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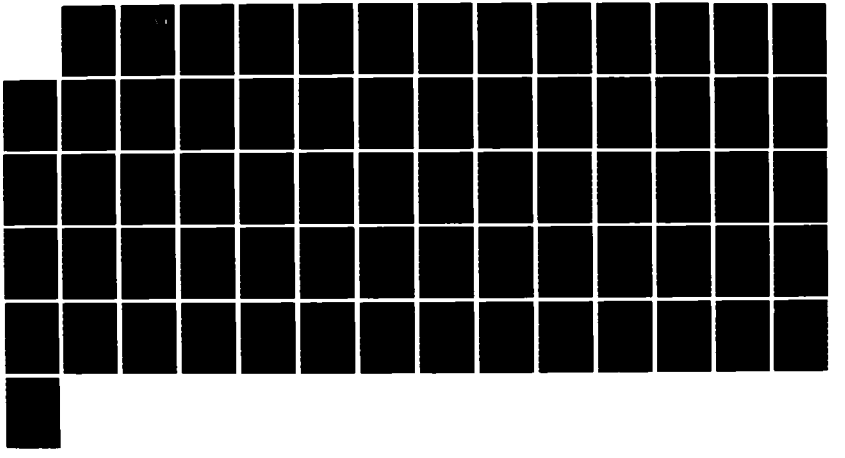

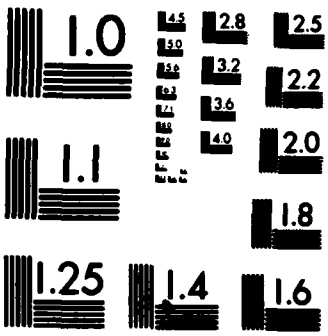

BROADENED AGENCY DISCRETION UNDER THE CIVIL SERVICE REFORM ACT OF 1978

by

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I. INTRODUCTION

The passage of the Civil Service Reform Act of 1978 [1] has generated numerous issues in the area of labor-management relationships, forcing both parties to balance their competing interests with respect to problems that may arise. To a large degree, the balance has tilted in favor of management preogatives, particularly in terms of negotiability issues and the establishment of performance standards. Federal employees, of course, retain grievance and appeal rights. One of the purposes of the Act has been to streamline and to simplify the different appeals procedures which may be utilized by federal employees. [2] The primary decision for the employee to make will be whether to pursue an adverse action [3] grievance through arbitration or the Merit Systems Protection Board (hereafter MSPB or the Board). [4] In most cases, this should not be a critical concern, since the arbitrator is largely governed by the same criteria and standards that would govern the MSPB. [5] The Federal Labor Relations Authority (hereafter FLRA) [6] will not review an adverse action case, whether grieved through arbitration or the MSPB; the following step in cases of this nature will be judicial review through the Court of Claims or the U.S. Court of Appeals for the Federal Circuit. [7] The FLRA will remain as an avenue of review in the case of other arbitration decisions (for example, those based on negotiability issues) and may find an award to be deficient if it is "contrary to law, rule,

or regulation or on other grounds similar to those applied by Federal courts in private sector labor-management relations." [8] Given this concern, it is clear that an arbitrator must consider external law as part of the exercise of his authority in the federal sector.[9]

As aforementioned, in adverse action cases, the avenue of appeal chosen by the grievant should not make a major difference with respect to the relevant issue. For many grievants, the appeal route chosen will be a matter of personal preference. Certain individuals may feel comfortable with an arbitrator who might be regarded as being sympathetic to the problems of the grievant. Other individuals may consider that the mechanics of the MSPB in which a case is heard by a presiding official (similar to an administrative law judge), with the potential for review by the full Board, is the preferred avenue because of the impression that there are significant protections inherent in a forum tantamount to a quasi-judicial form of review. This distinction may be ephemeral at best, as a manifestation more of form, rather than substance. In one respect, however, the choice may be more significant; this is in the nature of an adverse action grievance generated by the employee's failure to meet a performance standard. The MSPB and the Federal Circuit Court of Appeals have evidenced a willingness to examine the substance of a performance standard to ensure that it is based on objective criteria, to the maximum extent feasible. [10]

The arbitrator, on the other hand, may shy away from such an examination, feeling that (s)he may be invading management's right in setting the standard.

Generally, however, the federal agency has remained dominant in labor-management relations since the passage of the Civil Service Reform Act. Such will be the theme of this paper in examining three separate areas, focusing on the arbitrator/MSPB relationship in adverse action and § 4303 cases. Following a discussion of the purpose and relevant statutory provisions of the Civil Service Reform Act, this paper will first review management's right to take adverse action against an employee. Such action might be taken pursuant to either Chapter 43 of the Act for unacceptable performance or Chapter 75 of the Act for misconduct on the basis that such Chapter 75 action will promote the efficiency of the service. This area has been unsettled over the last few years by differing MSPB decisions, but has recently been addressed by the Federal Circuit decision of Lovshin v. Department of the Navy.[11] Whether Lovshin will remain the final word in this area is somewhat speculative, since an appeal is currently pending. A second area this paper will examine, again evidencing the importance of agency discretion, will be the agency's right to remove an individual for failure to attain, or loss of, a security clearance. Attention will be given to the recent MSPB decision of Egan v. Department of the Navy[12] which stresses the broad scope of agency authority in this

area, and prevents the MSPB from looking to the underlying reason for the loss of clearance or from ordering the agency to reinstate the clearance. Finally, this paper will examine recent decisions concerning the establishment of employee performance standards. This, again, may be an area where agency discretion may be more strictly examined by the MSPB (and the Federal Circuit Court) than by the arbitrator, thereby requiring a high degree of accountability by the agency in meeting the criteria of the Civil Service Reform Act when adverse action is contemplated.

II. THE CIVIL SERVICE REFORM ACT

The Civil Service Reform Act of 1978 is an extremely complex piece of legislation which has widely affected matters relating to employee performance standards and grievance/arbitration rights. For purposes of this paper, particular attention must be given to Chapters 43 and 75, as well as (briefly) Chapter 71.

A. Chapter 43

Section 4302 of Chapter 43 provides for the establishment of a performance appraisal system by federal agencies, designed in large measure to give renewed emphasis to merit principles, with, perhaps, the hope of depoliticizing employee evaluations and the promotion process as a whole. In addition, such a system would ideally provide an avenue to dismiss or otherwise discipline substandard performers. Nonetheless, em-

ployee protections remain. Chapter 43 of the Act, in essence, requires the federal agency to establish one or more performance appraisal systems in which performance standards would be utilized with respect to the various elements of an employee's position.[13] These standards, as well as the critical elements of each position,must be communicated in writing to each covered employee at the beginning of the appraisal period.[14] Each employee must be evaluated during the appraisal period on the basis of such standards and will be assisted when his/her performance is rated at an unacceptable level.[15] Unacceptable performance, of course, is the basis for action being taken under Chapter 43. If an employee's performance is unacceptable, defined as a failure to meet established performance standards in one or more critical elements of his/her position,[16] the agency may take such adverse action as reassignment, reduction in grade, or removal.[17] For purposes of later analysis, a performance standard is defined as

> the expressed measure of the level of achievement established by management for the duties and responsibilities of a position or group of positions and may include, but are not limited to, elements such as quantity, quality, and timeliness; a critical element, on the other hand, is a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance or other components of the job. [18]

As such, unacceptable performance may constitute a failure of an employee to meet the performance standard for only

one critical element; this, in itself, can be sufficient grounds for taking action against an employee. Proceeding under Chapter 43 for purposes of taking action may have both positive and negative features for the agency and employee. From management's viewpoint, an action taken pursuant to Chapter 43 need only be supported by substantial evidence.[19] This constitutes, in theory, a low burden since substantial evidence is defined as the "degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true." [20] As such, substantial evidence is sufficient evidence that a reasonable person could come to a certain conclusion. A review of a Chapter 43 action must focus on whether there was sufficient evidence that a reasonable person could, in essence, have reached the same determination as the agency. If the record as a whole contains enough evidence that a reasonable person could determine that the employee's job performance was unacceptable, then the reviewing authority must sustain the agency's action even if the reviewing authority, such as the MSPB, may have reached a different conclusion.[21]

The employee faced with this low standard of proof may take some solace in the procedural rights available to him/her under Chapter 43. The rights listed in 5 U.S.C. § 4303, applying to preference eligible and competitive service personnel only, include:

> entitlement to 30 days advance written notice of the proposed action which identifies specific instances of unacceptable performance on which the action is based and the critical elements of the employee's position involved in each instance of unacceptable performance; representation by an attorney or other representative; a reasonable time to answer orally and in writing; a written decision within 30 days after the expiration of the notice period specifying the instances of unacceptable performance on which the removal is based; freedom from removal proceedings for unacceptable performance occurring more than one year prior to the date of the 30 day notice; an opportunity to improve the employee's performance; and extraction from one's record of all entries or notations of removal proceedings if acceptable improvement continues for one year from the date of removal notice. [22]

It is considered that the low burden of proof, coupled with the procedural requirements, contribute to Chapter 43's purpose of fostering a merit system in civil service personnel matters.

B. Chapter 75

Adverse action may be taken under Chapter 75, pursuant to sections 7512/7513. Chapter 75 provides for adverse action to be taken for misconduct or any reason other than unacceptable performance. In order for adverse action to be taken, there must be a nexus between the misconduct and the efficiency of the service.[23] The term "efficiency of the service" is somewhat vague, but considers, in part, "the rights and obligations of the employer and employee, as well as equity, procedural fairness, and other relevant facts and circumstances." [24] As to what actions might give rise to discipline, the Federal Personnel Manual lists such factors as recognizable offenses

against the employer-employee relationship; on or off the job misconduct; inefficiency; or physical or mental inability to perform the duties of the position.[25] The appropriateness of the penalty must be reviewed in determining whether the discipline will promote the efficiency of the service. Such factors utilized in determining the appropriateness of the penalty include, but are not limited to, the nature and seriousness of the offense; whether the offense was intentional or inadvertent; the nature of the employment; the employee's past disciplinary record; the effect of the offense upon the employee's ability to perform in a satisfactory manner; the impact of the offense on the agency's reputation; mitigating factors; the potential for the employee's rehabilitation; and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.[26]

Procedural rights, while not as strict as under Chapter 43, are still available to the employee under Chapter 75. An agency proposing adverse action against an employee under Chapter 75 must give the employee the following rights:

> a. at least 30 days' advance written notice, unless there is reasonable cause to believe the employee committed a crime for which imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> b. seven days' response time for the employee to answer orally and in writing and to furnish affidavits and other documentary evidence;
>
> c. the right to be represented by an attorney, or other representative;
>
> d. the right to a written decision and the specific reasons therefor, at the earliest practicable date;

e. in addition, the agency may provide, by regulation, for a hearing which may be in lieu of, or in addition to, the opportunity to answer, as noted above. [27]

While such rights under Chapter 75 incorporate the traditional notice and opportunity to be heard, it is considered that the procedural requisites of Chapter 43, including the opportunity to improve (more reasonable, given the nature of the proposed action), as well as possible extraction of negative material from one's file, may well inure more to the benefit of the employee than do the Chapter 75 provisions.

Pursuant to 5 U.S.C. § 7701 (c)(1)(B), the standard of proof under Chapter 75 is a preponderance of the evidence standard - somewhat more strict than the substantial evidence standard for Chapter 43 actions. Preponderance of the evidence is "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." [28] Unlike the unacceptable performance case, it is not sufficient in a misconduct case for the record to show that a reasonable person may have reached the same determination as the agency. Instead, "the record as a whole must convince the MSPB that it is more likely true than not that the employee was guilty as charged." [29]

The differing bases for taking action under Chapters 43 and 75, along with the different standards of proof and employee procedural protections, might suggest that an agency

must utilize the appropriate Chapter in taking a particular action; that is, that an agency must proceed under Chapter 43 for unacceptable performance and under Chapter 75 for misconduct. As will be examined, however, recent case law provides broader agency discretion in this regard, consistent with evident trends since the passage of the Civil Service Reform Act.

C. Additional Provisions

Before engaging in such an analysis, however, two additional provisions warrant review. Relating to the topic of security clearances, Section 7532 (not in itself a part of the Civil Service Reform Act) entitles the head of an agency to suspend, and, following investigation, to remove an employee when it is considered necessary or advisable in the interests of national security. Within 30 days after suspension (and, of course, before removal), an affected employee who has a permanent - indefinite appointment, has completed a probationary period, and is a U.S. citizen, is entitled to:

> a written statement of the charges stated as specifically as security considerations permit; an opportunity to respond within 30 days thereafter; a hearing at the employee's request by an agency authority duly constituted for this purpose; a review of the case by the head of the agency or his designee, before a decision adverse to the employee is made final; and a written statement of the decision of the head of the agency. [30]

The interesting issue to be later examined is whether adverse action for failure to attain a security clearance may be ta-

ken under either the 7512/7513 provisions or the 7532 provision.

Finally, with a view toward the analysis of performance standards, Chapter 71, specifically § 7106, warrants brief consideration. Under 5 U.S.C. § 7106 (a)(2), an agency has a broad right to hire, assign, and, if necessary, to take disciplinary action against employees, as well as to direct and assign work. Indeed, such broad rights include an agency's freedom to identify critical elements of a position and to establish performance standards. The language of § 7106 (b)(2),(3), however, has been construed to require the agency to bargain on procedures to be observed in the development and implementation of performance standards and critical elements and on appropriate arrangements for employees adversely affected by the application of performance standards to them.[31] The arbitrator faced with a negotiability issue as to a performance standard is prevented from delving into the substance of a standard - that is, whether the critical element is not important enough to be critical or the standard is too strict - because to do so would invade the wide scale province of management rights.[32] The Federal Labor Relations Authority, which has jurisdiction in Chapter 71 matters, has, in several decisions, upheld the primacy of management rights in this area.[33] The interesting concern is whether in an adverse action case (involving an individual employee) relating to performance standards, the arbitrator might tread more lightly than the MSPB for fear of substitu-

ting his judgment for that of management in setting the standard, a step that the arbitrator has been directed not to take in labor-management negotiability issues.[34] Recent indications are that the MSPB and Federal Circuit Court are more willing to scrutinize the substance of a standard, while the arbitrator is more concerned with fairness in applying the standard. The arbitrator/MSPB distinction will provide for some fertile analysis in the section of this paper relating to performance standards, with the stricter MSPB review in this area being one of the few examples of the application of some restraint on otherwise broad agency discretion.

III. AGENCY APPROACH UNDER CHAPTERS 43 AND 75

A. MSPB Decisions

The purpose for taking action under Chapters 43 and 75 depends on whether the agency is assessing an employee's performance (Chapter 43) or reviewing an employee's commission of misconduct, which may warrant discipline to promote the efficiency of the service (Chapter 75). Chapter 43 contains stricter procedural employee safeguards, although the agency has the benefit of a more relaxed burden of proof. Since the performance criteria under Chapter 43 were designed to foster a civil service system emphasizing merit principles, such criteria form a critical linchpin of the Civil Service Reform Act. A main concern is whether the agency is channeled into Chapter 43 for performance based actions or whether the agency may elect to take such actions under Chapter 75, albeit bound, in theory, to a higher preponderance of the

evidence burden of proof. The significance of the issue is related to the overall question of broad or limited agency discretion.

Important MSPB decisions have varied in this respect. An early MSPB case, Wells v. Harris, [35] presented authority for broad agency discretion. Wells provided an examination into the important statutory provisions of the Civil Service Reform Act. The issue in Wells was whether, and under what limitations, removal or demotion actions based on unacceptable performance could be taken under § 4303 against employees for whom a performance appraisal system had not yet been established under § 4302 (the required date for such establishment being 1 October 1981). Action in this case was taken pursuant to interim regulations. The Board, in essence, determined that such action could not be taken in the absence of a performance appraisal system, and that the Office of Personnel Management's interim regulations in this area were invalid. Wells also established , however, that agencies need not wait until 1 October 1981 to proceed, because of availability of Chapter 75 for taking adverse action.[36]

In the following years, Wells was given a broad reading to allow agencies to take performance based actions under either 5 U.S.C. § 4303 or § 7513, even though Wells only addressed interim regulations before 1 October 1981 and did not address whether an agency was precluded from using Chapter 75 after a performance appraisal system had been developed. Extremely troubling, nonetheless, is the reasoning

behind the Wells decision for allowing the agency to proceed under Chapter 75 for performance based purposes. The language of section 7512, relating to penalties for most Chapter 75 adverse actions, clearly states that the provisions of Chapter 75 do not apply "to a reduction in grade or removal under section 4303 of this title." [37] It is especially troublesome that the Board, in Wells, after examining the legislative history of Chapter 75, was aware of this concern, but nonetheless stated:

> If an agency sees some advantage in pursuing performance based action under Chapter 75, it is not inconsistent with the Act so long as the agency meets the higher burden of proof - and the more difficult standard of demonstrating that the action will promote "efficiency of the service." There is not the slightest evidence in the legislative history to suggest that Chapter 43 was ever to be a refuge for employees to escape Chapter 75. Chapter 43 originated as a relief measure for agencies and it was enacted for that purpose.[38]

While such reasoning is certainly helpful to the agency, one must question whether it is supported by any statutory basis.

In Gende v. Department of Justice, Bureau of Prisons, [39] the MSPB reevaluated the Wells decision. In Gende, the appellant was demoted from his position as an Electrician Foreman because of careless workmanship and failure to follow agency policies. The adverse action was taken pursuant to 5 U.S.C. § 7513; the appellant claimed that § 4303 should have been utilized, conceivably to provide for the procedural protections which would have been available, such as an opportunity to improve. Since Wells did not address the exclusive appli-

cation of Chapter 43 to performance based actions after 1 October 1981, Gende reviewed the statutory and legislative history in order to effect a determination.

In considering the purpose of enacting Chapter 43, including defects in old evaluation procedures, as well as the need to simplify and expedite procedures, the Board found "persuasive indications in the legislative history that Congress intended performance based removal and demotion actions to be effected exclusively under Chapter 43 procedures." [40] This,supposedly, would be consistent with the development of a merit system. Benefits would flow to the agency through a lesser burden of proof, while the employee's performance would be weighed against an established performance appraisal system with some inherent procedural protections. Furthermore, Gende noted that since Chapter 75 specifically states that it does not apply to a § 4303 removal, the interpretative maxim "expressio unius est exclusio alterius" [41] should be utilized to determine that Chapter 43 be regarded as the exclusive vehicle for performance based actions after 1 October 1981, and that the rule be given prospective application.

One possible exception to this rule includes a situation where an employee simply refuses to perform. Such an intentional failure would be tantamount to misconduct and could be punished through Chapter 75 adverse action procedures, assuming that the intentional failure to perform was established by a preponderance of the evidence.[42] The Board also noted that Chapter 75 could be utilized in cases where there would

be a substantial likelihood that a delay in removal for the purpose of allowing time for improvement would result in injury, death, breach of security, or great monetary loss.[43]

In determining whether Chapter 75 actions are based on performance or misconduct principles, the Board noted that some presumptions would apply. Charges directly relating to critical or non-critical elements of performance standards would be regarded as performance based, subject to agency rebuttal by a preponderance of the evidence. Secondly, the Board would presume, subject to rebuttal by a preponderance of the evidence, that charges relating directly to the appellant's duties, responsibilities, work related tasks, functions, and objectives would be performance-based in nature and, therefore, could not be addressed under § 7513.[44] The Board also stated, in footnote 18:

> One consequence of the Board's ruling in this decision and of the application of this standard is that agencies may not take any removal or demotion actions based on an employee's non-critical elements. Such performance based actions are not available under Chapter 75 and are not included in § 4303 since § 4303 actions must be based on a failure to meet critical elements, 5 U.S.C. § 4303 (b)(1)(A)(ii). In such cases, however, if the agency were to reassign the employee, any such reassignment would not be appealable to the Board under Chapter 43. See 5 U.S.C. §§ 4302 (a)(3), (b)(6); 4303 (e).[45]

It is considered that the Gende decision provided a responsible analysis of the statutory language of the Civil Service Reform Act, seeking to strike a balance between the agency's need to take swift action based on poor performance

and the employee's concern for being evaluated pursuant to an established, rather than ad hoc appraisal system. Furthermore, the decision responded to the unanswered question in Wells concerning the appropriate route for agencies to follow regarding performance based actions taken after 1 October 1981.

B. Lovshin

The vitality of the well reasoned Gende decision is in serious jeopardy following the recent Federal Circuit Court decision of Lovshin v. Department of the Navy.[46] In this case, an Electronics Engineer was removed from his position at Naval Ship Weapons Systems Engineering Station, Port Hueneme, California for inefficiency and poor workmanship under proceedings conducted pursuant to § 7513 after 1 October 1981. This adverse action was approved by the MSPB and Lovshin appealed, contending that a removal action for poor performance was required to be taken under § 4303; the agency, on the other hand, considered that it had the option to proceed under either Chapter 43 or Chapter 75.

The Lovshin decision thoroughly analyzed Gende's purpose of remaining consistent with the statutory language and merit principles of Chapter 43. It considered, however, that the Board, in Gende, by "believing it was necessary to eliminate use of Chapter 75 totally in connection with performance based actions against employees..., read into Chapter 75 a limitation of sweeping proportions which Congress expressed nowhere in the statute itself or in the legislative history." [47] The court, in Lovshin, determined that the Gende standard

would lead to unnecessary complexity in forcing an agency to so strictly adhere to Chapter 43 appraisal principles, particularly since the development of appraisal systems is a rather new, and far from perfect undertaking. Such complexity could result in a time-consuming procedure, alien to the intent of Chapter 43, which would not well serve the public. Finding that an agency may proceed under Chapter 75, as well as Chapter 43, the court noted:

> The somewhat greater burden on the employee under Chapter 75 in this respect is balanced by the greater burden on the agency under Chapter 75... An employee sought to be removed under Chapter 43 is entitled to be rated on reasonable standards and to have the specific procedures of Chapter 43 applied in connection with these standards. This protection is the quid pro quo for the lesser burdens on the agency under that Chapter. However, nothing in the statute or legislative history indicates that an employee should thereby be entitled to his position despite serious performance deficiencies where an agency can meet the heavy burdens of Chapter 75 and can show substantive compliance with merit principles... We do not read Chapter 43 as implicitly eliminating removal or demotion actions for performance reasons under Chapter 75.[48]

The dissenting opinions focus on the clear statutory language of § 7512(D), which states that Chapter 75 "does not apply to a reduction in grade or removal under section 4303", as a solid basis for the well reasoned Gende decision.[49] The benefit and burden analysis to both agency and employee (expedite adverse action without resorting to ad hoc procedures) under Chapter 43 should be considered in determining the wisdom of proceeding under Chapter 43 for performance based actions. Finally, the dissents argue that more defer-

ence should be paid to an MSPB having considerable expertise in decisions of this nature.

Broad language similar to that in Lovshin was utilized in several decisions allowing an agency to proceed under either Chapter 43 or Chapter 75; such decisions include Turnage v. United States [50] and Hatcher v. Department of the Air Force.[51] In Hatcher, an individual who was removed from his position for poor performance as manager at the Tyndall Air Force Base Officers' Club, pursuant to Chapter 75, contended that Chapter 43 should be the exclusive vehicle for such a removal. The court, as did Lovshin two years later, used broad language in asserting that there was no legislative basis to prevent the agency from proceeding under Chapter 75 for performance based adverse action matters, if the requisite higher burden of proof could be satisfied. It should be noted that the above cases were decided prior to the Gende ruling. Since the disputed actions in these cases were taken during the interim period before the agencies had established an approved performance appraisal system, it is recognized that the courts were required to depend heavily on the Wells decision to support their reasoning. It can at least be said, however, that the courts afforded appropriate deference to this MSPB decision, which Lovshin failed to do relative to the Gende result.

The Lovshin decision's broad language might suggest that the decision was not particularly well reasoned. Too little attention appears to have been paid to the statutory distinctions between Chapters 43 and 75, with the aforementioned bene-

fits and burdens available to the agency and employee. The decision is certainly indicative of a recent trend of cases which give the agency broader powers to take adverse action. If the agency chooses to proceed under Chapter 75, of course, it must satisfy a higher standard of proof, an undertaking of probable limited difficulty in return for extricating itself from compliance with Chapter 43 procedural mandates. Such increased agency discretion, however, may have interesting ramifications. An agency pursuing a removal action under Chapter 75 may find that the affected employee could be granted mitigating relief (demotion or suspension rather than removal) which would not be available under Chapter 43. In Lisiecki v. Merit Systems Protection Board,[52] it was determined that the Board could reduce a penalty under Chapter 75, but not under Chapter 43 because of its statutory basis, as well as the language in Lovshin, that subsequent to compliance with Chapter 43 procedures:

> an agency may reduce in grade or remove an employee for receiving a rating of "unacceptable" in a single critical element. No more is required of the agency; that is, a removal or demotion on the basis of an "unacceptable performance" rating on a "critical element" is not subject to any of the substantive or procedural requirements of Chapter 75.[53]

It should also be noted that demotion and removal are the only sanctions available under Chapter 43.

It should further be noted that it is incumbent on the agency to make a choice at the outset as to which procedure to use. In Wilson v. Department of Health and Human Services,[54]

an agency took adverse action against an employee pursuant to Chapter 43. When the court found the performance standard to be invalid, the agency, citing Lovshin, requested that the case be remanded to the MSPB for consideration under Chapter 75. The court refused to do so, noting the separate guidelines established by Chapters 43 and 75, and also determined that remand to the Board would be inappropriate, since if the standard had been properly established at the outset, adverse action might not have been necessary.[55] Although remand to the Board was rejected, the court, citing Lovshin, left open the question as to whether the agency could institute a Chapter 75 action, utilizing the procedures contained therein, "based on the same or a similar set of operative facts." [56]

In a similar vein, in Hanratty v. Federal Aviation Administration,[57] the Federal Circuit Court examined an MSPB case in which the presiding official conducted a hearing regarding an individual's removal for failure to complete a portion of a training program. The presiding official regarded the case as a Chapter 43 proceeding, and conducted the hearing as though Chapter 43 principles should apply, including the agency having the burden of proving the reasons for the appellant's removal by substantial evidence. The action, however, was later recharacterized and sustained by the presiding official (one month after the record closed), as a Chapter 75 action because the agency had failed to introduce appellant's performance standards, and did not establish which duties

were critical elements.[58] Although the Board sustained the presiding official's action, the Federal Circuit Court vacated and remanded, stating that a recharacterization of the proceeding after the record had closed was inappropriate, with "after-the-fact switches being inherently unfair and governing considerations between the two chapters being distinct." [59] Such distinctions include the different burdens of proof in each chapter; the need to show an efficiency of the service under Chapter 75; and the unavailability of penalty mitigation under Chapter 43 (Lisiecki, supra). [60]

The Wilson rationale triggers one final consideration before concluding the analysis in this area. It will eventually be determined that the MSPB and courts are more strictly analyzing the content and validity of performance standards in Chapter 43 adverse action cases. Given the broader agency discretion granted in Lovshin to proceed under either Chapter 43 or Chapter 75, one may question whether more agencies will proceed under Chapter 75 if more performance standards under Chapter 43 are deemed invalid. Such a discretionary move by the agency would have to be balanced against the stricter burden of proof, preponderance of the evidence, and the more ready availability of mitigating action by the MSPB, pursuant to Chapter 75, as noted in Lisiecki.

IV. LOSS OF SECURITY CLEARANCE

An additional recent development, again indicative of broadened agency discretion, deals with whether the MSPB

can review the reason for an agency's revocation or denial of a security clearance. The MSPB will usually have jurisdiction in such cases because the loss or revocation of a clearance will, in many instances, require that adverse action be taken pursuant to Chapter 75. An important MSPB decision in this area, Egan v. Department of the Navy,[61] is well reasoned, relying on appropriate precedent. It should, unlike Lovshin, be relied on with some certainty by both the agency and the employee under similar circumstances.

A. Egan - Basic Holding

In this case, Egan was removed from his position as a Laborer Leader with the Trident Naval Refit Facility, Bangor, Bremerton, Washington since he was unable to obtain the security clearance which was a necessary condition of his employment. Egan appealed the adverse action to the Board's Seattle Regional Office. The presiding official, citing Hoska v. Department of the Army [62] and Bogdanovicz v. Department of the Army [63] found that the agency's denial of the clearance was unreasonable, and reversed the agency's action.

The Board, on appeal by the agency, determined that while it has jurisdiction over adverse actions, it had no authority to review the agency's stated reasons for the security clearance determination. Clearly, the Board cannot require restoration of the clearance. Instead, the Board's action is limited to a review of the agency procedures to ensure compliance with due process, with the Board stating that:

> We further hold that the minimal due process rights that must be afforded the employee upon the agency's denial or revocation of a security clearance are: notice of the denial or revocation; a statement of the reason(s) upon which the negative decision was based; and an opportunity to respond.
>
> The nature of the Board review in such cases, therefore, will be limited to determining that the agency has established the following: (1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; (3) and the granting of minimal due process protections to the employee.[64]

Finally, it was concluded that Sections 7512 and 7513 may be utilized in such cases and that the summary provisions of 5 U.S.C. § 7532 need not be relied on.

B. Rationale - Analogy to Military Decisions

The Board's decision is certainly consistent with federal case law, as well as some of its own previous decisions. The Department of Defense has established strict guidelines relating to security clearances, with such clearances granted if clearly consistent with the interests of national security.[65] The Board's evaluation of the reasons behind granting or revoking a security clearance would be inconsistent with the proper deference paid to those responsible for decisions of this nature, with the best analogy being deference to matters normally within military purview.[66] There has consistently been a general reluctance to interfere in military matters, unless an official has acted outside of his power or has improperly applied his own regulations.[67] Court review will not usually result in the absence of a constitutionally app-

lied right or the exhaustion of intraservice corrective measures.[68] The courts will not become involved in looking behind the reasons for an individual's non-selection for promotion,[69] or an individual's dismissal from a Reserve unit (resulting in loss of a civilian job), so long as the agency has sustained its burden of proof by a preponderance of the evidence that the adverse action taken was based on a matter within the individual's control.[70] The refusal of courts to review internal military decisions is, as noted by Egan,[71] clearly similar to a desire not to become involved in a review of reasons for denying a security clearance. Indeed, even beyond the military, internal agency decisions are generally accorded great deference. In Bacon v. Department of Housing and Urban Development, [72] the MSPB refused to look behind the stated reasons for an agency's reduction-in-force decision. It should also be noted, of course, that an arbitrary agency action in itself, without some showing of an adverse effect, is not reviewable by the courts or the MSPB.[73] Similarly, the MSPB would not have jurisdiction to review a constitutional claim relative to an employee's religious objections to an insurance coverage package developed by the agency.[74]

Indeed, the Egan refusal to scrutinize the reasons for a security clearance denial is consistent with previous Board decisions not to look behind a conviction to reexamine guilt or innocence,[75] or to look behind the reasons for an attorney's bar decertification.[76] In Schaffer v. Department of the Air Force,[77] an individual lost his civilian air force posi-

tion after he was dismissed from the Air Force Reserves for being overweight. Again, the Board refused to look behind the reasons for the agency action or to consider any affirmative defenses, once the agency was able to prove the reasons for its action, with such reasons being within the individual's control. This, of course, remains consistent with the traditional reluctance of a non-military authority to review the actions of a military body.

With the Board's concern "against treading into areas which are sensitive by virtue of their national security implications",[78] one must consider why the presiding official in Egan relied on Hoska and Bogdanowicz to provide for a review of security matters in the first place. A clear examination of Hoska, however, reveals no inconsistencies. The Hoska decision considered a removal action following a security clearance revocation. The presiding official sustained the agency action, which resulted in the final Board decision because of the appellant's failure to seek full review by the MSPB within the statutory time frame. On appeal to the court, it was determined that the agency action was based on unsubstantiated hearsay, with no rational nexus shown between the employee's conduct and his inability to safeguard classified information.[79] As such, the Hoska decision simply reemphasized the need to find a rational nexus based on appropriate evidence in a § 7513 action, and did not constitute authority for Board examination into the reasons behind a security clearance revocation. The Bogdanowicz decision, improperly

relying on Hoska as a basis for looking behind the reasons for loss of clearance was, in effect, overruled by the Egan decision.[80] Also now of questionable value is the decision of Doe v. National Security Agency,[81] in which the Board determined that a presiding official appropriately concluded that unless an agency invoked sections 7513 and 7532 for national security reasons, then the Board had the authority in a removal appeal to order reinstatement of a federal employee to his former position regardless of whether the position required a security clearance.

C. Section 7513 or 7532?

As previously noted, adverse action is normally taken under section 7513, although the provision exists for summary action by an agency head when consistent with national security grounds (§ 7532). Indeed, section 7512(A) excludes from Board review actions otherwise taken pursuant to section 7532. While clearance cases are related to national security, the Egan decision determined that in such cases there is no basis for requiring the exclusive use of the summary § 7532 provision, which places great discretion on the head of the agency to invoke suspension and, following investigation, termination when necessary in the interests of national security. In Cole v. Young,[82] the Supreme Court determined that the term "national security" would apply "only to those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the

strength of the Nation only through their impact on the general welfare."[83] Certainly, the situation manifested in Egan did not rise to the serious security concerns defined in Cole, and, therefore, the agency could pursue an adverse action of this nature under § 7513.

The use of § 7513 rather than § 7532 inures to the benefit of the employee since the agency, in seeking to discipline, must establish by a preponderance of the evidence a nexus between the "misconduct" involved and the efficiency of the service. As previously noted in Schaffer v. Department of the Air Force, an individual was removed from the Air Force Reserves for being overweight, thereby resulting in loss of his civilian job. In response to his claim of lack of nexus, the Board determined that such a nexus was shown in that having civilian employees retain a Reserve affiliation is related to the agency's purpose of providing active Reserve units with a cadre of Reservists who are fully trained in supplying support services; as such, dismissal from civilian employment for failure to maintain an active Reserve membership promotes the efficiency of the service.[84] While the denial (or loss) of a security clearance, as manifested by Egan, might not be tantamount to misconduct, the agency would still be required to prove a nexus between the loss of the clearance and the efficiency of the service.[85] To establish a nexus, there must be proof that the employee required a security clearance in performing his duties or responsibilities and that such duties would include access to either classified information or mater-

ial. [86] If these conditions are inapplicable, then the employee would not require a clearance and the nexus between the revocation of the clearance and the efficiency of the service will not have been established.[87] The absence of any recent or significant exposure to classified information or areas, however, may not necessarily be fatal to the proof of nexus; the agency may still prove its case by demonstrating a genuine need to have the position able to deal with either classified information or restricted areas.[88]

D. Remedy

As noted, Egan, consistent with previous MSPB and federal decisions, determined that while the Board cannot look to the underlying reasons for the clearance denial, it may ensure that the agency is complying with its own regulations in affording the appellant procedural due process rights when making a negative security clearance determination. Failure to afford such due process rights would result in a reversal of the adverse action and an order that the agency restore the appellant to pay status.[89]

E. Ramifications

As does Lovshin, the Egan decision serves to strengthen agency discretion in adverse action cases. Unlike Lovshin, it is considered that Egan is based on a consistent application of previous federal court and Board decisions which broadly defer to agency decisions in matters of this nature, so long as the agency follows its own regulations in affording the affected individual procedural due process rights. The

Egan decision may be utilized to allow agencies to operate more swiftly and with more certainty in sensitive cases, and certainly appears to strike an appropriate balance between agency and employee needs in this particular area.[90]

V. PERFORMANCE STANDARDS

While agency discretion was reemphasized in the Chapter 43/75 (Lovshin) and security clearance (Egan) situations, a series of recent federal and MSPB decisions may reflect a more strict examination of agency action with respect to the establishment of performance standards. As previously noted, Chapter 43 provides for the agency establishment of performance appraisal systems no later than 1 October 1981. Of particular concern is 5 U.S.C § 4302 (b)(1), which requires the agency to establish, in writing:

> performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system

As will be seen, the language "objective criteria to the maximum extent feasible" has provided some headaches for agencies tasked by the Civil Service Reform Act with this relatively new and complex requirement.

The most interesting concern with respect to this stricter scrutiny of performance standards deals with the affected employee's choice when pursuing a grievance. An employee grievance is broadly defined as "any complaint by any employee

concerning any matter relating to the employment of the employee" or "any complaint concerning the effect or interpretation, or a claim of breach, of a collective bargaining agreement or any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." [91] An employee may elect to pursue a grievance through the arbitrator or the MSPB, but not both.[92] Arbitrators have traditionally been reluctant to become involved with the substance of a performance standard in section 7106 negotiability issues because in those cases, subject to review by the Federal Labor Relations Authority, the FLRA has made it clear that management has the preogative to decide what elements are critical.[93] While an adverse action case presents different issues than a negotiability case (indeed, there is no FLRA review in adverse action cases)[94], the arbitrator may still be cautious. If the issue is whether an employee's performance standards were based on objective criteria, to the maximum extent feasible, "the line between deciding that issue and the substitution of the arbitrator's judgment for that of management in setting standards may be a very fine line indeed." [95] The arbitrator will try to refrain from crossing the line and entering into an area proscribed by FLRA decisions.[96]

In this section of the paper, a brief examination will be made of FLRA decisions emphasizing the primacy of management rights in negotiability issues, which have caused arbitrators to refrain from examining the substance of a standard, and to

act only to ensure that the standard is properly applied. Following this analysis, a more detailed examination will be given to the role of the MSPB and courts in analyzing the substance of the standard in adverse action cases. Two questions may then be presented for brief consideration:

> 1. Will more grievants elect MSPB review rather than arbitration in Chapter 43 performance cases because of the MSPB's willingness to analyze the standard in more detail?
>
> 2. Will agencies be more likely to bypass Chapter 43 and proceed under Chapter 75, on an efficiency of the service basis, albeit with the higher burden of proof?

A. FLRA Decisions

When an agency is tasked with developing performance standards, the union often submits its own proposals, in the hope that the agency will enter into negotiations with the union concerning the standard in question. The unions' efforts in this area have, to a large degree, been fruitless. The Federal Labor Relations Authority has generally maintained that 5 U.S.C. § 7106(a) provides for broad management discretion to direct and assign work, including the development of quantitative performance standards. Many union proposals are designed to set quantitative levels, with an eye toward easing the burden on employees. In the important FLRA decision of National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt,[97] a union proposal as to the number of batches an accounts maintenance clerk was required to process in order to retain the position and attain a within-grade step increase (nine batches per hour) was not considered

to be procedural in nature. Such a proposal would, instead, specify a critical element of the job, as well as the standard required for retention. Since the proposal required the agency to bargain as to the quantity, quality, and timeliness standards which it must establish in making work assignments and directing employees, it interfered with statutory management rights, under § 7106.[98] Similarly, a union proposal to establish the level of output which an agency would be required to accept as a satisfactory quantity of production in determining grade retention and within-grade increases was considered to limit management rights in NTEU, Chapter 72, and IRS, Austin Service Center.[99]

In general, proposals restricting management in the substantive establishment of performance standards will be deemed to violate management's right to assign work and to direct employees. For example, the attempt to restrict critical elements to those factors which are grade controlling components of a job have been deemed to interfere with management prerogatives.[100] In NTEU and Internal Revenue Service,[101] a union proposal to set standards concerning incentive pay was deemed to interfere with management's right to encourage and reward successful performance. In American Federation of Government Employees, Local 1917 and United States Immigration and Naturalization Service,[102] a dispute arose between the union and the agency regarding the agency's development of numerical performance standards for rating the work performance of criminal investigators in a certain job element. The

arbitrator determined the grievance to be arbitrable and denied the grievance as to the establishment of numerical standards. The FLRA determined that the grievance was not even arbitrable in the first place because the union was challenging management's right to direct and assign work under § 7106 (a)(2)(A) and (B).

In a recent ninth circuit decision, National Treasury Employees Union v. Federal Labor Relations Authority,[103] the primacy of management rights was reemphasized, as the following union proposals were deemed to be non-negotiable:

> (b) Critical elements shall only be elements which are in fact critical to the performance of the job.
>
> (d) Critical elements shall be mutually exclusive and explicitly defined. Critical elements shall not be defined or applied in a manner to be at cross purposes with each other.
>
> (f) The line between unacceptable and minimally acceptable performance shall be defined precisely and distinguished. [104]

The Court considered that such proposals, while not dictating "the precise content or contours of a critical element or performance standard, nevertheless restrict agency discretion by mandating some substantive criteria for the establishment of critical elements or performance standards." [105] These proposals would violate management rights in that they would allow an arbitrator to substitute his/her judgment for that of management in evaluating a standard, rather than merely providing for "the procedural review of management's application of its own critical elements." [106]

While the agency has the right to direct and assign work, it must, under 5 U.S.C.§ 7106 (b)(2), bargain on procedures to be observed in the development and implementation of performance standards and critical elements and, pursuant to § 7106 (b)(3), on appropriate arrangements for employees adversely affected by the application of performance standards to them.[107] In addition, proposals which apply to predicting performance concerning employees in career ladder positions do not violate management rights to assign work, since the criteria in such proposals serve only as a guideline for predicting employee performance at the higher grade level rather tha. as a standard of productivity for the current level.[108]

The procedures to be observed by the agency, pursuant to § 7106 (b)(2), are often spelled out in collective bargaining agreements, the Federal Personnel Manual, and the agency's own regulations. As such, an arbitrator could, pursuant to § 7106 (b), direct relief requiring the agency to comply with the procedures listed in any of the above sources.[109] As such, in Portsmouth Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO, [110] there was no improper interference with the right to assign work where the arbitrator rescinded a disciplinary transfer which was not for just cause, in accordance with the collective bargaining agreement.[111]

Nonetheless, as noted in the ninth circuit decision, National Treasury Employees Union v. Federal Labor Relations Authority, arbitrators are discouraged from scrutinizing the substance of a standard, which might lead to a substitution of

their judgment for that of management. Arbitrators have found most union grievances regarding performance standards to be non-arbitrable, unless there has been a contract violation,[112] such as by implementing standards in the middle of an appraisal period,[113] or by utilizing standards which were never written or communicated, as required by statute.[114] Employee claims that the established performance standard did not provide a fair, objective means of evaluation have generally been defeated, if the jobs were professional,requiring personal judgment and not subject to quantifying standards.[115] As to such positions, agencies are granted a certain degree of discretion, since it is often necessary to exercise subjective judgments.

A review, therefore, of the FLRA and arbitration decisions reemphasize the primacy of management rights in accordance with 5 U.S.C. § 7106 (a), with the limited exceptions of the agency being required to bargain as to the application of such standards, and the arbitrator reviewing such application, as well as ensuring that no contractual provision has been violated. [116]

Perhaps the best statement concerning the relationship between arbitral remedies and § 7106 is as follows:

> It can be said with certainty that a remedial order flatly prohibiting agency management from exercising any of the rights guaranteed by Section 7106 will be found deficient by the FLRA. At the other end of this spectrum, remedies merely requiring management to comply with contractual or regulatory provisions that mandate the procedures whereby that Section 7106 authority is to be exercised are

> likely (if not certain) to be sustained upon review.
>
> Therefore, the key to a proper remedy formulation would appear to be reliance by the arbitrator upon such regulatory or contractual procedures in the formulation of remedies. This, of course, assumes that the regulation or, more likely, the contractual provision relied upon does not constitute an absolute bar to management action...[117]

B. MSPB Decisions in Performance Standard Cases

In several cases, the MSPB has reviewed performance standards when an employee's failure to meet such standards has resulted in adverse action being taken. 5 U.S.C. § 4302(b)(1) requires that performance standards be formulated "which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria." Standards must also be reasonable, realistic, and clearly stated in writing. Although there is no requirement that quantitative criteria be established, the MSPB has focused on § 4302(b)(1) to analyze the standard vis-a-vis the employee in a stricter manner than the FLRA would provide for in negotiability issues. While some would contend that the MSPB is merely scrutinizing the fair application of the standards, it is asserted that the Board is doing much more.

1. Absolute Standards

Perhaps the bellweather MSPB decision regarding performance standards is Callaway v. Department of the Army,[118] which challenged an agency's promulgation of an absolute standard, in this instance, the fact that one established incident of discourtesy would result in unacceptable performance as to

that element. While Callaway noted that the statute does not forbid the establishment of an absolute standard, the use of such a standard must promote a statutory purpose. The main concern with absolute standards is that since they provide that one incident of poor performance will result in an unsatisfactory rating on a job element, they only provide a basis for taking adverse action against an employee and do not allow for evaluating and rewarding an employee who exceeds the performance standard.[119] As such, Callaway formulated the rule that while the establishment of absolute performance standards generally constitute an agency abuse of discretion, such standards would be appropriate in some positions where situations may develop that could result in death, injury, breach of security, or great monetary loss from a single failure to meet the performance standard.[120] The application of an absolute standard to "courtesy" clearly did not rise to the above cited test.

An additional significant factor in Callaway is that the Board placed the burden on the agency to show that its standards have met statutory requirements and do not constitute an abuse of discretion.[121] This modified the holding of Siegelman v. Department of Housing and Urban Development,[122] which determined that an action under § 4303 would be reversed if the agency has "abused its discretion so as to cause harm to the employee to whom the standards were applied." [123] As established by Callaway, the harmful error test is not applicable to the issue; harmful error is generally defined as one

"by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different from the one reached. The burden is on the appellant to show that based upon the record as a whole, the error was harmful, i.e., caused substantial harm or prejudice to his/her rights." [124] With this harmful error test no longer applicable, in accordance with Callaway, this burden shifting from appellant to agency constitutes an important factor in evaluating the substance and application of agency performance standards.

In more recent cases which challenged a standard as being absolute, the Board has usually looked at whether the agency abused its discretion in setting the standard. The nature of the employee's position has generally been considered, as well as whether it was possible for the appellant to have exceeded the standard with exemplary performance, a concern evident in the Callaway holding. In Denton v. Internal Revenue Service, [125] an absolute standard could not be justified when the position involved easily identifiable tasks and the duties were not necessarily subjective in nature. In Komara v. Veteran's Administration, [126] a standard requiring a medical technologist to accurately perform patient tests within the time frame established by the supervisor was deemed to be an improper absolute standard. The agency claim that some of the tests (STAT tests) were related to life-threatening situations did not bring that standard within the confines of the Callaway exception, since the original stan-

dard had applied to all tests; furthermore, the failure to perform even all STAT tests was not considered life-threatening or harmful to patients in this situation when it was determined that the time limits were designed to avoid inconvenience to the patients who were required to await the test results.[127] To come within the Callaway exception, "the agency must tailor the standard to apply only to situations where a single failure to meet the standard could result in death or injury, not merely to encompass such situations." [128]

Clearly, if there is a possibility of exceeding performance requirements, then an absolute standard will not result. In Fuller v. Department of the Treasury, Internal Revenue Service,[129] it was held that the standard regarding non-delivery of mail was not absolute, when it could be determined that the employee knew that a consistent failure to distribute all mail each day would constitute unacceptable performance, rather than the simple failure to deliver one piece of mail. More importantly, a grievant's challenge that a standard is absolute may very well fail in situations where it is difficult to precisely develop a standard. For example, in Stubblefield v. Department of Commerce, [130] an individual was demoted from his position as a Physical Scientist for the Oceanic/Atmospheric Administration, because of unsatisfactory ratings with respect to the following three critical elements:

> a. Submit a biannual report to the supervisor by March 15, 1984. Reports must be succinct, on time, and descriptive of high quality research as

adjudged by the supervisor.

b. A prepared research paper must be of sufficient quality to pass peer review and be approved for submission by the supervisor and Director by March 15, 1984.

c. Material must be submitted on time (without prior approval) and be of high quality so as to require few major revisions after review.[131]

While the presiding official felt that improper absolute standards had been established, the Board concurred with the agency's claim that the nature of the position was not susceptible to a mechanical rating system, thereby making it difficult to develop precise standards. In addition, the Board determined that the standards in this case were indeed objective, to the maximum extent feasible; that the standards could be exceeded; and that the standards were not negative in nature. Similarly, in Faust v. Smithsonian, [132] an individual was removed as a microbiologist for unacceptable performance in planning and conducting an agency's long term microbial research program for phytoplankton. The standard was not considered to be improperly absolute, since the nature of the job was not susceptible to strictly objective, numerical ratings. The performance standards were not unreasonable in including the judgment of trained fellow scientists in assessing performance; indeed, a subjective posture may be used "when a position involves research and judgment requiring the proficiency of a trained, scientific professional." [133]

As such, while Callaway provided for some scrutiny into whether a performance standard is improperly absolute, the

standard will generally survive if an appellant was able to exceed the published standard with superior performance, and the nature of the position was such as to make it difficult to develop criteria in a purely quantitative, mechanical, and objective fashion.

2. Objective to the Maximum Extent Feasible

Somewhat related to the Callaway issue of avoiding the setting of an absolute standard, the agency, in compliance with 5 U.S.C. § 4302 (b)(1), is tasked with ensuring that standards are objective, to the maximum extent feasible. This does not necessarily require that quantitative criteria be established as to each performance standard, since the nature of many positions may require subjective judgments by an employer or supervisor. In Shuman v. Department of the Treasury,[134] a revenue officer who failed to perform acceptably as to one of four critical elements was deemed to have performed unacceptably as a whole, thereby justifying removal, even though quantitative criteria had not been established. In this particular case, the agency had developed a nine-component performance standard in connection with an element entitled "Application of Collection and Investigative Skills." The Board noted that the standard in this instance was very complex, encompassing a wide range of duties. As such, it would not have been feasible to require the agency to state an exact number of errors which would warrant an unacceptable performance rating on the element.[135] Indeed, unacceptable performance may consist of a failure to

meet a performance standard for a single, critical element, so long as the agency presents substantial evidence that the performance warranted an unacceptable rating on the element as a whole.[136] It should also be noted that a performance standard (or a critical element) may be multiple in nature, and the employee may be required to perform acceptably as to each component of this standard.[137] Questions bearing on this issue might be whether the employee understood agency expectations and the consequences of the employee's failure to meet such expectations, as well as whether the appellant knew or should have known of the significance of the components at issue.[138] In Seay v. Department of Health and Human Services, [139] an individual was removed as a claims representative for failure to satisfy three critical elements of the position. It was determined that there was no per se requirement to establish quantitative criteria as to each performance standard, with standards based on such terms as "consistently" and "often" passing muster as generally encompassing a broad range of duties varying in complexity.[140] Indeed, the validity of performance standards is presumed, once the agency has shown that the standards are part of a valid performance system.

If quantitative criteria are established, however, the agency bears the burden of showing that the standard is reasonably attainable and realistic. The Board has scrutinized such standards rather carefully. In Rocheleau v. Securities and Exchange Commission, [141] an individual was removed from an examiner position for failure to perform 30 examinations of

investment advisors per year. The agency was considered to have abused its discretion because the numerical requirement was unreasonable. No individual in the office had ever conducted 30 exams in one year, nor did examiners nationwide have any quotas.[142] While the agency did attempt to show that other examiners around the nation had averaged 40 exams, such an average could not be related to the appellant's position in terms of time requirements or complexity of issues.[143] It should be noted, however, that the appellant's removal was considered to be justified because of the poor quality of his work.[144] Also, in Walker v. Department of the Treasury,[145] an individual was removed for unacceptable performance for failure to meet a numerical error rate requiring the screening, logging, and distribution of 400 to 700 pieces of correspondence per month with no more than 3 errors. While the appellant exceeded the error rate, it was determined that the standard was neither realistic nor reasonably attainable. A previous standard had been in effect providing for an error rate of no higher than 14% per month; the new standard, requiring 99.5% accuracy, violated employee rights by establishing a standard of near perfection which the employee would have to meet to avoid facing adverse action.[146]

A high employee error rate, however, can be shown to be unacceptable through substantial evidence. In Roberson v. Department of Health and Human Services,[147] a consistent employee error rate of 22% was regarded as unacceptable when it was determined that this error rate continued during a 60 day

warning period, with supervisor counseling every two to three weeks. The imprecise standard could not provide for appellant relief, given the agency actions taken to advise her of what was necessary to perform acceptably; the agency, again, is only required to use objective criteria, to the maximum extent feasible. Similarly, in Baker v. Defense Logistics Agency,[148] an imprecise standard reflecting the requirement of a Mechanic Foreman to plan, schedule, and manage work, as well as to ensure that work met acceptable levels of quality and quantity did not support the complainant's appeal when it could be shown that the agency augmented the imprecise standards by informing the employee of specific work requirements through such alternative methods as written instructions, memoranda, and agency responses to employee questions.

As such, it can be seen that objective criteria need not equate to a quantitative standard, though such standards, if utilized, must be realistic and reasonably attainable. In addition, agency methods of notification, particularly involving regular followups during counseling sessions, can augment an otherwise imprecise standard to eventually support an adverse action, assuming the employee has been given a reasonable time to improve. As noted in Shuman, the requirement of objectivity may generally be met by an agency with varying degrees of specificity and objectivity in its standards, depending on the complexity, significance, and innate subjectivity of the duties which are considered.[149]

3. Opportunity to Improve

The opportunity to improve is, of course, a critical employee right under Chapter 43.[150] In the important MSPB decision of Sandland v. General Services Administration,[151] it was determined that, in an unacceptable performance case, the agency had the burden of proof by substantial evidence to show that the employee had been afforded such an opportunity. Such a showing could be established by written memoranda of instruction/warning, as well as by training and counseling sessions. In Sandland, the agency failed to sustain its burden when it was established that during the sixty day improvement period, the appellant's supervisor informed other branch chiefs that the appellant would soon be removed from any managerial position. In addition, appellant's responsibilities were progressively diminished and his authority undermined.[152] On the other hand, in Pine v. Department of the Air Force,[153] an individual was demoted from a GS-7 Budget Analyst to a GS-5 Aircraft Mechanic Helper. The agency sustained its burden by substantial evidence when it showed that the appellant had been counseled several times before receiving a written notice of unsatisfactory performance. In addition, the appellant was referred to educational resource material which could aid his performance and was told he could seek additional assistance from his predecessor in the Budget Analyst position.[154]

4. Communication of Minimal Acceptability

In some instances, an agency may establish an appraisal

system of several tiers with respect to a standard of acceptable performance. While one of the tiers may be designated for a level of successful performance, an employee may sometimes avoid adverse action if his/her performance meets a level below this tier. Before the agency may take adverse action, it is generally necessary that the employee be advised of the standard which must be met in order to achieve a level of performance sufficient to warrant retention. A significant MSPB decision, Donaldson v. Department of Labor,[155] stated that some specificity as to the standard is necessary "to provide a firm benchmark toward which the employee must aim his/her performance, and not an elusive goal which the agency may find that the employee met or failed to meet at its pleasure." [156] In Donaldson, a claims examiner was improperly demoted when the agency failed to advise of at least the minimal requirements necessary for her to retain her position. Similarly, in Goodale v. Department of Labor,[157] an appellant was only advised of the standard she was being measured against at the successful level (approve and batch 40 bills each workday), rather than of the exact figure necessary for minimally acceptable performance. The failure to properly advise the appellant amounted to a lack of a basis to measure her performance, thereby rendering the standard invalid. The same result attached in Rogers v. Department of Labor [158] in which an individual was, again, not advised of what was required to attain a minimally satisfactory or "needs improvement" rating. Since the employee's performance only had

to rise to such a level to warrant retention and since there was no reason that the agency could not have been more specific based on the nature of the performance, as measured by the standard, the agency failed to meet the requirements of accuracy and objectivity.

As such, it is easy to consider that the requirement of objectivity provides that an agency advise the employee of the minimum level of performance necessary to retain employment when the standard provides for a multi-tiered system. Such communication to the employee may occur in the performance improvement plan or through counseling or written instructions designed to advise the employee of the standards against which (s)he is to be measured.[159] Communication of the nature of the standard is consistent with the statutory language of 5 U.S.C. § 4302 and is not a particularly difficult chore for the agency to undertake.

C. Federal Decisions

The Board's willingness to scrutinize the substance of a performance standard to determine whether it is improperly absolute, or whether the agency has complied with 5 U.S.C.§ 4302 in developing an objective standard and communicating the standard and critical elements to the employee, has been well documented. There has not yet been such a wealth of federal decisions in this area, although a series of recent cases may signal more of a movement in this respect.

Perhaps the most notable recent decision in this area is Wilson v. Department of Health and Human Services.[160] In this

decision, the Federal Circuit Court reviewed in some detail the function of the Civil Service Reform Act in providing for the new performance appraisal system. In reviewing MSPB decisions covering performance standards, the court discussed the objectivity requirement, noting that:

> under the statute's objectivity requirement, performance standards must be reasonable, sufficient in the circumstances to permit accurate measurements of the employee's performance, and adequate to inform the employee of what is necessary to achieve a satisfactory or acceptable rating. If the performance standards satisfy this test, then they further the congressional purpose. Employees will be spared arbitrary ratings and adverse personnel actions grounded purely on subjective impressions. Supervisors will feel freer to propose personnel actions against unsatisfactory employees - based on such objective standards - confident that they have made a verifiable decision, and the employee will not be retained because the evaluation process itself was arbitrary, or because the agency is reluctant to defend inevitable and protracted appeals.[161]

Such a discussion clearly reflects the basis for developing and implementing standards, and the balancing considerations which are taken into account.

In Wilson, adverse action was taken against an individual serving as a social insurance representative for failure to attain a minimally acceptable performance level in the following standard:

> Coordinates, controls, and directs activities of subordinate staff to insure adequate service to the public by appropriate management principles. Assignments and instructions to staff are hastily made and sometimes misunderstood. Direction of work is occasionally effective in achieving objectives. [162]

The court determined that the standard was much too vague with respect to the phrases "sometimes misunderstood", "hastily made", and "occasionally effective", allowing an employee to "insure adequate service to the public." These phrases were so imprecise as to encourage the arbitrary action that the Civil Service Reform Act intended to avoid. Wilson would not really be on notice as to what was expected of her, apart from the appraiser's own subjective evaluation.[163] The court, in formulating a test regarding performance standards, held that a standard should be "sufficiently precise and specific as to invoke a general consensus as to its meaning and content" - that is, that most people will understand what the performance standard means and what it requires.[164]

In the companion case to Wilson, Jackson v. Environmental Protection Agency,[165] an environmental scientist responsible for reporting on seminars and meetings of permittees and licensees of both the EPA and similar state and local agencies challenged a standard requiring that reports be made in a timely manner, address all relevant issues, and require minimum revisions, arguing that said standard was not sufficiently objective and precise. Consistent with previous MSPB decisions in this area, the court noted that the nature of Jackson's job as a professional required some subjective judgment on the part of his evaluators; in addition, he had been instructed as to how he could achieve a better rating.[166] Given these factors, the agency was able to take appropriate action.

The Wilson and Jackson cases were relied on in two decisions dated 30 January 1986, Weirauch v. Department of the Army[167] and Depauw v. U.S. International Trade Commission.[168] In Weirauch, the court determined that a Morale Support Officer, responsible for the operation of support shops and recreational facilities in Aschaffenburg, Germany, was properly advised as to the performance standards and critical elements he was required to meet, and that he was not removed for any instances of poor performance prior to being advised of the standard. Interestingly enough, the court stressed that standards cannot be frozen in time and permanently endorsed, but instead must be constantly reviewed as experience in developing them is gained and evaluation techniques are improved.[169] In Depauw, an individual working as a commodity-industry analyst challenged the objectivity and propriety of a standard stating:

> Usually identifies and anticipates problems and takes corrective action; usually meets requirements for questionnaire construction and data collection to support project; meets all statutory deadlines and usually meets other deadlines; reports are substantially complete with few errors and require few extensive changes due to omissions or lack of analysis.[170]

Such a standard was deemed to be minimally acceptable, utilizing the Jackson (supra, p.50) criteria in which work governing a professional employee will often require a subjective evaluation. In addition, Depauw was well advised by his superiors of what was expected of him in attaining an acceptable level of performance.[171] The standard, therefore, was consistent with the statute.

An additional federal case concerns the previously noted MSPB decision in Baker v. Defense Logistics Agency [172] (supra, p. 45). In this case, the Federal Circuit Court sustained the Board's decision that an agency had established performance standards based on objective criteria, to the maximum extent feasible. The standards had reflected that the employee must be "normally familiar with most of the on-going work of the organization" and must "in most cases assure that the work was completed on time." In addition, the employee was required to meet a standard stating that "the work unit usually meets deadlines and the quality of work is usually acceptable." [173] The presiding official in this case had attempted to rigidly quantify the terms "most" and "usually" in finding that the employee, in a bare majority of cases, met performance standards for the minimally acceptable level of performance. The court, in sustaining the Board's reversal of the presiding official's determination, found such rigidity inappropriate, particularly when it was shown that the agency had made otherwise imprecise standards more specific through instructions and memoranda. The court noted that a very rigid approach in such instances could allow for the retention of employees who do not otherwise meet a minimally acceptable level of performance.[174]

One further recent federal decision in this area, citing Wilson with approval, is Adkins v. Department of Housing and Urban Development. [175] In this case, an individual had failed to attain a satisfactory level of performance with regard to

the subelement of "typing output", although he performed acceptably as to the four other subelements of the critical "typing" element (the other four subelements being typing priorities are followed; typing is accurate; typing product is neat and clean; and supervisor is promptly notified when requirements cannot be met).[176] The Board had affirmed his removal for unacceptable performance pursuant to Chapter 43. The court also affirmed the removal, applying the Shuman (supra, p. 42) holding that when a "performance standard for a critical element consists of more than one subelement, an employee may be required to perform acceptably with respect to each subelement or subelements of the performance standard for a critical element." [177] In this instance, substantial evidence was presented justifying an unacceptable rating on the critical element as a whole because the appellant, Adkins, had been advised by memoranda of the significance and dominance of the "typing output" subelement (indeed, his output requirement had been lowered from two pages an hour to one page an hour, partially to accommodate his handicap of epilepsy) and his deficiency in this area was not counterbalanced by acceptable performance in the other subelements of the critical "typing element." [178]

As such, the federal circuit court cases, similar to the MSPB, reflect a willingness to scrutinize the performance standard, while still providing the agency with the opportunity to show that the employee's performance has been unacceptable. The agency's case will, of course, only be effec-

tive if the standard passes the Wilson "general consensus" test (supra, p. 50) and if the procedural requirements as to communication of minimal acceptability and opportunity to improve are afforded.

As noted, such federal cases, in evaluating performance standards, augment analyses developed in MSPB decisions over the past several years. Before leaving this area, it is appropriate to discuss one of the more recent MSPB cases, Alexander v. Department of Commerce,[179] which deals with performance standards and incorporates many of the previously discussed factors. In Alexander, an individual was demoted from a GS-9 Employee Relations Specialist to a GS-4 Patent Copy Inspection Clerk because of unacceptable performance in four critical elements of his position. He challenged the following portion of a supplemental written performance standard:

> Satisfactory: No more than two valid problems are noted in: oral or written responses concerning regulations, union contract or policy; or complaints concerning slow response time; or failure to assimilate and/or transmit supervisory policy guidance.[180]

Utilizing the above-cited Wilson test, the Board noted that the standard was sufficiently precise in that most people would realize from reading the standard that the agency is referring to substantive problems of accuracy, timeliness, and gathering and transmitting information.[181] The appellant's position required some subjective judgment by employers as it was not clerical in nature and subject to a numerical

measurement; instead, the job required the "judicious use of thought processes and the ability to make decisions; awareness of regulations, administrative orders, the Federal Personnel Manual, statutes, administrative instructions and union contracts; and the ability to apply this guidance to various questions." [182] Furthermore, the appellant had been advised as to what was required of him by written memoranda and was given an opportunity to improve before adverse action was taken. Finally, the claimant argued that the standard was absolute because it allowed for only two valid problems at the satisfactory level. The Board dismissed this argument, citing the Callaway holding that an absolute standard would provide that one incident of poor performance would result in an unsatisfactory rating on a job element.[183]

Alexander aptly embraces the factors relating to performance standards which have generated disputes between the agency and employee - that is, absoluteness, objectivity, specificity, attainability, and reasonableness. In so doing, the Board cites the key Board decisions which have addressed these factors in the past, as well as the critical Wilson decision which will most likely be relied on in the future, by both the Board and the Federal Circuit Court.

D. Performance Standard Conclusions

As previously set forth, two important questions might be considered, given the recent decisions on performance standards. The first question concerns whether more grievants will seek MSPB review rather than arbitration in adverse ac-

tion cases because of the Board's willingness to examine the substance of a performance standard and an arbitrator's perceived wariness to do so because of the previously noted constraints applied by the FLRA in negotiability cases (with such wariness conceivably being transferred to the arbitrator's treatment of an adverse action case). It is considered that in the past, most employees have sought arbitration because of a perception that the individual arbitrator, in interpreting the contract, might be more sympathetic to the individual employee's concerns. It is suggested, however, that the combination of Board decisions and federal cases, reflecting more of a willingness to become involved in the substance of a standard, may result in an increase of employees who seek MSPB review. The route chosen, however, might be somewhat less significant given the Wilson, Depauw, Weirauch, and Adkins decisions since federal review is available as to either the MSPB or arbitration vehicles; if the standard does not meet the Wilson criteria, specifically the "general consensus" test, adverse action may very well be overturned. Furthermore, the arbitral remedy will most likely be sustained if the arbitrator, as required, has considered appropriate federal law, regulations, and contractual provisions in rendering his award.

Secondly, it is possible that agencies may elect to proceed with adverse actions under an efficiency of the service basis, pursuant to Chapter 75, given increased federal court and MSPB scrutiny of performance standards under Chapter 43. Lovshin

v. Department of the Navy certainly gives the agency that option, albeit with the necessity of sustaining, in theory, a higher burden of proof. The agency, however, must make the decision a priori, rather than have the Board or courts reconsider a Chapter 75 option if Chapter 43 action fails.[184] Each Chapter has different procedures to follow, and the agency would be well advised to have its priorities well established before deciding which avenue to pursue.

VI. CONCLUSION

As can be seen, agency discretion has been generally broadened in taking adverse action. The agency may choose to proceed under Chapter 43 or Chapter 75, and, in security clearance matters, will have almost complete discretion if due process concerns are adhered to. Performance standards remain a dynamic and flexible area. The agency must ensure that the standard is validly established and communicated, and be prepared to defend a larger number of claims relating to objectivity and attainability, particularly given the increase of Board and court decisions in this area. Yet the performance appraisal system remains evolutionary in nature, and, with increased agency experience in developing and applying standards, valid grievances may possibly decline. During this evolutionary period, the Board and Federal Circuit Court, in interpreting the Civil Service Reform Act, have established some fairly firm guideposts for both the agency and employee to follow, albeit the Lovshin decision should remain open to criticism for its failure to defer to the Board

expertise expressed in Gende v. Department of Justice, Bureau of Prisons. In any event, it is considered that in most all personnel matters, the increased agency discretion sought to be attained through the Civil Service Reform Act will have been achieved, with, of course, the attendant concern for basic employee due process rights.

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FOOTNOTES

1. Civil Service Reform Act of 1978, Pub. L. No. 95-454, October 13, 1978 codified in Title 5 of U.S. Code (95th Congress).

2. Feigenbaum, The Relationship Between Arbitration and Administrative Procedures in the Discipline and Discharge of Federal Employees, 34 Lab. L.J. 586 (1983).

3. Adverse action includes removal, suspensions for more than 14 days, reductions in grade, reductions in pay, and furloughs for 30 days or less, 5 U.S.C. § 7512 (1978). In addition to adverse action cases, the employee may elect the negotiated grievance or statutory appeals procedures in cases of removals or demotions for unacceptable performance related to 5 U.S.C. § 4303 (1978).

4. 5 U.S.C. § 7121(e)(1)(1978); F. Elkouri and E.A. Elkouri, How Arbitration Works, at 54 (4th ed. 1985); see also Comment, Federal Sector Arbitration under the Civil Service Reform Act of 1978, 17 San Diego L. Rev. 857 (1980). The Civil Service Reform Act established the Merit Systems Protection Board to decide employee appeals which had previously been within the role of the Civil Service Commission.

5. 5 U.S.C. § 7121(e)(2), § 7701(c)(1)(1978); see also Cornelius v. Nutt, 105 S. Ct. 2882 (1985).

6. 5 U.S.C. § 7122(a)(1978). The Federal Labor Relations Authority has cognizance over federal labor relations matters, as detailed in 5 U.S.C. § 7105 (1978). It exists as an independent agency within the executive branch and is authorized to decide representation and unfair labor practice cases, negotiability disputes, and appeals from arbitration awards, 5 U.S.C. § 7105(a)(2)(D-H); see also Comment, 17 San Diego L. Rev., supra note 4, at 859.

7. 5 U.S.C. §§ 7121(e),(f), 7703(b)(1)(1978); see also Elkouri and Elkouri, supra note 4, at 55.

8. 5 U.S.C. § 7122(a)(1),(2)(1978).

9. Comment, 17 San Diego L. Rev., supra note 4, at 869.

10. As required by 5 U.S.C. § 4302(b)(1)(1978).

11. 767 F.2d 826 (Fed.Cir. 1985)(en banc)

12. 28 M.S.P.R. 509 (1985).

13. 5 U.S.C. § 4302(a)(1978); Feigenbaum, supra note 2, at 588.

14. 5 U.S.C. § 4302(b)(2)(1978).

15. 5 U.S.C. § 4302(b)(3),(5)(1978).

16. 5 U.S.C. § 4301(3)(1978).

17. Feigenbaum, supra note 2, at 588.

18. 5 C.F.R. § 430.202(d) and (e) (1986); see also National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 F.L.R.A. No. 119, 3 F.L.R.A. 769 (1980)(hereinafter cited as Bureau of the Public Debt).

19. 5 U.S.C. § 7701(c)(1)(A)(1978).

20. 5 C.F.R. § 1201.56(c)(1)(1986).

21. Feigenbaum, supra note 2, at 589.

22. 5 U.S.C. § 4303; see also Lovshin v. Department of the Navy, 767 F.2d at 846 (Fed. Cir. 1985)(en banc).

23. 5 U.S.C. § 7513(a)(1978).

24. Feigenbaum, supra note 2, at 591.

25. FPM, Chapter 752, subchapter 2, section 2-2(1), subchapter 3, section 3-2a(1)(a), December 31, 1980; see also Feigenbaum, supra note 2, at 591.

26. Douglas v. Veteran's Administration, 5 M.S.P.R. 280,305 (1981).

27. 5 U.S.C. § 7513(b),(c) (1978).

28. 5 C.F.R. § 1201.56 (c)(2)(1986); see also Feigenbaum, supra note 2, at 589.

29. Feigenbaum, supra note 2, at 589.

30. 5 U.S.C. § 7532 (c)(3)(A-E)(1966).

31. Bureau of the Public Debt, 3 F.L.R.A. No. 119, 3 F.L.R.A. 769 (1980).

32. Feigenbaum, supra note 2, at 592.

33. Bureau of the Public Debt, 3 F.L.R.A. No. 119, 3 F.L.R.A. 769 (1980); see also American Federation of Government Employees Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, 7 F.L.R.A. No. 34, 7 F.L.R.A. 217 (1981).

34. 5 U.S.C. § 7122(a)(1978); see also Feigenbaum, supra note 2 at 592.

35. 1 M.S.P.R. 208 (1979).

36. Id. at 249.

37. 5 U.S.C. § 7512 (5)(D) (1978).

38. Wells, 1 M.S.P.R. at 249.

39. 23 M.S.P.R. 604 (1984).

40. Id. at 610.

41. The expression of one thing excludes another; id. at 613.

42. Id. at 615.

43. Id. at 615, 616.

44. Id. at 616, 617.

45. Id. at 618 n. 18.

46. 767 F.2d 826 (Fed. Cir. 1985)(en banc)

47. Id. at 840.

48. Id. at 841, 842, 843.

49. See also Schwartz v. Department of Transportation, 714 F. 2d 1581, 1583 n. 5 (Fed. Cir. 1983).

50. 230 Ct. Cl. 799 (1982).

51. 705 F.2d 1309, rehearing denied 712 F. 2d 1419 (11th Cir. 1983).

52. 769 F. 2d 1558 (Fed. Cir. 1985).

53. Id.at 1567; see also Lovshin, 767 F. 2d at 834.

54. 770 F. 2d 1048 (Fed. Cir. 1985).

55. Id. at 1054, 1055.

56. Id. at 1055

57. 780 F. 2d 33 (Fed. Cir. 1985).

58. Id. at 34.

59. Id. at 35.

60. Id. at 36.

61. 28 M.S.P.R. 509 (1985).

62. 677 F.2d 131 (D.C. Cir. 1982).

63. 16 M.S.P.R. 653 (1983).

64. Egan, 28 M.S.P.R. at 519,520.

65. DOD Directive 5200.2, "Department of Defense Personnel Security Program", December 20, 1979,at § c.1, 32 C.F.R. § 156.3(a).

66. Egan, 28 M.S.P.R. at 516.

67. Orloff v. Willoughby, 345 U.S. 83 (1953).

68. Mindes v. Seaman, 453 F.2d 197 (5th Cir., 1971).

69. Buriani v. Department of the Air Force, 777 F.2d 674 (Fed. Cir. 1985).

70. Zimmerman v. Department of the Army, 755 F.2d 156 (Fed. Cir. 1985).

71. Egan, 28 M.S.P.R. at 516.

72. 767 F.2d 265 (Fed. Cir. 1985).

73. Manning v. Merit Systems Protection Board, 747 F.2d 1424 (Fed. Cir. 1984).

74. Rosano v. Department of the Navy, 699 F.2d 1315 (Fed. Cir. 1983).

75. Crofoot v. U.S. Government Printing Office, 21 M.S.P.R. 248 (1984), rev'd on other grounds, 761 F. 2d 661 (Fed. Cir. 1985).

76. McGean v. National Labor Relations Board, 15 M.S.P.R. 49 (1983).

77. 9 M.S.P.R. 305 (1981), aff'd 694 F.2d 281 (D.C. Cir. 1982).

78. Egan, 28 M.S.P.R. at 518.

79. Hoska v. Department of the Army, 677 F.2d at 138, 139 (D.C. Cir. 1982); see also Egan, 28 M.S.P.R. at 515,516.

80. Egan, 28 M.S.P.R. at 516.

81. 6 M.S.P.R. 555 (1981).

82. 351 U.S. 536 (1956).

83. Id. at 544; see also Egan, 28 M.S.P.R. at 521.

84. Schaffer v. Department of the Air Force, 9 M.S.P.R. at 310.

85. Gallagher, Defense of Adverse Actions Against Federal Civilian Employees Occasioned by the Revocation of a Security Clearance, The Army Lawyer, DA Pam. 27-50-126, June 1983 at 25.

86. Id. at 25.

87. Id. at 25.

88. Id. at 25.

89. 5 U.S.C. § 7701(c)(2)(c)(1978; Egan, 28 M.S.P.R. at 521.

90. Indeed, on 21 February 1986, this writer discussed the application of the Egan case with Mr. Ben Jones, Naval Civilian Personnel Command, Washington, D.C. Mr. Jones, a labor relations attorney, advised that a series of arbitration hearings had been scheduled at Mare Island, Vallego, California concerning adverse action taken against employees for loss of security clearances. Following the Egan decision, the Mare Island cases were settled favorably for the government without the requirement of an arbitration hearing. Of course, the arbitrator would have been required to utilize the same criteria as the M.S.P.B. in cases of this nature, see 5 U.S.C. § 7121(e)(1978).

91. 5 U.S.C. § 7103(a)(9)(A),(C)(1978).

92. 5 U.S.C. § 7121(e)(1)(1978).

93. Feigenbaum, supra note 2, at 592.

94. 5 U.S.C. § 7122(a)(1978).

95. Feigenbaum, supra note 2, at 592.

96. Id. at 592.

97. 3 F.L.R.A. No. 119, 3 F.L.R.A. 769 (1981), aff'd sub nom National Treasury Employees Union v. F.L.R.A., 691 F.2d 553 (D.C. Cir. 1982).

98. National Treasury Employees Union v. F.L.R.A. at 563, 64.

99. 11 F.L.R.A. No. 58, 11 F.L.R.A. 271 (1983).

100. American Federation of Government Employees, AFL-CIO, Local 1968 and Department of Transportation, Saint Lawrence Development Corporation, Massena, N.Y., 5 F.L.R.A. No. 14, 5 F.L.R.A. 70 (1981), aff'd sub nom American Federation of Government Employees, Local 1968 v. F.L.R.A., 691 F.2d 565 (D.C. Cir. 1982), cert. denied 103 S. Ct. 2085 (1983); see also AFL-CIO, Local 3483 and Federal Home Loan Bank Board N.Y. District Office, 13 F.L.R.A. No. 80, 13 F.L.R.A. 446 (1983).

101. 14 F.L.R.A. No. 77, 14 F.L.R.A. 463 (1984).

102. 15 F.L.R.A. No. 147, 15 F.L.R.A. 781 (1984).

103. 767 F. 2d 1315 (9th Cir. 1985).

104. Id. at 1316, n. 2.

105. Id. at 1317.

106. Id. at 1318. An arbitrator may generally review management's application regarding its standards and critical elements, see American Federation of Government Employees, AFL-CIO Local 32, and Office of Personnel Management, Washington, D.C., 3 F.L.R.A. No. 120, 3 F.L.R.A. 783 (1980).

107. Bureau of the Public Debt, 3 F.L.R.A. at 770 (1980).

108. NTEU, Chapter 72 and IRS, Austin Service Center, 11 F.L.R.A. No. 58, 11 F.L.R.A. 271 (1983).

109. Hayford, The Impact of Law and Regulation upon the Remedial Authority of Labor Arbitrators in the Federal Sector, 37 Arb. J. 28, 34 (1982).

110. 5 F.L.R.A. No. 28, 5 F.L.R.A. 230 (1981).

111. Hayford, supra note 109, at 34.

112. Department of Health and Human Services, SSA, Clayton, Mo., and AFGE,Local 2916, Arb. Smith, Kirby J., 83 F.L.R.R. 2-1586 (1983).

113. Department of Health and Human Services, SSA, Fort Lauderdale, Florida, and AFGE, Arb. Manson, John C., 85 F.L.R.R. 2-1053 (1984).

114. Department of Justice, Federal Correction Institution, Morgantown, West Virginia and AFGE, Local 2441, Arb. Felice, John M., 81 F.L.R.R. 2-1628 (1981).

115. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Md., and AFGE, Local 1923, Arb. Bernhardt, Herbert M., 85 F.L.R.R. 2-1219 (1984).

116. In a somewhat related instance, reflecting the importance of the F.L.R.A. in federal labor relations matters, it has been held that the F.L.R.A., rather than the District Court, had exclusive jurisdiction in a matter in which an agency administrator had failed to implement an arbitrator's award of a wage increase, see Columbia Power Trades v. United States Department of Energy, 671 F.2d 325 (9th Cir. 1982).

117. Hayford, supra note 109,at 34, 35.

118. 23 M.S.P.R. 592 (1984).

119. Id. at 598, 599.

120. Id. at 599. Note also that Gonde v. Department of Justice, Bureau of Prisons, 23 M.S.P.R. 604 (1984) provided for the processing of a performance based adverse action under Chapter 75 pursuant to the same limited guidelines.

121. Callaway, 23 M.S.P.R. at 597, n. 6; Shuman v. Department of the Treasury, 23 M.S.P.R. 620, 626 (1984); see also Benton v. Department of Labor, 25 M.S.P.R. at 434 (1985).

122. 13 M.S.P.B. 27 (1983).

123. Id. at 29.

124. 5 C.F.R. § 1201.56(c)(3)(1986); Feigenbaum, supra note 2 at 589.

125. 29 M.S.P.R. 49 (1985).

126. 28 M.S.P.R. 239 (1985).

127. Id. at 242.

128. Id. at 242.

129. 28 M.S.P.R. 354 (1985).

130. 28 M.S.P.R. 572 (1985).

131. Id. at 574, 575.

132. 29 M.S.P.R. 496 (1985).

133. Id. at 498.

134. 23 M.S.P.R. 620 (1984).

135. Id. at 624-626.

136. Id. at 627; see also Hazzard v. Department of the Navy, 24 M.S.P.R. 593,596 (1984).

137. Shuman, 23 M.S.P.R. at 628.

138. Id. at 628-629.

139. 24 M.S.P.R. 688 (1984).

140. Id. at 691.

141. 29 M.S.P.R. 193 (1985).

142. Id. at 195.

143. Id. at 196.

144. Id. at 197.

145. 28 M.S.P.R. 227 (1985).

146. Id. at 229.

147. 29 M.S.P.R. 201 (1985).

148. 25 M.S.P.R. 614 (1985).

149. Shuman, 23 M.S.P.R. at 620, 626.

150. Chapter 43, Section 4302 (b)(1)(6)(1978); note the procedural requirements of § 4303.

151. 23 M.S.P.R. 583 (1984).

152. Id. at 591.

153. 28 M.S.P.R. 453 (1985).

154. Id. at 455.

155. 27 M.S.P.R. 293 (1985).

156. Id. at 298.

157. 28 M.S.P.R. 158 (1985).

158. 28 M.S.P.R. 153 (1985).

159. Donaldson, 27 M.S.P.R. at 298.

160. 770 F.2d 1048 (Fed. Cir. 1985).

161. Id. at 1052.

162. Id. at 1053.

163. Id. at 1054.

164. Id. at 1052, 1055.

165. 770 F.2d 1048 (Fed. Cir. 1985).

166. Id. at 1056.

167. 782 F.2d 1560 (Fed. Cir. 1986).

168. 782 F.2d 1564 (Fed. Cir. 1986).

169. Weirauch, 782 F.2d at 1564.

170. Depauw, 782 F.2d at 1566.

171. Id. at 1566.

172. 782 F.2d 1579 (Fed. Cir. 1986).

173. Id. at 1581.

174. Id. at 1583.

175. 781 F.2d 891 (Fed. Cir. 1986).

176. Id. at 893.

177. Id. at 895; Shuman v. Department of the Treasury, 23 M.S.P.R. at 620, 626-28 (1984).

178. Adkins v. Department of Housing and Urban Development, 781 F.2d at 895 (Fed. Cir. 1986).

179. MSPB Docket No. DC04328510399 of 10 March 1986.

180. Id. at 3.

181. Id. at 4.

182. Id. at 5.

183. Id. at 5.

184. Wilson v. Department of Health and Human Services, 770 F.2d at 1055 (Fed. Cir. 1985).

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