Navy, 94 MSPR 262 (2003) (if the appellant proves that the agency threatened to remove him, that he was a qualified disabled employee entitled to reasonable accommodation, and that the agency would not accommodate his disability, then he would have proven that his demotion was coerced)

Dorrall v. Dept. of Army, 301 F.3d 1375 (Fed. Cir. 2002) (to establish the Board jurisdiction's over an appeal from an involuntary retirement, an appellant must show that the agency effectively imposed the terms of his resignation, that he had no realistic alternative but to resign, and that his resignation was the result of improper acts by the agency)

Dick v. VA, 290 F.3d 1356 (Fed. Cir. 2002) (the Board has jurisdiction over an appeal if the appellant makes nonfrivolous allegations of jurisdiction supported by affidavits or other evidence)

Brownlow v. USPS, 34 F. App'x 755 (Fed. Cir. 2002 NP) (denial of leave request, delay in restoring health insurance and paying back pay following settled removal, requirement that employee work under supervisor who disciplined him previously, and prospect of being charged with AWOL did not cause resignation to be involuntarily, since they did not show that reasonable person in appellant's situation would have felt coerced to resign)

Shoaf v. USDA, 260 F.3d 1336 (Fed. Cir. 2001) (requirements to prove coerced resignation or retirement were restated; they must be tailored to fit each case; the issue is whether agency made working conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign; the most probative evidence of coercion will usually be within a relatively short period before the resignation or retirement; it is up to the Board to give appropriate weight to evidence that is further from the resignation, but the failure to give any consideration to the earlier events was an abuse of discretion)

Nebblett v. OPM, 237 F.3d 1353 (Fed. Cir. 2001) (contrasts remedies and other factors between allegations of "involuntariness" under 5 USC § 8336(d)(1) and Chapter 75)

Groce v. Dept. of Air Force, 4 F. App'x 936 (Fed. Cir. 2001 NP) (for a resignation to be deemed involuntary based on misinformation, the misinformation must have been provided by the employing agency or that agency's agent)

Pickens v. SSA, 88 MSPR 525 (2001) (when allegations of discrimination and reprisal are alleged in connection with a determination of voluntariness, evidence of them may only be addressed insofar as it relates to voluntariness; the test for establishing that intolerable working conditions led to the appellant's retirement was restated)

Beverly v. USPS, 88 MSPR 247 (2001) (a retirement is involuntary if the agency made materially misleading statements, even negligently or innocently, upon which the employee reasonably relied to his detriment; where the appellant's original OWCP-approved claim was still in effect but a later claim had been denied, the agency's action in misleading him into believing that the ongoing approved claim was irrelevant, which led to his resignation, made the resignation the involuntary product of misinformation)

Manlogon v. EPA, 87 MSPR 653 (2001) (because the law of constructive demotions under *Russell v. Dept. of Navy*, 6 MSPR 698, has become clouded, the Board used this case to clarify it; in doing so, it overruled the "subsequent to" requirement in *Hogan v. Dept. of Navy*, 81 MSPR 252; an argument that an appellant's position "should have been" upgraded does not suffice as a claim of constructive demotion; *Bittner v. NCUA,* 76 MSPR 380, and *Pritchett v. USPS*, 72 MSPR 35, and subsequent cases holding to the contrary were also overruled)

Terban v. Dept. of Energy, 216 F.3d 1021 (Fed. Cir. 2000) (no error in concentrating on the last 14 months of employment; the most probative evidence is likely to have occurred within "a relatively short period of time" before the retirement; a choice between unpleasant alternatives is not involuntary unless it is shown that the agency lacked reasonable grounds for a threat to take the adverse action; alleged threat to convert approved leave retroactively to LWOP did not coerce retirement)

Starkey v. Dept. of Navy, 198 F.3d 851 (Fed. Cir. 2000) (where the appellant resigned before a RIF when he was denied preference eligibility, appeal was remanded so claim of involuntariness could be considered under correct reading of his status)

Schaeffer v. Dept. of Navy, 86 MSPR 606 (2000), *overruled by Covarrubias v. SSA*, 113 MSPR 583 (2010) (a retirement may be an involuntary adverse action, if the totality of the circumstances show that the agency made working conditions so intolerable that a reasonable person in the appellant's position would have felt compelled to retire; overruled as to the holding that an IRA appeal would cover an alleged involuntary retirement, since the involuntary retirement is an appealable constructive action, *Covarrubias v. SSA*, 113 MSPR 583 (2010))

Perez v. Dept. of Navy, 86 MSPR 168 (2000) (if an employee resigned after being misinformed by an agency official that he could resign before a RIF and still appeal it, his resignation could be deemed an appealable constructive removal)