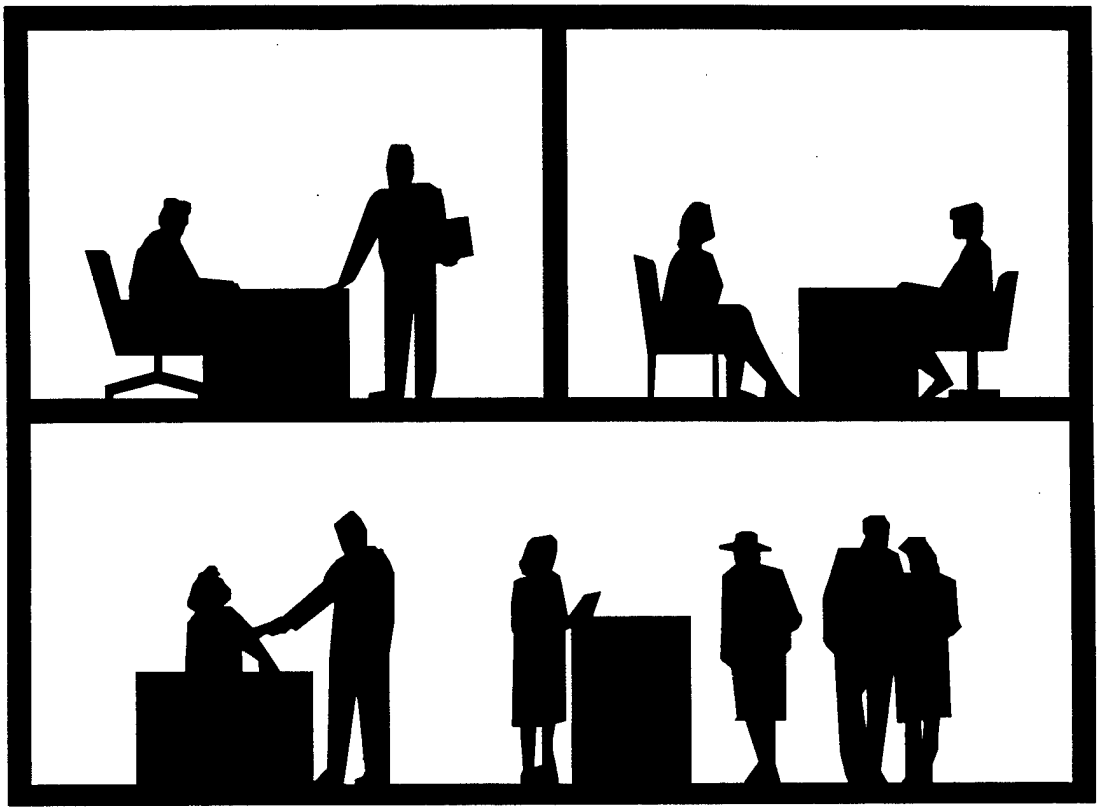
LAW OF
Federal Employment



Administrative and Civil Law Department
The Judge Advocate General's School
United States Army
Charlottesville, Virginia

JA 210

July 1998

DEPARTMENT OF THE ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
CHARLOTTESVILLE, VIRGINIA 22903-1781

REPLY TO
ATTENTION OF

JAGS-ADL-P

3 August 1998

MEMORANDUM FOR Defense Technical Information Center, ATTN: Ms. Anh Nguyen, 8725 Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218

SUBJECT: Request for Inclusion/Deletion of Publications

1. Please add the enclosed publications to the Defense Technical Information Center (DTIC) Database:

The Uniformed Services Employment and Reemployment Rights Act (USAERRA) Guide, Volume I, JA 270, June 1998, 219 pages

The Uniformed Services Employment and Reemployment Rights Act (USAERRA) Guide, Volume II, JA 270, June 1998, 223 pages

The Law of Federal Employment, JA 210, July 1998, 226 pages

2. Please delete the following publication from the DTIC database:

The Law of Federal Employment, JA 210-97, 290 pages

3. Enclosed are the SF 298, Report Documentation Page and DTIC Form 50, DTIC Accession Notice, for the publication. Please direct any questions to the undersigned at (804) 972-6396 or e-mail stroncj@hqda.army.mil.

3 Encls

Charles J. Strong
DOD, GS7
Editorial Assistant

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CASES AND MATERIALS ON THE LAW OF FEDERAL EMPLOYMENT

PREFACE

This student text is a compilation of statutes, regulations, cases and other materials on The Law of Federal Employment. It is designed to provide primary source materials for students in the Graduate Course and other Continuing Legal Education courses in Administrative and Civil Law.

The casebook contains nine chapters organized around major topics in the field of civilian personnel law. The first chapter reviews the legal authorities in the federal civil service area. Chapter 2 reviews the organization and structure of the federal civil service. Chapter 3 outlines the agency grievance system. Chapter 4 addresses the procedural and substantive issues involved in federal employee discipline. Chapter 5 reviews the civilian employee performance appraisal system and performance based personnel actions. Chapter 6 is a review of reduction in force procedures. Chapter 7 summarizes the rules for practice before the Merit Systems Protection Board. Chapter 8 surveys the extent of judicial review of federal personnel actions. The last chapter addresses equal employment opportunity in the federal sector, with emphasis on the complaint process.

Each of these chapters includes materials that highlight principal statutory and regulatory guidance in a particular area. The cases provide interpretations of these provisions and also illustrate those situations in which the law is not yet settled. This book is intended to provide a basic understanding of federal civilian personnel law and to serve as a basic reference for civilian personnel problems.

This casebook does not purport to promulgate Department of Army policy or to be in any sense directory. The organization and development of legal materials is the work product of the members of The Judge Advocate General's School faculty and does not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he," "him," and "his" when used in this publication represent both the masculine and the feminine genders unless otherwise specifically stated.

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LAW OF FEDERAL EMPLOYMENT

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CHAPTER 1

INTRODUCTION AND LEGAL FRAMEWORK

1-1. General.

The Army civilian workforce's importance has increased greatly during the past ten years as the size of the active uniformed Army has decreased. Despite hiring restrictions and strength reductions, the Army still employs nearly three hundred thousand appropriated fund civilian employees. Over one-third of the Department of Defense workforce is civilian employees. These employees do not have the same relationship to their employer that soldiers have to their superiors. A civilian employee, for example, generally is not subject to the Uniform Code of Military Justice and may leave Federal employment at anytime. The civilian employee may also be represented by a labor union. This book is a survey of the law relating to civilian employees.

The number of labor unions representing Federal employees has increased significantly in recent years. This increase heightens the need for judge advocates to be well-versed in civilian personnel law to provide essential legal advice on complex civilian personnel matters and labor-management problems. In response to this need for legal advice and expertise, The Army Judge Advocate General initiated the Labor Counselor Program in July 1974. Under this program, Army lawyers (military or civilian) are designated at Army installations worldwide to provide legal advice and assistance to military and civilian managers. Labor Counselors are expected to be knowledgeable in policies and procedures applicable to Federal civilian employee personnel actions and to assist the command in promoting healthy labor-management relations. Labor Counselor duties include participating in labor contract negotiations, arbitration sessions, and unfair labor practice proceedings; representing the command in adverse action proceedings and other hearings before the Merit Systems Protection Board; and assisting the command in resolving equal employment opportunity complaints locally and before administrative judges of the Equal Employment Opportunity Commission. The Labor Counselor's active participation in these varied activities has increased since the Program was initiated, and The Judge Advocate General reemphasized the value of the program in 1977, 1982, and again in 1985 in TJAG Policy Letter 85-3. Labor Counselor functions have been formally recognized in Army Regulations 27-1, 27-40, 690-600, and 690-700, Chapter 771.

Civilian Personnel Law can be divided into two principal areas. The first area, which concerns the statutes and regulations governing management of Federal employees and personnel actions in general, can be subsumed under the label, "Law of Federal Employment." which is the subject of this text. The second deals with the role of employee organizations (i.e., unions) in the Federal workforce and can be referred to as "Federal Labor-Management Relations." This subject is covered in another text, JA 211. These areas though are interrelated. A judge advocate cannot advise management

representatives at a bargaining session without first becoming familiar with civilian personnel law generally. A disciplinary action against an employee, inversely, may be challenged through a grievance under a collective bargaining agreement. It is therefore important to understand both areas when advising managers concerning civilian employees.

Current civil service law sets rigorous standards for agencies to follow and establishes three separate agencies to oversee management of the Federal workforce. The Army must follow the policies and procedures established by statute and these agencies' regulations. The law provides for checks on how well the Army follows these procedures -- through appeals by employees, review of certain programs and regulations, and independent investigation of agency actions. The Army may issue supplemental regulations addressing personnel policies only if they comply with the rules and guidelines established by these agencies.

In 1883 Congress enacted the Pendleton Act to reform the Federal civil service system. Under this law, authority for overseeing Federal civilian employment was vested in one executive agency -- the United States Civil Service Commission. For almost a century, the Civil Service Commission, a bipartisan three member commission set policy and established procedures used by all executive agencies. On January 1, 1979, however, the Civil Service Reform Act of 1978 became law and the Civil Service Commission was replaced by two new agencies: (1) the Office of Personnel Management (OPM), and (2) the Merit Systems Protection Board (MSPB). Each of these agencies took over a portion of the Civil Service Commission's responsibility. OPM, composed of a Director, a Deputy Director, and five Associate Directors, assumed the responsibility for promulgating regulations governing personnel matters throughout the Federal Government and for assisting the President in overseeing the Federal workforce generally. The Director, who is appointed by the President with the advice and consent of the Senate for a four-year term, implements Administration policy by promulgating policy and establishing procedures applicable to Federal employee matters.

The other agency, the MSPB, assumed the appellate functions of the former Civil Service Commission. The MSPB is a three-member bipartisan body whose members are appointed by the President for nonrenewable seven-year terms. The members do not serve at the pleasure of the President, but, rather, can only be removed from office for inefficiency, neglect of duty, or malfeasance in office. The principal function of the MSPB is to hear and adjudicate employee appeals. It is also responsible for conducting special studies of the civil service system from time to time and for reviewing the rules and regulations promulgated by OPM. The MSPB is divided into five regional offices and five field offices that hear appeals within their jurisdiction, although overall rules of practice before the board are standardized and quasi-judicial in nature.

On April 10, 1989, President Bush signed the Whistleblower Protection Act of 1989. Under the provisions of this Act, the Office of Special Counsel was removed from the MSPB and established as an independent agency. The President appoints the Special

Counsel with the advice and consent of the Senate for a five-year term. The Special Counsel is charged with receiving and investigating allegations of prohibited personnel practices.

In the Civil Service Reform Act, Congress enacted for the first time general merit principles intended to guide all management personnel decisions. These general principles also form the basis for the prohibited personnel practices set forth in the Civil Service Reform Act. Commission of prohibited personnel practices, may result not only in reversal of personnel actions based on these prohibited practices but also in disciplinary action against the offending official. The Special Counsel may file a complaint against any official who commits a prohibited personnel practice, and thereby initiate a disciplinary proceeding before the MSPB. An official has numerous procedural rights in this type of action, the consequences of which may include suspension, removal, reduction in grade, a five-year debarment from Federal employment, or a civil penalty up to $1,000.

Note. If an offending official is a member of the uniformed services, the Special Counsel may not initiate a disciplinary proceeding before the MSPB but, rather, will transmit recommendations for appropriate disciplinary action to the Secretary of the appropriate military department. 5 U.S.C. § 1215(c).

1.2 Constitutional Authority.

The Constitution grants Congress the authority to provide for and control the civil service below the level of Presidential appointments. The United States Constitution, Article II, section 2, provides that:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Congress has by statute delegated broad authority to the President to regulate the employees in the executive branch of Government. Congress has also delegated broad rule-making authority to the Office of Personnel Management, subject to direction of the President.

The constitutionality of the establishment of the Civil Service Commission (now OPM) and the granting to its of broad rule-making authority was upheld in Butler v. White, C.C.W. Va. 1897, 83 F. 578, reversed on other grounds, 171 U.S. 379 (U.S.W.Va. 1898).

1.3 Statutory Authority.

a. Delegation to the President. The President's general authority to regulate civil service in the executive branch authorizes him to prescribe regulations for the admission of individuals into the civil service of the executive branch and to determine the fitness of applicants for employment (5 U.S.C. § 3301). His authority also extends to prescribing rules governing the competitive service, including excepting positions from the competitive service (5 U.S.C. § 3302) and prescribing regulations for the conduct of employees in the executive branch (5 U.S.C. § 7301). Implicit in this authority is the power to remove executive branch employees. All the President's authority is exercised within the framework of a very extensive legal structure governing civilian employment found throughout Title 5, U.S. Code.

b. Delegation to OPM. Congress has given OPM broad rule-making authority in the administration of competitive service examinations and in the implementation of the Congressional policy to give preference in many employment matters to military veterans (5 U.S.C. § 1302). Congress has also authorized the President to delegate to the Director of the OPM the President's authority for personnel management functions. Congress further authorized redelegation of this authority by the Director of OPM to heads of agencies in the executive branch (5 U.S.C. § 1104). For further discussion of the statutory authority of the OPM, see 5 U.S.C. §§ 1101-1105 and §§ 1301-1303.

c. Congressional Control. Despite delegating authority to the President and OPM, Congress has retained significant authority for itself and has legislated in much detail the terms and conditions of Federal employment. Title 5, Part III, Employees, contains detailed Congressional regulation and control over such things as employment and retention (Subpart B), employee performance, including actions for unacceptable performance (Subpart C), pay and allowances (Subpart D), attendance and leave (Subpart E), and suitability, security, conduct, and adverse actions (Subpart F). In most instances, however, Congress contemplates implementation of its basic rules by the President, OPM, and each of the employing executive agencies.

1.4 Implementation of Statutory Authority.

a. Presidential. The President has implemented the authority granted him under 5 U.S.C. §§ 3301 and 3302 by Executive Order 10577, as amended, set out as a note under 5 U.S.C. § 3301. This Executive Order established Civil Service Rules that prescribe generally how the civil service is to be organized and managed by the OPM. The President also has issued other executive orders independent of the Civil Service Rules that establish Federal policies or create special programs for Federal employees.

b. OPM.

1. OPM has published regulations at Title 5, Code of Federal Regulations, Chapter I, Subchapter B, implementing the general authority granted it under 5 U.S.C. §§ 1101-1105 and 1301-1303, the authority delegated to it by the President pursuant to the President's authority under 5 U.S.C. § 1104, and the various statutory provisions requiring implementation.

2. OPM had previously published a Federal Personnel Manual (FPM) system, which constituted its official medium for issuing to other agencies personnel regulations and instructions, policy statements, and related materials on Government-wide personnel programs. The FPM system consisted of the basic Federal Personnel Manual, the FPM Supplements, the FPM Letters, and the FPM Bulletins. Executive Order 12861, September 11, 1993, directed the elimination of 1/2 of all federal civilian personnel regulations. OPM, to achieve this end, planned to eliminate, or "Sunset," the FPM system in the fall of 1993. The FPM was officially Sunset on December 31, 1993. Portions of the FPM have been selectively retained and converted into other formats (C.F.R., executive order, or OPM Directive). For most purposes, however, the FPM no longer exists as a reference tool.

1.5 Military Regulations.

a. Department of Defense. In 1978 DOD established the Department of Defense Civilian Personnel Manual (DODCPM) system to publish uniform, DOD-wide policies governing civilian personnel management programs supplementing selected chapters of the Federal Personnel Manual. See DOD Directive 1400.25 and DODCPM 1400.25-M for a discussion of this system. The format and numbering system follow the structure of the former Federal Personnel Manual.

b. Department of the Army. The Army's civilian personnel regulations are located in the 690 series. These regulations contain the official Army instructions governing civilian personnel administration and supplement the DOD Civilian Personnel Manual. They can also be found on the internet on http://www.cpol.army.mil/.

1.6 Case Law.

a. Merit Systems Protection Board. Through 1984 the decisions of the Merit Systems Protection Board (MSPB) were officially published by the board itself and available from the Superintendent of Documents (cite ____ M.S.P.B. ____). In 1985 West Publishing Company assumed official publication of Board decisions in the Merit Systems Protection Board Reporter (cite ____ M.S.P.R. ____). Board decisions are also available online at the MSPB's web site, www.access.gpo.gov/mspb/. Other unofficial sources, such as Information Handling Services (microfiche, CD-ROM, and hard copy)

and Labor Relations Press (hard copy), are also available. There is a full discussion of MSPB jurisdiction and procedures in Chapter 7 of this book.

b. Equal Employment Opportunity Commission decisions. The decisions of the Equal Employment Opportunity Commission (EEOC) currently are published by Information Handling Services and are available on microfiche or in CD-ROM format. A full discussion of the role of the EEOC and the processing of equal employment opportunity complaints is provided in Chapter 9. EEOC decisions may also be researched at http://www.eeoc.gov/.

c. Federal court decisions. Decisions of the MSPB are reviewable directly by the U.S. Court of Appeals for the Federal Circuit. Decisions of the EEOC are reviewable by suit in the U.S. district courts and then by the regional U.S. Courts of Appeals. A full discussion of judicial review of personnel actions, including equal employment opportunity complaints, is provided in Chapter 8 of this book.

CHAPTER 2

EMPLOYMENT IN THE FEDERAL CIVIL SERVICE

2.1 Types of Civilian Employees.

a. General. The Federal civil service consists of all appointed positions in the three branches of the Federal Government, except those in the uniformed services. 5 U.S.C. § 2101. There are many different types of employees in the Federal civil service. These employees differ in how they are hired or "appointed" into their jobs, how they are paid, and the substantive and procedural due process rights they receive in certain personnel actions. This chapter will focus on the major categories of Federal civil service employees and on the significance of the differences. These materials address only executive branch employees; employees of the judicial and legislative branches are beyond the scope of this text.

Positions in the Federal civil service generally can be divided into three categories: the competitive service, the excepted service, and the senior executive service. All are defined by statute. The vast majority of DOD employees are either in the competitive or excepted service; therefore, this text will not address problems involving the senior executive service employees.

b. The competitive service. The competitive service consists of all civil service positions in the Federal Government that are not specifically excepted from the competitive service by statute, by the President, or by the Office of Personnel Management (OPM). 5 U.S.C. § 2102. Sometimes these employees are referred to as "classified civil servants" or "classified service" employees. Many acts of Congress use these terms interchangeably. Employees generally enter the competitive service only after passing a competitive examination.

c. The excepted service. As noted above, positions may be excepted from the competitive service by Congress, the President, or, more commonly, OPM. Sometimes employees in the excepted service are referred to as "unclassified employees." Excepted service employees generally are not required to pass competitive examinations before being employed by the Federal Government.

There are three categories or "schedules" of excepted service positions. OPM publishes an annual update of these schedules in the federal register, usually in September or October.

Schedule A consists of those positions not of a confidential or policy-determining character for which an examination is not practicable; attorneys, chaplains, Presidential appointees not confirmed by the Senate, White House Fellows, and certain handicapped and low-level summer employees are examples of Schedule A employees.

Schedule B consists of those positions not of a confidential or policy-determining character for which it is not practicable to hold a competitive examination. OPM may, however, require a noncompetitive examination for Schedule B positions. Some examples of Schedule B positions include many student trainee positions under cooperative education programs, Secret Service positions, and certain specialists in cryptography, systems analysis, and tax accounting.

Schedule C consists of all excepted positions of a confidential or policy-determining character. These positions are subject to political patronage and are found at all levels within the civil service. Included in Schedule C are not only special staff assistants, general counsels, and directors of various programs, but also private secretaries, chauffeurs, and couriers.

d. Significance of status as competitive or excepted service employee. An employee's due process rights are tied to employment status in the competitive service or excepted service. Competitive service employees generally receive procedural and substantive due process rights in connection with certain personnel actions after one year, while most excepted service employees must serve a two-year "probationary" period before becoming entitled to due process. See, e.g., 5 C.F.R. § 752.401(c).

There are two exceptions to the rule stated above. The first exception is that excepted service employees who are either war veterans or have been deployed and received an expeditionary or campaign badge generally receive rights equivalent to those of competitive service employees under the Veterans' Preference Act of 1944, P.L. 78-359, 58 Stat. 387, June 27, 1944. Dreher v. U.S. Postal Service, 711 F.2d 907 (9th Cir. 1983). The FY 98 Defense Authorization Act (PL 105-85) extended veteran's preference to Gulf War veterans (those having served in the theater) and to recipients of the Armed Forces Service Ribbon for service in Operation Joint Endeavor or Operation Joint Guard in the Former Yugoslavia. Those receiving the expeditionary medal for relief efforts in Somalia, Rwanda, Macedonia, or Haiti are also eligible for a veteran's preference.

The second exception allows actions against all "probationary" employees without the normal due process. All new civil service employees are required to serve a probationary period. More specifics of this probationary requirement will be addressed in detail later; however, a competitive service employee or a preference eligible excepted service employee gets virtually no procedural or substantive due process protections until after the one-year probationary period. Immigration and Naturalization Serv. v. Fed. Labor Relations Auth., 709 F.2d 724 (D.C. Cir. 1983); Stern v. Dep't of Army, 699 F.2d 1312 (Fed. Cir. 1983) *cert. denied*, 462 U.S. 1122, 103 S.Ct. 3095, 77 L.Ed.2d 1354 (1983). Piskadlo v. Veterans Administration, 668 F.2d 82, 83 (1st Cir.1982), (Probationary federal employee had no statutory right of appeal to the Merit Systems Protection Board, and had no regulatory right of appeal to Board for the handicap

discrimination alleged. 5 U.S.C.A. §§ 7511(a)(1)(A), 7702(a)(1)). Other excepted service employees receive no due process until after two years of current, continuous service.

A more detailed review of employee rights is contained in Chapters 3 and 4 of this text.

e. Notes and Discussion.

Note 1. Positions are often converted from the competitive service to the excepted service and vice versa. What happens when a position is changed from the competitive service to the excepted service? Does the incumbent employee forfeit the procedural safeguards? In Roth v. Brownell, 215 F.2d 500 (D.C. Cir.), cert. denied, 348 U.S. 863 (1954), Mr. Roth, a GS-14 trial attorney in the Department of Justice, was summarily removed from his position effective July 31, 1953, by a letter dated June 29, 1953. At the time of his removal, Mr. Roth occupied a Schedule A, excepted service position. He had been transferred into that position in 1947 from a competitive service position that he had held for more than four years. In 1947 the President had issued an executive order transferring all attorney positions to the excepted service. The Department of Justice argued that Mr. Roth had not been removed from his position in 1947 but had merely ceased to be in the competitive service on the date of the executive order. There was, therefore, no need to comply with the statutory protections applicable to competitive service employees in removing him from his position in 1953. The court concluded that whether Mr. Roth was technically removed from his position in 1947 or in 1953, there still had been no compliance with the requisite statutory requirements. The court held:

> Neither the formula of "excepting" the kind of position a person holds, nor any other formula, can obviate the requirement of the Lloyd-LaFollette Act that "No person in the classified civil service of the United States shall be removed. . . therefrom" without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear.
>
> It is immaterial here that the President has long been authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof . . . [5 U.S.C. § 3301]. (Emphasis added.) Complete control over admissions does not obviate the removal requirements of the Lloyd-LaFollette Act.
>
> In our opinion the plaintiff is entitled to a summary judgment that his removal from his position was not in accordance with law and that he should be restored to the position.

The general rule in cases involving transfer of positions from the competitive service to the excepted service is now stated in 5 C.F.R. § 212.401(b). "An employee in

the competitive service at the time his position is first listed under Schedules A, B, or C remains in the competitive service while he occupies that position."

Note 2. The Veterans' Preference Act of 1944, codified in various sections of Title 5 of the United States Code, gives veterans and certain other individuals called "preference eligibles" several advantages in securing and retaining Federal employment. See 5 U.S.C. § 2108 for a definition of "preference eligible." Some of the advantages conferred on veterans are the following: (1) authorizing bonus points on competitive examinations, 5 U.S.C. § 3309; (2) waiving physical qualifications for appointment, 5 U.S.C. § 3312; (3) requiring no passovers without justification of veterans eligible for appointment to Federal positions, 5 U.S.C. § 3318; (4) affording veterans greater tenure in reductions-in-force, 5 U.S.C. § 3502; and (5) specifying additional procedural safeguards for veterans undergoing adverse actions, 5 U.S.C. §§ 7511-13. Veterans receive no special consideration for promotions under this statute, but the initial hiring advantage and the retention rights have allowed veterans to fill a large number of Federal jobs compared to their composition of the total work force. The statutory advantages bestowed on veteran preference eligibles is covered in more detail later in this text.

Nonveterans have frequently challenged in Federal court the significant benefits provided to veterans by law. In one such case, Fredrick v. United States, 507 F.2d 1264 (Ct. Cl. 1974), the plaintiff claimed he was entitled to the job retention protection of the Veterans' Preference Act in 5 U.S.C. §§ 3501-3502 during a reduction-in-force. His challenge was based on the equal protection and due process clauses of the Fifth Amendment; he alleged discrimination because he had "served" his Government in a civilian capacity as a War Service Appointee. The Court of Claims upheld the validity of the veterans' preference provisions in holding that the classification of "veterans" was not unreasonable or arbitrary and that veterans' preferences had in fact existed in the United States since 1876. Among the justifications discussed by the court were (1) a soldier's loss of personal freedom, (2) the rigors of military duty--discipline, possible relocation overseas, and potentially hazardous duty, and (3) the problems of reorientation to civilian life upon return to the civilian community. The court found a rational basis for differentiating between veterans and those who performed alternative service and upheld the validity of the statute.

More recently, the United States Supreme Court upheld the Massachusetts veterans' preference statute in an equal protection challenge. In Massachusetts v. Feeney, 442 U.S. 256 (1979), the Massachusetts law gave veterans an absolute preference over nonveterans if they passed the state civil service exam. The Massachusetts law provides an even broader right of preference than the federal law. In upholding the Massachusetts statute, the Supreme Court therefore effectively eliminated future challenges to the Federal preference provisions.

2.2 Becoming a Federal Civil Service Employee.

Many of an employee's procedural and substantive due process rights depend on the employee's status. Understanding the legal requirements for attaining employee status is therefore essential to determine the employee's rights.

a. Statutory requirements generally. 5 U.S.C. § 2105 requires three elements for a person to attain the status of Federal Government employee. The first step is appointment in the civil service by one of several designated officials; the second is performance of a Federal function; and finally, supervision in the performance of duties by a federal official. All three requirements must be satisfied for the individual to become an employee. Of the three requirements, the appointment requirement has generated the most controversy and litigation.

b. The appointment requirement. The appointment of a Federal civilian employee generally requires the execution of a Standard Form 52, "Request for Personnel Action," an OPM form used throughout the Federal Government. A completed Standard Form 50 can however, also evidence an appointment, "Notification of Personnel Action." While both forms are normally used in an appointment, either form, if signed by the approval authority (appointing authority), will result in an appointment of the individual to a particular position in the civil service. Normally the servicing CPOC is the appointing/approval authority. The proper appointment requirement is demonstrated by the following cases that decided employees had not been appointed into the Federal service. See also Horner v. Acosta, 803 F.2d 687 (Fed. Cir. 1986) (finding contract employees hired by Navy to perform intelligence functions were not appointed and were therefore not employees entitled to retirement credit) and Costner v. United States, 665 F.2d 1016 (Ct. Cl. 1981) (finding employee of government contractor RCA was not a federal employee despite years of working in federal worksite under supervision of federal official). Watts v. Office of Personnel Management, 814 F.2d 1576 (Fed.Cir. Apr 01, 1987) *cert. denied* 484 U.S. 913, 108 S.Ct. 258, 98 L.Ed.2d 216. Bridgewood v. Department of Veterans Affairs, 75 M.S.P.R. 480 (1997)(Appellant was not "employee" during period in which she served in without- compensation (WOC) training position, and thus that time could not be counted towards three year period necessary for appellant to be considered 'career employee' so as to be placed in tenure group of career employees for reduction in force (RIF) purposes; appellant was not paid compensation and benefits as an "employee" under civil service system during her WOC appointment, and evidence concerning WOC appointment reflected that her services were retained merely by contract).

BEVANS v. OFFICE OF PERSONNEL MANAGEMENT
900 F.2D 1558 (Fed. Cir. 1990)

[OPM decided that petitioner's deceased husband's survivorship benefits did not include the time he spent as an employee of a proprietary corporation of the Central Intelligence Agency (CIA). Because he had not received a

clear and unequivocal appointment into the Federal service. The Federal Circuit affirmed OPM's determination.]

I

The basic facts, as found by the Board and as shown by the record, are as follows.

In the 1960's and 1970's, the CIA had several so-called proprietary corporations, which it owned. Two of these were Air America, Inc. (Air America) and its subsidiary, Air Asia Company, Ltd. (Air Asia). These companies were air carriers that operated primarily in the Far East and that the CIA used in conjunction with its operations. (Apparently the CIA used these companies interchangeably, and in this opinion we usually refer to either or both of them as "Air America."). Air America had a large number of employees. Some of its officials also were CIA employees. The petitioner's deceased husband, Henry P. Bevans (Bevans), was a lawyer with considerable experience in airline work. In early 1964, Clyde Carter, the secretary and legal counsel of Air America, suggested to Bevans the possibility of his working for that company. After discussions, Mr. George A. Doole, Jr., the chief executive officer of Air America, who also was an undercover CIA employee, offered Bevans a position as an attorney with Air America. Bevans was to start work in Washington, D.C., but shortly thereafter would be moved to Taipei, Taiwan. The offer of employment, on an Air Asia letterhead, stated: "This letter constitutes the only authorized offer of employment to you from or on behalf of the Company."

Bevans accepted the offer and began work in Washington, D.C., on August 3, 1964.

In a handwritten 1980 letter from Bevans to another former Air America employee, Jerry Fink, in connection with Fink's appeal to the Board from OPM's denial of Fink's claim for civil service retirement credit for Fink's service with that company, Bevans stated:

Sometime during that first week (probably Aug. 5), after reviewing the corporate files, I raised with Mr. Bastian the question of the exact relationship between Air America and Southern. At that point, I was taken into Mr. Doole's office. He administered to me the oath set out in Title 5, Sec. 3331 and gave me a detailed explan[ation] of the ownership, control and management of Air America, Inc. and its associated companies. [Underlining in original.]

Bevans worked for Air America and Air Asia until December 1976. During that employment, government retirement contributions were not deducted from his salary and deductions sometimes were made for Social Security taxes. In March 1977, Bevans went to work as a civilian for the United States Air Force. None of his Air America employment was credited to him for retirement or leave computation purposes, and he made no objection despite the adverse immediate effect that had on the amount of leave. While so employed, he died in January 1982.

His widow, the petitioner, filed an application for survivor benefits. The application was based upon Bevans' service with both Air America and the Air Force. In response to a request from her lawyer, the CIA declined to certify Bevans' employment with Air America "as federal service for the purpose of obtaining certain federal death benefits" because "[e]mployees of Air America, Inc., are not federal employees within the meaning of 5 U.S.C. § 2105(a), which is the operative definition for purposes of civil service retirement credit. 5 U.S.C. § 8331(1)(A)."

In its reconsideration decision, OPM ruled that "because he was not appointed in the civil service during the term of his contract from August 3, 1964 through December 6, 1976 his service during this period is not creditable for civil service retirement purposes."

The Board affirmed that decision. The administrative judge, whose initial decision became the decision of the Board, found that the petitioner has failed to establish by preponderant evidence that her husband was appointed to a position in the civil service. There is no clear and unequivocal document appointing Mr. Bevans to the civil service. In addition to the absence of any such document, the other indicia of appointment are also absent. There is no evidence that Mr. Bevans was paid through the civil service system. Though Mr. Bevans was apparently administered an oath of office, there is no evidence that the person who administered the oath was authorized to do so or to hire employees on behalf of the CIA. An appointment to the civil service can only be made by a person authorized to make the appointment. Finally, another indicia of federal employment, at the time, was that a federal employee's salary was not subject to Social Security withholding. The appellant's documents show that Social Security withholding was taken out of her husband's earnings from Air America.

I find, therefore, that the agency's decision to deny civil service credit for Mr. Bevans' service with Air America was proper. It is well established that an appointment is necessary for a person to hold a government position and be entitled to its benefits.

II

Section 8332 of Title 5 of the United States Code provides that service as an "employee" is creditable for the Act's purposes. 5 U.S.C. § 8332 (1988). The term "employee" is defined in 5 U.S.C. § 8331(1)(A) (1988) by reference to 5 U.S.C. § 2105(a) (1988), which in turn defines "employee" to mean an individual who, among other requirements, has been "appointed in the civil service by one of [listed employees] acting in an official capacity." This court twice has considered whether service with government proprietary corporations or units engaged in intelligence activities qualifies for civil service retirement credit.

Horner v. Acosta, 803 F.2d 687 (Fed.Cir.1986), involved employment as "independent contractors" pursuant to employment contracts between individual employees and a naval unit and a naval proprietary corporation,

both of which were engaged in intelligence activities. The Board ruled that service pursuant to such contracts was entitled to credit for civil service retirement purposes. This court reversed, holding that the employment contracts did not make the individuals "employees," because they had not been "appointed in the civil service." Id. at 693-94.

The court quoted with approval the statement in Baker v. United States, 614 F.2d 263, 268 (Ct.Cl.1980), that to qualify as an "employee "an individual must have "been appointed to that position by a person authorized to make the appointment." Acosta, 803 F.2d at 692. The court ruled that "definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of 5 U.S.C. § 2105(a)." Id. at 693. The court noted the "absence of the usual indicia of civil service, such as an executed SF [Standard Form] 50 or 52 as an appointive document." Id. at 694. (A Form 50 is a federal government personnel form used to record a personnel action, and a Form 52 is one used to initiate a federal personnel action.) The court concluded:

In view of the Board's express finding that respondents were not appointed in the civil service when they were engaged to work in the unit, and the substantial evidence to support that finding and the Board's erroneous conclusion that contract service, without appointment, is creditable for [CSRA] purposes, we must reverse the Board's decision. Id. at 696.

.....

[1] A. Under these standards defining the requirement that to qualify for civil service retirement benefits, an individual must have been "appointed in the civil service," the Board did not err in concluding that the petitioner had not shown that Bevans had been so appointed.

As noted, the court in Acosta referred to "an executed SF 50 or 52 as an appointive document" as one of "the usual indicia of civil service status." 803 F.2d at 694. There is nothing in the record to show that either Form 50 or Form 52 was executed for Bevans, and the petitioner makes no claim that it was. Although there are several executed personnel forms in the record that pertain to Bevans, all captioned "Request for Personnel Action," they are Air America forms, not those customarily used to make an appointment in the civil service.

The forms themselves have no indication that they are federal government forms. The spaces for signature list among the potential signers "President," and two of them were signed by that officer. The first line has space for listing the name of the individual for which action is requested "(IN ENGLISH)" and "(IN CHINESE)." As the petitioner's witness Mr. Merrigan, a former Air America attorney who dealt with personnel matters, explained, this was "an Air America form also called Request for Personnel Action. It's also copied, certainly not identical, but in many respects it's similar to the federal form. It was copied from it."

Moreover, there was no evidence that any of the officials with whom Bevans dealt in obtaining his position with Air America was authorized to make appointments in the civil service. The only authority those company officials appeared to have had was to appoint individuals to positions with their company. All the record shows is that Bevans was appointed to a legal position with Air America, and not to a position in the civil service. Indeed, the letter offering Bevans the position stated that it "constitutes the only authorized offer of employment to you from or on behalf of the Company."

As the court stated in Watts, one of the "essential prerequisites" of a civil service appointment is "an authorized appointing officer who takes an action that reveals his awareness he is making an appointment in the United States civil service." 814 F.2d at 1580. That requirement was not met here.

.....

[8] D. The petitioner argues that even if the objective evidence does not establish that Bevans was appointed in the civil service, Bevans believed that he had been so appointed and therefore should be treated as having been so appointed. The record, however, does not establish that Bevans believed he had been appointed in the civil service.

The argument apparently is that since Bevans was aware that Air America was a CIA proprietary company, and since the officers with whom he dealt in obtaining employment were CIA employees, he necessarily believed that he received an appointment in the CIA when he was appointed as a lawyer with Air America. Not only does the argument lack evidentiary support for crucial elements, but it is a non sequitur. The fact that the CIA controlled Air America and that CIA employees may have hired Bevans, does not establish that Bevans, unlike the vast bulk of Air America employees, became a CIA employee when he was employed by Air America, or establish that Bevans believed he had been so appointed in the civil service.

[9] E. Finally, the petitioner contends that even if Bevans was not appointed in the civil service, the government should be equitably estopped from making the contention. The argument rests on the factual assumption, which the record does not establish, that Bevans believed he had received such an appointment. Moreover, there is no evidence that the government misrepresented to Bevans or misled him into believing that he was a civil service employee, or that Bevans relied upon that belief to his detriment.

Skalafuris v. United States
683 F.2d 383 (Ct. Cl. 1982)

[The Civil Service Commission decided that plaintiff was a probationary employee at the time of his termination. The Court of Claims affirmed, holding that a probationary employee, who commenced work, and received

pay prior to receiving an official appointment into the Federal service did not become a Federal employee for purposes of his 1 year probationary period until such time as his appointment was effective.]

Plaintiff's case is the most recent in a series of cases that have called upon the court to define what constitutes Federal employment. The dispute here concerns the date on which plaintiff commenced employment with the Government. Upon that determination depend the procedural rights to which he was entitled upon termination. The Government contends that the date entered on various personnel action forms controls; plaintiff argues that he was appointed and commenced work at least a month earlier. It is not disputed that, if he was no longer a probationary employee at the time of his termination, plaintiff was not accorded all of the procedural rights to which a nonprobationary employee is entitled. We hold that, as a matter of law, this was correct.

I.

On October 29, 1973, the Naval Research Laboratory (NRL) advertised an opening for the GS-15 position of Head, Mathematics Research Center (MRC). Plaintiff applied for the job in November 1973 and was interviewed at NRL in December. He was selected as the best candidate in January 1974 by Dr. Paul Richards. Dr. Richards then sent a memorandum, with attached routing slip, to Dr. Herbert Rabin and Dr. Alan Berman, making this recommendation and asking for their approval. The memorandum was dated January 22, 1974, and Drs. Rabin and Berman signified their approval by initialing the routing slip on January 29 and 30, 1974, respectively. Plaintiff had been informed of his selection by telephone in mid-January, and a Standard Form 52 (SF-52), Request for Personnel Action, was prepared for him, as well as a request for Civil Service certification.

Plaintiff arrived at NRL immediately after approval of his selection. On January 31, 1974, he received a temporary identification badge. The record plainly shows that plaintiff was actively engaged in his new duties throughout February. On February 22 and March 7, 1974, he was paid by voucher for this work.

On March 4, 1974, plaintiff executed an Appointed Affidavit (the oath of office), and on March 5, 1974, a Standard Form 50 (SF-50), Notification of Personnel Action, was executed. Both of these documents, as well as the SF-52 completed earlier, give the effective date of plaintiff's appointment as March 5, 1974. The March 5th date is the one which the Government contends is the correct date of appointment.

On January 20, 1975, after nearly a year at NRL, plaintiff received a supervisor's evaluation from Dr. Richards which recommended his retention because he was performing well. However, on February 24, 1975, plaintiff received a memorandum from Dr. Berman stating that he would be terminated on March 3, 1975, for inadequate performance. The SF-50 which accompanied the termination notice was later superseded by another which gave no reason for termination.

Plaintiff appealed his removal unsuccessfully for several years. Upon receiving a final denial of reconsideration of his case on June 5, 1980, plaintiff filed in this court on August 18, 1980, for back pay and reinstatement to his original grade.

II.

This court set out the law governing plaintiff's status as a Federal employee in Costner v. United States:

> There is no dispute as to the applicable statutory provision. "Employee" is defined in the United States Code as a person who is
>
> (1) appointed in the civil service by one of the following acting in an official capacity --
>
> . . . . .
>
> (C) a member of a uniformed service;
>
> (D) . an individual who is an employee under this section;
>
> . . . . .
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

It is obvious from the statutory language that there are three elements to the definition -- appointment by an authorized Federal employee or officer, performance of a Federal function, and supervision by a Federal employee or officer -- and that they are cumulative. A person must satisfy each requirement.

. . . .

We grant that plaintiff, from late January 1974, was performing a Federal function and was supervised by a Federal employee. But as the court said in Baker v. United States, which considered this problem:

> If [plaintiff] did not have a Federal appointment, it will not be necessary to consider the other two requirements, as it is well settled that all three tests must be met by an individual before he can be a Federal employee.

Thus, the work plaintiff did at NRL between late January 1974 and March 5, 1974, and the fact that he was represented to others as the head of MRC, while important to an overall case for Federal employment, do not bear directly on the question of appointment. We turn then to the facts bearing on the existence and date of plaintiff's appointment.

III.

The standard to be applied here is whether plaintiff was "appointed to [his] position by a person authorized to make the appointment." At the outset, it is conceded that the persons who selected and approved the selection of plaintiff were persons "authorized to make the appointment."

Therefore, the question before us is only whether plaintiff was in fact appointed.

Recognizing that appointment is a single, discrete act, plaintiff argues that he was appointed by the action of Dr. Rabin's initialing the routing slip on January 29, 1974. We cannot agree, however, that Dr. Rabin's act had that effect.

The documents effecting plaintiff's appointment all specify March 5, 1974, as plaintiff's date of appointment. The SF-52 gives "3-5-74" as the effective date for the requested action, which is described as "C[areer] C[onditional] Appt" (emphasis supplied]. It is hardly coincidental that the next personnel action documents were not executed until on or about March 5, 1974. On the Appointment Affidavit, signed on March 4th, the space for "(Date of appointment)" is filled in with "3/5/74." Finally, the actual notification form, the SF-50, gives "03/05/74" as the effective date of plaintiff's "CAREER CONDITIONAL APPOINTMENT." Furthermore, the SF-50 notes that the appointment is "subject to completion of 1 year probationary (or trial) period commencing "03/05/74." We have in the past cases emphasized the importance of the SF-52, SF-50, and oath of office in determining the date or existence of an appointment,[1] and in this case they unequivocally set the date of appointment at March 5, 1974.

. . . .

We may therefore conclude, on the basis of all of the Government documents which purport to describe plaintiff's status, that the plaintiff was appointed on March 5, 1974, and that his probationary period ended on March 5, 1975, two days after he was terminated.

We have only left to discuss plaintiff's direct evidence for an earlier appointment date, the routing slip. The first key point is that the memorandum being approved on the slip does not recommend the appointment of plaintiff. Rather, it recommends "that Dr. Skalafuris be offered the GS-15 position of Head of the Mathematics Research Center" (emphasis supplied). While we have no doubt that in approving this recommendation Drs. Rabin and Berman expected and intended that plaintiff would eventually be appointed, the fact is that the process had not progressed to the appointment state at that point. Plaintiff still had to be notified of the offer, had to accept it, NRL needed to request the appointment, the Civil

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[1] Goutos, 212 Ct. Cl. at 98, 552 F.2d at 924 (SF-52, in facts of that case, is "the sine qua non to [an] appointment"); Shaw v. United States, 223 Ct. Cl. 532, 546, 622 F.2d 520, 528, cert. denied, 449 U.S. 881, 101 S. Ct. 231, 66 L.ED.2d 105 (1980) (in determining date of end of probationary period, the Civil Service Commission properly looked to "the date of his appointment evidenced in Standard Form 50"); Costner v. United States, 229 Ct. Cl. at __, 665 F.2d at 1023 (importance of oath of office). See also Vukonich v. Civil Serv. Comm'n, 589 F.2d 494, 496 (10th Cir. 1978) (completion of an SF-50 necessary to appointment).

Service Commission had to certify plaintiff, and plaintiff had to take his oath of office. It is hard to believe that Drs. Rabin and Berman thought they were appointing plaintiff, even if they had the power to do so at that point. This can hardly be characterized as the "last act" defined in Marbury v. Madison.

Furthermore, it would seem to us very odd that the Government appointive process should be consummated by initials on a routing slip. We emphasize, as we noted in Goutos v. United States, the chaotic effect on the Government of a vague or informal procedure for Government hiring. Plaintiff cannot base his appointment on the initialed approval of a memorandum recommending that he be given an offer.

. . . .

We therefore conclude, after careful consideration of the brief and after hearing oral argument, that the Civil Service Commission was correct as a matter of law in finding that plaintiff was not appointed to his position until March 5, 1974, and that consequently he was still in his probationary period when he was terminated on March 3, 1975. Because of this disposition of the case, we do not address the other defenses raised by the Government. There being no genuine issue as to any material fact, defendant's cross-motion for summary judgment is granted; plaintiff's motion for summary judgment is denied; and the petition is dismissed.

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c. Federal function and supervision. The other two requirements of 5 U.S.C. § 2105 have generated very little litigation. They were considered, however, in McCarley v. MSPB, 757 F.2d 278 (Fed. Cir. 1985), overruled on other grounds Hagmeyer v. Department of the Treasury, 852 F.2d 531 (Fed.Cir.1988). In McCarley, the court reaffirmed that all three requirements of 5 U.S.C. § 2105 must be met for an individual to attain "employee" status. The court determined that McCarley was not an employee even though he had been appointed, because he had not yet started work and therefore had neither performed a Federal function nor been supervised while performing his duties by a Federal employee. Because McCarley was merely an appointee and not an employee, he was not entitled to the procedural protections established by law for employees when management canceled his appointment.

d. Notes and Discussion.

Note 1. While the courts have determined that a completed SF 50, SF 52, or oath of office constitutes the sine qua non of a valid appointment into the Federal civil service, the presence of such documentation does not necessarily control an individual's status. See Grigsby v. Dep't of Commerce, 729 F.2d 772 (Fed. Cir. 1984), where the Department of Commerce was permitted to demonstrate with independent evidence that the information on the forms was erroneous. In Grigsby the employee was aware that the information on the SF 50 and SF 52 erroneously reflected that he had been hired by

transfer and that his probationary period was completed. The court suggested that the result might have been different if the employee had been unaware of the error and had relied to his detriment on the erroneous information.

Note 2. A proper appointment is normally necessary to become an employee, but the MSPB has acknowledged a limited exception. If an appointment is found to be improper or erroneous under law, rule, or regulation after an individual has been appointed to a position, has entered on duty, and the other criteria of 5 U.S.C. § 2105 have been met, the individual is considered an employee unless the appointment violates an absolute statutory prohibition. Travaglini v. Dep't of Educ., 23 M.S.P.R. 417 (1984). See also Torres v. Department of Treasury, 47 M.S.P.R. 421, (M.S.P.B. 1991)(Individual who shows that he is otherwise entitled to adverse action procedures does not lose that protection merely because agency's action was based on an unlawful appointment; only exception to rule is an appointment that violates an absolute statutory prohibition so that appointee is not qualified for appointment in the civil service.) Absent such an absolute statutory prohibition on appointment, the employee is entitled to all the due process rights that a similarly situated employee would receive. See Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983), *superseded on other grounds* Bloomer v. Department of Health and Human Services, 966 F.2d 1436 (Fed.Cir. 1992) where the court determined that this rule applies even if the individual allegedly obtained the appointment through material misrepresentation.

The foregoing discussion demonstrates the importance of the status of "employee" within the statutory definition. A competitive service employee receives additional rights and protections that escalate with seniority.

2.3 Employee Status Upon Appointment in the Competitive Service.

a. Probationary period. An individual appointed to a competitive service position ordinarily must serve a one-year probationary period before attaining full competitive status. 5 C.F.R. §§ 315.801-802. Competitive status refers to "an individual's basic eligibility for noncompetitive assignment to a competitive position." 5 C.F.R. § 212.301. This allows an employee to be transferred, promoted, reassigned, or demoted without open competitive examination. The employee automatically attains competitive status at the end of the one-year probationary period.

This probationary period is an extension of the hiring process; it is an opportunity for management to evaluate on the job the employee's fitness for the position. During this period, if the employee by conduct or performance fails to demonstrate fitness for the position, management should terminate the employee. During this period, management has virtual summary removal authority unconstrained by the detailed procedural requirements that apply to nonprobationary competitive service employees. Probationary employee rights are covered later in this text in the discussion of personnel actions and procedural requirements. The following case explains how the probationary period is

calculated and the results of management failing to remove an employee before the probationary period expires.

DANIEL v. DEPT. OF VETERANS AFFAIRS,
68 M.S.P.R. 459

Merit Systems Protection Board
Aug. 3, 1995

Employee petitioned for review of initial decision dismissing her appeal of removal for lack of jurisdiction. The Merit Systems Protection Board held that: (1) where probationary employee's tour of duty on day before her anniversary date ended at 7 a.m. and agency effected her separation at 7 a.m., employee had completed her probationary period when she was removed, so that Board had jurisdiction over her appeal, and (2) employee's termination without being given opportunity to respond to the charges violated her constitutional right to due process.

Petition granted; initial decision reversed; removal not sustained.

.....

The agency terminated the appellant from the position of GS-5 Police Officer effective January 22, 1995. Agency File, Tab A. The administrative judge dismissed the appellant's petition for appeal after finding that the appellant was terminated during her probationary period for post-appointment reasons, that she did not allege that the termination was based on partisan political reasons or marital status discrimination, and thus that the Board lacked jurisdiction over her appeal. Initial Decision (I.D.) at 2-4. The appellant has filed a petition for review to which she has attached documents already submitted below. Petition For Review (PFR) File, Tab 1. The agency has filed a timely response opposing the petition.

.....

The facts as found by the administrative judge are not in dispute. The agency appointed the appellant to her position on January 23, 1994, subject to completion of a one-year probationary period. Agency File, Tab M. In a memorandum dated January 19, 1995, it notified the appellant that she would be discharged effective "at the end of your tour of duty that begins at 11 PM on January 21, 1995." Id., Tab B. The appellant's tour of duty ended at 7 a.m. on January 22, 1995, and she was terminated at that time. I.D. at 2; Initial Appeal File, Tabs 9, 13.

The administrative judge found that because the appellant had been scheduled to work the shift beginning at 11 p.m. on January 22, 1995, and ending at 7 a.m. on January 23, 1995, she had not completed her probationary period when she was terminated at 7 a.m. on January 22, 1995. I.D. at 2 n. 1. We find that the administrative judge incorrectly interpreted the relevant case law. A separation action must be effected prior to the end of the

probationer's "tour of duty" on the last day of probation, which is the day before the anniversary date. See, e.g., Stanley v. Department of Justice, 58 M.S.P.R. 354, 357 (1993); Burke v. Department of Justice, 53 M.S.P.R. 372, 375 (1992). Here, the appellant's last day of probation was January 22, 1995, because her anniversary date was January 23, 1995. The end of the appellant's tour of duty on January 22, 1995, occurred at 7 a.m. Because the agency effected her separation at 7 a.m., and not before that, she had completed her probationary period when she was removed. See, e.g., Stanley, 58 M.S.P.R. at 357. The fact that the appellant was scheduled to begin another tour of duty on January 22, 1995, that would not end until January 23, 1995, is irrelevant. Thus, we find that the appellant's probationary period ended at the completion of her last full tour of duty ending on the day before her anniversary date, and the Board has jurisdiction over this appeal. Id.

[3][4] Where an agency takes an appealable action without affording an appellant prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, the action must be reversed because it violates the appellant's constitutional right to minimum due process. Stephen v. Department of the Air Force, 47 M.S.P.R. 672, 680-81 (1991), citing Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985). Here, although the January 19, 1995 memorandum afforded the appellant prior notice and an explanation of the agency's charges, it did not provide the appellant with an opportunity to respond to the charges. Thus, the agency action must be reversed. See, e.g., Drummonds v. Department of Veterans Affairs, 58 M.S.P.R. 579, 584-85 (1993); cf. Stanley, 58 M.S.P.R. at 357- 58 (where the appellant received prior notice, an explanation of the evidence, and an opportunity to respond, the agency accorded the appellant the requisite minimum due process in effecting his separation, and the case was remanded for a determination of whether the agency committed harmful procedural error).

Although Daniel may seem like an aberration, the last minute termination scenario is all too common in the civil service. For various reasons, supervisors procrastinate removing a probationer until the last possible day--or minute, as demonstrated in Daniel.

Under some circumstances, an employee may have to serve more than one probationary period while moving from one job to another within Federal employment. An employee may be able to "tack" time served in a probationary period toward satisfaction of the probationary period in a new position. The following case outlines when tacking is permitted and when an entirely new probationary period is required.

FRANCIS v. DEPARTMENT OF the NAVY
53 M.S.P.R. 545
Merit Systems Protection Board.
April 10, 1992.

The appellant worked for the Department of the Navy as a GS-9 Nurse Specialist from January 27, 1991, until she was separated effective July 1, 1991. The agency effected the separation under 5 C.F.R. part 315, subpart H, based upon the appellant's failure to effectively perform the duties of her position. The appellant filed an appeal with the Board's Philadelphia Regional Office. See IAF, Tab 1. The administrative judge provided the appellant with an opportunity to file evidence and argument showing that her appeal was within the Board's jurisdiction. See id., Tab 2. The appellant, in response to the order, argued that the Board had jurisdiction over the appeal because she had over one year of continuous service in her Nurse Specialist position. See id., Tab 5. The agency moved for dismissal of the appeal for lack of jurisdiction. See id., Tab 3.

In his initial decision, the administrative judge agreed with the agency. He found that the appellant had been serving in a probationary period at the time she was separated because (1) she was appointed from a register and therefore properly required to serve a one-year probationary period, (2) she was separated less than a year after her appointment, and (3) her prior service as a Clinical Nurse in the Department of the Army (beginning more than a year before her separation) was not creditable toward completion of the probationary period because it was not performed in the same agency as the one that separated her. He found further that the appellant had not raised any allegation that her separation was based on partisan political reasons or marital status, and thus the Board lacked jurisdiction over the appeal. See Initial Decision at 1-4.

In her petition for review, the appellant contends that she completed her probationary period before she was separated, and that the Board therefore has jurisdiction over her appeal. See PFR File, Tab 5.

ANALYSIS

The appellant was separated from a position in the competitive service. Under 5 U.S.C. §§ 7511(a)(1)(A) and 7513, employees in the competitive service are entitled to appeal their separations to the Board only if they are not serving a probationary period under an initial appointment, or if they have completed a year of current continuous employment under other than a temporary appointment limited to a year or less. Because the appellant was hired from a civil service register, she was required by law to serve a one-year probationary period. See 5 C.F.R. § 315.801(a)(1); Sullivan v. Department of Agriculture, 32 M.S.P.R. 194, 196 (1987). [FN1] As the

administrative judge noted, the appellant was separated on July 1, 1991, less than a year after her January 27, 1991, appointment. See IAF, Tab 3, Subtabs 1, 6. The appellant alleges, however, in her petition for review, that her prior service as a Clinical Nurse in the Department of the Army should be credited toward completion of her probationary period, and that, when this credit is given, she has completed her probationary period. FN1. The appellant's Standard Form 50, dated January 27, 1991, states that her "[a]ppointment is subject to completion of one year initial probationary period." IAF, Tab 4, Subtab 2.

[1] The Board has held that service prior to an appointment may be creditable toward completion of the probationary period if: (1) the prior service was rendered immediately preceding the appointment; (2) the prior service was performed in the same agency and in the same line of work as the service performed under the appointment; and (3) there has been no more than one break in service of less than 30 days. See Peery v. Department of the Navy, 40 M.S.P.R. 377, 379 (1989).

[2] Here, according to the record, the appellant's prior service as a Clinical Nurse was performed immediately before her present appointment, and there was no break in her service as a Clinical Nurse and a Nurse Specialist. See IAF, Tab 3, Subtab 2, and Tab 5. Thus, the appellant has established that she has met the first and third criteria needed to show that her service as a Clinical Nurse should be credited toward completion of the probationary period. The essential question in this case, then, is whether the appellant has met the second criterion. [FN2] The appellant argues that, because both the Department of the Army and the Department of the Navy are part of the Department of Defense, they should be considered part of the "same agency." [FN3] For the reasons stated below, we disagree.

FN2. The similar titles of the two positions, and the appellant's unchallenged characterization of the nature of her work, see IAF, Tab 5 (appellant's response to agency's motion to dismiss appeal), indicate that the appellant has met the "same line of work" requirement of the second criterion. In light of our conclusion below, however, we need not make a final determination regarding this matter.

FN3. She has cited no specific authority in support of this argument.

.....

The statutory provisions and legislative history described above demonstrate that Congress intended, in redesignating the Department of the Army and the Department of the Navy as military departments, to allow their independent appointing authority and other personnel functions to continue, and to continue to treat the two departments as separate agencies for purposes of part 315. It follows, then, that service in one military department is not creditable toward completion of a probationary period in another military department. [FN7]

FN7. This holding is consistent with the definition of "agency" that appears in FPM Supplement 296-33, entitled "The Guide to Processing Personnel Actions." Under that definition, "Departments of Army, Navy, and Air Force are considered to be individual agencies for the purposes of this supplement." FPM Supplement 296-33, subch. 35 (1991). See also Brown v. Department of the Navy, 53 M.S.P.R. 537, 542-543 (1992) (the Rehabilitation Act of 1973 does not require the Department of the Navy to accommodate its employees by placing them in positions outside that department). In addition, because the personnel functions of the Department of the Navy are separate from the personnel functions of the other military departments, the "same agency" definition set forth at FPM ch. 315, appendix A, s A-3c(2) does not apply here.

[3] In light of this congressional judgment, we find here that the appellant's service in the Department of the Army cannot be credited toward completion of the probationary period she began when she was appointed by the Department of the Navy, and that the appellant therefore had not completed her probationary period when the latter agency separated her. For these reasons, the appellant is not an "employee" under 5 U.S.C. § 7511(a)(1), and she is thus not entitled to appeal her separation to the Board under 5 U.S.C. § 7513(d). Instead, any appeal right she might have would arise under 5 C.F.R. part 315, which governs the rights of employees separated during their probationary periods. Because the appellant was separated for unsatisfactory performance during her probationary period, she is entitled to appeal to the Board only if she raises a non-frivolous allegation that her separation was based on partisan political reasons or marital status. See 5 C.F.R. §§ 315.804, 315.806; Von Deneen v. Department of Transportation, 33 M.S.P.R. 420, 422, aff'd, 837 F.2d 1098 (Fed.Cir.1987) (Table); Ceraso v. Department of the Army, 3 MSPB 180, 3 M.S.P.R. 63, 64 (1980). Because the appellant raised no such allegation, we agree with the administrative judge that the Board lacks jurisdiction over this appeal.

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b. Notes and Discussion.

Note 1. A simple rule to follow in probationer cases is that all employees (with limited exceptions) appointed from a civil service register must serve a new probationary period. 5 C.F.R. § 315.801(a)(1). This rule applies even when an employee has successfully completed a probationary period and is later appointed from a register to a substantially similar position or to a position in the same job series at a higher grade. Arispe v. Dept. of Air Force, 43 M.S.P.R. 96 (1990), Flowers v. Department of Navy, 60 M.S.P.R. 167 (1993). For an excellent review of the probationary period applicable to excepted service employees under the Civil Service Due Process Amendments of 1990, see Todd v. Merit Systems Protection Board, 55 F.3d 1574 (Fed. Cir. 1995) (holding that employees whose rights were not specifically addressed by the Act were not affected by

its provisions). *See also* Anderson v. Merit Systems Protection Board, 12 F.3d 1069 (Fed. Cir. 1993), *cert. denied,* 114 S.CT. 2673 (1994)(holding that temporary employees not covered by the Due Process Amendments could not establish MSPB jurisdiction by estoppel).

Note 2. The probationary period ends at the completion of the last duty period on the day before the anniversary date of appointment. An employee given notice of removal on the last duty day of the probationary period has, therefore, completed the probationary period and the removal is defective. Stanley v. Dep't of Justice, 58 M.S.P.R. 354 (1993); Dagstani v. Dep't of Housing and Urban Dev., 15 M.S.P.R. 700 (1983). This is true because the personnel action does not become effective until midnight of the date the action is taken. See Stephen v. Department of Air Force, 47 M.S.P.R. 672 (1991)(Evidence supported conclusion of administrative judge that employee was separated after she completed her probationary period; under the Federal Personnel Manual (FPM), an effective preprobationary period separation must occur prior to end of tour of duty on last day before anniversary date, since separations are otherwise effective at midnight, and agency's advance notice of termination and Standard Form 50-B documenting action stated that employee's termination was effective on the last day before her anniversary date, but documents did not specify that action was effective at a time prior to completion of her tour of duty on that day; agency's advance notice of termination could not be construed to provide that termination was effective at beginning of day.) Toyens v. Dep't of Justice, 58 M.S.P.R. 634 (1993); Shannon v. Dep't of Air Force, 19 M.S.P.R. 510 (1984). To ensure proper termination of a probationer, make the removal effective at least several business days before the anniversary date of appointment.

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c. Probationary Period for Newly-Appointed Supervisors. Newly-appointed supervisors and managers must also serve a probationary period. The purpose of this probationary period is to test the managerial and supervisory skills of the employee. Under 5 C.F.R. § 315.905, each agency is entitled to determine an appropriate length for this probationary period, and it may vary among different occupations. The Army has chosen to use a one-year period in all cases unless a special exception is granted. See AR 690-300, ch. 315.9.

A manager who fails to complete satisfactorily the probationary period must be reassigned to a position no lower in grade than the lower of the supervisory position currently occupied or the position occupied before taking the supervisory position. 5 C.F.R. § 315.907. There is generally no appeal right upon return to the nonsupervisory position, 5 C.F.R. § 315.908, and the reassignment may not be grieved under the Department of Defense grievance procedure (adopted by 18 March 1994 memorandum and succeeding in the Army AR 690-700, Chapter 771-1). See also DeCleene v. Department of Educ., 71 M.S.P.R. 651 (1996). (Board lacked jurisdiction over appeal of probationary supervisor who, for failure to satisfactorily complete his probationary

period, was returned to position of no lower grade and pay then that from which he was promoted and who did not allege that agency action against him resulted from discrimination based on partisan politics or marital status. 5 U.S.C.A. §3321(a)(2)).

d. Tenure upon appointment: career-conditional status. Immediately upon appointment to a competitive service position, an appointee is both a probationary employee and a career-conditional employee. The employee automatically becomes a career employee upon completion of the service requirement established by OPM. The Office of Personnel Management normally requires a three-year period of substantially continuous creditable service to become a career employee. See generally 5 C.F.R. Part 315 for a discussion of career employment.

This "career" status provides the employee with higher retention standing in a reduction-in-force. In a reduction-in-force, a career employee will always be retained over a career conditional employee in the same type job. A detailed discussion of the reduction-in-force process is provided in Chapter 6.

e. Summary of employee status in the competitive service. Upon appointment to a competitive service position, an appointee is normally a probationary career-conditional employee. After one year, the employee becomes a nonprobationary, career-conditional employee. Finally, after three years, the employee is a nonprobationary career employee. OPM has proposed various adjustments to this scheme of career progression; however, as of the date of publication of this text, no rules have been adopted.

2.4 Pay Systems for Federal Employees. Federal civil service employees are categorized not only by their status as competitive or excepted service employees, but also by their category of pay. This section will review the principal categories of employees by pay systems and focus on how pay is determined for each category of employee.

a. General Schedule Employees. The General Schedule consists of the Government's white collar workers. The pay levels and timing of pay increases for Federal General Schedule (GS) employees are prescribed by statute. See 5 U.S.C. Chapter 53, subchapter III. The General Schedule consists of fifteen (GS-1 through GS-15) with ten steps per pay grade. Employees progress through the ten steps per pay grade after completion of specified waiting periods and performance at an acceptable level of competence.

There were formerly eighteen grades; however, the "supergrades," GS-16 through GS-18, have been converted to positions in the Senior Executive Service (SES). SES employees are governed by separate statutory provisions and are beyond the scope of this book. See 5 U.S.C. Chapter 31, subchapter II and Chapter 53, subchapter VIII.

(1) General schedule pay.

General Schedule employees are compensated on the basis of the General Schedule at 5 U.S.C. § 5332. There is generally no consideration of local rates of pay for their type of work in the civilian sector in the geographic area in which they are employed. Under the Federal Employees Pay Comparability Act of 1990, however, a locality comparability payment for GS employees adds a specific percentage differential, or "locality pay," based on Bureau of Labor Standards geographic area surveys of non-Federal employers. The Federal Employees Pay Comparability Act of 1990 also included several important provisions to narrow the pay gap between private sector and public sector employee salaries. Beginning in FY 1992, GS pay raises have been based on the annual rate of increase in employment costs for the U.S. labor force. This index is called the Employment Cost Index (ECI). The ECI is tied to labor costs and not cost of living increases. Under the Act, the President may limit the annual raise to 5% if the ECI exceeds 5% or cancel the raises if there is a state of war or severe economic conditions. See 5 U.S.C. §§ 5301-5307. The exact amount of the Pay Comparability adjustment has been an annual source of heated debate in Congress.

The General Schedule closely resembles the pay tables familiar to military personnel. There are 15 possible grades within the General Schedule (exclusive of the Senior Executive Service) and within each grade there are ten steps for pay increases based on longevity. There are two significant distinctions, however, between the Military Pay Schedule and the General Schedule. First, a civilian employee's grade depends upon the position in fact occupied and is not a personal attribute of the employee, as is the case with military personnel (SES grades are, however, personal to the individual). For example, a Captain will be paid a Captain's salary regardless of the duties performed. A civilian employee, on the other hand, has no personal right to the grade assigned to the position occupied. The grade belongs to the position rather than the individual. A civilian attorney working in a judge advocate office in Germany may fill a GS-13 position, therefore, but will, in effect, be demoted to a GS-12 rating upon return to the U.S. if that is the grade of the position to which the employee has return rights. The second distinction between the Military Pay Schedule and the General Schedule is that a civilian employee is not necessarily guaranteed a within-grade longevity increase, commonly referred to as a step increase. The statutory standard requires an employee to perform at an "acceptable level of competence" to receive a within grade increase. See 5 U.S.C. § 5335(a). Supervisors may withhold these increases from employees who have not performed satisfactorily during the rating period. The procedures to deny an employee a within-grade step increase will be discussed later in this book.

(2) Performance Management and Recognition System employees.

The Civil Service Reform Act of 1978 established the Merit Pay System, codified at 5 U.S.C. Chapter 54. The Performance Management and Recognition System (PMRS), created by Title II of the Civil Service Retirement Spouse Equity Act of 1984 (Pub. L. 98-615) (also codified at 5 U.S.C. Chapter 54), later replaced the merit pay

rules. This system applied to supervisors and managers in pay grades GS-13 through GS-15, designated GM-13 through GM-15, and tied their pay in part to their performance. After temporarily extending the system several times, Congress abolished PMRS. Public Law 103-89, Sep. 24, 1993, the Performance Management and Recognition System Termination Act abolished PMRS, and provided that the pay scales for GM employees would be converted to equivalent GS grades. Although "GM" titles still exist, the Act provides that these employees will be paid from the GS scale.

b. Prevailing rate employees. Prevailing rate employees are the blue collar workers in the civil service. The statutory definition of prevailing rate employee is at 5 U.S.C. § 5342(a)(2). Included are employees in recognized trades or crafts or other skilled mechanical crafts, or in unskilled, skilled, or semi-skilled manual labor occupations, including supervisors and foremen. The Office of Personnel Management and Department of the Army have separate regulations applicable to prevailing rate employees, although their rights and obligations are substantially similar to those of general schedule employees. The distinguishing characteristic of prevailing rate employees, sometimes referred to as "wage board" or "wage grade" employees, is how their pay is calculated. Wage grade pay is based on the prevailing rate of pay for a particular occupation within the private sector in the geographic area of employment. The United States is divided into over 100 wage board areas for purposes of computing prevailing rates. The Office of Personnel Management has overall responsibility for supervising the manner in which these prevailing rates are computed, but it has delegated its authority to a "lead agency" for each of the areas. 5 U.S.C. § 5343. This lead agency must conduct an annual survey of the rates of compensation within its area and promulgate pay schedules based on the survey. The schedules so derived are binding on all Federal agencies within that wage board area. In conducting the annual survey, the lead agency will appoint an agency wage committee consisting in part of representatives of management and employees or their unions. This committee is entitled to call upon the Department of Labor's Bureau of Labor Statistics for professional advice and logistical support in conducting the annual survey.

Like the GS employees, prevailing rate employees also receive periodic step increases based on completion of designated waiting periods and satisfactory performance. The regulatory guidelines for prevailing rate employees are at 5 C.F.R. Part 532.

c. Other Civilian Employees. Not all civilians working at Army installations are legally employees of the United States. Many of them are not covered by the rules and regulations promulgated by the Office of Personnel Management. Employees of nonappropriated fund instrumentalities (NAFI), such as the post exchange, the Army and Air Force Motion Picture Service, and the Officer or NCO clubs, for example, are not covered by the Federal personnel regulations of the Office of Personnel Management. See 5 U.S.C. § 2105(c). Although a nonappropriated fund instrumentality may, for some purposes, be an instrumentality of the United States, for most purposes its employees are not considered employees of the United States. They are, rather, employs of the

particular nonappropriated fund instrumentality that employees them. NAFI employees often receive far less due process protection than their appropriated fund counterparts and will never have appeal rights to the MSPB.

There are also numerous employees of independent organizations on military installations. These employees are neither Department of the Army employees nor nonappropriated fund employees. Examples of such individuals are those employed by the Red Cross, the United Service Organizations, Inc. (USO), the local credit union, the Boy Scouts or Girl Scouts, a PX concessionaire, or contractor employees. None of these employees are entitled to the protections and benefits of a civil service employee.

2.5 Classification of Positions

a. General. A Federal civilian employee's pay depends on the level or "grade" of the position the employee occupies. This grade is determined by a process called "classification." This section will outline how positions are classified, what employees can do to get their positions reclassified, and the extent to which courts will get involved in classification issues.

Under the Classification Act of 1949, the Office of Personnel Management is responsible for analyzing various positions in the Federal civil service and grouping them according to their relative responsibility, difficulty, and qualification requirements. The purpose of the Classification Act is to insure that all employees in the Federal Government receive equal pay for equal work, regardless of which agency employs them. See 5 U.S.C. § 5101 for Congress' statement of policy on classification.

To accomplish this purpose, Congress directed OPM to prepare classification standards for use in analyzing and grouping positions. The required content of these standards and the method for classifying positions are described in 5 U.S.C. §§ 5105-5112.

b. The classification process. The Office of Personnel Management must establish standards for placing positions in appropriate classes and grades. 5 U.S.C. § 5105. The standards for grading positions within all classes of jobs must be consistent with the broad guidelines for grading in 5 U.S.C. § 5104, which define in general terms the level of responsibility associated with each grade.

Using the standards established by OPM, individual agencies then classify each of their positions into the proper job series and grade. To insure proper classification of positions under the OPM standards, OPM conducts periodic audits of agency classification actions.

c. Employee appeals. An employee's pay is based upon the classified grade of the position; the classification process is, therefore, often challenged--particularly if an

employee's position has been "downgraded" or reduced in grade. Employees may, at any time, appeal the classification of their positions within their agency or to OPM. A classification appeal may challenge only the appropriateness of the grade for the position or the wage system determination, the General Schedule or the prevailing wage system. Employees may not challenge the accuracy of their job description or OPM's classification standards.

An employee may challenge a classification determination at any time, but any relief granted is only prospective. An appeal decision for the employee will award retroactive relief only in cases involving a downgrade or other action that wrongfully reduced the employee's pay, and then only if the appeal is initiated within 15 days of the effective date of the reduction. Relief is otherwise prospective only. See 5 C.F.R. § 511.703. The appeal decision made by OPM is final and binding on the agency.

d. Judicial review of classification decisions. Once an employee exhausts the administrative appeal to OPM, judicial review of the classification decision is difficult to obtain. A request for judicial review of the decision raises several interesting legal questions: (1) when, if ever, can OPM reconsider its "final" decision; (2) in which court and on what theory should the aggrieved employee sue; and (3) can a court award back pay as a remedy for an improper classification.

The courts have generally held that classification decisions are nonreviewable. *See, e.g.*, Karamanos v. Egger, 882 F.2D 447 (9th Cir. 1989) (finding that misclassifications are prohibited personnel actions and must be processed as such under the Civil Service Reform Act); Barnhart v. Devine, 771 F.2d 1515 (D.C. Cir. 1985). The Supreme Court addresses these issues in the Testan case below.

United States v. Testan,
424 U.S. 392 (1976)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This is a suit for reclassification of Federal civil service positions and for backpay. It presents a substantial issue concerning the jurisdiction of the Court of Claims and the relief available in that tribunal.

I

The plaintiff-respondents, Herman R. Testan and Francis L. Zarrilli, are trial attorneys employed in the Office of Counsel, Defense Personnel Support Center, Defense Supply Agency, in Philadelphia. They represent the Government in certain matters that come before the Armed Services Board of Contract Appeals of the Department of Defense. Their positions are subject to the Classification Act, 5 U.S.C. § 5101 et seq., and they are presently classified at civil service grade GS-13.

In December 1969 respondents, through their Chief Attorney, requested their employing agency to reclassify their positions to grade GS-14. The asserted ground was that their duties and responsibilities met the requirements for the higher grade under standards promulgated by the Civil Service Commission in General Attorney Series GS-905-0. In addition, they contended that their duties were identical to those of other trial attorneys in positions classified as GS-14 in the Contract Appeals Division, Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Dayton, Ohio, and that under the principle of "equal pay for substantially equal work," prescribed in § 5101(1)(A), they were entitled to the higher classification.

The agency, after an audit by a position classification specialist, concluded that the respondents' assigned duties were properly classified at the GS-13 level under the Commission's classification standards. On appeal, the Commission reached the same conclusion and denied reclassification. The Commission also ruled that comparison of the positions held by the respondents with those of attorneys employed by the referenced Logistics Command was not a proper method of classification.

. . . .

We granted certiorari because of the importance of the issue in the measure of the Court of Claims' statutory jurisdiction, and because of the significance of the court's decision upon the Commission's administration of the civil service classification system. 420 U.S. 923 (1975).

II

We turn to the respective statutes that are advanced as support for the action taken by the Court of Claims.

A. The Tucker Act.

. . . .

[The Court concludes that the Tucker Act merely confers jurisdiction on the Court of Claims in certain cases but does not create a substantive right to recover money damages from the U.S. for a period of wrongful classification.]

B. The Classification Act. Inasmuch as the trial judge proposed, App. 57, that the respondents were not entitled to backpay under the Back Pay Act, 5 U.S.C. § 5596, and the Court of Claims held that there was no need for it to reach and construe that Act, . . . it is implicit in the court's decision in favor of respondents that a violation of the Classification Act gives rise to a claim for money damages for pay lost by reason of the allegedly wrongful classifications.

. . . .

[The Court discusses sovereign immunity, stating that a waiver of sovereign immunity must be unequivocal. Absent such a waiver, the Court of Claims has no jurisdiction to hear a suit against the U.S.]

We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the "purpose" section of the Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was "to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed." And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified.

In answer to this fact, the respondents and the amici make two observations. They first argue that the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a Federal statute or regulation, and makes available any and all generally accepted and important forms of redress, including money damages. It is said that the Government has confused two very different issues, namely, whether there has been a waiver of sovereignty, and whether a substantive right has been created, and it is claimed that where there has been a violation of a substantive right, the Tucker Act waives sovereign immunity as to all measures necessary to redress that violation.

The argument does not persuade us. As stated above, the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. . . . In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument of amici that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation.

. . . .

The respondents and the amici next argue that the violation of any statute or regulation relating to Federal employment automatically creates a cause of action against the United States for money damages because, if this were not so, the employee would then have a right without a remedy, inasmuch as he is denied access to the one forum where he may seek redress.

Here again we are not persuaded. Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the Federal claim--whether it be the Constitution, a statute, or a regulation--does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Eastport S. S. Corp. v. United States, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009. We see nothing akin to this in the Classification Act or in the context of a suit seeking reclassification.

The present action, of course, is not one concerning a wrongful discharge or a wrongful suspension. In that situation, at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified. United States v. Wickersham, 201 U.S. 390 (1906). There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. United States v. McLean, 95 U.S. 750 (1878); Ganse v. United States, 180 Ct. Cl. 183, 186, 376 F.2d 900, 902 (1967). The Classification Act does not purport by its terms to change that rule, and we see no suggestion in it or in its legislative history that Congress intended to alter it.

. . . .

The situation, as we see it, is not that Congress has left the respondents remediless, as they assert, for their allegedly wrongful civil service classification, but that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification. There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other. See Edelman v. Jordan, 415 U.S. 651 (1974). Respondents, of course, have an administrative avenue of prospective relief available to them under the elaborate and structured provisions of the Classification Act. . . . Among the Act's provisions along this line are those requiring the Civil Service Commission to engage in supervisory review of an agency's classifications, and, where necessary, to review and reclassify individual positions, 5 U.S.C. § 5110; allowing the Commission to reclassify, § 5112; and allowing the Commission even to revoke or suspend the agency's authority to classify its own positions, § 5111. Indeed, as the amici describe it: "[T]he Act is not merely a hortatory catalogue of high principles." Brief for Amici Curiae 15. The built-in avenue of administrative relief is one response to these statutory requirements. Review and reclassification may be brought into play at the request of an employee. 5 U.S.C. § 5112(b). And respondents, as has been noted, did just that. A second possible avenue of relief--and it, too, seemingly, is only prospective--is by way of mandamus, under 28 U.S.C. § 1361, in a proper Federal district court. In this way, also, the respondents have asserted their claims. See n. 5, supra.

The respondents, thus, are not entirely without remedy. They are without the remedies in the Court of Claims of retroactive classification and money damages to which they assert they are entitled. Additional remedies of this kind are for the Congress to provide and not for the courts to construct.

Finally, we note that if the respondents were correct in their claims to retroactive classification and money damages, many of the Federal statutes--such as the Back Pay Act--that expressly provide money damages as a

remedy against the United States in carefully limited circumstances would be rendered superfluous.

The Court of Claims, in the present case, sought to avoid all this by its remand to the Civil Service Commission for further proceedings. . . . The remand statute, Pub. L. 92-415, 86 Stat. 652, now codified as part of 28 U.S.C. § 1491 (1970 ed., Supp. IV), authorizes the Court of Claims to "issue orders directing restoration to . . . position, placement in appropriate duty . . . status, and correction of applicable records" in order to complement the relief afforded by a money judgment, and also to "remand appropriate matters to any administrative . . . body" in a case "within its jurisdiction." The remand statute, thus, applies only to cases already within the court's jurisdiction. The present litigation is not such a case.

. . . .

C. The Back Pay Act. This statute, which the Court of Claims found unnecessary to evaluate in arriving at its decision, does not apply, in our view, to wrongful-classification claims. The Act does authorize retroactive recovery of wages whenever a Federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of" the compensation to which the employee is otherwise entitled. 5 U.S.C. § 5596(b). The statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and "other unwarranted or unjustified actions affecting pay or allowances [that] could occur in the course of reassignments and change from full-time to part-time work." S. Rep. No. 1062, 89th Cong., 2d Sess., 3 (1966). The Commission consistently has so construed the Back Pay Act. See 5 C.F.R. § 550.803(e) (1975). So has the Court of Claims. See Desmond v. United States, 201 Ct. Cl. 507, 527 (1973).

For many years Federal personnel actions were viewed as entirely discretionary and therefore not subject to any judicial review, and in the absence of a statute eliminating that discretion, courts refused to intervene where an employee claimed that he had been wrongfully discharged. . . . Relief was invariably denied where the claim was that the employee had been denied a promotion on improper grounds. See Keim v. United States, 177 U.S., at 296; United States v. McLean, 95 U.S., at 753.

Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U.S.C. § 7501, for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay. But Federal agencies continue to have discretion in determining most matters relating to the terms and conditions of Federal employment. One continuing aspect of this is the rule, mentioned above, that the Federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from

it, with its enactment of the Back Pay Act. It could easily have so provided had that been its intention.

. . . .

III

We therefore conclude that neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications. This makes it unnecessary for us to consider the additional argument advanced by the United States that the Classification Act does not require that positions held by employees of one agency be compared with those of employees in another agency.

The Court of Claims was in error when it remanded the case to the Civil Service Commission for further proceedings. . .

Note. The role of the Civil Service Commission discussed in Testan is now performed by OPM. Although the Civil Service Reform Act replaced the appeal rights in the Lloyd-Lafollette Act, the substantive analysis of the employee's right to review in Testan is still valid today.

2.6 Promotion of Federal Employees.

a. Statutory Requirements. Unlike employees of civilian enterprises, who may be promoted by receiving more pay and increased responsibility within the same position, Federal employees normally must change positions to be promoted. Because a Federal position is classified at a certain fixed level under the Classification Act, the incumbent of that position cannot move to a higher grade level while occupying that position. It is the position, not the status or experience of the employee, that determines the grade and pay level. Only if the duties and responsibilities of the position increase, can the position be reclassified and possibly upgraded.

The Federal civil service is based on merit principles. A competitive service employee may therefore have to take a competitive examination to qualify for promotion to a higher graded position, unless the employee is somehow exempt from the examination requirement. See 5 U.S.C. § 3361.

b. Regulatory Implementation. A major exemption from the examination requirement is for Federal employees who have competitive status. Competitive status is acquired by completion of a probationary period under a career-conditional or career appointment. An individual with competitive status may be promoted without open competitive examination, subject to conditions prescribed by civil service rules and regulations. See 5 C.F.R. § 212.301. OPM rules limit such promotions to employees in positions covered by a clearly defined merit promotion plan. See 5 C.F.R. § 335.103.

The result of this OPM rule has been the adoption by all Federal agencies of merit promotion plans. Part 335 of 5 C.F.R. describes the minimum requirements for these plans, including such things as the types of positions covered, the use of minimum qualification standards, the methods for locating candidates, the requirements for training programs, and the maintenance of records. The plans must also define an area of consideration within which eligible candidates will be sought for job vacancies. Each plan must contain a method for evaluating eligible candidates to identify those "highly qualified" for the position. This is generally accomplished by comparing the qualifications of the eligible candidates to the requirements of the job. After the highly qualified candidates are identified, they must be further evaluated to determine which of them are "best qualified" for the position. Up to ten of those best qualified for the position are then certified to the selecting official, who decides which, if any, candidate will fill the vacant position. Department of the Army implementation is at AR 690-300, Chapters 335 and 335-1.

Such a promotion system rewards eligible employees already employed by an agency by insuring their consideration for job vacancies at equal or higher grades in that agency. Merit promotion plans also ensure that promotions within agencies are based on merit principles rather than favoritism, nepotism, or some other nonmerit factor. Most importantly for the agencies, merit promotion plans provide the agency flexibility by enabling supervisors to fill vacancies without going through the cumbersome competitive procedures using OPM registers for selection of outside candidates.

An alternative to the merit promotion system considered in the "Reinventing Government" proposals involves pay or grade banding. Under this system, employees would be classified into a broad pay or grade "band" instead of into a specific pay grade. These bands would cover the equivalent of two, three, five, or more grade equivalents; over $20,000 would separate the highest and lowest pay in a band. Instead of seeking an upgrade in grade classification for an employee, management would have authority to simply escalate the employee on the pay band--up to the band maximum. Since this is an exception to GS pay, however, it requires specific authority from Congress. Pay banding has been used in some NAF positions.

c. Judicial Review of Promotion Decisions. The merit promotion system inevitably results in many qualified candidates for promotion being passed over, or nonselected, for a position. Nonselected employees have often attempted to challenge the selection decision in Federal court. These nonselectees have alleged various defects in the process: improper notice of vacancy, lack of detail concerning qualifications, use of improper procedures, consideration of ineligible employees, or discrimination.

Historically Federal courts have reviewed such claims. Accord, Latimer v. Dep't of Air Force, 657 F.2d 235 (8th Cir. 1981); Estes v. Spence, 338 F. Supp. 319 (D.D.C. 1972). See also Maule v. Office of Personnel Management, 812 F.2d 1396 (Fed.Cir. 1987)(Remand to Merit Systems Protection Board was required for determination of whether Office of Personnel Management's refusal to reopen register for federal

employee, who was on active duty with Air Force Reserve at time of job postings, was "employment practice" within meaning of regulation governing appeals to Merit Systems Protection Board.).

The Court of Appeals for the D.C. Circuit has often refused to review such nonconstitutional claims. Williams v. Internal Revenue Serv., 745 F.2d 702 (D.C. Cir. 1984); Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983). The D.C. Circuit reasoned in its decisions that the Civil Service Reform Act of 1978 established a comprehensive scheme of administrative and judicial review of certain designated personnel actions; therefore, no judicial review is available for other personnel actions absent a constitutional claim.

Note. Unless the employee alleged prohibited discrimination, there has been no administrative appeal procedure for those not selected for promotion. The only basis for filing a grievance over a promotion decision was that the agency followed improper procedures. The former 5 C.F.R. § 771.108 addressed agency grievance coverage and specifically excluded from grievance coverage "[n]onselection for promotion from a group of properly ranked and certified candidates." OPM has recently repealed this provision. *See* 60 Fed. Reg. 47039-01 (Sep. 11, 1995). The DOD Grievance process, at para. 13-1.d.2(a) also excludes nonselection for promotion.

2.7 Incentive Awards.

Employees may also be eligible for cash incentive awards under 5 U.S.C. Chapter 45. This chapter provides the authority for paying employees cash awards up to $25,000 for suggestions, inventions, superior accomplishments, or other meritorious efforts deserving recognition. An award may be either an agency award or (in exceptional circumstances) a Presidential award.

The Office of Personnel Management regulations in 5 C.F.R. Part 451 provide a broad framework within which Federal agencies may design and operate their own incentive award programs. Agency plans must, however, be reviewed by OPM for compliance with the regulatory requirements. See 5 C.F.R. § 451.106.

Army Regulation 672-20 provides for a variety of incentive awards: suggestion awards, invention awards, special act or service awards, merit step increases, sustained superior performance awards, public service awards, length of service recognition, and other honorary awards and recognition devices. Portions of this regulation are also applicable to military personnel; however, the principal purpose of this regulation is to implement the statutory provisions for incentive awards for Federal civilian employees. The regulation contains all of the criteria concerning eligibility and approval authority for each of the various types of awards. All decisions on performance awards, honorary awards, and employee suggestions and inventions are management discretionary

decisions and are not grievable under the DOD grievance procedures. (See para 13-1d(2)(a).)

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CHAPTER 3

EMPLOYEE GRIEVANCES UNDER AGENCY GRIEVANCE PROCEDURES

3.1 Purpose of Agency Grievance Procedure.

Prior civil service regulations required each Federal agency (including the executive agencies and military departments) to establish and maintain an agency grievance procedure. OPM has abolished this requirement in its amendment of 5 C.F.R. Part 771. *See* 60 Fed. Reg. 47039 (Sep. 11, 1995). Agencies must maintain the grievance systems already in place under the old Part 771 until the agency's grievance process is appropriately modified or revised.

An agency grievance process serves a variety of purposes. First, it provides a legitimate outlet for an employee to complain about management practices. Second, it allows an employee to obtain review of personnel actions from which there is no statutory appeal right. An employee who receives a letter of reprimand or a 3-day suspension, for example, has no right to appeal the agency action. The employee may, however, file a grievance to obtain limited review of the action. Third, the grievance procedure may provide a forum for challenging some aspect of the employee's working conditions, relationships, or status that is not covered by some other statutory or regulatory procedure. The agency grievance procedures encourage orderly consideration and prompt resolution of employee concerns and dissatisfactions. Management can consider each grievance fairly, equitably and promptly.

3.2 Regulatory Requirements.

Each Federal agency can now establish a grievance system for its employees without complying with the requirements of former 5 C.F.R. Part 771. The regulation requires only that agencies maintain current systems until a new grievance process--preferably one implementing alternate dispute resolution techniques--is fully implemented.

Note. Establishment of time limits in grievance procedures is within the discretion of the agency and, therefore, not subject to judicial review. Campbell v. Department of Air Force, 755 F. Supp. 902 (E.D. Cal. 1991).

3.3 The Department of Defense Grievance System.

a. General. Mr. Ronald P. Sanders, the Principal Director to the Assistance Secretary of the Army for Civilian Personnel Policy established a new Agency Grievance System (AGS) for all DOD military departments through an 18 March 1994

memorandum. It modified this process through publication of DOD 1400.25-M on 20 December 1995 to implement the OPM changes. The Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs through a 13 February 1996 memorandum published implementing instructions for the new DOD process. All matters are excluded under the DOD Grievance System that were excluded by the old 5 C.F.R. 771.105(b) or are not personal to the employee or the employee's personal well being or career.

b. Procedure. The DOD AGS contains only two steps, compared to the former three-step process in AR 690-600, chap. 771. The employee has the initial option of engaging in informal resolution to a problem through problem-solving. The employee presents the problem to a first or second line supervisor either orally or in writing within 15 days of the event giving rise to the problem. The 15 days runs from the time the employee becomes aware of the event or should have become aware of it. The supervisor has 30 days (which in no event can be extended beyond 60 days) to resolve the problem or inform the employee that no resolution is possible.

If the grievance is not resolved during problem-solving, or the employee elects to bypass that stage, the employee files a formal, written grievance with a designated deciding official within 15 days. This deciding official must be at least a second-line supervisor, and will often be a chief of staff or deputy commander. The deciding official must be higher graded than any employee having a direct interest in the outcome of the grievance (except heads of activities or installations). The grievance must state specific dates, facts, and witnesses involved in the problem. The deciding official decides whether and how to investigate the grievance, approves or disapproves a representative for the grievant, and determines the appropriate amount of official time to be allowed for preparation and presentation of the grievance. Investigation can be conducted by the Office of Complaints Investigation on a cost-reimbursable basis, by an uninterested investigator within the command, or other means. The deciding official then issues a written, final decision within 60 days. There is no appeal or review of the deciding official's determination on the grievance.

CHAPTER 4

EMPLOYEE DISCIPLINE

SECTION I: Authority and Procedure

4.1 Introduction. Management's ability to take effective disciplinary action is critical to maintaining a well-disciplined work force, whether in the private sector or in the Federal civil service. To attain this goal in the civil service system, we must understand what disciplinary tools are available, what procedures must be followed to impose the various types of disciplinary actions, and what circumstances permit us to legally impose discipline. This section will examine the various types of disciplinary actions available to Federal supervisors, the procedures they must employ to impose each of these actions, and the employee's predecisional and postdecisional due process rights.

The ultimate goal of a disciplinary system is to motivate employees to conform to acceptable standards of conduct. A supervisor's best means for maintaining discipline is through cultivation of a positive work environment and good relations with subordinates. When an employee fails to conform to expected standards, the supervisor must take appropriate remedial action.

4.2 Types of Disciplinary Action.

a. General. Disciplinary tools available to Federal managers range from counseling to removal. The Army's regulation on civilian employee discipline, AR 690-700, Chapter 751, establishes two categories of disciplinary actions. The first category, informal disciplinary actions, includes oral admonishments and written warnings. The second category, formal disciplinary actions, includes letters of reprimand, suspensions, reductions in grade or pay, and removals. Informal action is encouraged as a first step in constructive discipline for behavioral offenses, but management can impose formal disciplinary for a first infraction whenever appropriate. See AR 690-700, Chapter 751, paragraph 1-3.

b. Informal disciplinary actions. Oral admonishments or counseling and warning letters are actions usually taken by the first or second line supervisor. An informal, oral action should always be noted on the employee's Standard Form 7-B (Employee Record Card) and explained in a corresponding memorandum for record. AR 690-700, Chapter 751, paragraph 1-3b.

c. Formal disciplinary actions. The supervisor in the Army initiates formal disciplinary actions, but they must be coordinated with the servicing CPOC and reviewed by the Labor Counselor.

(1) Written reprimands. Written reprimands may be imposed by a supervisor and are included in the employee's official personnel file (OPF). The supervisor imposing the discipline decides how long the reprimand will remain in the employee's OPF, but the period may not exceed three years. The letter of reprimand will automatically be removed from the employees' file if the employee changes positions and the new position is serviced by a different CPOC.

(2) Suspensions. Suspensions are divided into two categories based on their duration: suspensions for fourteen days or less, and suspensions for more than fourteen days. The procedural rights an employee receives depends on the duration of the suspension. The suspension is measured in calendar days, not workdays. For employees working a normal tour of duty, Monday through Friday, a 14-day suspension amounts to a 10-workday suspension. 5 C.F.R. §§ 752.201(d)(1); 752.402(a).

There is no specific limit on the duration of a suspension; however, a suspension generally cannot be indefinite. See, e.g., Tigner-Kier v. Department of Energy, 20 M.S.P.R. 552 (1984). The courts recognize a type of "indefinite" suspension that is linked to the disposition of criminal changes. Such a suspension is not truly indefinite because it is limited by a condition subsequent--the outcome of criminal proceedings. This type of action is discussed fully in paragraph 4.12 of this chapter. Regardless of its length, a suspension results in the employee not reporting to work and not being paid for the period of suspension. See 5 C.F.R. § 752.201(d)(4) ("S*uspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.").

(3) Reductions in grade or pay. While reductions in grade or pay are more frequently used in performance-based actions, they may be appropriate for some misconduct problems. Most frequently, a reduction for misconduct is used to reduce a supervisor to a nonsupervisory position because of misconduct impacting on the special trust and confidence required of management personnel.

(4) Removals. The most serious disciplinary action is the removal - firing the employee.

4.3 Procedural requirements for imposing formal disciplinary actions. The procedures required to impose formal disciplinary action vary depending on the type action. As expected, the more serious the action, the more extensive the procedural protections are for the employee being disciplined.

a. Written reprimand. This is the least severe of the formal disciplinary actions and the easiest to impose. A supervisor obtains all reasonably available and relevant information and then determines whether a letter of reprimand is warranted. Coordination with the CPOC and review by the Labor Counselor is required. Before deciding whether to impose this type discipline the supervisor may, but need not, interview the employee involved. An employee generally has no right to counsel at such

an interview, but may be entitled to union representation at the interview under 5 U.S.C. § 7114(a)(2)(B) if the employee is in a collective bargaining unit. See AR 690-700, Chapter 751, paragraph 3-2, for more detailed guidance, including instructions on the content of a letter of reprimand.

b. Suspensions for 14 days or less. The statutory basis for these disciplinary actions is 5 U.S.C. §§ 7501-7504. This law and its implementing regulations contain significant predecisional, procedural due process requirements; however, these procedures apply only to nonprobationary competitive service employees. Excepted service employees, even those who are preference eligibles or have two or more years current, continuous service, may be summarily suspended for 14 days or less. Bredehorst v. United States, 677 F.2d 87 (Ct. Cl. 1982) (at the time of the disciplinary action in Bredehorst, the critical length for suspensions was 30 days instead of the current 14 days).

Nonprobationary competitive service employees receive the following procedural due process (see 5 U.S.C. § 7503; 5 C.F.R. § 752.404) before a suspension for 14 days or less may be imposed:

1. advance written notice specifying the reasons for the proposed action;

2. the right to review all the material and information relied upon by management in support of the proposed action;

3. the right to reply, orally and in writing, to the charges;

4. the right to representation during this process; and

5. the right to a final written decision, specifying the reasons for the action, prior to the effective date of the action.

The right to review all the information relied upon by management in proposing this action does not include questioning the agency officials involved. Such a right exists only during the appeals process to the Merit Systems Protection Board for those actions appealable to the board. See paragraph 5.4 for a discussion of these appellate rights and Chapter 8 for a discussion of employee rights during the appellate process.

c. True adverse actions. Suspensions for more than 14 days, reductions in grade or pay, and removals are often referred to as true adverse actions. The procedures leading to the imposition of true adverse actions are very similar to those required for suspensions for 14 days or less. The differences lie in the types of employees who receive the procedural protections, in the amount of time given to the employee to respond to the proposed action, and in appeal and grievance rights.

Nonprobationary competitive service employees and nonprobationary excepted service employees (preference eligibles with over one year service and nonpreference eligible excepted service employees with two or more years of current, continuous service) all receive the same predecisional due process in a true adverse action. Most excepted service employees now receive due process because of the definition of employee in 5 U.S.C. § 7511, which is broader than the definition of employee for the lesser suspensions found at 5 U.S.C. § 7501. The Civil Service Due Process Amendments modified this definition to grant most excepted service employees due process rights in true adverse actions.

Despite these rights for the "protected" employees, agencies still have virtual summary disciplinary authority over nonpreference eligible excepted service employees with less than two years current, continuous service and probationary competitive service or excepted service preference eligible employees. See, e.g., Forest v. Merit Systems Protection Bd., 47 F.3d 409 (Fed. Cir. 1995) (nonpreference eligible excepted service employee with less than two years of current, continuous employment in a nontemporary appointment has no right of appeal from removal); Antolin v. Department of Justice, 895 F.2d 1395, 1397 (Fed.Cir.1989) (Under the plain language of the statute, even when an individual serves a series of temporary appointments of one year or less, that individual does not become an employee for the purpose of 7511(a)(1)). Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980); Shaw v. United States, 622 F.2d 520 (Ct. Cl.), cert. denied, 449 U.S. 881, reh'g denied, 449 U.S. 987 (1980); Ferguson v. Dep't of Interior, 59 M.S.P.R. 305 (1993); and Horton v. Dep't of Navy, 60 M.S.P.R. 397 (1994).

An employee entitled to due process in a true adverse action receives at least thirty days advance written notice of the action and at least seven days to prepare matters in response to the proposed action. See 5 U.S.C. § 7513(b)(1). If the agency has reasonable cause to believe the employee has committed a crime for which imprisonment may be imposed, the advance notice period may be reduced to 7 days under the "crime provision." See 5 U.S.C. § 7513(b)(1) and 5 C.F.R. § 752.404(a)(1). Regardless of the length of the notice period, the employee is normally in a full duty status during the notice period. See 5 C.F.R. § 752.404(b)(3) for alternatives to normal duty status during the notice period, including placing the employee in a paid nonduty status for the entire notice period.

Title 5, U.S. Code, section 7513(c) provides for an optional predecisional hearing in true adverse actions. The Army, however, has elected not to provide predecisional hearings.

4.4 Appeal and grievance rights. After management has provided an employee predecisional due process and decided to take disciplinary action, the employee may be entitled to challenge the action through a grievance or appeal. An employee's right to grieve or appeal a disciplinary action depends on three factors: whether the employee is covered by a collective bargaining agreement, the type disciplinary action involved, and the employee's individual status.

a. Without a collective bargaining agreement.

(1) True adverse actions. An employee with status (discussed below) who is not covered by a collective bargaining agreement between management and a labor organization can appeal a true adverse action to the Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 7513(d); 5 C.F.R. § 752.405. In this appeal, the employee receives a full administrative hearing before an administrative judge of the MSPB, at which the agency has the burden of proving the propriety of the disciplinary action. See 5 U.S.C. § 7701. Details of MSPB procedures are provided in Chapter 8 of this book.

(2) Other disciplinary actions. For lesser disciplinary actions, employees generally can grieve the action under the DOD AGS. There is no third party hearing or other review outside the command in this system. The final decision on the grievance is made within command channels. Details of the DOD AGS are provided in Chapter 3 above.

There are significant differences in postdecisional appeal rights between a 14-day and 15-day suspensions; courts have, therefore, scrutinized attempts to "split" suspensions of more than 14 days into two or more lesser suspensions to limit the employee's appeal rights. Such splitting of punishments for the same offense will not defeat the employee's appeal rights. Lyles v. U.S. Postal Service, 709 F.2d 358 (5th Cir. 1983).

b. With a collective bargaining agreement. Every public sector collective bargaining agreement must contain a grievance procedure that includes an arbitration process that binds the parties. See 5 U.S.C. § 7121. Arbitration under this process provides the employee and the union a full administrative hearing outside the agency, and the arbitrator's decision in the case binds the parties in the same way as would a decision by the MSPB. For a detailed discussion of the negotiated grievance process, see The Judge Advocate General's School, U.S. Army, JA 211, Law of Federal Labor-Management Relations.

(1) True adverse actions. An employee covered by a collective bargaining agreement can either appeal a true adverse action to the MSPB or grieve the action under the negotiated grievance procedure. The employee must make a binding election; pursuit of one bars later recourse to the other procedure. Rolon v. Dep't. of Veteran Affairs, 53 M.S.P.R. 362 (1992). See 5 U.S.C. § 7121(e)(1) and 5 C.F.R. 1201.3(c)(2) for the rule regarding when the employee is held to have made an election; Jones v. Dep't. of Justice, 53 M.S.P.R. 117, dismissed, 972 F.2d 1352 (Fed. Cir. 1992)(finding employee's later withdrawal of grievance did not affect validity of election).

An employee in essence forfeits control of an appeal by electing to grieve under a negotiated grievance procedure instead of appealing to the MSPB. Rolon v. Dep't of Veterans Affairs, 53 M.S.P.R. 362 (1992). Under the negotiated grievance procedure, an employee chooses to file a grievance; however, the employee cannot invoke arbitration,

only the union can do that. If the union elects not to invoke arbitration, the employee's grievance and appeal rights end. See Billops v. Dep't of the Air Force, 725 F.2d 1160 (8th Cir. 1984), Parks v. Smithsonian Inst., 39 M.S.P.R. 346 (1988), Little v. Department of Treasury, 65 M.S.P.R. 360, 362 (1994) for examples of such aggrieved employees. Of course, the employee's appeal rights are still defined by law. An employee who has no MSPB appeal rights, therefore, can not further appeal an arbitrator's decision as could a nonprobationary employee. *See* Burke v. U.S. Postal Serv., 888 F.2D 833 (Fed.Cir. 1989) (finding it had no jurisdiction over petition from arbitrator's decision by nonpreference-eligible excepted service postal worker).

(2) Other disciplinary actions. Under a collective bargaining agreement, employees can grieve the lesser disciplinary actions and potentially go to binding arbitration. This is a significant benefit to the employee; without a collective bargaining agreement the employee cannot grieve this type disciplinary action outside the agency. Do not confuse this arbitration right with the arbitrability of true adverse actions. An employee who can not appeal a true adverse action (*i.e*, probationary competitive service employees, excepted service employees with less than two years, current, continuous service) also can not arbitrate that action, and any union proposal to give those employees arbitration rights is nonnegotiable. Dep't of Health & Human Servs., v. Federal Labor Relations Auth., 894 F.2d 333 (9th Cir. 1990); Dep't of Treasury v. Federal Labor Relations Auth., 873 F.2d 1467 (D.C. Cir.1989); Dep't of Health & Human Servs., v. Federal Labor Relations Auth., 858 F.2D 1278 (7th Cir.1988) (all reversing FLRA's finding that proposal to allow probationary employees arbitration rights was negotiable). But see Suzal v. Director, U.S. Information Agency, 32 F.3d 574, 580 (D.C.Cir. 1994)(United States Information Agency (USIA) did not act ultra vires when it allowed employee to challenge nonrenewal of appointment through arbitration, since nonrenewal was not "adverse action"; although agencies were probably prohibited from allowing employees to challenge major "adverse actions" through arbitration when Congress had specifically precluded them from appealing such actions to Merit Systems Protection Board (MSPB), no parallel inference could be drawn for "prohibited personnel practices.")

c. Employee status. The type of disciplinary action at issue controls appeal rights, and the existence or absence of a collective bargaining agreement controls grievance rights. The employee's status, however, determines what, if any, appeal and grievance rights the employee has in any disciplinary action.

A probationary employee generally has no statutory appeal right to the MSPB. Pierce v. Government Printing Office, 95-3301 (Fed. Cir. Nov. 11, 1995); Horton v. Dep't of Navy, 60 M.S.P.R. 397 (1994); McChesney v. Dep't. of Justice, 55 M.S.P.R. 512 (1992); Stern v. Department of Army, 699 F.2d 1312 (Fed. Cir. 1983). Probationary employees also cannot arbitrate a disciplinary action. INS v. FLRA, 709 F.2d 724 (D.C. Cir. 1983).

Before passage of the Civil Service Due Process Amendments of 1990, excepted service employees who were not preference eligible had no right to MSPB or judicial review of adverse personnel actions. United States v. Fausto, 484 U.S. 439 (1988). Relying on the reasoning of Fausto, courts and the Federal Labor Relations Authority (FLRA) held such employees were similarly barred from challenging true adverse actions through negotiated grievance procedures. Department of Health and Human Services v. FLRA, 894 F.2d 333 (9th Cir. 1990); Department of Treasury v. FLRA, 873 F.2d 1467 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990); Department of Health and Human Services v. FLRA, 858 F.2d 1278 (7th Cir. 1988); NLRB and NLRB Professional Association, 35 F.L.R.A. No. 123 (1990).

Effective August 17, 1990, most Schedule A and Schedule B excepted service employees with two or more years of current, continuous service became entitled to an MSPB appeal in true adverse actions. These employees are now able to arbitrate lesser disciplinary actions and have the option of appealing or grieving true adverse actions once they have satisfied this probationary period. As noted above, however, these employees may not arbitrate true adverse actions unless they could otherwise appeal that action to the MSPB.

4.5 Procedural rights for probationary and excepted service employees in disciplinary actions. Probationary competitive service and probationary veteran's preference excepted service employees receive little due process in disciplinary actions--even true adverse actions. They are, however, entitled by law to some protections.

a. Probationary employee rights. The basis of the action determines, what, if any, process is due a probationary employee.

(1) Predecisional rights. In removals based on conduct or performance during the probationary period, a probationary competitive service employee or a probationary veteran's preference excepted service employee are entitled only to written notice stating the reasons for the action and the effective date of the separation. See 5 C.F.R. § 315.804. The employee need not even receive the termination notice before its effective date if the agency acts with reasonable diligence to provide it in advance. Santillan v. Dep't. of Air Force, 54 M.S.P.R. 21 (1992). Lavelle v. Department of Transp., 17 M.S.P.R. 8 (1983) (The courts interpreting this provision have recognized that the rights conferred by 5 C.F.R. S 315.804 are very narrow. "Procedurally, a probationary employee has the right only to be notified prior to the termination of his employment as to the agency's 'conclusions as to the inadequacies of [the probationer's] performance or conduct.' " See e.g., Shaw v. United States, 622 F.2d 520, 527, 223 Ct.Cl. 532, cert. denied, 449 U.S. 881, 101 S.Ct. 231, 66 L.Ed.2d 105 (1980), citing Perlongo v. United States, 215 Ct.Cl. 982, 566 F.2d 1192 (1977), cert. denied, 436 U.S. 944, 98 S.Ct. 2844, 56 L.Ed.2d 785 (1978), and Horne v. United States, 190 Ct.Cl. 145, 148, 419 F.2d 416, 418 (1969)). Although failure to provide such notification prior to termination has been held to constitute substantial noncompliance with the regulation where the employee did

not receive the agency reasons until six months after her discharge (See Watson v. United States, 162 F.Supp. 755, 758-759, 142 Ct.Cl. 749 (1958)), such notification does not have to be actually received by the employee prior to the termination where the agency's attempts to give prior notification are diligent and reasonable under the circumstances.

If, however, the action is based, in whole or in part, on incidents arising before appointment, the agency must provide the employee advance written notice, an opportunity to respond in writing, and a final written decision. See 5 C.F.R. § 315.805. and Pierce v. GPO, 70 F.3d 106, (1996) (In reviewing the appeal rights of a probationary employee, a claim that the removal was based on either a learning disability or sexual harassment by a supervisor does not constitute a pre-appointment reason entitling the employee limited due process under 5 CFR § 315.805.) Presumably, the employee could file an EEO complaint.; Munson v. Dep't of Justice, 55 M.S.P.R. 246 (1992); James v. Dep't of Army, 55 M.S.P.R. 124 (1992).

(2) Appeal right to MSPB. By OPM regulation, probationary employees can appeal a firing to the MSPB if the firing is based on a nonfrivolous allegation of partisan political reasons or marital status. The MSPB and courts have strictly scrutinized appeals invoking this jurisdiction before granting review.

Partisan political reasons are those relating solely to recognized political parties, candidates for office, and political campaign activities. Poorsina v. MSPB, 726 F.2d 507 (9th Cir. 1984). It does not include an employee's affiliation with a labor organization. Schindler v. General Services Admin., 53 M.S.P.R. 171 (1992); Masticano v. FAA, 714 F.2d 1152 (Fed. Cir. 1983). Bante v. Merit Systems Protection Bd., 966 F.2d 647 (Fed. Cir. 1992) (discussing the requirement for partisan politics review generally).

Marital status is not the same as sexual discrimination; it includes only discrimination based on marriage. A successful allegation by a single woman would be that management terminated her because it perceived married women as more mature and stable. The converse allegation by a married woman would be termination because management sought a single woman who was less likely to have children and leave the position. Edem v. Dep't of Commerce, 64 M.S.P.R. 501 (1994); Bedynek-Stumm v. Dep't of Agriculture, 57 M.S.P.R. 176 (1993); Gribben v. Dep't of Justice, 55 M.S.P.R. 257 (1992); Hurst v. GSA, 2 M.S.P.R. 497 (1980). Employees have been unsuccessful in attempts to obtain an expansive interpretation of "marital status" discrimination. See, e.g., Yakupzack v. Department of Agriculture, 10 M.S.P.R. 180 (1982) and Shah v. GSA, 7 M.S.P.R. 626 (1981).

Probationary employees fired for preemployment matters can appeal a removal to the MSPB for defects in the procedures required by 5 C.F.R. § 315.805. In this appeal, however, the MSPB will not review the substantive merits of the action, but rather only the procedures. Hibbard v. Department of Interior, 6 M.S.P.R. 181 (1981).

A probationary employee who appeals to the MSPB based on a nonfrivolous allegation of partisan political or marital status discrimination or on improper procedures for preemployment matters can also properly raise additional allegations of discrimination based on sex, race, religion, color, national origin, age, or handicapping condition. See 5 C.F.R. § 315.806. Allegations of discrimination because of race, religion, color, sex, national origin, age, or handicapping condition do not, standing alone, invoke the jurisdiction of the MSPB; a remedy under those circumstances is only through equal employment opportunity channels discussed in Chapter 10 of this book. The MSPB will, however, hear evidence of discrimination in any case properly before it. Roja v. Dep't of Navy, 55 M.S.P.R. 618 (1992).

(3) Special Counsel action. Any federal employee, even probationers, can complain to the Office of Special Counsel that a personnel action allegedly constitutes a prohibited personnel practice as defined in 5 U.S.C. § 2302(b). The Special Counsel can seek corrective action, if a personnel action appears to have been taken for improper reasons, and administratively prosecute the agency official responsible for the prohibited personnel practice. The Special Counsel brings these cases before the MSPB. The MSPB can also grant the Special Counsel a stay of pending personnel action while it investigates an allegation based on only the Special Counsel's petition. See generally 5 C.F.R. Part 1209. Such a stay need be supported only by "reasonable grounds." Special Counsel v. Dep't of Air Force, 55 M.S.P.R. 482 (1992). A probationary employee's service during a stay period will not, however, count toward satisfaction of the probationary period if the stay extends beyond the one-year probationary period; the stay merely preserves the status quo. See Special Counsel v. Department of Veterans Affairs, 45 M.S.P.R. 486 (1990); Special Counsel v. Department of Commerce, 23 M.S.P.R. 469 (1984).

A good faith allegation of a prohibited personnel practice generally does not give the probationary employee an independent appeal right to the MSPB. That employee may complain to the Special Counsel, and the Special Counsel has discretion in pursuing the matter. Borrell v. U.S. International Communications Agency, 682 F.2d 981 (D.C. Cir. 1982) and Wren v. MSPB, 681 F.2d 867 (D.C. Cir. 1982). DeLeonardis v. Weiseman, 986 F.2d 725, (5th Cir 1993)(When Office of Special Counsel (OSC) decides to terminate investigation that it began pursuant to employee's complaint of prohibited personnel practice, that decision is not reviewable, even if OSC has allegedly applied incorrect legal standard in deciding to terminate investigation.)

An employee who complains to the Special Counsel that a personnel practice violates the provisions of the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8), however, may bring an independent action before the MSPB if the Special Counsel either defers action or fails to act within 120 days (referred to as the independent right of action, or "IRA"). 5 U.S.C. § 1221; 5 C.F.R. § 120.3(b). *See also* Horton v. Dep't of Transp., 66 F.3d 279 (Fed. Cir. 1995) (affirming removal and nonselection for promotion appeal by probationary employee who alleged whistleblower reprisal).

(4) DOD Agency Grievance Procedure. The final possible avenue for a probationary employee to challenge a removal is to grieve under the agency's grievance procedure. The DOD procedure is discussed in chapter 3, above. Under prior OPM regulations (5 C.F.R. Part 771), probationary employees were not entitled to grieve removal. Agencies are now free to implement their own grievance systems without the requirements of 5 C.F.R. Part 771. Most will continue to prohibit removal grievances by probationers, as does the DOD Grievance Process. See DOD AGS Memorandum, para 13-1d(2)(c).

b. Excepted service employee rights. Among excepted service employees, only preference eligible employees with one year of service or, after August 17, 1990, most other Schedule A and B excepted service with over two years' continuous service, receive appeal rights to the MSPB from a true adverse action. These employees are considered "nonprobationary." Those excepted service employees who do not fall within one of these groups receive even fewer due process protections than competitive service probationary employees.

(1) Predecisional rights. An excepted service employee who is not a preference eligible and not covered by the Civil Service Due Process Amendments of 1990 receives no predecisional rights in any disciplinary action. An excepted service employee who is a preference eligible beyond the first year of employment or has two or more years of current, continuous service (nonprobationary equivalent) receives the same predecisional rights as a nonprobationary competitive service employee for true adverse actions. See 5 U.S.C. § 7511. These excepted service employees still receive no predecisional rights, however, for suspensions of 14 days or less. See 5 U.S.C. §§ 7501-7503.

(2) Appeal rights to MSPB. Only nonprobationary excepted service employees have appeal rights to the MSPB. Probationary excepted service employees can, however, appeal a personnel action based on a nonfrivolous allegation of partisan political reasons or marital status, just as probationary competitive service employees. Kane v. Dept of Army, 60 M.S.P.R. 605 (1994).

(3) Special Counsel action. Excepted service employees have the same rights as competitive service and all other employees to complain to the Special Counsel and allege that a personnel action is based on a prohibited personnel practice.

(4) DOD grievance procedure. Excepted service employees who have completed a one-year period of employment, equivalent to the one-year probationary period, may grieve their disciplinary actions, including removals, under the DOD AGS.

4.6 Constitutional right to due process. The rights of probationary competitive excepted service employees just discussed are based on statute and regulation. They are the only rights these employees receive in a disciplinary action, unless they can

demonstrate a constitutional right to a hearing based upon the implication of a property right or a liberty interest.

a. Property right. A reasonable expectation of continued employment can create a property right protected by the due process clause of the Fifth Amendment to the U.S. Constitution. Arnett v. Kennedy, 416 U.S. 134 (1974). When a property right is implicated, the person to be adversely affected is entitled to "some kind of prior hearing." Board of Regents v. Roth, 408 U.S. 564, 570 (1972). Because federal employees' rights are so specifically delineated in law and regulation, however, a constitutional property right will be implicated only when the Civil Service Reform Act provides due process protections. Bush v. Lucas, 462 U.S. 367, 378 n. 14 (1983) (holding civil service protections are "clearly constitutionally adequate").

(1) Statutory right. A property right has been created by statute for nonprobationary competitive service employees and nonprobationary equivalent excepted service employees. This property right is created by language in 5 U.S.C. § 501, which states that these employees may only be removed "for such cause as will promote the efficiency of the service." The Court in Arnett v. Kennedy found that the language in Section 7501 created an expectation in continued Federal employment absent cause. The Court in Arnett v. Kennedy also determined that the procedural protections provided to these employees, similar to what is currently provided, satisfied due process requirements. The Court reaffirmed that aspect of Arnett v. Kennedy in Cleveland School Board v. Loudermill, 470 U.S. 532 (1985). No such reasonable expectation of continued employment can arise for a probationary or probationary equivalent employee, since the statutes that enable their employment provide no such right to a hearing.

(2) Other property right. The U.S. Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1972), held that a property right could be created by something other than a statutory provision. The Court suggested that rules or understandings between an agency and its employees could create an expectancy in continued employment and create a property right in employment. See Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979), and Paige v. Harris, 584 F.2d 178 (7th Cir. 1978), where the courts found property rights created by language in agency handbooks suggesting that employment would not be terminated except for cause. But see Fiorentino v. United States, 607 F.2d 963 (Ct. Cl. 1979) where the court found no property right created by the same handbook provision examined in Paige v. Harris. The courts in Ashton and Paige found that the employees were entitled to a hearing for their termination even though statute and implementing OPM and agency regulations provided them no such right. While the implication of a property right may trigger a right to a hearing, that hearing does not necessarily have to be a formal trial-type hearing, and, absent a statutory change, that hearing is not before the MSPB.

Note. For a discussion of Cleveland School Board v. Loudermill, and the possible expansion of due process property rights for Federal employees, see St. Amand, Probationary and Excepted Service Employee Rights in Disciplinary Acts in the Wake of

Cleveland School Board v. Loudermill, The Army Lawyer, July 1985, at 1, and Garrow v. Gramm, 856 F.2d 203 (D.C. Cir 1988).

b. Liberty interest. A second Constitutional basis to assert some right to procedural due process protection is to establish that a "liberty interest" is at stake.

(1) Nature of the interest. A liberty interest is a right not to have stigmatizing information disseminated without an opportunity to respond. Board of Regents v. Roth, 408 U.S. at 572-575. Stigmatizing information in an employment context refers to a person's general character, reputation, or misconduct that could adversely affect the individual's ability to take advantage of other employment opportunities.

To be actionable in an employment context, the stigmatizing information must be associated with the loss of a job and it must be disseminated. Siegert v. Gilley, 111 S. Ct. 1789 (1991); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693, 706-709 (1976); Lyons v. Barrett, 851 F.2d 406 (D.C. Cir. 1988).

The 10th Circuit Court of Appeals has found a liberty interest implicated when the Air Force fired a probationary employee for falsifying a preappointment document. The court found that referring to a person being a liar, if disseminated, could adversely affect the individual's ability to take advantage of other employment opportunities. The court also found the dissemination element satisfied by the Air Force's disclosing the reasons for the termination to the Oklahoma Employment Security Commission for use in determining the individual's entitlement to unemployment benefits. Walker v. United States, 744 F.2d 67 (10th Cir. 1984). In response to Walker, OPM amended the Federal Personnel Manual to provide that agencies will not state the basis for an adverse action in agency documents unless the employee receives procedural protections that would satisfy due process requirements. See former FPM Supp. 296-33, " § 31-4c and 4d. Although this FPM provision no longer exists, its Constitutional foundation does.

(2) Nature of the remedy. Courts have consistently held that an employee is only entitled to a hearing to clear the employee's name, not to litigate the question of reinstatement, if only a liberty interest is at stake, not a property right. Codd v. Velger, 429 U.S. 624 (1977). The right to a hearing exists only if the individual asserts that the information is false. There is no right to a hearing to argue inadequacy of evidence or credibility issues.

SECTION II: Substantive Requirements for Disciplinary Actions

4.7 Introduction. The preceding section focused exclusively on the procedural aspects of disciplinary actions. This section will focus on the substantive aspects of discipline by

examining the proof requirements to sustain a disciplinary action, whether challenged in an appeal to the MSPB or in a grievance and subsequent arbitration hearing.

In every disciplinary action the agency must prove by a preponderance of the evidence that:

a. The employee committed the act of misconduct forming the basis for the discipline;

b. The discipline is for "such cause as will promote the efficiency of the service" (5 U.S.C. §§ 7503(a) and 7513(a));

c. The penalty selected was appropriate for the misconduct and circumstances involved; and

d. The agency followed proper procedures.

4.8 Proving the Employee's Act of Misconduct.

a. General. Proving an act of misconduct in a hearing before an MSPB administrative judge or an arbitrator is no different than proving a case in any other administrative forum. Formal rules of evidence do not strictly apply at MSPB hearings. Accord Hillen v. Dep't of Army, 66 M.S.P.R. 68, 84 (1994); Schrider v. U.S. Postal Service, 36 M.S.P.R. 650 (1988); Debose v. Department of Agriculture, 700 F.2d 1262 (9th Cir. 1983). Crawford v. Department of Treasury, 56 M.S.P.R. 224, (1993). Administrative judges can admit any category of evidence. Arterberry v. Department of Air Force, 25 M.S.P.R. 582 (1985).

Generally, an administrative judge has wide discretion to control the proceedings before him, including the authority to exclude testimony he believes would be irrelevant, immaterial, or repetitious. Purcell v. Department of Agriculture, 55 M.S.P.R. 305, (1992) Any evidence that is relevant, material, and not unduly repetitious will be admitted. Hearsay evidence is admissible and, even standing alone, may be sufficient proof; the nature of the evidence goes to its weight and not to admissibility. Woodward v. Office of Personnel Management, 74 M.S.P.R. 389 (1997); Marable v. Dep't of Army, 52 M.S.P.R. 622 (1992); Campbell v. Department of Transportation, FAA, 735 F.2d 497 (Fed. Cir. 1984). Hearsay evidence alone will usually be insufficient proof if contradicted by sworn nonhearsay testimony. Dubiel v. U.S. Postal Service, 54 M.S.P.R. 428 (1992); Bonner v. Department of Navy, 18 M.S.P.R. 659 (1984). For a detailed discussion of the use of hearsay in MSPB proceedings, see Borninkhof v. Department of Justice, 11 M.S.P.R. 177 (1982) and 5 M.S.P.R. 77 (1981); and Behensky v. Department of Transportation, 19 M.S.P.R. 341 (1984), in Chapter 8 of this casebook..

b. Evidence of conviction. As an alternative to presenting independent evidence of misconduct, agency counsel can satisfy the agency's burden by use of a state or Federal

criminal court conviction. The agency may meet its obligation to prove the misconduct by introducing a judgment of conviction on the same charges stated in the judgment of conviction. The employee does not have a right to relitigate before the MSPB what has already been decided in the criminal trial.

The MSPB recently approved such administrative collateral estoppel, or issue preclusion, in Beasley v. Dep't of Defense, 52 M.S.P.R. 572 (1992). The rule had been firmly established in Otherson v. Department of Justice, 711 F.2d 267 (D.C. Cir. 1983) and Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir. 1981), and was tacitly approved in Crofoot v. Government Printing Office, 761 F.2d 661 (Fed. Cir. 1985). The court's opinion in Otherson, set out in part below, contains an excellent discussion of how the process operates.

Otherson v. Department of Justice,
711 F.2d 267 (D.C. Cir. 1983).

McGOWAN, Senior Circuit Judge:

Jeffrey Otherson formerly worked as a border patrol agent for the Immigration and Naturalization Service (INS). INS discharged him after he and a co-worker received criminal convictions for physically abusing liens according to a prearranged scheme they carried out during working hours with apparent zest. When Otherson appealed his discharge, the Merit Systems Protection Board (MSPB) held that the doctrine of issue preclusion, also known as collateral estoppel, forbade him from relitigating the facts established at the criminal trial. It also found discharge appropriate given the nature of Otherson's misconduct.

On June 2, 1980, INS removed Otherson from his job effective June 13, 1980, having notified him of its proposal to do so on February 28. INS cited Otherson's mistreatment of aliens as the reasons for removal and specified the same acts of misconduct contained in the superseding information on which Otherson had been convicted. Otherson appealed his removal to the MSPB. At a hearing before a presiding official, the INS bore the burden of proving beyond a preponderance of the evidence, 5 U.S.C. § 7701(C)(1)(B) (Supp. V 1981), that Otherson's removal would "promote the efficiency of the [Federal] service." id. § 7513(a). INS relied on Otherson's-criminal conviction to prove that he had in fact committed the specified misconduct. In addition, it offered the testimony of the INS official who removed Otherson. The official testified that he reviewed the record of the criminal proceedings and that the seriousness of Otherson's criminal acts made removal appropriate.

The heart of Otherson's contention that issue preclusion is always inappropriate is that an employee has a right to a hearing in adverse action appeals to the MSPB, 5 U.S.C. § 7701(a)(1) (Supp. V 1981). . . .

The fact that Congress guaranteed employees one full opportunity to be heard, however, does not mean that Congress intended them to have more than one. Issue preclusion is only appropriate when a party had a full and fair opportunity to present his case at a prior hearing, . . . and the employee may always argue in his hearing before the MSPB that the prior proceeding failed to meet this standard. Just as application of issue preclusion in civil trials does not unlawfully deprive litigants of their day in court, neither does application of issue preclusion in MSPB hearings deprive employees of their statutory hearing rights. Moreover, only those issues determined against the employee at the earlier proceeding may not be contested again. Employees whose misconduct is established preclusively will thus still have an undiminished opportunity to press other arguments before the Board, such as whether removal would promote the efficiency of the service.

III.

Otherson's next attack is on the appropriateness of giving preclusive effect to facts underlying this particular criminal conviction. Because his attack is on several fronts--some at which he fights more fiercely than others--it will be wise to set out in brief form the elements of issue preclusion, also known as collateral estoppel. Along with the doctrine of claim preclusion or res judicata, issue preclusion aims to avert needless relitigation and disturbance of repose, without inadvertently inducing extra litigation or unfairly sacrificing a person's day in court. As the Supreme Court has explained,

> "a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case." Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

Issue preclusion establishes in a later trial on a different claim identical issues resolved in an earlier trial, if certain conditions are met. First, the issue must have been actually litigated, that is, contested by the parties and submitted for determination by the court. See Cromwell v. County of Sac, 94 U.S. 351, 353 (1877) ("only as to those matters in issue or points controverted"); Stebbins v. Keystone Insurance Co., 481 F.2d 501, 508 (D.C. Cir. 1973). Second, the issue must have been "actually and necessarily

determined by a court of competent jurisdiction" in the first trial. Montana v. United States, 440 U.S. 147, 153 (1979) (citing draft version of what became RESTATEMENT (SECOND) OF JUDGMENTS § 27). See also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979) ("necessary to the outcome of the first action"); accord Association of Bituminous Contractors Inc. v. Andrus, 581 F.2d 853, 859-60 (D.C. Cir. 1978). Third, preclusion in the second trial must not work an unfairness. Preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial. See Blonder-Tongue Laboratories, 402 U.S. at 333 (in connection with preclusion against plaintiff in second action who lost as plaintiff in first action against a different defendant); see also Parklane Hosiery, 439 U.S. at 330 (heightened concern for potential unfairness from preclusion against defendant in second action brought by plaintiff not a party to the first suit). We now consider each factor with respect to preclusion at Otherson's MSPB hearing.

A. Necessarily Determined in the First Action

We can dispose of one element without much difficulty: whether the criminal trial necessarily determined the facts the Government sought to establish preclusively at the MSPB hearing. Otherson notes that each count against him and his co-defendant included either conspiracy, 18 U.S.C. § 371 (1976), or aiding and abetting, id § 2, as a source of liability. He also notes that the judge rendered no special findings of fact. Perhaps, he argues, the judge's general verdict did not decide in the Government's favor on every fact the Government alleged and to which the Government's witnesses testified. Perhaps the court found Otherson's own involvement to be less direct and substantial than alleged, illegal only on grounds of conspiracy or aiding and abetting.

We find this argument unconvincing. Otherson has not shown that "'a rational [factfinder] could have grounded its verdict upon an issue other than that which the [party] seeks to foreclose from consideration.'" Ashe v. Swenson 397 U.S. 436, 444 (1970) (effect of prior acquittal). As Emich Motors Corp. v. General Motors Corp, 340 U.S. 558, 569 (1951), required, the MSPB presiding official examined the record of the prior trial in detail to see if the judge might have disbelieved some aspects of the acts charged. The MSPB examination was not to be "hypertechnical," but to be conducted "with realism and rationality." Ashe, 397 U.S. at 444. The only grounds the judge at the criminal trial had for doubting the Government's version of events was Otherson's cross-examination, which made general attacks on the witnesses' credibility. The MSPB official concluded that the judge must have found the Government's witnesses credible, and thus that "it was necessary and essential for the court to find that the defendants did commit the acts listed in the pleadings." We find this conclusion to be perfectly reasonable and thus reject Otherson's contention that the general verdict at the criminal trial did

not necessarily determine against him the facts preclusively established at the MSPB hearing.

B. Actually Litigated

Otherson next contends that, because the criminal trial was conducted on the basis of a stipulated record, the issues were not actually litigated. His contention, however, misconstrues the sort of stipulations that bring issues outside the actual litigation requirement. Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been "actually litigated" and thus is not a proper candidate for issue preclusion. See Sekaquaptewa v. MacDonald, 575 F.2d 239, 247 (9th Cir. 1978); Anderson, Clayton & Co. v. United States, 562 F.2d 972, 992 (5th Cir. 1977), cert. denied, 436 U.S. 944 (1978); Red Lake Band v. United States, 607 F.2d 930, 934 (Ct. Cl. 1979) (alternative holding); cf. United States v. International Building Co., 345 U.S. 502 (1953) (consent judgment); Tutt v. Doby, 459 F.2d 119, 1199-200 (D.C. Cir. 1972) (default judgment). The reasoning behind this rule is apparent from the Restatement's articulation of the actual litigation requirement:

> The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party, are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action could be narrowed by stipulation and thus to intensify litigation.

Otherson, however, did not stipulate to the truth of the Government's allegations. He simply stipulated that the Government's witnesses would testify in the second trial as they had at the first. When a stipulation merely helps to shape the record a factfinder will use to determine the truth of a fact, rather than to establish the truth of the fact itself, that fact may be preclusively established in a later trial if the other requirements for issue preclusion are met. See Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622 (4th Cir.), cert. denied, 350 U.S. 838 (1955). Otherson contested the allegations against him through his attorney's cross-examination, and the parties left it to the trial judge to evaluate the witnesses' testimony and determine whether the Government established its allegations beyond a reasonable doubt. Therefore, the factual basis of the charges was actually litigated and those facts are appropriate for issue preclusion at later proceedings.

C. Incentive to Litigate

Fears that a party might have litigated less than fully because the stakes in the first action were low in relation to those in the second inhere in the justification for not preclusively establishing issues not actually litigated. See Tutt v. Doby, 459 F.2d 1195, 1200 (D.C. Cir. 1972) (incentive-to-litigate problems in default judgments); Red Lake Band v. United States, 607 F.2d 930, 934-35 (Ct. Cl. 1979) (lack of incentive to litigate a factor in affording no preclusive effect to issues resolved by stipulation); . . . Courts, however, have considered potential unfairness from a lack of incentive to litigate even when some litigation actually took place in the first trial. See Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 540 (2d Cir. 1965) (among other considerations), cert. denied, 382 U.S. 983 (1966); Spiker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951) (same). In the Restatement's formulation, lack of incentive to litigate is one consideration for possible exception from preclusion even in cases where the other requirements for preclusion are met. See Restatement (Second) Of Judgments § 28(5)(c).

We now consider and reject two arguments that Otherson's lack of incentive to litigate fully in the first trial makes preclusion inappropriate even though the facts were contested and submitted for judicial determination. The first argument is that the stakes in the first trial were quite low in relation to the stakes at the MSPB hearing. Otherson was fined $1,000 and was at risk for only six months in jail, see App. 15. This is arguably much less than the stakes of a proceeding concerning a discharge from employment. Indeed, one circuit that has found preclusion generally appropriate for issues determined by verdicts entered upon guilty pleas has suggested that facts inhering in a guilty plea to a misdemeanor may not similarly be established preclusively in later trials. In re Raiford, 695 F.2d 521, 524 (11th Cir. 1983). Yet Otherson's case is one good example of a defendant who took the first trial quite seriously even though he was at risk for only a small amount. See Zdanok v. Glidden Co. 327 F.2d 944, 956 (2d Cir.) (defended first action with vigor, so preclusion appropriate in second action for much higher stakes); cert. denied, 377 U.S. 934 (1964). Although he did withhold some of his evidence, he obviously thought the charge a serious one, for he pursued his appeal on the legality of his conviction all the way to the Supreme Court. Therefore, preclusion is much more appropriate here than in a case where a defendant put up no resistance at all because the misdemeanor was too trivial to worry about.

A second argument for an exception to preclusion is that the bargain with the prosecution created an actual disincentive to litigate these particular issues, above and beyond the fact that Otherson was at risk for only a misdemeanor. Had Otherson insisted on presenting his full factual defenses to the allegations, he presumably would have faced felony charges rather than

misdemeanors. In this respect Otherson's plight resembles that of the party sought to be bound in Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966).

Although this contention merits serious consideration, we nonetheless find preclusion appropriate under the circumstances. We note first that preclusion is sought here by Otherson's adversary in the first trial, the Federal Government. According to the Restatement's formulation, when preclusion is sought by a former adversary, and the other requirements for preclusion are met, courts should refuse to give the first judgment preclusive effect on grounds that the party lacked adequate incentive to litigate in the first proceeding only upon a "compelling showing of unfairness." Restatement (Second) Of Judgments § 28 comment j. Even the fact that the first determination was "patently erroneous" is not alone sufficient. . . . The apparent justification for this formulation is that relitigation between the same two adversaries is more strikingly wasteful than relitigation between two different parties and that parties can most readily foresee, and expect to be subject to issue preclusion in future suits involving a present adversary.

Under the circumstances we think there is no great unfairness in holding Otherson to the determinations from his prior criminal conviction. Even without the full evidentiary presentation Otherson made at the felony trial, the misdemeanor conviction does provide an extra margin of reliability that dispels some of the worries about using the conviction at the MSPB hearing. The court found Otherson guilty beyond a reasonable doubt. It did so after considering the testimony of witnesses subjected to full cross-examination. Given that the Government must prove misconduct at the MSPB hearing by a mere preponderance of the evidence, it is not likely that preclusive use of the conviction will work an unfairness at the later hearing.

. . . .

For the foregoing reasons, we deny Otherson's petition for review.

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c. Notes and Discussion.

Note 1. One of the requirements for use of collateral estoppel as outlined in Otherson is actual litigation of the issue in dispute. This requirement raises a serious question about the propriety of using collateral estoppel based on a nolo contendere plea or what has become known as an Alford plea of guilty. An Alford plea of guilty is a guilty plea where the individual does not admit the underlying facts and the court does not make a finding on the underlying facts. North Carolina v. Alford, 400 U.S. 25 (1970). To view how the MSPB and the Court of Appeals for the Federal Circuit have analyzed the difficult questions presented by an Alford or nolo contendere plea, see Wenzel v. Dep't of Interior, 33 M.S.P.R. 344, aff'd 837 F.2d 1097 (Fed. Cir.

1987)(approving use of estoppel in nolo plea); Crofoot v. GPO, 823 F.2d 495 (Fed. Cir. 1987); Graybill v. USPS, 782 F.2d 1567 (Fed. Cir. 1986); Loveland v. Air Force, 34 M.S.P.R. 484 (1987); and Crofoot v. GPO, 31 M.S.P.R. 442 (1986) aff'd Crofoot v. Government Printing Office, 823 F.2d 495 (Fed.Cir. 1987).

Note 2. Even if collateral estoppel cannot be used based on an Alford plea, the Court of Appeals for the Federal Circuit in Crofoot sanctioned disciplinary action for "notoriously disgraceful conduct" based on a conviction resulting from an Alford plea. Of course the agency had to demonstrate how the conviction in that case amounted to notoriously disgraceful conduct. It did so by showing that Crofoot's conviction was known throughout the agency and was considered particularly disgraceful because the nature of the offense was closely related to the work Crofoot performed for the agency.

Note 3. The Board may, even if collateral estoppel is inappropriate, rely upon a documentary record from the criminal proceedings to establish the fact of misconduct. Payer v. Department of Army, 19 M.S.P.R. 534 (1984).

Note 4. If collateral estoppel is available, it clearly satisfies the agency's burden of proof; however, if the agency has independent evidence to prove the misconduct, it is wise to also introduce that evidence to preclude the case later being lost if the criminal case is reversed on appeal or the charges of the removal are not identical to those of the conviction. Owens v. U.S. Postal Service, 57 M.S.P.R. 63 (1993); Robinson v. Department of Army, 21 M.S.P.R. 270 (1984).

d. Evidence of indictment. An agency will occasionally want to discipline an employee pending criminal charges, but it lacks the independent evidence to pursue the charges. An indictment is clearly insufficient evidence of the underlying misconduct. Brown v. Department of Justice, 715 F.2d 662, 667 (D.C. Cir. 1983); O'Connor v. Dep't of Veterans Affairs, 59 M.S.P.R. 653 (1993); Roby v. Dep't of Justice, 59 M.S.P.R. 426 (1993); Crespo v. U.S. Postal Service, 53 M.S.P.R. (1992). The agency still has options, however.

A federal agency may take disciplinary action when it has reasonable cause to believe that an employee has committed a crime for which imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Evidence of indictment provides this reasonable cause. Accord Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955 (Fed. Cir. 1993); Dunnington v. Dep't of Justice, 956 F.2d 1151 (Fed. Cir. 1992); Smith v. Gov't Printing Office, 60 M.S.P.R. 450 (1994); Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976). Evidence that the employee was arrested or is under investigation is insufficient. Richardson v. U.S. Custom Serv., 47 F.3d 415 (Fed. Cir. 1995); Reid v. U.S. Postal Service, 54 M.S.P.R. 648 (1992); Larson v. Department of Navy, 22 M.S.P.R. 260 (1984); Martin v. Department of Treasury, 16 M.S.P.R. 292 (1982). But see Dunnington v. Department of Justice and OPM, 45 M.S.P.R. 305 (1990), aff'd, 956 F.2d 1151 (Fed. Cir. 1992) (arrest based on arrest warrant issued by neutral magistrate based on a finding of probable cause

sufficient). See also Ellis v. Department of Veterans Affairs, 60 M.S.P.R. 681 (1994) (Employee's arrest for murder after he shot and killed customer in his bar, newspaper article reporting arrest and employee's admission to his supervisor that he killed someone did not give agency "reasonable cause" to believe that employee had committed crime for which sentence of imprisonment could be imposed, so as to justify his indefinite suspension; newspaper article provided few details of underlying incident, and it was unclear whether employee confessed that he committed murder or simply stated that he acted in self-defense.)

Typically the discipline imposed in this situation is an indefinite suspension pending resolution of the criminal charges. This type of disciplinary action will be examined in detail in paragraph 4.13 of this chapter.

4.9 Proving the Connection Between the Misconduct and the Efficiency of the Service -- "Nexus." Proving that the employee did something wrong, even criminal, is insufficient to justify disciplinary action. Serious disciplinary actions may be taken only "for such cause as will promote the efficiency of the service." 5 U.S.C. §§ 7503(a), 7513(a). This requirement to prove the impact on the efficiency of the service has become known as the "nexus" requirement.

a. The nexus requirement: the general rule. The nexus requirement is not something new created by the Civil Service Reform Act of 1978. It has existed since the passage of the Lloyd-LaFollette Act in 1912 and has been the subject of much judicial interpretation by the various U.S. courts of appeals. The MSPB first examined in detail this nexus requirement under the CSRA in Merritt v. Department of Justice, 6 M.S.P.R. 585 (1981). The Board in Merritt examined judicial precedent to date and established the foundation for all subsequent Board decisions in this area. This lead case is set forth in part below.

Merritt v. Department of Justice
6 M.S.P.R. 585 (1981)

[Footnotes and selected portions deleted].

OPINION AND ORDER

This appeal raises the issue of when off-duty misconduct may justify the removal of a non-probationary competitive service employee, an issue not previously addressed by this Board. The issue involves the historically perplexing question of how such misconduct must relate to "the efficiency of the service" before action may be warranted under Chapter 75 of Title 5, U.S. Code. It also involves the impact on that standard of a statutory provision newly enacted by the Civil Service Reform Act of 1978 (the Reform Act), which now makes it a prohibited personnel practice to take a personnel action discriminating "on the basis of conduct which does not adversely affect the

performance of the employee . . . or the performance of others." 5 U.S.C. § 2302(b)(10).

I. FACTUAL BACKGROUND

The appellant had been employed with the agency for eighteen months when his removal was effected based on . . . possessing and using marijuana . . . the presiding official sustained the . . . charge based on appellant's own admission.

II. EFFICIENCY OF THE SERVICE STANDARD

The removal of a Federal employee for misconduct is governed by 5 U.S.C. Chapter 75. Section 7513(a) of that Chapter, as amended by the Reform Act, provides that:

> Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service. [Emphasis supplied]

Regulations to implement section 7513(a) have been issued by the Office of Personnel Management (OPM) in 5 C.F.R. Part 752, but those regulations do not attempt to define or elaborate upon the statutory "efficiency of the service" standard.

A. Judicial Treatment of the Standard

Any casual review of the many Federal court decisions on this subject is bound to suggest a widespread lack of judicial consensus as to the requirements of the statutory standard, with results that sometimes appear clearly inconsistent under circumstances that seem distinguishable only by the most fanatical hair-splitter.

However, the clearly discernible trend over the past decade or so has been toward closer judicial examination of agency claims that an employee's off-duty behavior relates sufficiently to the efficiency of the service to justify firing the employee for the behavior. . . .

The trend toward closer judicial scrutiny of off-duty misconduct as allegedly related to service efficiency received its initial impetus from the 1969 decision of the D.C. Circuit in Norton v. Macy, 417 F.2d 1161. Observing that "[t]he Due Process Clause may . . . cut deeper into the Government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is . . . a foundation of several specific constitutional protections," id. at 1164, the court reversed the removal of a NASA budget

analyst on alleged grounds of "immoral conduct" and of possessing personality traits which rendered him "unsuitable for Government employment.".

The only justification for removal mentioned by the agency in Norton was the possibility of embarrassment to the agency. The agency failed to establish and the court could not discern any "reasonably foreseeable, specific connection between [the] employee's potentially embarrassing conduct and the efficiency of the service." Id. at 1167. Insisting that the employing agency "must demonstrate some 'rational basis' for its conclusion that a discharge 'will promote the efficiency of the service,'" the court held that the sufficiency of the charges "must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do." Id. at 1164, 1166.

In Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974), a differently constituted panel of the D.C. Circuit signaled a partial retreat from any implication in Norton that there must always be evidence directly substantiating the linkage of an employee's off-duty conduct to the efficiency of the service. Considering the removal of a postal foreman based upon his conviction for manslaughter, the court concluded that conviction of such a serious crime supplies the requisite nexus even without a showing of an explicit deleterious effect on the efficiency of the service. Finding that "it is clear that manslaughter, the unlawful taking of a human life, falls in the area where the nexus is strong and secure," the court nevertheless cautioned:

> We readily recognize that the nexus may become attenuated if an agency attempts to invoke the regulation for activities of a minor nature, such as a traffic citation. We leave the difficult task of drawing a line of demarcation for a future time.

510 F.2d at 1226.

The court also emphasized in Gueory that the presumption of nexus for such a serious crime is not "irrebuttable," and that "mere incantation by an agency of the interpretive regulation involving less serious criminal conduct might necessitate a different result." 510 F.2d at 1227.

In Young v. Hampton, 568 F.2d 1253 (1977). . . the court established these criteria for determining whether there is a rational basis for concluding that an employee's removal for off-duty misconduct will promote the efficiency of the service:

> The agency may base this determination . . . on [1] evidence adduced at the employee's hearing which tends to connect the

> employee's misconduct with the efficiency of the service; or [2] , in [a] certain egregious circumstances, where the adverse effect of retention on the efficiency of the service could, in light of the nature of the misconduct, reasonably be deemed substantial, and [b] where the employee can introduce no evidence showing an absence of effect on the efficiency of the service, the nature of the misconduct may "speak for itself".

Id. at 1257.

The agency in Young had failed to introduce a scintilla of evidence relating to the nexus question, while the employee presented testimony by his supervisor and foreman to the effect that the employee continued to do good work following his conviction. The court held, therefore, that the "vital nexus" had not been established. In so concluding, the Young court distinguished two earlier cases upholding removals based on drug charges, on the ground that evidence in those cases linked the charges with the employees' capacity to perform their jobs reliably.

It is important to observe that the test established by Young v. Hampton, while permitting the requisite nexus to be inferred in some cases without an explicit evidentiary demonstration by the agency, does so only when two conditions are both met. The first is that the particular misconduct must be egregious and of such a nature that the adverse effect of the employee's retention on the efficiency of the service can reasonably be deemed substantial. The second condition is that no evidence shows an absence of adverse effect on the efficiency of the service. This second condition is equivalent to Gueory's holding that the presumption of nexus arising from a serious criminal act is not an irrebuttable one. When either condition is not met, the nexus determination must be based on evidence connecting the employee's misconduct with the efficiency of the service.

The Court of Claims agreed with the Young analysis of the nexus problem in Masino v. United States, 589 F.2d 1048 (1978). Applying the Young criteria to the removal of a customs inspector for personal use and transportation of a small quantity of marijuana from New York to Arizona, the Court found, with "some reluctance, and agreeing that the issue is close," id. at 1049, that both of the conditions for determining nexus without explicit linking evidence were satisfied. Emphasizing that the employee had transported and used the very contraband which as a customs inspector he was sworn to interdict, the court concluded that his conduct was so egregious that the adverse effect of retention on the efficiency of the service could reasonably be deemed "substantial." The employee having presented no evidence to show an absence of effect on the efficiency of the service, the removal action was sustained.

. . . .

This was the current state of the law when Congress, while re-enacting the "efficiency of the service" standard in the Reform Act, also enacted 5 U.S.C. § 2302(b)(10).

B. The Effect of Section 2302(b)(10)

The Reform Act, at 5 U.S.C. § 2302(b)(10), makes it a prohibited personnel practice for any employee who has authority to take, direct others to take, recommend, or approve any personnel action, to:

> discriminate for or against an employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States. . . .

The question that necessarily then arises is whether Section 2302(b)(10) adds anything to the requirement of Sections 7503(a) and 7513(a) that Chapter 75 adverse actions be taken only "for such cause as will promote the efficiency of the service."

The Department of Justice and OPM assert that the only effect of Section 2302(b)(10) is to extend the protection of the nexus requirement to all the categories of employees and actions listed in 5 U.S.C. § 2302(a)(2), and to make available to persons covered by Chapter 75 as well as to others the protective authority of the Special Counsel in situations of alleged discrimination for nonservice-related conduct through personnel actions not subject to Chapter 75. Clearly, Section 2302(b)(10) does at least that much on its face.

. . . . We find that in enacting Section 2302(b)(10), Congress intended to make clear that in applying the efficiency of the service standard under Chapter 75 as well as in considering the alleged prohibited personnel practice, a nexus determination is essential and the law requires the Board and the courts to assure that such requirement is properly satisfied. Section 2302(b)(10) reflects Congressional approval of the trend in judicial interpretation of the efficiency of the service standard, already apparent in mid-1978 but then still much disputed among the Federal courts, toward closer scrutiny of nexus determinations made by agencies.

. . . .

We conclude that the requirement of Section 2302(b)(10) and the efficiency of the service standard are consistent with the Morton-Gueory-Young mode of analysis. Accordingly, we adopt the criteria for nexus determinations established by those cases, as more particularly described in our discussion of Young v. Hampton, ante at 19-20. The effect of the two conditions specified in Young is that a nexus determination must be based on evidence linking the employee's off-duty misconduct with the efficiency of the service or, in "certain egregious circumstances," on a presumption of nexus which may arise from the nature and gravity of the misconduct. In the latter situation, the presumption may be overcome by evidence showing an absence of adverse effect on service efficiency, in which case the agency may no longer rely solely on the presumption but must present evidence to carry its burden of proving nexus. The quantity and quality of the evidence which the agency need present in that circumstance would clearly then depend upon the nature and gravity of the particular misconduct as well as upon the strength of the showing made by the appellant in overcoming the otherwise applicable presumption.

. . . .

III. THE NEXUS ISSUE IN THIS APPEAL

Appellant's misconduct in his home was not of an egregious character or gravity from which impairment of service efficiency can be presumed. Young v. Hampton, supra, 568 F.2d at 1258, 1260-61, 1264, 1265-66. It was, therefore, the agency's burden to present evidence tending to prove that appellant's off-duty conduct affected the efficiency of the service. This the agency failed to do. The fact that appellant's conduct may have been unlawful did not relieve the agency of its burden to establish the requisite nexus, particularly in view of limitations upon the power of the Government to intrude unnecessarily upon the discreet conduct of citizens, including Federal employees, in the privacy of their homes.

Moreover, to the extent that the criminality of appellant's conduct warrants any inference of doubt about his reliability or trustworthiness, such inference was rebutted by appellant's evidence that during the five months following the marijuana incident his job performance improved and he was recommended for a promotion. The agency offered no evidence in response to this showing by appellant, and none to support its post-hearing argument of possible "pressures and blackmail" against appellant.

Under these circumstances, we find that the agency's nexus allegation is not supported by the preponderance of the evidence. See 5 U.S.C. § 7701(c)(1)(B). . . .

CONCLUSION

Accordingly, the initial decision is hereby REVERSED, and the agency is ORDERED to cancel its removal action against the appellant. . . .

Note. The nexus requirement flows from the "efficiency of the service" cause standard in 5 U.S.C. §§ 7503 and 7513. These sections apply only to certain designated employees, i.e., nonprobationary competitive service employees and nonprobationary excepted service employees. In Merritt the Board briefly examined the prohibited personnel practices listed in 5 U.S.C. § 2302(b)(10) and concluded that this provision extended the cause standard from 5 U.S.C. §§ 7503 and 7513 to virtually all personnel actions against all employees. The agency must, therefore, satisfy the nexus requirement even in lesser adverse actions and those taken against employees other than nonprobationary competitive service and nonprobationary equivalent excepted service employees. Because of the Board's limited jurisdiction, this issue would only arise in an arbitration hearing or another administrative proceeding. See St. Amand, Probationary and Excepted Service Employee Rights in Disciplinary Actions in the Wake of Cleveland School Board v. Loudermill, The Army Lawyer, July 1985, at 1, for discussion of possible expansion of employee hearing rights due in part to 5 U.S.C. § 302(b)(10).

b. Presenting evidence of nexus. In August 1984, the MSPB decided several nexus cases that continue to be cited as stating the agency's burden of proof. See particularly the following cases and those they cite: Thomas v. Department of Air Force, 67 M.S.P.R. 79, (1995); Ingram v. Dep't of Air Force, 53 M.S.P.R. 101, aff'd, 980 F.2d 742 (1992); Beasley v. Dep't of Defense, 52 M.S.P.R. 272 (1992); Jaworski v. Department of the Army, 22 M.S.P.R. 499 (1984); Honeycutt v. Department of Labor, 22 M.S.P.R. 491 (1984); Backus v. Office of Personnel Management, 22 M.S.P.R. 457 (1984); Franks v. Department of Air Force, 22 M.S.P.R. 502 (1984); and Abrams v. Department of Navy, 22 M.S.P.R. 480 (1984). Since 1984, the MSPB has reversed very few cases based on the lack of nexus. These cases should therefore be used simply for their evidentiary analysis.

These cases, like most nexus cases, are fairly fact specific while continuing to apply the guidance initially set out in Merritt v. Department of Justice. They do help to categorize somewhat the types of evidence the Board will accept as adequate proof of the required nexus. The best evidence is that which demonstrates direct impact, or misconduct, on the job site, e.g., misuse of government equipment. Sternberg v. Dep't of Defense, 52 M.S.P.R. 547 (1992). Another on-the-job effect is fellow employees afraid to work with the offending employer. See Beasley v. Dep't of Defense; Backus v. Office of Personnel Management above. In many cases, that type of evidence is not available.

The second type of evidence to look for is that which reflects reasonable cause to fear impact in the future, e.g., the nature of the offense and the nature of the employee's duties lead the supervisor to lose confidence in the employee's ability to continue to perform satisfactorily. Honeycutt v. Department of Labor and Jaworski v. Department of Army. If that type evidence is not available, the final type to look for is evidence that the misconduct impacts on the organization in a broader sense, e.g., bad publicity or the need to use agency resources to deal with the misconduct. Franks v. Department of Air Force. Adams v. Defense Logistics Agency, 63 M.S.P.R. 551, (1994)(Agency established nexus between employee's off-duty possession of marijuana and efficiency of his service by deciding official's unchallenged hearing testimony that employee's misconduct adversely affected agency's trust and confidence in his job performance.)

c. Exception: the presumption of nexus.

(1) Application of the presumption. The MSPB in Merritt v. Department of Justice clearly established the general rule that requires agencies to present evidence in every case to prove nexus by a preponderance of the evidence. The Board also recognized in Merritt that in "certain egregious circumstances" nexus could be presumed from the nature and seriousness of the misconduct. In doing so, the Board suggested that it was adopting an approach taken by the courts in Masino v. United States, 589 F.2d 1048 (Ct. Cl. 1978) and Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974).

After the Board's decision in Merritt, two U.S. Courts of Appeals rejected the presumption of nexus under any circumstances. D.E. v. Department of Navy, 707 F.2d 1049 (9th Cir. 1983) (opinion withdrawn) and Bonet v. U.S. Postal Service, 661 F.2d 1071 (5th Cir. 1981). The court of appeals for the 3d Circuit in Abrams v. Department of Navy, 714 F.2d 1219 (3d Cir. 1983), approved the presumption of nexus in egregious circumstances. The differences in the circuits caused confusion in the area until the issue was addressed by the U.S. Court of Appeals for the Federal Circuit in Hayes v. Department of Navy, 727 F.2d 1535 (Fed. Cir. 1984). The court in Hayes specifically held that nexus may be presumed in egregious circumstances, and upheld the MSPB's decision presuming nexus in that case based on the employee's conviction for assault and battery on a 10-year-old female. The Hayes decision is paramount to MSPB practice because virtually all appeals from MSPB decisions must go to the Court of Appeals for the Federal Circuit. See, Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The MSPB considers Federal Circuit decisions "controlling" on the Board, while decisions by other circuits are only "persuasive" authority. Fairall v. VA, 33 M.S.P.R. 33 (1987).

While this presumption helps the agency, it applies only in egregious circumstances. What constitutes egregious circumstances will have to be determined on a case by case basis. See Hayes at 1539, n.3 for a list of cases in which the presumption was applied. See also Graham v. U.S. Postal Service, 49 M.S.P.R. 364 (1991) and Coleman v. U.S.

Postal Serv., 57 M.S.P.R. 537 (1993) (drinking on job and AWOL presumptively affect efficiency of service). Wagstaff v. Department of Air Force, 945 F.2d 418 (Fed.Cir. 1991) (Table, text in WESTLAW)(use of cocaine by aircraft mechanic during lunch hour presumptively affected efficiency of service). The composition of the Board at the time the case is heard will have obvious bearing on the outcome of the "egregious" determination.

(2) Employee rebuttal of presumption. The presumption of nexus is rebuttable. The limited case law in this area indicates that the employee must demonstrate that the misconduct has no adverse impact on the employee's performance, no adverse impact on the performance of other employees, and no adverse impact on the organization. Allred v. Department of Health and Human Services, 786 F.2d 1128, (Fed.Cir. 1986)(Presumption of a nexus between the conduct and the employee's job-related responsibilities, which is applicable to employees who engage in egregious misconduct, forces the employee to prove the negative proposition that his retention would not adversely affect the efficiency of the service.). Abrams v. Department of Navy, 714 F.2d 1219 (3d Cir. 1983); Abrams v. Department of Navy, 22 M.S.P.R. 480 (1984); Johnson v. HHS, 22 M.S.P.R. 521 (1984); Williams v. GSA, 22 M.S.P.R. 476 (1984).

If the agency is able to prove that the employee committed an act of misconduct and that the misconduct adversely affects the efficiency of the service, it justifies taking disciplinary action. The agency must then demonstrate the appropriateness of the specific discipline imposed.

4.10 Demonstrating the Appropriateness of the Penalty Choice. In Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), the Board issued its lead decision on how an agency should choose an appropriate penalty. The Board in Douglas provided detailed guidance concerning the scope of its review, how and when it would mitigate an agency's chosen penalty, and the relevant factors it would consider in reviewing penalties. Douglas continues to be the most important case in the area and is set forth in part below.

Douglas v. Veterans Administration
5 M.S.P.R. 280 (1981)

OPINION AND ORDER

Under 5 U.S.C. § 1205(a)(1), as enacted by the Civil Service Reform Act of 1978 ("the Reform Act"), this Board is authorized and directed to "take final action" on any matter within its jurisdiction. These cases present the question of whether that statutory power includes authority to modify or reduce a penalty imposed on an employee by an agency's adverse action, and if so, by what standards that authority should be exercised. For the reasons set out hereafter, we conclude that the Board does have authority to mitigate penalties when the Board determines that the agency-imposed penalty is

clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. We also conclude that this authority may be exercised by the Board's presiding officials, subject to our review under 5 U.S.C. § 7701(e)(1).

The appellants in these cases, career employees in the competitive service, were each removed by their agencies upon charges of job-related misconduct under 5 U.S.C. § 7513. In all but one case, they alleged in their appeals before this Board that the penalty imposed by the agency was too severe. The Board's presiding officials sustained the agency decisions, finding that selection of an appropriate penalty is a matter essentially committed to agency discretion and not subject to proof. The Board thereupon reopened the initial decisions to consider these issues. . . .

I. THE BOARD'S AUTHORITY TO MITIGATE PENALTIES

The Office of Personnel Management (OPM), most of the agencies, and AFGE urge that the Board lacks authority to mitigate an agency-selected penalty. They acknowledge that an agency's choice of penalty may be so disproportionate to an offense or otherwise improper as to constitute an abuse of discretion warranting reversal by the Board. However, they assert that in such cases the Board may not itself reduce or modify the penalty but must instead remand the appeal to the employing agency for selection and imposition by the agency of a substitute penalty, subject to further appeal to the Board from the agency's substituted penalty. For the Board itself to modify or reduce a penalty, they contend, would intrude upon the employing agency's managerial functions. The proponents of this position cite various Federal court decisions referring to selection of penalties as a matter within "agency" discretion; OPM also emphasizes the purpose of the Reform Act to separate managerial from adjudicatory functions in the civil service system.

The other Federal employee unions and the Acting Special Counsel, on the other hand, point to the authority previously reposed in the former Civil Service Commission to mitigate or lessen agency-imposed penalties. The Commission delegated that authority to its Federal Employee Appeals Authority (FEAA) and Appeals Review Board (ARB) for certain categories of cases, otherwise reserving such authority to the Commissioners themselves. Under Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act, it is contended, this Board as the successor agency to the Commission is vested with the same power to mitigate or lessen penalties imposed by agencies. These participants also urge that such authority is inherent in the Board's adjudicative function and is necessary to the proper exercise of the Board's statutory role as a strong, independent protector of merit system principles, including particularly the principle of "fair and equitable treatment in all aspects of personnel management. . . ."

These provisions have now been succeeded by new Section 1205(a) of title 5, as enacted by the Reform Act, sec. 202(a), 92 Stat. 1122, which provides:

> (a) The Merit Systems Protection Board shall--
>
> (1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title . . . or any other law, rule or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;
>
> (2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order. . . .

Thus, unless "inconsistent with any provision in" the Reform Act, the functions specified as remaining with the Board under Section 202 of Reorganization Plan No. 2 of 1978, including the former Commissioner's mitigation authority, remain vested in the Board through 5 U.S.C. § 1205(a).

II. STANDARDS GOVERNING EXERCISE OF THE BOARD'S MITIGATION AUTHORITY

A. Scope of Review

Since the agency's actions in these cases were taken under Chapter 75 of Title 5, the respective agency decisions to take those actions may be sustained only if supported by a preponderance of the evidence before the Board. 5 U.S.C. § 7701(c)(1)(B). We must therefore consider whether the preponderance standard applies only to an agency's burden in proving the actual occurrence of the alleged employee conduct or "cause" (5 U.S.C. § 7513) which led the agency to take disciplinary action, or whether that standard applies as well to an agency's selection of the particular disciplinary sanction.

We have no doubt that insofar as an agency's decision to impose the particular sanction rests upon considerations of fact, those facts must be established under the preponderance standard and the burden is on the agency to so establish them. This is so whether the facts relate to aggravating circumstances in the individual case, the employee's past work record, nature of the employee's responsibilities, specific effects of the employee's conduct on the agency's mission or reputation, consistency with other agency actions

and with agency rules, or similar factual considerations which may be deemed relevant by the agency to justify the particular punishment. Section 7701(c)(1) admits of no ambiguity in this regard, since an agency's adverse action "decision" necessarily includes selection of the particular penalty as well as the determination that some sanction was warranted. The statute clearly requires that all facts on which such agency decision rests must be supported by the standard of proof set out therein.

It is also clear, however, that the appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgment and discretion." Kulkin v. Bergland, 626 F.2d 181, 185 (1st Cir. 1980). It is well established that "assessment of penalties by the administrative agency is not a factual finding but the exercise of a discretionary grant of power." Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Thus, an adverse action may be adequately supported by evidence of record but still be arbitrary and capricious, for instance if there is no rational connection between the grounds charged and the interest assertedly served by the sanction. . . .

The evidentiary standards of 5 U.S.C. § 7701(c) specify the quantity of evidence required to establish a controverted fact. As procedural devices for allocating the risk of erroneous factual findings those standards are inapposite to evaluating the rationality of non-factual determinations reached through the exercise of judgment and discretion. For such determinations, the characteristic standard of review is the arbitrary-or-capricious, or abuse-of-discretion, standard. . . .

By the standard, the Commission reviewed agency penalties to determine whether they were "clearly excessive" or were "arbitrary, capricious, or unreasonable. . . ."

In focusing not merely on whether a penalty was too harsh or otherwise arbitrary but also on whether it was "unreasonable," the Commission's standard appears considerably broader than that generally employed by the Federal courts. Both the Court of Claims and the Courts of Appeals have characteristically reviewed Commission-approved penalties only to determine whether they were so disproportionate to the offense as to amount to an abuse of discretion or whether they exceeded the range of sanctions permitted by statute, regulation, or an applicable table of penalties. The Commission's broad standard of "unreasonableness," encompassing greater latitude of review than is typically employed by the appellate courts in appeals from Commission or Board decisions, accords a measure of scope to the

Commission's and now this Board's independent discretionary authority which the courts have recognized.

The Board's marginally greater latitude of review compared to that of the appellate courts does not, of course, mean that the Board is free simply to substitute its judgment for that of the employing agencies. Management of the Federal work force and maintenance of discipline among its members is not the Board's function. Any margin of discretion available to the Board in reviewing penalties must be exercised with appropriate deference to the primary discretion which has been entrusted to agency management, not to the Board. Our role in this area, as in others, is principally to assure that managerial discretion has been legitimately invoked and properly exercised.

At all events the Board must exercise a scope of review adequate to produce results which will not be found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" when reviewed by appellate courts under Section 7703(c). This is the identical standard (prescribed) by Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To assure that its decisions meet that standard under Section 7703(c), the Board must, in addition to determining that procedural requirements have been observed, review the agency's penalty selection to be satisfied (1) that on the charges sustained by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty "was based on a consideration of the relevant factors and [that] . . there has [not] been a clear error of judgment." . . .

Therefore, in reviewing an agency-imposed penalty, the Board must at a minimum assure that the Overton Park criteria for measuring arbitrariness or capriciousness have been satisfied. In addition, with greater latitude than the appellate courts are free to exercise, the Board like its predecessor Commission will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. In making such determination the Board must give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.

Before turning to matters which may be pertinent in determining whether the agency's selection of a penalty was based on consideration of the relevant factors, it seems advisable to address one further point which has been a source of much semantic muddle. The appropriateness of a particular penalty is a separate and distinct question from that of whether there is an adequate relationship or "nexus" between the grounds for adverse action and

"the efficiency of the service." The establishment of such a relationship between the employee's conduct and the efficiency of the service, while adequate to satisfy the general requirement of Section 7513(a) that no action covered by Subchapter II of Chapter 75 may otherwise be taken, "is not sufficient to meet the statutory requirement that removal for cause promote the efficiency of the service." . . . The appropriateness of a particular Subchapter II penalty, once the alleged conduct and its requisite general relationship to the efficiency of the service have been established, is "yet a third distinct determination." Young v. Hampton, 568 F.2d 1253, 1264 (7th Cir. 1977). . . .

Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case. Thus, while the efficiency of the service is the ultimate criterion for determining both whether any disciplinary action is warranted and whether the particular sanction may be sustained, those determinations are quite distinct and must be separately considered.

B. Relevant Factors In Assessing Penalties

A well developed body of regulatory and case law provides guidance to agencies, and to the Board, on the considerations pertinent to selection for an appropriate disciplinary sanction. Much of that guidance is directed to the fundamental requirement that agencies exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation. OPM's rules on this subject, like those of the Commission before it, emphasize to agencies that in considering available disciplinary actions, "There is no substitute for judgment in selecting among them." Further, OPM specifically counseled agencies that:

> Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; this is particularly true of an employee who has a previous record of completely satisfactory service. An adverse action, such as suspension, should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate.
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> . . .
>
> . . . Agencies should give considerations to all factors involved when deciding what penalty is appropriate, including not only the gravity of the offense but such other matters as mitigating

circumstances, the frequency of the offense, and whether the action accords with justice in the particular situation.

Section 7513(b)(4) of Title 5 requires that written agency decisions taking adverse actions must include "the specific reasons therefor." While neither this provision nor OPM's implementing regulation, 5 C.F.R. 752.404(f), requires the decision notice to contain information demonstrating that the agency has considered all mitigating factors and has reached a responsible judgment that a lesser penalty is inadequate, a decision notice which does demonstrate such reasoned consideration may be entitled to greater deference from the Board as well as from the courts. Moreover, aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the agency's deciding official, and the decision notice should explain what weight was given to those factors in reaching the agency's final decision.

Court decisions and OPM and Civil Service Commission issuances have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Without purporting to be exhaustive, those generally recognized as relevant include the following:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee's past disciplinary record;

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Not all of the factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case. The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the Board's review of any agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

In considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanistically by any preordained formula. For example, the principle of "like penalties for like offenses" does not require mathematical rigidity or perfect consistency regardless of violations in circumstances or changes in prevailing regulations, standards, or mores. This consideration is redolent of equal protection concepts, also reflected in the merit system principle calling for "fair and equitable treatment" of employees and applicants in all aspects of personnel management. As such, this principle must be applied with

practical realism, eschewing insistence upon rigid formalism so long as the substance of equity in relation to genuinely similar cases is preserved. OPM has required that agencies "should be as consistent as possible" when deciding on disciplinary actions, but has also cautioned that "surface consistency should be avoided" in order to allow for consideration of all relevant factors including "whether the action accords with justice in the particular situation." Similarly, agency tables of penalties should not be applied so inflexibly as to impair consideration of other factors relevant to the individual case.

Lastly, it should be clear that the ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed. This follows from the fact that selection of the penalty is necessarily an element of the agency's "decision" which can be sustained under Section 7701(c)(1) only if the agency establishes the facts on which that decision rests by the requisite standard of proof. The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision. The selection of an appropriate penalty is a distinct element of the agency's decision, and therefore properly within its burden of persuasion, just as its burden includes proof that the alleged misconduct actually occurred and that such misconduct affects the efficiency of the service.

In many cases the penalty, as distinct from underlying conduct alleged by the agency, will go unchallenged and need not require more than prima facie justification. An agency may establish a prima facie case supporting the appropriateness of its penalty by presenting to the Board evidence of the facts on which selection of the penalty was based, a concise statement of its reasoning from those facts or information otherwise sufficient to show that its reasoning is not on its face inherently irrational, and by showing that the penalty conforms with applicable law and regulation. When no issue has been raised concerning the penalty, such a prima facie case will normally suffice to meet also the agency's burden of persuasion on the appropriateness of the penalty. However, when the appellant challenges the severity of the penalty, or when the Board's presiding official perceives genuine issues of justice or equity casting doubt on the appropriateness of the penalty selected by the agency, the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge or to satisfy the presiding official.

Whenever the agency's action is based on multiple charges some of which are not sustained, the presiding official should consider carefully whether the sustained charges merited the penalty imposed by the agency. In all cases in which the appropriateness of the penalty has been placed in issue,

the initial decision should contain a reasoned explanation of the presiding official's decision to sustain or modify the penalty, adequate to demonstrate that the Board itself has properly considered all relevant factors and has exercised its judgment responsibility.

III. APPLICATION TO APPELLANTS

[Board discusses facts of 5 cases.]

This is the final order of the MSPB in these appeals.

The Board in Douglas noted that the choice of penalty will largely be left to agency discretion, but that it will review the agency's choice to ensure consistency with law, rule, regulation, agency table of penalties, and consideration of other relevant factors. See also Uske v. U.S. Postal Svc., 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995)*cert. denied* 516 U.S. 1056, 116 S.Ct. 728, 133 L.Ed.2d 680, 64 USLW 3466 (1996); Betz v. General Services Admin., 55 M.S.P.R. 424 (1992); Schulmeister v. Dep't of Navy, 46 M.S.P.R. 13 (1990), aff'd, 928 F.2d 411 (Fed. Cir. 1991). The other relevant factors set out in Douglas have become known as the "Douglas factors."

a. Notes and Discussion.

Note 1. The Board explicitly stated in Douglas that its list of relevant factors was not exhaustive and that the agency need not address the listed factors mechanically. The Court of Appeals for the Federal Circuit approved this analysis in Nagel v. Department of Health and Human Services, 707 F.2d 1384 (Fed. Cir. 1983). See also Chauvin v. Dep't of Navy, 59 M.S.P.R. 675 (1993); Ingram v. Dep't of Air Force, 53 M.S.P.R. 101, aff'd 980 F.2d 744 (1992); Eidmann v. Merit Systems Protection Bd., 976 F.2d 1400, (Fed.Cir. 1992).

Note 2. Because the appropriateness of the agency's penalty choice is part of the agency's burden of proof, the agency must present evidence concerning its penalty choice even in the absence of an employee challenge to the penalty. Douglas requires the agency to produce evidence concerning penalty choice. "An agency may establish a prima facie case supporting the appropriateness of its penalty by presenting to the Board evidence of the facts on which selection of the penalty was based, a concise statement of its reasoning from those facts or information otherwise sufficient to show that its reasoning is not on its fact (sic) inherently irrational, and by showing that the penalty conforms with applicable law and regulation. When no issue has been raised concerning the penalty, such a prima facie case will normally suffice to meet also the agency's burden of persuasion on the appropriateness of the penalty. However, when the appellant challenges the severity of the penalty ... the agency will be called upon to present such further evidence as it may

choose to rebut the appellant's challenge." See also Parsons v. Department of Air Force, 707 F.2d 1406 (D.C. Cir. 1983); Mertins v. Dep't of Navy, 61 M.S.P.R.157 (1994).

Note 3. What has developed into the most important "Douglas factor" is consistency of the penalty with the agency's table of penalties. The Army's current table of penalties is published as Table 1-1 in Change 5 to AR 690-700, Chapter 751 (15 September 1989). The MSPB has repeatedly held that consistency with an agency's table of penalties is a relevant factor in reviewing the appropriateness of a penalty. Stephens v. Department of Air Force, 58 M.S.P.R. 502, (1993)(A penalty of removal is within the tolerable bounds of reasonableness for a sustained charge of criminal sexual misconduct. See, e.g., Graybill v. U.S. Postal Service, 782 F.2d 1567 (Fed.Cir.), cert. denied, 479 U.S. 963, 107 S.Ct. 462, 93 L.Ed.2d 407 (1986); Williams v. General Services Administration, 22 M.S.P.R. 476, 478-79 (1984), aff'd, 770 F.2d 182 (Fed.Cir.1985) (Table); Hayes v. Department of the Navy, 15 M.S.P.R. 378 (1983), aff'd, 727 F.2d 1535 (Fed.Cir.1984)). See, e.g., Peterson v. Dep't of Transportation, 54 M.S.P.R. 178 (1992).

a. One issue of concern is when the offense committed is not listed on the table of penalties. Most tables suggest that in such a case the supervisor should look to an offense found on the table that is similarly seriousness. The 9th circuit approved this approach in McLeod v. Department of Army, 714 F.2d 918 (9th Cir. 1983); however, that court no longer hears appeals from MSPB decisions.

b. Is a supervisor limited to a penalty within the range set out in the table of penalties? Most agencies establish their tables as guides which are not mandatory. The ability to impose a penalty in excess of that on the table of penalties was recognized in Weston v. Department of Housing and Urban Development, 724 F.2d 943 (Fed. Cir. 1983). The agency always has the burden to justify why the recommended penalty in the table of penalties is inadequate.

c. Most tables of penalties recommend penalties for various offenses based on whether the misconduct is the first, second, or third offense. For purposes of determining whether the misconduct is the first or later offense, all prior misconduct, not just offenses of the same type, may be considered. Villela v. Department of Air Force, 727 F.2d 1574 (Fed. Cir. 1984). An employee may challenge the previous disciplinary action being used to enhance the punishment, depending on the circumstances surrounding the agency's processing of that earlier action. If the employee had been informed of the previous disciplinary action in writing, had an opportunity for a substantive review of the action by a higher authority than the one who took the action, and the action was made a matter of record, then the agency can use that prior disciplinary action to enhance the punishment for the correct misconduct, and the employee may not relitigate the prior action. Hill v. U.S. Postal Service, 69 M.S.P.R. 453, (1996); Huettner v. Dep't of Army, 54 M.S.P.R. 472 (1992); Ballew v. Department of Army, 36 M.S.P.R. 400 (1988); Bolling v. Department of Air Force, 9 M.S.P.R. 335 (1981). Failure to meet these three requirements does not preclude the agency's use; it merely allows the employee to

challenge the merits of the prior action during the current action. Parsons v. Department of the Air Force, 21 M.S.P.R. 438 (1984).

4.11 Mitigation of Penalty Choice: Following Douglas, the general rule was deference to the agency in penalty selection. Penalty selection was reviewed under an abuse of discretion standard. Uske v. U.S. Postal Serv., 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995); Schulmeister v. Dep't of Navy, 46 M.S.P.R. 13 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991); Miguel v. Dep't of Army, 727 F.2d 1081 (Fed. Cir. 1984).

a. *De Minimis* misconduct:. In a recent line of cases, however, the Board has mitigated numerous penalties despite the AJ's affirmation of the agency charges and chosen penalty. See, e.g., Shelly v. Department of the Treasury, 75 M.S.P.R. 677, (1997)(One-grade demotion, rather than removal, was proper penalty for law enforcement employee's misconduct leading to charges that she gave appearance that she was using her position for other than official business and other unrelated charges arising principally out of incidents in which employee discussed religion with suspect she was investigating and touched suspect's forehead on another occasion and declared that she was rebuking Satan in the name of Jesus. Employee believed that she had engaged in consensual discussion with suspect about religion, her offense was one of poor judgment rather than dishonesty, violence or other serious action, agency official improperly based penalty determination on conclusion that investigator had violated suspect's right to religious freedom although this violation was not charged, employee had rehabilitation potential as she admitted her actions were wrong, and she had 23 years of service with agency with no previous discipline.); Perez v. U.S. Postal Service, 75 M.S.P.R. 503(1997)(Removal was not warranted by supervisory employee's falsification of his employment application in his answer to question involving prior criminal offenses, where employee had 15 years of federal service, including 11 years with agency, he committed no offense involving dishonesty, or any other offense, during his employment with agency, and underlying criminal charge that employee had failed to report was merely "willful failure to appear."); Matson v. Dep't of Army, 32 M.S.P.R. 168 (1987); Casia v. Dep't of Army, 62 M.S.P.R. 130 (1994); Taylor v. Dep't of Justice, 60 M.S.P.R. 686 (1994).

SKATES V. DEPARTMENT OF ARMY
69 M.S.P.R. 366 (1996)

On remand from the Federal Circuit, the Board mitigated the removal of a WG-8 Cook at West Point for theft of government property (left over food) to a 14 day suspension. The Board took into account the *de minimus* value of the food taken, the employee's 17 years of good service, and his dedication to his position as evidenced by his having walked (all the roads were closed) to work during the blizzard of 1993, and then working double shifts, to cook for the cadets.

b. Not all agency charges sustained. The Board will now apply reasonable penalty standard to make penalty selection and direct agency to implement penalty selected by the Board.

WHITE V. U.S. POSTAL SERVICE
71 M.S.P.R. 521 (1996)

While acknowledging that it must accord proper deference to an agency's determination as to appropriate penalties, when not all agency charges are sustained, the agency penalty determination made by the agency no longer stands and MSPB will independently balance the relevant *Douglas* factors to determine the appropriate penalty. The Board further indicated that it will consider any statements made by deciding officials concerning what penalties they would have imposed for the sustained charges. This was a split decision and the dissent of Member Amador strongly argued that the Board should continue to accord deference to the agency's choice of penalty where not all charges are sustained. For an application of this new standard, see Devall v. Department of the Navy, 1998 WL 39279, (1998)("The Board has found that, when not all of the agency's charges are sustained, it will consider carefully whether the sustained charges merited the penalty imposed by the agency. See Douglas, 5 MSPB 313, 5 M.S.P.R. at 308. This admonition to "consider carefully" is inconsistent with the notion that the Board should simply defer to an agency's penalty selection when not all charges are sustained. See White, 71 M.S.P.R. at 525. As we further pointed out in White, the Board applied this "careful consideration" standard immediately following Douglas to cases involving fewer than all sustained charges but inexplicably abandoned that approach in favor of the more deferential "maximum reasonable penalty" standard. See 71 M.S.P.R. at 525 (citations omitted). This abandonment notwithstanding, our reviewing court has continued to find that, when not all agency charges are sustained, the Board should carefully scrutinize whether an agency's penalty selection should be affirmed based on the sustained charges; such consideration requires the Board itself to identify, balance, and analyze the relevant Douglas factors. See Chauvin v. Department of the Navy, 38 F.3d 563, 567 & n. 4 (Fed.Cir.1994); Webster v. Department of the Army, 911 F.2d 679, 686 (Fed.Cir.1990); Quinton v. Department of Transportation, 808 F.2d 826, 829 (Fed.Cir.1986); Kline v. Department of Transportation, 808 F.2d 43, 45-46 (Fed.Cir.1986); Hagmeyer v. Department of the Treasury, 757 F.2d 1281, 1285 (Fed.Cir.1985)").

If the agency successfully proves that the employee committed the act of misconduct, that discipline is for just and proper cause, and that the penalty imposed is appropriate, then the adverse action should be sustained. The only remaining hurdle that could cause reversal of the action is the agency's failure to follow proper procedures.

4.12 Following Proper Procedures. The procedural requirements for disciplinary actions were discussed in Section I of this chapter. Procedures are mandated by statute and implementing regulations of OPM and the employing agency. Failure to follow these procedures may, but does not necessarily, result in reversal of the adverse disciplinary action. Only harmful error warrants reversal of the adverse action. See 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3).

The Court of Appeals for the Federal Circuit has determined that there is no per se harmful procedural error, even for procedures mandated by statute. Accord Handy v. U.S. Postal Service, 754 F.2d 335 (Fed. Cir. 1985) (employee allowed written but no oral reply); Baracco v. Department of Transportation, 735 F.2d 488 (Fed. Cir. 1984) (employee given 6 instead of 7 days advance notice); Diaz v. Department of Air Force, 63 F.3d 1107(Fed.Cir. 1995) (Agency employee's removal was not invalidated by agency's failure to remove employee until after period of notice of proposed removal had expired; removal was subject to harmful error analysis, and employee made no effort to demonstrate that agency's procedural violation affected outcome of agency's decision. 5 U.S.C.A. §§ 4303(c)(1), 7701(c)(2)(A)).

The Board will reverse actions that fail to satisfy minimum Constitutional due process. Tyler v. U.S. Postal Service, 62 M.S.P.R. 509 (1994); Green v. U.S. Postal Service, 61 M.S.P.R. 34 (1994); Polite v. Dep't of Navy, 49 M.S.P.R. 653 (1991). Generally, however, the employee must show "harmful" error by demonstrating the procedural defect would have affected the agency's decision. Keller v. Department of Navy, 69 M.S.P.R. 183 (1996); Kranz v. Dep't of Justice, 62 M.S.P.R. 630 (1994); Stephen v. Dep't of Air Force, 47 M.S.P.R. 672 (1991).

4.13 Indefinite Suspension Pending Disposition of Criminal Charges.

a. General. The MSPB and the courts have recognized a Federal agency's ability to indefinitely suspend an employee pending disposition of criminal charges. Richardson v. U.S. Custom Serv., 47 F.3d 415 (Fed. Cir. 1995); Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955 (Fed Cir. 1993); Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976); Smith v. Gov't Printing Office 60 M.S.P.R. 450 (1994); Martin v. Department of Treasury, 12 M.S.P.R. 12 (1982). An excellent discussion of the basis for this adverse disciplinary action is found in Martin v. Department of Treasury, which is set forth in part below. On appeal, the D.C. circuit found that the acquitted employee was entitled to compensation for pay and benefits lost during the time of the suspension, Brown v. Department of Justice, 715 F.2d 662, 230 U.S.App.D.C. 188 (D.C.Cir. 1983), a finding that was later rejected in Richardson v. U.S. Customs Service, 47 F.3d 415, (Fed.Cir. 1995), infra. Despite this finding, the Board's analysis of the factors to be used in making an indefinite suspension determination are useful.

Martin v. Department of Treasury
12 M.S.P.R. 12 (1982)

[Footnotes and other selected portions omitted]

OPINION AND ORDER

Appellant was indefinitely suspended from his position by his employing agency. The indefinite suspension . . . taken pursuant to the shortened notice period provided for by 5 U.S.C. § 7513(b)(1) where ". . . there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, . . ."

I. STATEMENT OF FACTS

Appellant Martin was indefinitely suspended from his position as Supervisory Customs Patrol Officer by the United States Customs Service, Mobile, Alabama. Three reasons, all based upon the same occurrence, were given for the action: (1) unauthorized interception of oral communications; (2) conduct prejudicial to the best interest of the service; and (3) interfering with the rights of another.

. . . .

The agency based its action on the search warrants and the preliminary report, and also cited its need for further investigation into appellant's involvement. The preliminary report also states that the matter had been referred to the U.S. Attorney's Office for possible action. The presiding official sustained the action, and Martin has petitioned for review.

. . . .

II. ISSUES

By order dated March 2, 1981, the Board identified issues as pertinent to th[is] appeal, . . . under what circumstances is an indefinite suspension initially valid; under what circumstances does an initially valid suspension become invalid; the manner in which an employee can obtain termination of an indefinite suspension if warranted; and, related sub-issues.

III. DISCUSSION

It would be helpful, at the outset, to examine the definition of the term "suspension" which is set forth at 5 U.S.C. § 7501(2). That provision defines a suspension, for the first time statutorily, as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay."

According to the legislative history of the Civil Service Reform Act, (C.S.R.A.), Congress' intent in enacting this provision was to adopt, rather than change, the definition of "suspension" utilized by the former Civil Service Commission (C.S.C.). The former C.S.C. had defined a suspension as "an action placing an employee in a temporary nonduty and nonpay status for disciplinary reasons or for other reasons pending inquiry." Former FPM Supp. 752-1, S1-6(a). (Emphasis supplied.)

The most essential criterion of an action, if it is to meet the definition of "suspension" set forth at 5 U.S.C. § 7501(2), is that it be "temporary." Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension. Although the time duration of the action may not be determinable, an indefinite suspension continuing beyond the given point of termination would be improper. See Erdwein v. United States, 215 Ct. Cl. 54, at 65, n.8 (1977). Such an action imposed with no ascertainable end in sight is not sustainable as a suspension, because of failure to meet the criterion of temporariness.

. . .

Cuellar v. United States Postal Service, MSPB Order No. SF075299045 at 6 (November 13, 1981), "[i]n passing the Reform Act, Congress maintained the 'crime exception' now contained in 5 U.S.C. § 7513(b)(1) as the only instance in which an agency's need to protect its employees, property, and/or reputation could outweigh the employee's right to 30 days' notice [of an adverse action]." Courts have examined, and given approval to, suspension actions taken on shortened notice and based on examinations into charged criminal conduct. See Coleman v. United States Postal Service, No. 79-4751 (S.D. N.Y. May 21, 1980), (approving, "[a]s a practical matter," an indefinite suspension based upon an arrest on a serious charge and an arraignment on the basis of a felony complaint); Jankowitz v. United States, 533 F.2d 538 at 543 (Ct. Cl. 1976), (holding "eminently fair" an indefinite suspension based upon an indictment because "[r]ecognizing that he might well have been acquitted, the agency even-handedly rejected the 'knee-jerk' approach, giving plaintiff a chance to save his job if exonerated.")

Another reason courts have approved of indefinite suspensions based upon examinations into criminal charges was set forth in Polcover v. Department of the Treasury, 477 F.2d 1223, 1231-1232 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973). Quoting from Silver v. McCamey, 221 F.2d 873, 874-875 (D.C. Cir. 1955), the court specifically warned of the dangers of subjecting an employee to an administrative hearing while criminal action is pending:

> [we] agree . . . that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.

See also Peden v. United States, 512 F.2d 1099, 1103 (Ct. Cl. 1975).

As has been stated, indefinite suspensions are based upon "reasonable cause." "[R]easonable cause" is virtually synonymous with the "probable cause" which is necessary to support a grand jury indictment.

An indefinite suspension based on reasonable cause to believe that a crime has been committed for which imprisonment may be imposed must meet the "efficiency of the service" standard of 5 U.S.C. § 7511(a). Thus, there must be a nexus between the crime the employee is reasonably believed to have committed and his position.

. . . .

Another element of the agency's proof is the reasonableness of its penalty. Douglas v. Veterans Administration, MSPB Docket Number AT075299006 (April 10, 1981). Thus, agencies must show that a lesser penalty would be ineffective under the circumstances of the particular cases.

Indefinite suspensions are not based upon provable misconduct but upon the examination into that misconduct. Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976). Therefore, an indefinite suspension may be found to have been reasonable when imposed, although facts later developed may cause the Board to find that an agency acted unreasonably in failing or refusing to vacate the action. In this regard, however, the Board notes that before an agency or before the Board, the bare fact of a subsequent acquittal does not demonstrate that an indefinite suspension had been unjustified. An acquittal because a jury or judge was not convinced beyond and to the exclusion of all "reasonable doubt," Speiser v. Randall, 157 U.S. 513 (1978), is not binding on an administrative agency, Alsbury v. United States Postal Service, 192 F. Supp. 71 (C.D. Calif. 1975), aff'd, 530 F.2d 852 (9th Cir. 1976), because the standard of proof before the Board is the "preponderance of the evidence." The Board concludes that where, after a full review of the attendant facts and circumstances, an indefinite suspension is found to have been reasonably imposed and maintained, the Board will sustain the action.

Because a suspension is by definition temporary, an indefinite suspension must have a determinable condition subsequent which will bring

the action to an end. Accordingly, the Board's order sustaining the action would explicitly or implicitly mandate that the agency move expeditiously, and that the suspension terminate upon the occurrence of the condition subsequent. Noncompliance with these terms of the order could be brought to the Board's attention via 5 C.F.R. § 1201.181, which provides:

> Any party may petition the Board for enforcement of a final decision issued under the Board's appellate jurisdiction. Submission of this petition shall be made to the field office which rendered the initial decision. The petition shall specifically set forth the reasons why the petitioning party believes there is non-compliance.

The Board agrees that this provision gives an appellant the procedural opportunity to argue that conditions have occurred which should have brought about a termination of his suspension.

Having set forth the principles which the Board must use to determine the validity of indefinite suspensions, we will now apply them to the specific cases before us.

IV. APPLICATION

Appellant Martin was indefinitely suspended . . . upon charges of unauthorized interception of oral communications, conduct prejudicial to the best interest of the service, and interfering with the rights of another. The agency took the position that the action was appropriate in view of Martin's role as supervisory law enforcement official in an agency (Customs Service) which has a mission of law enforcement.

The record indicates that the agency had received only a preliminary investigative report and that further investigation, or further analysis of the information and materials obtained was ongoing. The Board finds that this continuing investigation, taken together with the search warrants, the actual evidence obtained, and the fact that the matter was referred to the U.S. Attorney for investigation and possible action, provides sufficient basis for "reasonable cause." While an investigation should not per se form the basis for an indefinite suspension, it may provide such a basis where, as is the case herein, it is accompanied by evidence which is sufficient to afford "reasonable cause to believe. . . ." Further, the ongoing agency investigative process and the referral to the U.S. Attorney support the "temporary" nature of the suspension. Finally, the Board finds the suspension action reasonable, Douglas, supra, and also concludes that the action was taken for such cause as will promote the efficiency of the service, in view of appellant's position as a

law enforcement officer. Accordingly, the indefinite suspension action taken against Martin is sustained.

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b. Notes and Discussion.

Note 1. An indefinite suspension pending disposition of criminal charges must be based on reasonable cause to believe that the employee committed a crime for which imprisonment can be imposed. See 5 U.S.C. § 7513(b)(1). This section of Title 5 is the same one relied upon to shorten the normal 30-day notice period to 7 days.

Note 2. Most cases rely upon an indictment to establish the requisite reasonable cause. Jankowitz. See also Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955 (Fed. Cir. 1993); Dunnington v. Dep't of Justice, 956 F.2d 1151 (Fed. Cir. 1992); Smith v. Gov't Printing Office, 60 M.S.P.R. 450 (1994); Crespo v. U.S. Postal Service, 53 M.S.P.R. 125 (1992); and Johnson v. Department of Health and Human Services, 22 M.S.P.R. 521 (1984). An indictment is not, however, the only evidence providing the necessary reasonable cause. An arrest or an investigation standing alone is generally insufficient to establish reasonable cause. Phillips v. Dep't of Veterans Affairs, 58 M.S.P.R. 12 (1993), aff'd, 17 F.3d 1443 (Fed. Cir. 1994); Martin; and Larson v. Department of Navy, 22 M.S.P.R. 260 (1984). A combination of circumstances, however, including an arrest or investigation may suffice. Accord Gonzales v. Department of the Treasury, 37 M.S.P.R. 589 (1988); Rampado v. U.S. Customs Service, 28 M.S.P.R. 189 (1985); Martin; Honeycutt v. Department of Labor, 22 M.S.P.R. 491 (1984); Backus v. Office of Personnel Management, 22 M.S.P.R. 457 (1984). See also Dunnington v. Department of Justice and OPM, 45 M.S.P.R. 305 (1990) (finding arrest based on arrest warrant issued by neutral magistrate based on finding of probable cause sufficient).

c. Nature of the action. This indefinite suspension is a temporary action and requires that there be a determinable condition subsequent that will terminate the action. If the suspension is imposed pending disposition of criminal charges, therefore, the agency must promptly terminate the suspension when the charges are resolved. Newbold v. Dep't of Treasury, 58 M.S.P.R. 532 (1993); Drake v. Veterans Administration, 26 M.S.P.R. 34 (1985).

An indefinite suspension is viewed as a suspension for more than 14 days and thus is treated as a true adverse action for all procedural and substantive purposes. This requires that the agency prove the nexus between the indictment and the efficiency of the service; demonstrate the appropriateness of this penalty choice; and follow the procedures for imposing a true adverse action. Because 5 U.S.C. § 7513(b)(1) is the basis for this type suspension and for reducing the notice period from 30 to 7 days, only a 7-day notice should be required in these actions.

d. Action upon resolution of criminal charges. The agency may not continue the suspension after the employee is acquitted, the charges are dismissed, or the employee is convicted. The agency must promptly decide then to reinstate the employee and/or to institute adverse action procedures. Newbold v. Dep't of Treasury, 58 M.S.P.R. 532 (1993); Covarrubias v. Department of Treasury, 23 M.S.P.R. 458 (1984).

Acquittal or dismissal of the charges does not necessarily entitle the employee to reinstatement because the agency may be able to prove the underlying misconduct by the lower administrative standard - preponderance of the evidence. Rodriquez-Ortiz v. Department of Army, 46 M.S.P.R. 546 (1991); Covarrubias; Eilertson v. Department of Navy, 23 M.S.P.R. 152 (1984). The Supreme Court has reaffirmed the propriety of this type of administrative action following unsuccessful criminal action in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

e. Effect of reinstatement on the original suspension. The critical issue arising upon reinstatement of an employee after acquittal or dismissal of charges, concerns the employee's entitlement to back pay for the period of suspension.

The Court of Claims in Jankowitz held that the employee's acquittal and subsequent reinstatement did not entitle the employer to back pay, unless the employee can demonstrate that the suspension was unjustified or unwarranted when it was imposed or during the period it was in effect. This decision was based on the Back Pay Act, codified at 5 U.S.C. § 5596, which permits back pay only if the employee had been subjected to an unwarranted or unjustified personnel action.

The Court of Appeals for the Federal Circuit (CAFC) addressed the issue in Wiemers v. Merit Systems Protection Board, 792 F.2d 1113 (1986) and affirmed the Jankowitz rationale. It has recently reaffirmed the denial of back pay when an indefinite suspension was lifted, but was justified when imposed. Jones v. Dep't of Navy, 51 M.S.P.R. 607 (1991), aff'd, 978 F.2d 1223 (Fed. Cir. 1992)

Most recently, the CAFC held that an agency has discretion to grant or deny back pay following an indefinite suspension. In Richardson v. U.S. Custom Serv., 47 F.3d 415 (Fed. Cir. 1995), the CAFC reviewed the denial of back pay to customs agents who were suspended based on an indictment and later reinstated following acquittal of all charges. It found "the agency is neither required to nor precluded from making the reinstatement with back pay retroactive to the date of the suspension. *Id.* at 421. In so finding, the CAFC made reinstatement decisions nonreviewable by the MSPB (since no appealable action is involved, there is no jurisdiction). See also Czubinski v. Department of Treasury, 76 M.S.P.R. 552, (1997)("We note that an agency is not precluded from granting back pay for the period of the indefinite suspension under these circumstances. However, '[t]hat decision is a matter for the agency, in the first instance, to make, based on all the facts and circumstances.' Richardson v. U.S. Customs Service, 47 F.3d 415, 421 (Fed.Cir.1995). The proper forum for testing the agency's decision on back pay is the United States Court of Federal Claims in a Tucker Act suit based on the Back Pay Act, or

in some cases arbitration under the provisions of a collective bargaining agreement. Id. at 422.").

4.14 Constitutional Considerations. The focus of this section has been on the statutory and regulatory provisions governing employee discipline. There are, however, significant constitutional concerns in the substantive aspects of discipline, as there were in the procedural execution of discipline. This paragraph will address several important questions of constitutional dimension in substantive rights.

a. Fifth Amendment. Federal employees have the same fifth amendment rights, including the rights against self-incrimination, as all other persons in the United States. The right to remain silent, however, does not include the right to lie to investigators, investigating allegations of employee misconduct.

Janice R. LaCHANCE, Acting Director, Office of Personnel Management,Petitioner,

v.

Lester E. ERICKSON, Jr., et al.

118 S.Ct. 753, 139 L.Ed.2d 695, 66 USLW 4073 (1998)

Director of the Office of Personnel Management (OPM) petitioned for review of the Merit System Protection Board's final decisions in 62 M.S.P.R. 586, 63 M.S.P.R. 80, 64 M.S.P.R. 570, and 65 M.S.P.R. 186 reversing falsification charges against six employees. In separate opinions, the Court of Appeals for the Federal Circuit, Lourie, Circuit Judge, 89 F.3d 1575, and 92 F.3d 1208 affirmed. OPM sought certiorari. After granting certiorari, the Supreme Court, Chief Justice Rehnquist, held that: (1) neither due process clause or Civil Service Reform Act (CSRA) precludes federal agency from sanctioning employee for making false statements to agency regarding alleged employment-related misconduct; and (2) federal agency may take adverse action against employee for false statements employee made during agency investigation of underlying charge of employee misconduct. Reversed.

Chief Justice REHNQUIST delivered the opinion of the Court.

[1] The question presented by this case is whether either the Due Process Clause or the Civil Service Reform Act (CSRA), 5 U.S.C. § 1101 et seq., precludes a federal agency from sanctioning an employee for making false statements to the agency regarding alleged employment-related misconduct on the part of the employee. We hold that they do not.

Respondents Walsh, Erickson, Kye, Barrett, Roberts, and McManus are government employees who were the subject of adverse actions by the various agencies for which they worked. Each employee made false statements to agency investigators with respect to the misconduct with which they were charged. In each case, the agency additionally charged the false statement as a ground for adverse action, and the action taken in each

was based in part on the added charge. The employees separately appealed the actions taken against them to the Merit Systems Protection Board (Board). The Board upheld that portion of the penalty based on the underlying charge in each case, but overturned the false statement charge. The Board further held that an employee's false statements could not be used for purposes of impeaching the employee's credibility, nor could they be considered in setting the appropriate punishment for the employee's underlying misconduct. Finally, the Board held that an agency may not charge an employee with failure to report an act of fraud when reporting such fraud would tend to implicate the employee in employment-related misconduct.

The Director of the Office of Personnel Management appealed each of these decisions by the Board to the Court of Appeals for the Federal Circuit. In a consolidated appeal involving the cases of Walsh, Erickson, Kye, Barrett, and Roberts, that court agreed with the Board that no penalty could be based on a false denial of the underlying claim. King v. Erickson, 89 F.3d 1575 (1996). Citing the Fifth Amendment's Due Process Clause, the court held that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge," nor may "[d]enials of charges and related facts ... be considered in determining a penalty." Id., at 1585. In a separate unpublished decision, the Court of Appeals affirmed the Board's reversal of the false statement charge against McManus as well as the Board's conclusion that an employee's "false statements ... may not be considered" even for purposes of impeachment. McManus v. Department of Justice, 66 M.S.P.R. 564, 568 (1995).

[2] We granted certiorari in both cases, 521 U.S. ----, 117 S.Ct. 2506, 138 L.Ed.2d 1011 (1997), and now reverse. In Bryson v. United States, 396 U.S. 64, 90 S.Ct. 355, 24 L.Ed.2d 264 (1969), we said: "Our legal system provides methods for challenging the Government's right to ask questions--lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." Id., at 72, 90 S.Ct., at 360 (footnote omitted). We find it impossible to square the result reached by the Court of Appeals in the present case with our holding in Bryson and in other cases of similar import.

Title 5 U.S.C. § 7513(a) provides that an agency may impose the sort of penalties involved here "for such cause as will promote the efficiency of the service." It then sets forth four procedural rights accorded to the employee against whom adverse action is proposed. The agency must: (1) give the employee "at least 30 days' advance written notice"; (2) allow the employee "a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish ... evidence in support of the answer"; (3) permit the employee to "be represented by an attorney or other representative"; and (4) provide the employee with "a written decision and the specific reasons therefor." 5 U.S.C. § 7513(b). In these carefully delineated rights there is no hint of any right to "put the government to its proof" by falsely denying the charged conduct. Such a right, then, if it exists at all, must come from the Fifth Amendment of the United States Constitution.

The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law ...." U.S. Const., Amend. V. The Court of Appeals stated that "it is undisputed that the government employees here had a protected property

interest in their employment," 89 F.3d, at 1581, and we assume that to be the case for purposes of our decision.

[3][4] The core of due process is the right to notice and a meaningful opportunity to be heard. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). But we reject, on the basis of both precedent and principle, the view expressed by the Court of Appeals in this case that a "meaningful opportunity to be heard" includes a right to make false statements with respect to the charged conduct.

[5] It is well established that a criminal defendant's right to testify does not include the right to commit perjury. Nix v. Whiteside, 475 U.S. 157, 173, 106 S.Ct. 988, 997, 89 L.Ed.2d 123 (1986); United States v. Havens, 446 U.S. 620, 626, 100 S.Ct. 1912, 1916, 64 L.Ed.2d 559 (1980); United States v. Grayson, 438 U.S. 41, 54, 98 S.Ct. 2610, 2617-2618, 57 L.Ed.2d 582 (1978). Indeed, in United States v. Dunnigan, 507 U.S. 87, 97, 113 S.Ct. 1111, 1118, 122 L.Ed.2d 445 (1993), we held that a court could, consistent with the Constitution, enhance a criminal defendant's sentence based on a finding that he perjured himself at trial.

[6][7] Witnesses appearing before a grand jury under oath are likewise required to testify truthfully, on pain of being prosecuted for perjury. United States v. Wong, 431 U.S. 174, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977). There we said that "the predicament of being forced to choose between incriminatory truth and falsehood ... does not justify perjury." Id., at 178, 97 S.Ct., at 1826. Similarly, one who files a false affidavit required by statute may be fined and imprisoned. Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966).

The Court of Appeals sought to distinguish these cases on the ground that the defendants in them had been under oath, while here the respondents were not. The fact that respondents were not under oath, of course, negates a charge of perjury, but that is not the charge brought against them. They were charged with making false statements during the course of an agency investigation, a charge that does not require that the statements be made under oath. While the Court of Appeals would apparently permit the imposition of punishment for the former but not the latter, we fail to see how the presence or absence of an oath is material to the due process inquiry.

The Court of Appeals also relied on its fear that if employees were not allowed to make false statements, they might "be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge." App. to Pet. for Cert. 16a-17a. But we rejected a similar claim in United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). There a sentencing judge took into consideration his belief that the defendant had testified falsely at his trial. The defendant argued before us that such a practice would inhibit the exercise of the right to testify truthfully in the proceeding. We described that contention as "entirely frivolous." Id., at 55, 98 S.Ct., at 2618.

If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. See Hale v. Henkel, 201 U.S. 43, 67, 26 S.Ct. 370, 376, 50 L.Ed. 652 (1906); United States v. Ward, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742 (1980). It may well be that an agency, in ascertaining the truth or falsity of the charge, would take into consideration the failure of the employee to respond. See Baxter v. Palmigiano, 425 U.S. 308, 318, 96

S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976) (discussing the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify"). But there is nothing inherently irrational about such an investigative posture. See Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

For these reasons, we hold that a government agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct. The judgments of the Court of Appeals are therefore

Reversed.

Two general consequences flow from the right to remain silent. First, an employee may not be disciplined for properly invoking his or her privilege against self-incrimination. Second, later criminal prosecution cannot constitutionally use statements coerced from an employee in an earlier disciplinary investigation by threat of discipline for failure to answer questions. Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973); Peden v. United States, 512 F.2d 1099 (Ct. Cl. 1974); Weston v. Department of Housing and Urban Development, 724 F.2d 943 (Fed. Cir. 1983).

These courts, while recognizing the employees' constitutional rights, mapped out a clear course describing how to discipline an employee in this situation. If an employee properly invokes the fifth amendment privilege in refusing to answer a work-related question by the employer, the employer should advise the employee first that the employee is subject to disciplinary action for refusal, and second, that the reply, and its fruits, cannot be used in a criminal proceeding. Following this court-suggested course of action results in a use immunity by operation of law.

These steps are necessary only if the employee asserts a proper fifth amendment privilege. The employee's refusal to answer the employer's question for fear of disciplinary action, not criminal action, is not a proper fifth amendment invocation. Devine v. Goodstein, 680 F.2d 243 (D.C. Cir. 1983).

b. First Amendment. When an employee alleges that discipline was imposed in retaliation for exercising a first amendment free speech right, two issues commonly arise. First, is the speech at issue constitutionally protected? Second, if the speech is constitutionally protected and it is a substantive part of the reason for the disciplinary action, is reversal of the disciplinary action required?

(1) Constitutionally protected speech. The Supreme Court in Pickering v. Board of Education of Township High School, 391 U.S. 563 (1968) established the framework for deciding what speech is constitutionally protected in a public employment context. That landmark decision continues to be the starting point for any first amendment analysis in connection with free speech and public employment. The decision is set out in part below.

Pickering v. Board of Education of Township High School
391 U.S. 563 (1968)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and hence, under the relevant Illinois statute, Ill. Rev. Stat., c. 122, § 10-22.4 (1963), that "interests of the school require[d] [his dismissal]."

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. 36 Ill. 2d 568, 225 N.E.2d 1 (1967). We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments. 389 U.S. 925 (1967). For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both the Board and the school administration. The Board

also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was "detrimental to the best interests of the schools." Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection. In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E.g., Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, supra, at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the

interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . false or with reckless disregard of whether [they were] . . . false or not," New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)-(4) of appellant's letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher

in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV

The public interest in having free and unhindered debate on matters of public importance--the core value of the Free Speech Clause of the First Amendment--is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); St. Amant v. Thompson, 390 U.S. 727 (1968). Compare Linn v. United Plant Guard Workers, 383 U.S. 53 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a "matter of public interest" is involved. Time, Inc. v. Hill, 385 U.S. 374 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times.

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. Louisiana, 379 U.S. 64 (1964); Wood v.

Georgia, 370 U.S. 375 (1962). In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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c. Notes and Disucussion.

Note 1. The Supreme Court, in Connick v. Myers, 461 U.S. 138 (1983), reexamined Pickering in a Federal employment context. The Court reemphasized that determining if speech is constitutionally protected requires balancing the employee's right, as a citizen, to comment on matters of public concern, against the Government's interest, as an employer, to promote the efficiency of the service. Connick noted, however, that before getting into the balancing test, a threshold determination must be made that the speech is on a matter of public concern and not on a purely employment matter. If the speech is not on a matter of public concern, there is generally no first amendment protection. Henry v. Department of Navy, 902 F.2d 949 (Fed. Cir. 1990); Barnes v. Small, 840 F.2d 972 (D.C. Cir. 1988); Mings v. Department of Justice, 813 F.2d 384 (Fed. Cir. 1987).

Note 2. The most recent public employee first amendment decision by the Supreme Court is Rankin v. McPherson, 483 U.S. 378 (1987), in which the court reversed

the firing of a clerk who had remarked to a co-worker, upon learning of the assassination attempt on President Reagan, "if they go for him again, I hope they get him." The court found that the statement was a matter of public concern and that, given the context of the statements, the employee's interest in expression outweighed the potential harm to Government interests. For more recent applications of the federal bar to alleged First Amendment violations, see Hamlet v. United States, 63 F.3d 1097 (Fed. Cir. 1995) (finding allegations of 1st Amendment denial are insufficient to invoke jurisdiction of court absent specific statutory authority); Gergick v. Austin, 997 F.2d 1237, 1239 (8th Cir.1993) (the Civil Service Reform Act contains the exclusive remedy for Whistleblower Protection Act claims), *cert. denied*, 114 S. Ct. 1536 (1994).

Note 3. A major free speech case arising out of the much publicized Federal air traffic controller strike is Brown v. Federal Aviation Administration, 735 F.2d 543 (Fed. Cir. 1984).

In Brown, an FAA supervisor addressed a group of his striking air traffic controllers at the union hall, and advised them that if they stayed together, they would win. These remarks were videotaped and later broadcast nationally on television. Brown also told a reporter that he supported some of the strike demands. The court reviewed Brown's firing, which had been upheld by the MSPB, and considered whether his remarks were constitutionally protected. The court recognized that the strike was a matter of public concern, but determined that Brown's remarks were only tangentially related to that concern. Applying the balancing test from Pickering, the court found that the timing of the remarks, at the beginning of the strike, and Brown's position as a supervisor, from whom management should reasonably expect loyalty, justified disciplinary action. The court did, however, direct the MSPB to mitigate the penalty based on the Douglas criteria.

(2) Impact of first amendment violation. If, using the balancing test of Pickering and Connick, the court concludes that the speech at issue is constitutionally protected, does that alone require reversal of the disciplinary action? The short answer is "no." The employee has the additional burden of showing that the protected speech was a substantial or motivating factor in the employer's decision to discipline.

Even if the employee can demonstrate the connection, the Supreme Court's controversial decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), allows the agency employer to defeat the employee's claim, if it can prove by a preponderance of the evidence that it would have taken the same action absent the employee's protected speech (mixed motive analysis).

The Mt. Healthy decision has had a tremendous impact not only in first amendment cases but several other areas as well, e.g., in Special Counsel actions and in the equal employment opportunity area. Because of its significant impact in all of these areas, the decision is set out in part below.

Mt. Healthy City School District Board of Education v. Doyle
429 U.S. 274 (1977)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution.

. . . .

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently

prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum---on a subject which he apparently understood was to be settled by joint teacher-administration action--was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by references to the radio station incident and to the obscene-gesture incident.

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. . . . The Court of Appeals affirmed in a brief per curiam opinion. 529 F.2d 524.

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, Board of Regents v. Roth, 408 U.S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. Perry v. Sindermann, 408 U.S. 593 (1972).

That question of whether speech of a Government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its

reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

. . . .

Clearly the Board legally could have dismissed respondent had the radio station incident never come to its attention. . . We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But the same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

. . . .

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.
>
> The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

So ordered.

The key to Mt. Healthy, and its significance in areas other than first amendment, is the Court's unwillingness to put an employee in a better position after the speech than the employee would have been in otherwise. Engaging in free speech should not immunize an employee from otherwise proper disciplinary action.

Congress, in the Whistleblower Protection Act of 1989, modified the Mt. Healthy standard in cases where the employee's speech constitutes whistleblowing under 5 U.S.C. § 2302(b)(8). In a whistleblowing case, initially the employee need only demonstrate by preponderant evidence that reprisal for whistleblowing was a contributing factor in the decision to take adverse action against the employee. If the employee satisfies this initial burden, then the agency must demonstrate by clear and convincing evidence that it still would have taken the same action. See 5 U.S.C. § 1214(b)(4). See also Horton v. Dep't of Transp., 66 F.3d 279 (Fed. Cir. 1995); Watson v. Dep't of Justice, 64 F.3d 1524 (Fed. Cir. 1995); Clark v. Dep't of Army, 997 F.2d 1466 (Fed. Cir., 1993), cert. denied, 114 S. Ct. 920 (1994); Kochanoff v. Dep't of Treasury, 54 M.S.P.R. 517 (1992); McDaid v. Department of Housing and Urban Development, 46 M.S.P.R. 416 (1990).

In the Civil Rights Act of 1991, Congress again modified the Court's mixed motive burdens from Mt. Healthy for cases arising under Title VII of the Civil Rights Act of 1964 and the other discrimination laws. In these cases, an employee must first demonstrate (satisfy the burden of production and persuasion) that discrimination was a "motivating factor" in the action. The employee can then receive attorney fees, costs, and injunctive relief, even if the employer can demonstrate it would have taken the same action without discrimination. Should the employer fail to satisfy its burden, it becomes liable for the full range of damages discussed in chapter 9, below. 42 U.S.C. § 2000e-5(g).

d. Fourth Amendment. Searches and seizures by Government employers or supervisors of private property of their employees are subject to restraints of the Fourth Amendment. O'Connor v. Ortega, 480 U.S. 709 (1987). In O'Connor, the Supreme

Court ruled that a public employer's intrusion on an employee's constitutionally protected privacy interest is valid when justified at its inception by a work-related need or reasonable suspicion, and when it is reasonable in scope. See also Schowengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987); McGregor v. Greer, 748 F. Supp. 881 (D.D.C. 1990).

Compulsory drug testing by urinalysis of certain civilian employees mandated by Executive Order 12564 (September 15, 1987) also implicates the fourth amendment. The Supreme Court has held, however, that the need to detect and deter drug use by public employees performing certain law enforcement and safety-sensitive functions warrants warrantless--even suspicionless--drug testing. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). Applying Von Raab and Skinner, lower courts have upheld random testing of Army civilian employees occupying aviation, law enforcement, nuclear and chemical surety, and alcohol and drug control positions. NFFE v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989). See also Mulholland v. Department of the Army, 660 F. Supp. 1565 (E.D. Va. 1987) (aviation mechanics). Stigile v. Clinton, 110 F.3d 801, (D.C.Cir. 1997) (Government's interest in protecting president and vice president justified random drug testing of employees who held permanent passes to old executive office building.)

CHAPTER 5

EMPLOYEE PERFORMANCE

5.1 Employee Performance Appraisal System.

a. General.

One of the major changes made by the 1978 Civil Service Reform Act was the introduction of a separate statutory basis for removing employees based on unsatisfactory performance. The foundation of such an action is failure to satisfy performance standards. Until recently, OPM required all federal agencies to adopt a formal performance appraisal system with certain characteristics. It has recently withdrawn this requirement, however, and delegated to federal agencies authority to establish their own performance appraisal systems. Portions of the current OPM regulation are reproduced below.

b. Statutory Provisions.

Under the Civil Service Reform Act of 1978, all Federal agencies are required to adopt a performance appraisal system. The requirements for each agency's plan are set out in the statute. 5 U.S.C. Chapter 43 provides for employee performance appraisals.

c. Regulatory Provisions.

(1) OPM Regulations. Regulations published by the Office of Personnel Management implement the statutory requirement of Title 5, Chapter 43. The OPM regulations are found at 5 C.F.R. Part 430—Performance Management, provide general guidance to agencies while delegating complete authority over performance appraisals to the agency.

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(2) The OPM regulations still require agencies to submit performance appraisal systems for approval, since that is required by law. This will obviously be a cursory review, at best. Agencies must keep their current performance appraisal system in place until OPM approves the new system.

(3) Army Implementation. The Army implementation of these OPM regulations is located at AR 690-400, Chapter 4302, Total Army Performance Evaluation System (TAPES)(1 June 1993).

Note. All agency performance plans must be approved by OPM, and the agency must show by substantial evidence, as part of its burden of proof in an employee appeal, OPM approval of its performance appraisal system. Griffin v. Department of Army, 23 M.S.P.R. 657 (1984). The MSPB has held that OPM approval can be proved by submitting agency regulations that reference OPM approval. Chennault v. Department of Army, 796 F.2d 465 (Fed. Cir. 1986).

Appendix C-1 of AR 690-400, Chapter 4302, contains a copy of the OPM approval letter on TAPES.

5.2 Actions for Unacceptable Performance.

a. General. Title 5 U.S.C., Section 4303, provides the statutory authority for actions based on unacceptable performance. These performance-based actions require, as stated above, an appropriate appraisal system under 5 U.S.C. § 4302. An agency may also, in certain circumstances, take action against an employee for unacceptable performance under the misconduct provisions of 5 U.S.C. Chapter 75 (see Chapter 5, Section I). Shorey v. Dep't of Army, 77 M.S.P.R. 239 (1998); Lovshin v. Department of Navy, 767 F.2d 826 (Fed. Cir. 1985), cert. denied, 475 U.S. 1111 (1986); Stenmark v. Dep't of Transp., 59 M.S.P.R. 462 (1993); McGillivray v. Federal Emergency Management Agency, 58 M.S.P.R. 398 (1993).

BETTY J. SHOREY, Appellant,
v.
DEPARTMENT OF THE ARMY, Agency.
77 M.S.P.R. 239 (1998)

OPINION AND ORDER

The agency has petitioned for review of an initial decision that mitigated the appellant's removal to a 60-day suspension, and the appellant has cross-petitioned. For the reasons set forth below, we GRANT the agency's petition, REVERSE the initial decision in part, SUSTAIN the removal penalty, and DENY the appellant's cross-petition for review.

BACKGROUND

The procedural history in this case begins on October 3, 1995, when the appellant filed a timely appeal of the agency action removing her from her position as a GS-9 Budget Analyst on the following charges: (1) Unsatisfactory performance; (2) insubordination; and (3) using offensive, discourteous language toward her supervisor. In an initial decision issued on January 26, 1996, the administrative judge ordered the agency to cancel the removal, and to substitute a 60-day suspension. After the agency filed a petition for review, the parties reached a settlement, and the agency withdrew its petition. Accordingly, the Board reopened the appeal under 5 C.F.R. § 1201.118, vacated the initial decision, and dismissed the appeal as settled. The administrative judge subsequently granted the appellant's second petition for enforcement, recommending that the Board rescind the settlement agreement and reinstate the initial decision, along with the agency's petition for review. The Board adopted the recommendation. In the now-reinstated initial decision, the administrative judge had sustained all three specifications of the first charge, which alleged the appellant's failure to meet the standards of her critical performance element three: Prepares/Analyzes Reports. However, she found that the standards given to the appellant covering critical element three did not establish a "benchmark" against which the appellant could assess whether her performance was acceptable. Therefore, the administrative judge did not sustain the agency's first charge. She found that the agency proved its second and third charges by preponderant evidence, and she sustained them. She further found that the appellant did not

establish that the agency discriminated against her on the basis of sex and/or national origin, disability, or reprisal for her previous EEO activity.

Because the charge of unsatisfactory performance was not sustained, and in light of what she found to be mitigating factors involving the second and third charges, the administrative judge mitigated the penalty to a 60-day suspension.

ANALYSIS

[2] We find, at the outset, that the appellant's challenge to the agency's undue disruption determination is beyond the scope of our review authority. See King v. Jerome, 42 F.3d 1371, 1374-75 (Fed.Cir.1994) (the Board has no authority to review whether an agency's decision to detail or reassign an appellant was made in good faith; the Board's authority is restricted to deciding whether an undue disruption determination was made when required, and whether the appellant is receiving appropriate pay and benefits). Thus, the appellant's request for immediate reinstatement on this ground is without merit.

[3] We therefore turn to the agency's petition for review, in which it requests that the removal penalty be sustained, because it communicated to the appellant the level of performance necessary for her to receive an acceptable rating. We agree.

The three specifications under the first charge are as follows: (1) Failure to accurately prepare the Executive Budget Summary for January 5, 1995; (2) failure to analyze adverse trends and to manage Operations Maintenance Army Reserve (OMAR) accounts; and (3) failure to post commitments to the Army Community of Excellence (ACOE) accounts. Although, as noted, the administrative judge sustained each of the specifications individually, she did not sustain the charge of unsatisfactory performance because, she found, the agency failed to establish that the appellant's performance was evaluated "pursuant to valid standards." The administrative judge then proceeded to cite a series of cases finding performance standards to be necessary, citing, inter alia, Wilson v. Department of Health and Human Services, 770 F.2d 1048, 1052 (Fed.Cir.1985). We note that all the cases the administrative judge cites in support of her conclusion concern actions effected under 5 U.S.C. chapter 43.

Our reviewing court, the United States Court of Appeals for the Federal Circuit, has allowed the continued use of chapter 75 to effect actions that are entirely or partially performance-based. See Lovshin v. Department of the Navy, 767 F.2d 826, 843 (Fed.Cir.1985) (en banc) (an agency may rely on either chapter 75 or chapter 43 to take a performance-based action). The agency's SF-50 states that the action taken was a removal under chapter 75. In addition, the administrative judge found that the agency removed the appellant pursuant to the provisions of chapter 75, and neither party, upon petition for review, has challenged her finding. The Board has held that an agency may not process an action under chapter 43 and then change the theory of its case to chapter 75 after hearing, by which point it has determined that it has not complied with all chapter 43 requirements. See Ortiz v. U.S. Marine Corps, 37 M.S.P.R. 359, 363 (1988). However, that is not what occurred here. We find that the action in this matter was taken, and was legitimately taken, under chapter 75.

[4] We further find that the administrative judge has erred in applying chapter 43 standards to a chapter 75 case. It is well established that a specific standard of performance need not be established and identified in advance for the appellant in a performance action brought under chapter 75; rather, when an agency takes such an action under that chapter, it must simply prove that its measurement of the appellant's performance was both accurate and reasonable. See

Moore v. Department of the Army, 59 M.S.P.R. 261, 265 (1993), appeal dismissed, 16 F.3d 422 (Fed.Cir.1993) (Table).

[5][6] An agency may not, though, circumvent chapter 43 by charging that an employee should have performed better than the standards communicated to her in accordance with chapter 43. See Lovshin, 767 F.2d at 842. The record here reflects no indication of surprise or circumvention; nor does the appellant make any such claim. The administrative judge, herself has usefully summarized the parties' stipulations, which set forth the specific requirements conveyed to the appellant, and the agency's numerous discussions of those requirements with her, including memoranda of deficient performance, followed by a 90-day performance improvement plan (PIP), with a 60-day extension. Based on the record evidence, the administrative judge's own findings, and the state of chapter 75 case law regarding performance-based actions, we find that the agency proved that its measurement of the appellant's performance was both accurate and reasonable. See Moore, 59 M.S.P.R. at 265. Accordingly, the first charge, too, is sustained.

[7][8][9] An agency's penalty determination is based on the charged misconduct. See Payne v. U.S. Postal Service, 72 M.S.P.R. 646, 650 (1996). When all of the charges are sustained, the penalty determination made by the agency is a reliable standard to review. Id. That determination is entitled to deference, and should be reviewed only to determine whether the agency responsibly balanced the relevant factors in the individual case. See Douglas v. Veterans Administration, 5 MSPB 313, 5 M.S.P.R. 280, 306 (1981). Since the record reflects that the agency considered all factors pertinent to the three charges, see IAF, Tab 12, we defer to the agency's penalty as being within the "tolerable limits of reasonableness," given the clear relationship of all charges and the appellant's work place responsibilities. See Douglas, 5 MSPB 313, 5 M.S.P.R. at 306. Accordingly, we sustain the penalty of removal.

b. Statutory Requirements. The statute provides substantial procedural due process to employees who will be reduced in grade or removed for unacceptable performance. The procedures include both predecisional notice and opportunity to respond and postdecisional appeal rights, as follows:

Note. The Civil Service Due Process Amendments of 1990 amended 5 U.S.C. § 4303(e) effective August 17, 1990. Subsection (e)(3) grants appeal rights for performance based actions to most nonpreference eligible excepted service employees who have completed 2 years of current continuous service in the same or similar positions.

c. Regulatory Requirements.

(1) OPM Regulations. Performance based actions are commonly referred to in the "trade" as "432 actions." This acronym derives from 5 C.F.R. Part 432; the OPM implementing regulations for performance based actions. The Army implements these regulations in AR 690-400, Chapter 4302.

d. Procedures for Performance-Based Actions. An employee who fails to meet established performance standards in one or more Responsibility for the base system TAPES or Objective for the senior system (previously called "critical elements") may be reduced in grade or removed. The reduction or removal must be based on unacceptable performance occurring within one year of the date the employee is given notice of the action. 5 CFR 432.105(a)(1). This one-year period may, however, cover more than one performance appraisal period. Weirauch v. Department of the Army, 782 F.2d 1560 (Fed. Cir. 1986); Sullivan v. Dep't of the Navy, 44 M.S.P.R. 646 (1990); Brown v. Veterans Admin., 44 M.S.P.R. 635(1990).

Before initiating a reduction or removal action, the agency must notify the employee of specific deficiencies in performance and allow the employee a reasonable time to demonstrate acceptable performance. During this performance improvement period ("PIP"), management must assist the employee to improve the unacceptable performance. If the employee improves performance during the PIP to an acceptable level, management takes no action. If, however, the employee's performance returns to an unacceptable level within one year after the beginning of the PIP (the so-called "roller coaster" employee), management can initiate a removal or reduction action without giving the employee another PIP. Cohen v. General Services Admin., 53 M.S.P.R. 492 (1992); Cockrell v. Dep't of Air Force, 58 M.S.P.R. 211 (1993); Sullivan v. Department of the Navy, 44 M.S.P.R. 646 (1990). See 5 C.F.R. § 432.106(a)(1). Only after a full year has passed since the original notice of deficiencies need management provide a new PIP. 5 C.F.R. § 432.105(a)(2).

Employees demoted or removed for unacceptable performance frequently attempt to challenge the content of the performance standards by which they were rated. The agency must demonstrate that the performance standards are reasonable, realistic, and attainable. Johnson v. Department of Army, 44 M.S.P.R. 464 (1990). "Absolute" standards (standards requiring perfection or near perfection) are generally impermissible, Hurd v. Dep't of Interior, 53 M.S.P.R. 107 (1992) aff'd 11 F.3d 1074 (Fed.Cir., 1993) (Table, Text in WESTLAW); Walker v. Department of Treasury, 28 M.S.P.R. 227 (1985); Callaway v. Department of Army, 23 M.S.P.R. 592 (1984); an absolute standard generally constitutes an abuse of discretion unless death, injury, breach of security, or great monetary loss could result from a single failure to meet the standard. Sullivan v. Department of the Navy, 44 M.S.P.R. 646 (1990); Callaway v. Department of the Army, 23 M.S.P.R. 592 (1984). Contra James v. Veterans Administration, 27 M.S.P.R. 124 (1985). Performance based actions may not be founded on "backwards" performance standards (defining unacceptable performance as minimally acceptable performance). See Eibel v. Department of Navy, 857 F.2d 1439 (Fed.Cir.1988); Cordioli v. Department of Navy, 976 F.2d 748 (Fed.Cir. 1992) (Table, text in WESTLAW); Dancy v. Dep't of Navy, 55 M.S.P.R. 331 (1992) (holding backwards standards were effectively "fleshed out" by agency oral and written clarifications); Oritz v. Department of Justice, 46 M.S.P.R. 692 (1991). Standards must also be objective, "to the maximum extent feasible." 5 U.S.C. § 4302(b)(1). This means that performance standards must be sufficiently precise and specific to invoke a general consensus as to its meaning and content. Romero v. E.E.O.C., 55 M.S.P.R. 527(1992), aff'd 22 F.3d 1104 (Fed.Cir.1994) (TABLE, text in WESTLAW).

An employee who fails to improve performance to an acceptable level during a PIP is entitled to 30 days advance written notice of a proposed reduction in grade or removal, 5 C.F.R. 432.105(a)(4)(I). This notice must identify the specific incidents of unacceptable performance under the Responsibility or Objective that were failed during the PIP. An agency is not required to consider the employee's performance during this 30-day advance notice period in reaching its final decision on the proposed action. Sandland v. General Services Admin., 23 M.S.P.R. 583 (1984); Gilbert v. Department of Health and Human Services, 27 M.S.P.R. 152 (1985). Like an employee facing a true adverse action based on misconduct, the employee subjected to a Chapter 43 action for unacceptable performance has the right to respond to the advance notice orally and in writing and to be represented by counsel. In a performance-based action, unlike in a misconduct action, the employee is entitled to a decision that has been concurred in by a supervisor above the proposing official. 5 C.F.R. 432.105(b).

If the employee appeals the reduction in grade or removal, the agency has the burden of demonstrating unacceptable performance by "substantial evidence" rather than the "preponderance" standard applicable in misconduct cases. 5 U.S.C. § 7701(c)(1); 5 C.F.R. § 1201.56(a)(i). Procedures in performance cases are subject to the harmful error rule. *See, e.g.* Diaz v. Dep't of Air Force, 63 F.3d 1107 (Fed. Cir. 1995) cert. denied 517 U.S. 1208, 116 S.Ct. 1823, 134 L.Ed.2d 929, 64 USLW 3778 (1996)(finding that removal after expiration of proposal notice was subject to harmful error analysis). *But see* Stenmark v. Dep't of Transp., 59 M.S.P.R. 462 (1993); Nafus v. Dep't of Army, 57 M.S.P.R. 386 (1993); Cross v. Dep't of Air Force, 25 M.S.P.R. 353 (1984), regarding what is a "procedural" matter.

In a performance based case, the MSPB, arbitrators, and courts may not mitigate the agency's selected penalty (removal or demotion) as they can in misconduct cases. Lisiecki v. MSPB, 769 F.2d 1558 (Fed. Cir. 1985), cert. denied, 475 U.S. 1108 (1986); Horner v. Bell, 825 F.2d 391 (Fed. Cir. 1987); Davis v. Dep't of Health and Human Servs., 58 M.S.P.R. 538 (1993); Cook v. Equal Employment Opportunity Comm'n, 50 M.S.P.R. 660 (1991).

The procedures required for taking performance based actions also apply to employees in the excepted service. 5 U.S.C. § 4303(e) and 5 U.S.C. § 7701govern MSPB appeal rights for excepted service employees. Section 7701(a) provides for appeal to the MSPB of any action "which is appealable to the Board under any law, rule, or regulation." To what extent may an agency, by its regulations, extend an appeal right for unacceptable performance actions to employees not given this right under § 4303(e)? The Court of Appeals for the Federal Circuit addressed this question in Schwartz v. Department of Transportation, 714 F.2d 1581 (Fed. Cir. 1983).

The petitioner in that case, Mr. Schwartz, was a nonpreference eligible in the excepted service (an attorney-advisor with DOT) until removed for unacceptable performance. Mr. Schwartz appealed to the MSPB, which held that it had no jurisdiction because of 5 U.S.C. § 4303. Mr. Schwartz appealed the MSPB's decision, arguing that the Department of Transportation could broaden Chapter 43 rights by regulation. He cited 5 U.S.C. § 7701(a) as the basis for his argument.

The court held that employees do not have appeal rights under Section 7701(a) simply because an agency has issued a regulation that purportedly bestows such a right. It must first be established that the agency issuing the regulation was specifically granted the authority to do so by statute. In this case, Schwartz failed to establish the requisite statutory authorization for the DOT's regulation on appeal rights.

The court read employing agencies' powers under Chapter 43 as being limited to the establishment of the performance appraisal systems, the encouragement of employee participation in the establishment of performance standards, and the use of the results of performance appraisal as a basis for training, rewarding, reassigning, promoting, reducing, retaining, and removing employees. In other words, the discretion given agencies under Chapter 43 is limited to the internal establishment and use of performance appraisal systems and does not extend to appellate jurisdiction from decisions taken under those systems.

As noted earlier, the Civil Service Due Process Amendments of 1990 extended MSPB appeal rights to most nonpreference eligible excepted service employees with 2 years current continuous service in the same or similar positions who are removed or demoted for unacceptable performance. Schwartz would, of course, continue to apply to nonpreference eligible excepted service employees not covered by the 1990 amendments.

Of course, nonpreference eligible excepted service employees who have completed the equivalent of a 1-year probationary period but who are not covered by the 1990 amendments may be able to challenge a performance based action through agency grievance procedures. See infra, Chapter 3.

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CHAPTER 6

REDUCTIONS IN FORCE (RIF)

6.1 Introduction.

Use of RIF Procedures

An agency is required to use RIF procedures when an employee is faced with separation or downgrading for a reason such as reorganization, lack of work, shortage of funds, insufficient personnel ceiling, or the exercise of certain reemployment or restoration rights. A furlough of more than 30 calendar days, or of more than 22 discontinuous workdays, is also a RIF action. (A furlough of 30 or fewer calendar days, or of 22 or fewer discontinuous workdays, is an adverse action.)

Management Responsibility

The agency has the responsibility to decide whether a RIF is necessary, when it will take place, and what positions are abolished. However, the abolishment of a position does not always require the use of RIF procedures. The agency may reassign an employee without regard to RIF procedures to a vacant position at the same grade or pay, regardless of where the position is located.

The U.S. Office of Personnel Management's (OPM) Reduction In Force (RIF) regulations are derived from the Veterans' Preference Act of 1944 and are codified in Title 5, United States Code, Sections 3501-3503. 5 USC Section 3502 provides that OPM's RIF regulations must give effect to four factors in releasing employees: (1) tenure of employment (e.g., type of appointment); (2) veterans preference; (3) length of service; and (4) performance ratings. The law does not assign any relative weight to the four factors, or require that the factors be followed in any particular order. OPM implements the laws through regulations published in Part 351 of Title 5, Code of Federal Regulations, and instructions in OPM's Downsizing Handbook.

Employees are ranked on the basis of these factors, and then the employees are released or reassigned beginning with those persons having the lowest ranking. A reduction-in-force at one level can have a domino effect on numerous positions at lower levels in the same Federal agency. The statutory and regulatory requirements for this procedure are the subject of this chapter.

6.2 Statutory Requirements.

Congress has prescribed general criteria for Federal agencies to determine which employees to release during a reduction-in-force.

5 U.S.C. § 3502. Order of retention.

(a) The Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to-

(1) tenure of employment;

(2) military preference, subject to section 3501(a)(3) of this title;

(3) length of service; and

(4) efficiency or performance ratings.

In computing length of service, a competing employee--

(A) who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

(B) who is a retired member of a uniformed service is entitled to credit for--

(i) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(ii) the total length of time in active service in the armed forces if he is included under section 3501(a)(3)(A), (B), or (C) of this title; and

(C) is entitled to credit for service rendered as an employee of a county committee established pursuant to section 590h(b) of title 16, or of a committee or an association of producers described in section 610(b) of title 7.

(b) A preference eligible described in section 2108(3)(c) of this title who has a compensable service-connected disability of 30 percent or more and whose performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this title is entitled to be retained in preference to other preference eligibles.

(c) An employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this title is entitled to be retained in preference to other competing employees.

The general rule under this law is that veterans who qualify as "preference eligibles" with satisfactory performance ratings receive higher retention standing than nonveterans. Many retired veterans do not receive this veteran's preference under 5 U.S.C. § 3501, which defines preference eligible employees for purposes of retention preferences. Retired military personnel who have 20 or more years of service are not considered preference eligibles under 5 U.S.C. § 3501(3)(B) unless their retired pay is based on disability. Likewise, under 5 U.S.C. § 3501(3)(A), a disabled veteran whose injury was not the result of service in war or armed conflict is not entitled to the preference for purposes of determining order of retention. An individual may therefore be considered a preference eligible for appointment and appeal rights but not for reductions-in-force.

6.3 Regulatory Requirements.

a. Scope of Competition. A Federal agency must follow the regulations in 5 C.F.R. Part 351 whenever it intends to release a competing employee under a reduction-in-force (RIF). An agency is never required to fill a vacant position during a RIF (5 C.F.R. § 351.201(b)); however, if it elects to do so, it must follow the RIF rules for RIF. Both competitive service and excepted service employees can be subjected to a RIF. Excepted service employees are ranked separately from competitive service employees and then released in the same order as the competitive service employees, but from their own list.

(1) **Competitive Area.**

First, the agency defines the competitive area (e.g., the geographical and organizational limits within which employees compete for retention). A competitive area may consist of all or part of an agency. The minimum competitive area in the departmental service is a bureau, major command, directorate, or other equivalent major subdivision of an agency within a local commuting area. An agency must obtain approval from OPM before changing a competitive area within 90 days of a RIF. 5 C.F.R. § 351.402, defines the competitive area for RIFs. The "commuting area" referred to in § 402 is defined in 5 C.F.R. 351.203 as "the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment." *See also* Ginnodo v. Office of Personnel Mgt., 753 F.2d 1061 (Fed. Cir.), *cert. denied*, 474 U.S. 848 (1985); Blevins v. Tennessee Valley Auth., 46 M.S.P.R. 239 (1990); Compton v. Dep't of Energy, 3 M.S.P.R. 452 (1980). Generally, the competitive area in the military departments is the local installation. The minimum competitive area is a bureau, major command, directorate, or other equivalent major subdivision of an agency within a local commuting area. "Just because a few employees may travel great distances and endure substantial commute times, the agency is not obligated to reflect these extremes in establishing competitive areas." Kelley v. Dept of Defense, 107 F.3d 30 (Fed. Cir. 1997)

(2) **Competitive Level.**

Next, the agency groups inter-changeable positions into competitive levels based upon similarity of grade, series, qualifications, duties and working conditions. Positions with different types of work schedules (e.g., full-time, part-time, intermittent, seasonal, or on-call) are placed in different competitive levels. Because of differences in duties and responsibilities, positions of supervisors and management officials are placed in competitive levels comprised only of those positions. Finally, competitive and excepted service positions are placed in separate competitive levels. The end result is many, many different groups, or levels, of employees. 5 C.F.R. § 351.403 states how to determine competitive levels. *See* Jicha v. Dep't of Navy, 65 M.S.P.R. 73 (1994); Griffin v. Dep't of Navy, 64 M.S.P.R. 561 (1994); Kline v. Tennessee Valley Authority, 46 M.S.P.R. 193 (1990); Foster v. U.S. Coast Guard, 8 M.S.P.R.

240 (1981). *See also* Anderson v. Tennessee Valley Authority, 77 M.S.P.R. 271, (M.S.P.B. 1998) (employee has substantive right to be placed in properly drawn competitive level.)

(3) **Retention Registers.**

Then, the four retention factors are applied and the competitive level becomes a retention register under 5 C.F.R. §351.404, listing employees in the order of their retention standing. 5 C.F.R. 351.501 provides for the order of retention in the competitive service. The rules on retention of excepted service employees are substantially the same as those that apply to competitive service employees. 5 C.F.R. § 351.502 provides for the order of retention for the excepted service.

(4) **Length of service.**

An employee's standing on the retention register often determines whether the employee will stay employed in the agency or be released, or "RIFed," as the saying goes. The employee's standing is determined by the sum of the employee's length of service and constructive credit based on the employee's three most recent performance appraisals. As the following regulations demonstrate, the key to an employee's standing is often the performance appraisals. 5 C.F.R. § 351.503 provides for establishing an employee's length of service. 5 C.F.R. § 351.504 provides for the credit to be given an employee based upon his performance appraisals.

Note: On November 24, 1997 OPM enacted final rules that enhance the opportunity for federal employees to receive retention service credit during reductions in force based on their actual job performance. The new regulations propose a greater use of actual performance through several mechanisms. First, a longer look back period of six years will be phased in. Second, fewer assumed ratings will be used because an average will be taken of actual ratings. Third, a new method will be used for determining the value of assumed ratings for employees with no ratings. In addition, since September of 1995, there has been eight possible performance rating patterns (*e.g.*, pass/fail, traditional five level, etc.). The new regulations propose that if ratings exist under more than one pattern in a competitive area, the agency can decide on credit within certain limits. (See 62 Federal Register 62495-62504 (1997)). The final rules are also available at the OPM internet site: *http://www.opm.gov/fedregis/html/nov_97.htm*

(5) **Release from competitive level - RIF.**

After the agency determines the standing of employees within their levels on the retention register, it is ready to begin its RIF. Starting with the employees with the lowest relative retention standing, the agency releases or reassigns employees and works its way up the register. With few exceptions, the RIF will not affect employees with a higher relative standing on the register until all employees of lower standing have been released or reassigned. 5 C.F.R. §351.601.

(6) **Rights to Other Positions**

Employees in Groups I and II with current performance ratings of "Unsuccessful," and all employees in Group III, have no assignment rights to other positions. Employees holding excepted service positions have no assignment rights unless their agencies, at its discretion, chooses to offer these rights. Employees in Groups I and II with current performance ratings of at least "Minimally Successful" are entitled to an offer of assignment if they have "bumping" or "retreating" rights to an available position in the same competitive area. An "available" position must: (1) last at least 3 months; (2) be in the competitive service; (3) be one the released employee qualifies for; and (4) be within three grades (or grade-intervals) of the employee's present position. 5 C.F.R. §351.701

(7) **Bumping.**

Means displacing an employee in the same competitive area who is in a lower tenure group, or in a lower subgroup within the released employee's own tenure group. Although the released employee must be qualified for the position, it may be a position that he or she has never held. The position must be at the same grade, or within three grades or grade-intervals, of the employee's present position. 5 C.F.R. §351.701(b)

(8) **Retreating**

Means displacing an employee in the same competitive area who has less service within the released employee's own tenure group and subgroup. The position must be at the same grade, or within three grades or grade-intervals, of the employee's present position. However, an employee in retention subgroup AD has expanded retreat rights to positions up to five grades or grade-intervals lower than the position held by the released employee. The position into which the employee is retreating must also be the same position (or an essentially identical position) previously held by the released employee in any Federal agency on a permanent basis. An employee with a current annual performance rating of "Minimally Successful" only has retreat rights to positions held by employees with the same or lower ratings. 5 C.F.R. §351.701(c)

6.4 A General Overview of the RIF Process.

a. Summary. The establishment of the retention register can best be understood by thinking of it as a repeated screening process. First, the employees are grouped according to the type of their appointment as follows:

Group I	Career employees (non-probationary)
Group II	Career employees serving probationary periods and Career-conditional employees
Group III	Indefinite employees and Term employees

Second, each of these groups is subdivided into three subgroups: AD for disabled veterans (30% variety), A for veterans, and B for nonveterans. Within each subgroup the employees are ranked according to their service dates reflecting their total Federal (civilian and military) service. Employees are given additional service credit based on their last three annual performance ratings, if outstanding (level 5), exceeds fully successful (level 4), or fully successful ratings (level 3) were given.

Three types of employees are listed apart from the retention register: (1) those with temporary appointments limited to one year or less, (2) those holding only temporary promotions to the affected positions, and (3) those with unsatisfactory performance ratings. These employees are not considered "competing employees" and must be released before anyone else on the retention register is released.

An employee in Group I or Group II (not Group III) who is released during a RIF is entitled to a reasonable offer of reassignment if the agency has a suitable job that the employee can assume by displacing another employee with a "bump" or "retreat." A job is suitable only if it is (1) located in the same competitive area, (2) at the same or a lower grade as that from which the competing employee was released, (3) one for which the employee is fully qualified, and (4) one that the employee can fill without unduly interrupting the agency's work. A "bump" occurs when the employee displaces an employee in a lower retention group or subgroup in a different competitive level. A "retreat" occurs when the employee returns to a job from which the employee was promoted (or one like it) and displaces an employee with a later service date in the same subgroup. The agency must only make one reasonable offer of reassignment; it need neither fill a particular vacant position nor offer a particular position because the employee would prefer it. An employee who refuses a reasonable offer can be separated. The effect of these assignments is the creation of waves of RIF actions as the employees in each successive lower grade level go through the bumps and retreats in attempting to avoid separation.

b. Notice of RIF. Before an employee can be released from a competitive level, the employee is entitled to at least 60 days' advance written notice (a recent change to the previous requirement of 30 days). DOD employees receive 120 days notice if more than 50 employees are involved. 5 C.F.R. § 351.801(a)(2)(extends longer notice effective date through January 31, 2000). Previously agencies issued a general notice of the intended RIF action to all employees likely to be affected and then later issue a specific notice to the employees actually affected. This process is no longer allowed. The notice rules of 5. C.F.R. §§ 351.801-807 apply.

As with an action for misconduct, if the agency decides to take an action more severe than that specified in the notice, the employee is entitled to a new written notice and an additional 30-day period before the more severe action can become effective. An employee normally remains in an active duty status during the notice period, although an agency can place an employee on annual leave, on leave without pay, or in a nonpay status in emergency situations (lack of work or lack of funds).

An employee who is reduced in pay or grade or removed in a reduction in force can appeal to the Merit Systems Protection Board unless the employee is covered by a negotiated grievance procedure (NGP). 5 C.F.R. § 351.901. Employees covered by an NGP must use that process unless it specifically excepts grievance of RIF. *See* Sotak v. HUD, 19 M.S.P.R. 569 (1984); Sirkin v. Department of Labor, 16 M.S.P.R. 432 (1983). (Employee's reduction in grade pursuant to reduction in force fell within negotiated agreement's definition of grievance and, therefore, within coverage of exclusive negotiated grievance procedure and, since RIF actions are neither statutorily excepted from coverage, excluded from coverage by the agreement, nor otherwise provided for in statute relating to grievance procedures, Merit Systems Protection Board lacked jurisdiction to hear employee's appeal from the reduction in grade.) An MSPB appeal must be in writing and must be initiated under the MSPB's regulations within 30 days of the action's effective date. 5 C.F.R. § 1201.22. The appeal is limited to the issue of whether the agency has correctly applied the RIF procedures. Examples of typical employee appeals include allegations that (1) the agency failed to make a reasonable offer of assignment; (2) the agency failed to grant the employee proper veteran's preference rights; (3) the retention register was improperly established; and (4) the RIF procedure was improperly used in lieu of some other required procedure. If the employee wins the appeal at the Merit Systems Protection Board, the agency will be bound by the decision and required to take corrective action, unless it petitions the MSPB to reopen and reconsider the case. 5 C.F.R. § 1201.113.

c. Notes and Discussion.

Note 1. In a RIF appeal, the burden of proof is on the agency to prove by a preponderance of the evidence that a reduction in force was invoked for one of the legitimate reasons set forth in 5 C.F.R. § 351.201(a). Once the agency has met this burden, the employee must provide rebuttal evidence to place into issue the agency's asserted reasons for the RIF action. Schroeder v. Dep't of Transp., 60 M.S.P.R. 566 (1994); Losure v. Interstate Commerce Commission, 2 M.S.P.R. 195 (1980).

Note 2. The determination of an employee's retention standing includes possible extra credit for performance of duty above the fully successful level. The agency is required to use the employee's current performance rating for this purpose. The current rating is the rating that is on record on the day when the RIF notice is issued. A rating of "outstanding" that has not yet received agency approval (under agency performance appraisal regulation) at the time the RIF notice is issued cannot be considered. This underscores the importance of timely performance appraisals for civilian employees. 5 C.F.R. 351.504. AFGE v. OPM, 821 F.2d 761 (D.C. Cir. 1987); Haataja v. Department of Labor, 25 M.S.P.R. 594 (1985); Mazzola v. Department of Labor, 25 M.S.P.R. 682 (1985)

Note 3. Where procedural error is present in an agency reduction-in-force, the appellant must show harmful error in the agency's application of those procedures. There is no harmful error where the correct application of procedural rights in a RIF would not change the outcome. Hill v. Department of Commerce, 25 M.S.P.R. 205(1984). (While in Losure, the Board made clear that RIF entitlements were substantive rights and that it is the agency's burden to

prove by a preponderance of the evidence that it afforded the appellant those rights, the Board subsequently explained that RIFs would not be reversed in those cases where it is shown that the agency's error in not precisely complying with the RIF regulations had no adverse effect on the employee's substantive.) *See also* Jicha v. Dep't of Navy, 65 M.S.P.R. 73 (1994). Davidson v. Department of Energy, 22 M.S.P.R. 531(1984) (Agencies have discretion in organizing their operations and the bona fide modification of these operations will be upheld.) Where the agency error involves substantive rather than procedural rights of the affected employee, however, the Board will not have to consider the harmful error question. Foster v. Department of Transportation, 8 M.S.P.R. 240 (1981). Only procedural rights are subject to the harmful error standard of 5 U.S.C. § 7701(c)(2)(A). Ray v. Department of Air Force, 3 M.S.P.R. 445 (1980). Speaker v. Department of Education, 11 MSPB 430, 431, 13 M.S.P.R. 163, 165- 66, (1982). (The determination of a properly constituted competitive level is not merely a procedural requirement subject to the harmful error standard of 5 U.S.C. S 7701(c)(2)(A). Rather, it is a substantive right and the burden is on the agency to prove by a preponderance of the evidence that appellant was in a correctly defined competitive level.) *See also* Buckler v. Federal Retirement Thrift Investment Board, 73 M.S.PR. 476 (1997).

6.5 Improper Use of Reduction-in-Force Actions.

The following administrative decision by the Civil Service Commission illustrates what happens if an agency attempts to use the RIF procedures improperly in lieu of the adverse action procedures.

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS EXAMINING OFFICE
WASHINGTON, D.C. 20415

(18 September 1973)

APPEAL OF A. ERNEST FITZGERALD
UNDER PART 351, SUBPART I
OF THE CIVIL SERVICE REGULATIONS

Appeal from the action of the Department of the Air Force in separating the appellant by reduction-in-force from the position of Deputy for Management Systems, GS-17, Step 4, $31,874.00 per annum, Office of the Secretary, Assistant Secretary for Financial Management, Washington, D.C., effective January 5, 1970.

INTRODUCTION

By letter dated January 20, 1970, John Bodner, Jr. and William L. Sollee, Attorneys at Law, submitted an appeal to this office in behalf of Mr. A. Ernest Fitzgerald. Investigation was conducted and numerous lengthy submissions to the file were received from both the appellant and the agency. The appellant raised a question as to the bona fides of the reduction-in-force (RIF) as it was applied to him, contending that the RIF was used as a subterfuge to conceal the agency's action in firing him because of his November 13, 1968 testimony of the C-5A cost overruns. Since Mr. Fitzgerald was a preference eligible and the various submissions to the file did constitute a prima facie showing that the reduction-in-force may have been based upon an intention to separate the appellant for cause rather than for a nonpersonal reason, a hearing was scheduled to inquire into the circumstances surrounding the RIF.

The agency was requested and agreed to make available to testify Secretary of the Air Force Robert Seamans, Assistant Secretary Spencer Schedler, Administrative Assistant to the Secretary John Lang, Deputy Administrative Assistant Thomas Nelson, Air Force Chief of Staff General John D. Ryan, Comptroller of the Air Force Lieutenant General Duward Crow, Director of Office of Special Investigations (OSI) Brigadier General Joseph J. Cappucci, and Colonel James D. Pewitt.

In accordance with the Civil Service regulations in effect at that time, the hearing was not open to the public. However, an independent court reporting firm prepared a verbatim transcript of the proceeding. The hearing was conducted on May 4, 5; June 16, 17, 18, and 22, 1971. On the latter date the hearing was suspended in compliance with a temporary restraining order and subsequent injunction issued by the U.S. District Court for the District of Columbia relative to the issue of an "Open Hearing." The hearing, open to the public, resumed on January 26, 1973 after all litigation on this issue had been completed. Additional hearing sessions were held on January 29, 30, 31; February 2, 28; March 5, 6, 7, 20, 21, 22, 28, 30; April 3, 4, 5, 6, 19; and May 3, 1973.

. . . .

[See Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972), where the court held Fitzgerald had a right to an open and public hearing before the Commission in his appeal for reinstatement to his Federal employment.]

ANALYSIS AND FINDINGS

By letter dated November 4, 1969 the agency gave Mr. Fitzgerald notice of his proposed separation by reduction-in-force, effective January 5, 1970, due to the abolishment of this position, "necessitated by a reorganization under the current Air Force retirement program."

. . . .

Turning now to the reduction-in-force action itself, the agency's position is that as a part of Defense Department's Project 703, the Air Force was required to reduce expenditures one (1) billion dollars in fiscal year 1970. This

involved large cutbacks in military and civilian personnel nationwide and in the headquarters staff of the Department. Each office in the Secretariat was given a specific number of reductions to be effected. SAFFM was assigned a net reduction of two (2) spaces. As part of a reorganization of that office five (5) positions were abolished and three (3) new positions were established. Of the five (5) positions abolished Mr. Fitzgerald's was the only professional position. The other four (4) were secretarial positions.

The agency contends that the abolishment of Mr. Fitzgerald's position, initiated by Assistant Secretary Spencer J. Schedler and approved by Secretary Robert Seamans, was based upon a valid management decision to reorganize SAFFM in order to improve its cost effectiveness capability and at the same time achieve the required reduction of two (2) spaces.

The agency further contends that Secretary Seamans and Assistant Secretary Schedler were not in office at the time of Mr. Fitzgerald's November 1968 testimony; that they alone were responsible for the decision to reorganize the financial management office; that the testimony Mr. Fitzgerald gave a year earlier was not the reason or a reason for their decision; and that neither had sought or received any instructions to abolish the appellant's position.

Mr. Fitzgerald contends that the RIF as applied to him was not for non-personal reasons and was, in essence, an agency adverse action based upon his November 13, 1968 testimony on the C-5A cost overruns.

The record reveals that out of the 80 positions abolished in the Office of the Secretary of the Air Force, Mr. Fitzgerald was the only employee who actually was issued a RIF notice and who was actually separated by RIF (L/N 723-724). As his part of the Project 703 reductions, Assistant Secretary Schedler was required to take a cut of two (2) spaces. He accomplished this by abolishing four (4) secretarial positions plus Mr. Fitzgerald's position and creating three (3) new positions.

The Air Force, through the testimony of witnesses and documentary evidence, did show that a reorganization of SAFFM had taken place; that the appellant's position had been abolished and not recreated; and that there was some need to reorganize in addition to reducing the office staff by two (2) positions.

The appellant has not questioned the validity of the Project 703 reductions and the resultant reduction-in-force, only the agency's decision to abolish his position and include him in that RIF.

The reduction-in-force system as provided for by Statute and Commission regulations is a system for releasing employees from their competitive levels when their release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights. The system is predicated upon the concept of competition for retention based upon tenure, veterans preference, length of service, and performance rating.

Reduction-in-force may be necessary because of conditions inside or outside the agency. Agency management may reduce certain phases of its

work as the workload changes. Appropriations may be reduced or cut-off entirely, or the agency may be allowed to use only part of its appropriations. These and other factors occurring singly or in combination may make it necessary for the agency to have a reduction-in-force.

Reduction-in-force may require the separation of all employees in part of an agency or may require separation of some and shifting about of others. Small reductions may require no involuntary separations when there are enough transfers, retirements, and other voluntary losses. Some reductions, in fact, require no reduction in the number of employees but are accomplished through reorganization.

Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located, and where they are to be filled, abolished, or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work. A surplus of employees in any part of an agency requires the agency to determine whether the employees will be assigned to vacant positions, be adversely affected for reasons related to performance or conduct, or compete in reduction-in-force.

These are management responsibilities and the management determinations regarding these responsibilities are not ordinarily subject to review . . . in a reduction-in-force appeal.

It would be a valid and proper exercise of its management prerogative for an agency faced with the necessity for reducing its force to select for abolishment those functions and/or positions that are least necessary to the accomplishment of, or are making the least substantive contribution to, the agency's mission.

In this situation the lack of substantive contribution may be due to a change in the agency's mission or its method or approach to the accomplishment of its mission. It may also be that the lack of substantive contribution is due to the incumbent of the position.

Inherent in the Commission's reduction-in-force system and one of its fundamental precepts is that it be used only for reasons that are non-personal to the employees affected. The reduction-in-force system must not be used to remove inadequate or unsatisfactory employees in lieu of following the Commission's adverse action procedures set forth in Part 752 of the Civil Service Regulations.

Federal Personnel Manual Chapter 351, Subchapter 1 states in part as follows:

"1-9. IMPROPER USE OF REDUCTION IN FORCE

There sometimes has been a tendency to distort the reduction-in-force system by using it to eliminate inadequate employees."

Thus, an allegation that the RIF was a subterfuge to conceal an agency removal action taken without following the adverse action procedures, when

supported by a sufficient showing that the RIF action may have been based upon a non-personal reason for reducing the force, goes directly to the question of the bona fides of the RIF and will be reviewed on appeal.

In order to properly evaluate the propriety of the RIF action as applied to Mr. Fitzgerald it is essential that we review and analyze the circumstances leading up to and surrounding the decision to abolish his position and to include him in the project 703 RIF.

From our review of the complete appellate record including all submissions by both parties and the transcript of the hearing (26 days), we find the circumstances to be as follows:

Mr. Fitzgerald received an excepted appointment to the position of Deputy for Management Systems, Office of the Assistant Secretary of the Air Force for Financial Management (SAFFM) on September 20, 1965 (AF-1/30/70, Attachment #4). While no specific time limit was established as to the length of this appointment, it is clear from Mr. Fitzgerald's testimony of his conversations with the then Assistant Secretary, Dr. Leonard Marks, that it was to be for only a few years (TR 2618-2621).

Assistant Secretary Marks resigned on December 31, 1967 and was succeeded by Thomas H. Nielsen who was appointed Assistant Secretary for Financial Management on January 1, 1968 (L/N 366). Mr. Nielsen submitted a proposed reorganization plan for his office dated January 9, 1968 (AF-6/25/70, P-253) focusing additional attention on cost performance, designating the appellant as the focal point for this effort and proposing increasing his staff.

Mr. Fitzgerald was first contacted by the Proxmire Committee in the summer of 1968 to testify on the C-5A (TR 2720-2722). Senator William Proxmire put this request into writing on October 18, 1968 (APP-1/20/70, Attachment #2).

The file contains unrefuted allegations and testimony that there was high level Air Force and DOD opposition to Mr. Fitzgerald testifying.

Mr. Fitzgerald did testify before the Proxmire Committee on November 13, 1967 and discussed possible cost overruns on the C-5A plane. This testimony received a great deal of publicity for it was the first public disclosure of cost overruns on that project.

. . . .

Mr. Fitzgerald visited the Civil Service Commission on January 10, 1969 to complain of the alleged loss of tenure and his supervisor's statement that his usefulness to the Air Force was at an end. Therefore, Assistant Secretary Nielsen prepared a memorandum for record (M.Ex #7, 1/13/69 attachment). This memo states that Mr. Nielsen reviewed the entire matter of the tenure controversy with Mr. Fitzgerald who stated that he mailed a copy of the first SF-50 to the Committee immediately after the conclusion of the November 13, 1968 hearing and that when the second form was received it was mailed directly to the Proxmire Committee. The memo also states that Mr. Nielsen told the appellant "I felt his actions in this connection had ended his usefulness to the Air Force."

Secretary Seamans testified it was his belief that Mr. Fitzgerald released the SF-50's in the tenure controversy in order to obtain publicity and to place the Air Force in a bad light (TR 430-431, 435-437); that his actions inflamed the situation; exacerbated relations between Mr. Fitzgerald and people in the Secretariat; and "that's when it became much more of a confrontation" (TR 480-481). Secretary Seamans also stated that Mr. Fitzgerald was a celebrity and a controversial person at the time as a result of the press releases concerning the tenure controversy (TR 438-439).

Colonel Pewitt testified that Assistant Secretary Nielsen gave Mr. Fitzgerald the "Lang Memo;" that Mr. Nielsen felt Fitzgerald "had betrayed a personal confidence" by the way the memo was handled; and that Mr. Nielsen lost confidence in the appellant and his usefulness to the Air Force (TR 1991-1992). Colonel Pewitt also stated that he thought Mr. Fitzgerald's days in the Air Force were numbered and that he might be leaving because of the tenure-nontenure publicity and the Lang Memo (TR 2121-2122).

It is clear that the "Lang Memo" and Secretary Nielsen's declaration that Mr. Fitzgerald had lost his usefulness to the Air Force both stemmed from the Washington Post January 1, 1969 front page article erroneously implying that the appellant lost his career tenure in retaliation for his testimony on the cost overrun in the C-5A project. It is also evident that the Air Force considered Mr. Fitzgerald responsible for this erroneous implication reaching the news media.

. . . .

Assistant Secretary Nielsen considered Mr. Fitzgerald's usefulness to the Air Force to be at an end as of January 8, 1969. Therefore, he obviously did not include Mr. Fitzgerald in his proposed reorganizations of February 26, 1969 and May 5, 1969. Mr. Nielsen's last proposal is essentially the same as the reorganization Assistant Secretary Schedler, with Secretary Seamans' approval, finally put into effect. This reorganization abolished Mr. Fitzgerald's position and led to his separation by RIF on January 5, 1970.

Mr. Schedler testified that he did not decide to abolish Mr. Fitzgerald's position until late September or early October 1969. However, Secretary Seamans and Secretary Laird came to the decision that Mr. Fitzgerald had to leave the Air Force much earlier than Mr. Schedler was willing to admit. They were busy looking for another position outside the Air Force for the appellant as early as May 1969. One of the positions under consideration was with the Fitzhugh Blue Ribbon Panel, previously discussed.

Secretary Seamans denied being instructed directly, or ordered by anyone to terminate Mr. Fitzgerald. However, he initially declined to respond to any and all questions concerning possible communications he may have had with, or any advice received from, the White House staff regarding Mr. Fitzgerald. This declination was based on the doctrines of Executive Privilege and privileged communications. Secretary Seamans was advised by this examiner (TR 499) as follows:

"Mr. Secretary, I am without authority to order you to answer the question. If the answer to the question becomes relevant and material, all I can do is to take into consideration your refusal to answer the question."

Secretary Seamans subsequently testified that at some point in time prior to Mr. Fitzgerald's job being abolished he did receive some advice from the White House; however, he refused to discuss it any further (TR 839).

By letter dated August 2, 1973, with a copy to the agency representative, appellant's attorney submitted a copy of a January 20, 1970 internal White House memo from Alexander Butterfield to Mr. H.R. Haldeman that had just been discovered. The agency was offered but declined the opportunity to comment. This memo states:

"You'll recall that I relayed to you my personal comments while you were at San Clemente, but let me cite them once again-partly for the record-and partly because some of you with more political horse sense than I will probably want to review the matter prior to next Monday's press conference.

"--Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.

"--Last May he slipped off alone to a meeting of the National Democratic Coalition and while there revealed to a senior AFL-CIO official (who happened to be unsympathetic) that he planned to "blow the whistle on the Air Force" by exposing to full public view that Service's 'shoddy purchasing practices.' Only a basic no-goodnik would take his official business grievances so far from normal channels. As imperfect as the Air Force and other military services are, they very definitely do not go out of their way to waste Government funds; in fact, quite to the contrary, they strive continuously (at least in spirit) to find new ways to economize. If McNamara did nothing else he made the Services more cost-conscious and introspective-so I think it is safe to say that none of their bungling is malicious . . . or even preconceived.

"--Upon leaving the Pentagon-on his last official duty-he announced to the press that 'contrary to recent newspaper reports,' he was not going to work for the Federal Government, but instead, was going to 'work on the outside' as a private consultant.

"We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.

"We owe 'first choice on Fitzgerald' to Proxmire and others who tried so hard to make him a hero."

The information contained in the memo concerning Mr. Fitzgerald's May 1969 statements at a meeting of the National Democratic Coalition had not previously come to light in this proceeding. In the light of Secretary Seamans'

refusal to furnish testimony on conversations he had with, or advice he received from the White House Staff; and our notification to the Secretary (TR 499), quoted supra, we must conclude and do hereby find that Mr. Fitzgerald's May 1969 statements were the subject of Secretary Seamans' discussion with the White House staff. We must also conclude and do hereby find that these statements by Mr. Fitzgerald were one of the underlying reasons for the decision to abolish Mr. Fitzgerald's position and to terminate his employment with the Air Force.

. . . .

Our findings, supra, reveal many instances of dissatisfaction with Mr. Fitzgerald. In addition, Secretary Seamans testified (TR 964) that:

> "It is obvious from the testimony these past three days that I was not satisfied with Mr. Fitzgerald's performance. I made no pretense that I was."

After carefully reviewing the complete appellate record and in view of all of the foregoing analysis, findings, and conclusions, we find that the agency's decision to abolish Mr. Fitzgerald's position and to include him in the Project 703 reduction-in-force improperly resulted from and was influenced by reasons purely personal to the appellant; and was for the purpose of terminating his employment with the Air Force.

Secretary Seamans, in discussing his dissatisfaction with Mr. Fitzgerald also stated (TR 964):

> "But at the same time it does not give Mr. Fitzgerald immunity against having his job abolished, and the abolition of the job for improvement in our management capability was a separate and distinct step, or action."

It is true that an undesirable, inadequate, or unsatisfactory employee is not immune from having his position abolished. However, the decision to abolish that employee's, or any employee's, position must be based solely on reasons not personal to the employee. These employees must be removed from their positions by other means because the spirit, intent, and letter of the Commission's regulations require that the reduction-in-force system be used for reasons that are not personal to the employees affected. The more an employee is deserving of being fired, the more inappropriate it is to abolish his position and separate him by reduction-in-force.

In the case at hand, where we have found from the evidence of record that the decision to abolish Mr. Fitzgerald's position and to separate him by reduction-in-force was influenced by, and resulted from, reasons that were personal to the appellant; and where the appellant was an employee entitled to the adverse action procedures set forth in Part 752-B of the Civil Service regulations; we find his separation by reduction-in-force to be improper, inappropriate, and contrary to the spirit, intent, and letter of the Commission's regulations.

RECOMMENDATION

Accordingly, we recommend that Mr. Fitzgerald be restored retroactively on January 5, 1970 to the position from which he was improperly separated, or to any other position of like grade, salary, and tenure in the Excepted Service and with the same or similar qualification requirements as his former position. Please furnish this office with a copy of the SF-50 accomplishing the recommended corrective action.

6.6 Grade and Pay Retention.

The Civil Service Reform Act of 1978 provides for grade and pay retention for certain employees whose grade or pay would be reduced in a RIF or a reclassification action. Employees who are not separated from Federal service but who accept positions at lower pay grades may claim the benefits of this statute. 5 C.F.R. Part 536 implements these provisions.

CHAPTER 7

MERIT SYSTEMS PROTECTION BOARD - PRACTICE AND PROCEDURES

7.1 Statutory Power and Authority of MSPB.

The MSPB is a quasi-judicial body created by the Civil Service Reform Act of 1978. It consists of three members appointed by the President with the advice and consent of the Senate for nonrenewable terms of seven years. The MSPB's jurisdiction is limited specifically to matters made appealable to it by law and regulation. Title 5 United States Code, § 1204 spells out its powers.

Most details concerning the MSPB's appellate jurisdiction and procedures in MSPB appellate actions are established by statute. Under 5 U.S.C. § 7701, employees subjected to an "appealable" personnel action file their appeals initially with an MSPB regional or field office and the case is assigned to an administrative judge (AJ).

Note. The remainder of 5 U.S.C. § 7701 addresses the authority of the MSPB to establish alternative methods of settling cases and the requirement on the MSPB to announce publicly when it will complete appellate consideration of each case. "Mixed cases" or appeals involving allegations of discrimination are processed under a special procedure outlined in 5 U.S.C. § 7702, which will be covered in Chapter 9 of this casebook.

7.2 MSPB Regulations.

a. Jurisdiction. The Board's regulations describe the two types of jurisdiction it exercises and the types of cases in which each is exercised. The most common type of case before the MSPB is, by far, under its appellate jurisdiction stated in 5 C.F.R. § 1201.3. These are the typical employees' appeals from adverse personnel actions.

Note 1. MSPB review of the removal of a probationary employee under 5 C.F.R. § 1201.3(a)(8) is extremely limited. MSPB has jurisdiction only if the probationer demonstrates that (1) the removal was based on discrimination because of marital status or political affiliation or (2) the limited procedural rights set out in 5 C.F.R. § 315.806 were not afforded in connection with a removal based on pre-employment reasons. For cases interpreting these narrow grounds for appellate jurisdiction, see Bedynek-Stumm v. Dep't of Agriculture, 57 M.S.P.R. 176 (1993); McChesney v. Dep't of Justice, 55 M.S.P.R. 512 (1992) aff'd McChesney v MSPB, 5 F.3d 1503(Fed. Cir. 1993); Gribben v. Dep't of Justice, 55 M.S.P.R. 257 (1992); Shah v. GSA, 7 M.S.P.R. 626 (1981); Uriarte v. Department of Agriculture, 6 M.S.P.R. 393 (1981); Van Daele v. USPS, 1 M.S.P.R. 601 (review denied 2 M.S.P.B. 16 (1980)).

Note 2. An employee adversely affected by a reduction in force or the denial of a within grade ("step") increase may generally appeal to the MSPB (see 5 C.F.R. §§ 1201.3(a)(5) and (10)); however, if the employee is a member of a bargaining unit and the collective bargaining agreement does not specifically exclude RIF actions and denials of step increases from grievance and arbitration coverage, the employee must use the negotiated grievance procedure to challenge the action. No MSPB jurisdiction exists in such circumstances. Sirkin v. Department of Labor, 16 M.S.P.R. 432 (1983) (RIF); Lovshin v. Department of Navy, 16 M.S.P.R. 14 (1983) (denial of step increases). See 5 C.F.R. § 1201.3(c).

b. Hearing Procedures.

The hearing procedures for cases before the Board are contained in 5 C.F.R. Part 1201. Subpart B contains procedures for appellate cases and Subpart D contains procedures for original jurisdiction cases.

c. Discovery. The MSPB regulations set forth at 5 C.F.R. 120.71 provide for using the Federal Rules of Civil Procedure as a general guide for discovery.

How does 5 C.F.R. § 752.404(b), which gives an employee the right to review material "relied upon" to support a proposed action, affect the scope of discovery? The following case examines this issue.

Bize v. Department of the Treasury
3 M.S.P.R. 155 (1980)

OPINION AND ORDER

The appellant is a Criminal Investigator, GS-12, with the Internal Revenue Service, Baton Rouge, Louisiana. He was suspended for 30 days for failure to safeguard his pocket commission and enforcement badge and failure to prevent them from being improperly used. He appealed to the Board's Dallas Field Office. In the initial decision, issued September 17, 1979, the presiding official found the reasons for the actions supported by a preponderance of the evidence and sustained the suspension action. The petition for review set forth some 21 asserted errors or exceptions to the initial decision. The assertions shall be discussed individually below. . .

The reasons on which the appellant's suspension was based grew out of an incident, which occurred at the Alexandria, Louisiana Airport on the night of December 26, 1977. The appellant was not on duty on that date. Following a family dinner at his grandmother's home, the appellant took his uncle, Samuel O. Foster, to the airport for a return flight to his home in California, first stopping for some drinks.

Though some of the details and circumstances are in dispute, as will be seen, it is clear that the appellant and his uncle arrived at the airport some time before the flight was scheduled to depart. The airline ticket agent told them the flight was delayed. The appellant and his uncle went for some drinks rather than wait at the airport. Ultimately, upon return to the airport, Mr. Foster found he had missed his flight and in the ensuing arguments with airline personnel he displayed the appellant's pocket commission to the airline ticket salesperson to show he was not "without influence."

In March, 1978, the airline official contacted his congressman to complain about the incident. After congressional inquiry concerning the matter, the Internal Revenue Service had it investigated. After the "Report of Investigation" was submitted, adverse action against the appellant was initiated.

The appellant was specifically charged with:

(1) Failure to adequately safeguard his pocket commission and enforcement badge, in violation of IRM 0735.1, Text 223.7.

(2) Failure to prevent his pocket commission and enforcement badge from being improperly used in violation of IRM 0735.1, Text 223.7.

The agency presented the incident in the specification to reason 2 as follows:

> On December 26, 1977, your pocket commission and enforcement badge was used by Mr. Steve Foster, your uncle, to intimidate Mr. Bruton Dawkins, an airline official. You were present when the incident started; you saw that Mr. Foster had your pocket commission and enforcement badge in his hand while he was berating the airline official. You did not retrieve your credentials during the altercation or restrain Mr. Foster for having improper possession of them. They were subsequently used by Mr. Foster, after you had left the scene, to intimate the airline official.

The appellant said that he was unaware that his uncle had his badge, and that as soon as he found out he escorted his uncle out of the terminal.

. . . .

Allegation 4 is that the presiding official erroneously refused to order the agency to produce the "Report of Investigation." The report was prepared by an inspector of the Internal Security Division of the IRS. The proposing official, Mr. Hinchman, testified that he received the report, but on cross-examination it appeared that he may have relied only on portions of the report. The deciding official did not see the whole report.

In a pre-hearing motion, appellant had initially requested the presiding official to order the agency to produce the entire report. . . . The agency's position was that it did not rely on the full report and that appellant was supplied with the pages of the report on which it relied--pages 3, 4, 9 and 10. Therefore, the agency contended, since the appellant was not entitled to more than the material relied on, the request was irrelevant. . . . The presiding

official denied appellant's request for the report because it was not necessary to a decision in the case. . . .

The appellant's request for production of the investigation report has been evaluated throughout the proceedings in terms of compliance with 5 C.F.R. 752.404(b), which gives an employee the right to review materials which the agency relied on to support a proposed action. While there was some uncertainty about which material the proposing official relied on . . .the finding that the appellant received the pertinent pages of the investigation report is supported by the evidence. However, we conclude that 5 C.F.R. 752.404(b) was erroneously interpreted as limiting appellant's right to only that evidence on which the agency relied.

5 C.F.R. 752.404 speaks to the procedures which an agency must follow when proposing and executing an action under 5 U.S.C. 7513. The section 752.404 process does not, and was not intended to, provide an employee an adversary hearing with all the concomitant rights that such a process connotes. Section 752.404 guides an agency during its processing of a 5 U.S.C. § 7513 action, but it is not a limitation upon the rights of appellants in appeals under 5 U.S.C. § 7701 and accompanying regulations.

Prior to enactment of the Civil Service Reform Act, the majority view was that the right accorded employees in section 752.404(b) defined that evidence an agency was required to produce. Hoover v. United States 513 F.2d 603, 606 (Ct. Cl. 1975); Heffron v. United States, 405 F.2d 1307 (Ct. Cl. 1969). More recently the U.S. Court of Appeals, in a decision to the contrary, viewed the issue in terms of due process instead of the narrow ambit of the regulation, and held that the appellant was entitled to production of the relevant report absent any valid claim of privilege by the agency. McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

The McClelland decision is even more persuasive when considered in conjunction with the Board's regulations, which were not applicable to the case, since the extent of discovery procedures available in an administrative hearing is primarily determined by the particular agency. McClelland, supra, at 1258. The Board's discovery procedures are set forth at 5 C.F.R. 1201.71 et seq. While a presiding official may exclude evidence from a hearing because it is repetitious, 5 C.F.R. 1201.62, there is no provision which allows for the exclusion of evidence because the agency did not rely on it.

In 5 C.F.R. 1201.75, the Board stated that guidance in discovery matters may be obtained from the Federal Rules of Civil Procedure, but that such "rules should be interpreted as being instructive rather than controlling." While it is clear that the FRCP are not of legal effect in cases before the Board, they offer guidance in the area of discovery and should be studied by presiding officials.

Particularly instructive to the issues of this case is FRCP 26(b), which sets forth the scope of discovery; it reads, in pertinent part, as follows:

> (b) Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim of defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis supplied)

Following the lead case of Hickman v. Taylor, 329 U.S. 495 (1947), courts have liberally interpreted the meaning of "relevant" for purposes of discovery. The U.S. Court of Appeals has held that evidence is relevant, for discovery purposes, as long as it is "germane" to the subject matter. Local 13, Detroit Newspaper Union v. N.L.R.B., 598 F.2d 267, 271 (D.C. Cir. 1979). It should be kept in mind that relevancy for purposes of discovery is different from the question of admissibility. Thus, if evidence which is not admissible is likely to lead to the discovery of admissible evidence, it is relevant for purposes of discovery. Rozier v. Ford Motor Co., 573 F.2d 1332, 1342 (5th Cir. 1978).

The Board's presiding officials have been given similar authority in relation to discovery requests. In 5 C.F.R. 1201.72, discovery is defined as "the process whereby a party may obtain information . . . for the purposes of assisting . . . in planning and developing his/her case." Evidence which assists in planning a case may or may not be admissible, but as in FRCP 26(b), it is discoverable.

Since one of the main functions of the Board is the adjudication of cases within its jurisdiction, 5 U.S.C. § 1205, the fairness of such adjudications can only be enhanced by disclosure of the facts in a case. Therefore, uncertainty as to the relevancy of requested evidence should be resolved in the favor of the movant, absent any undue delay or hardship caused by such request. . . .

The evidence denied appellant in this case was central to the case. The report detailed an investigation conducted into the charges which were subsequently levied against appellant, and selected portions of the report were relied on by the agency. It is reasonable to infer that the report contains summaries of witness interviews which were not disclosed to appellant. Without imputing any bad faith to the agency, it is reasonable to conclude that even if they were not exculpatory in nature, such summaries could lead to exculpatory evidence, or other witnesses. Considering that the agency had resources to conduct interview nation-wide, access to the report would be

helpful to the appellant, if for no other reason than to assist him in deciding how to commit his resources. Notably, production of the report would have placed no burden on the agency, nor would it have delayed the proceedings. Therefore, we conclude that the presiding official erroneously denied appellant's request for production of the full report and, if necessary, rule on any claims of privilege advanced by the agency. . . Assuming no valid privilege prevents production of the report, the presiding official must determine if further proceedings are appropriate and issue a new initial decision taking into consideration the evidence and arguments advanced after production of the report insofar as they raise matters not already fully decided herein. . . .

Accordingly, the initial decision is VACATED and the case is REMANDED for further consideration consistent with this Opinion.

(See also Johnson v. Dept. of Treasury, 8 M.S.P.R. 170 aff'd Johnson v. MSPB 770 F.2d 181 (1985). Failure to comply with an order for discovery issued by an administrative judge may result in serious sanctions under 5 C.F.R. § 1201.43.Consider the effect on the agency of such a sanction in the following case.

Fuller v. Department of the Treasury
10 M.S.P.R. 13 (1982)

The appellant was suspended for 30 days for using a Government vehicle to transport his wife from her workplace to their residence and using a Government vehicle to travel on personal business. The agency charged him with violating 31 U.S.C. § 638a(c)(2). Misuse of a Government Vehicle. A 30-day suspension is the minimum statutory penalty for such a violation. The appellant argued that he was disparately treated in that other employees in similar situations were either not charged at all or were charged with violations of minor rules with lesser penalties. The appellant requested, and the presiding official ordered the agency to produce documents relating to disciplinary actions taken against other employees for unauthorized use of a Government vehicle. The agency refused to comply with that order and the presiding official declined to impose sanctions for that refusal, concluding that sanctions would not serve the end of justice. He then upheld the agency action. In his petition for review, the appellant argued that the presiding official erred in failing to impose sanctions. OPM intervened arguing that the agency has discretion to determine whether misuse has occurred in terms of 31 U.S.C. § 638a(c)(2), and that once the agency makes that determination, it must comply with the statutory penalty. The Board found that the documents sought to be produced could have led to the discovery of information relevant to the appeal. The Board held them to be within the types of materials subject to discovery under 5 C.F.R. 1201.72. The Board stated that it does not serve "the end of

justice" to permit an agency to deny an appellant materials relevant to the development of his case or to ignore an agency's direct disobedience of a presiding official's proper order. It concluded that the presiding official in the instant case abused his discretion in not imposing sanctions. The Board found that the most appropriate sanction was that found at 5 C.F.R. 1201.43(a)(4), and thereby struck all of the agency's pleadings and submissions. It then found that the agency was unable to meet its burden of proof and reversed the suspension action.

Ordinarily, the imposition of sanctions is a matter within the administrative judge's sound discretion. Absent a showing that such discretion has been abused, the administrative judge's determination will not be found to constitute reversible error. See Bilger v. Department of Justice, 33 M.S.P.R. 602, 607 (1987), aff'd 847 F.2d 842 (Fed.Cir.1988), citing Felter v. Department of Transportation, 16 M.S.P.R. 132, 134-35 (1983). However, the Board has not hesitated to impose sanctions where an administrative judge has failed to do so when an agency willfully and flagrantly disobeys a legitimate discovery order of the administrative judge. See Fuller v. Department of the Treasury, 9 MSPB 294, 10 M.S.P.R. 13, 15-16 (1982) (the administrative judge abused his discretion in adjudicating the appeal without imposing the appellant's requested sanction, where the agency failed to comply with a legitimate discovery order of the administrative judge); Julson v. Office of Personnel Management, 7 MSPB 655, 8 M.S.P.R. 178, 182 (1981) (the agency's failure to comply with the administrative judge's order to answer an interrogatory warranted the imposition of sanctions); Stone v. Office of Personnel Management, 5 MSPB 142, 5 M.S.P.R. 68, 70-71 (1981) (the agency's failure to comply with an order of the administrative judge to respond to the appellant's interrogatories, or to show cause why it could not respond, warranted the sanction of striking the agency's response to the appellant's petition for appeal, as well as all of its submissions).

At Appendix A are sample forms for use in MSPB discovery.

7.3 Proving Your Case Before the MSPB.

a. Standard of Review of Agency Actions. Under 5 U.S.C. § 7701(c)(1), the MSPB applies two different standards of proof in reviewing agency personnel actions: "(1) Personnel actions based on unacceptable performance described in 5 U.S.C. § 4303 must be supported by substantial evidence; (2) All other personnel actions must be supported by a preponderance of the evidence." The legislative history of this portion of the 1978 Civil Service Reform Act demonstrates a clear congressional intent to grant agencies more discretion and flexibility in removing employees for unacceptable performance.

In Parker v. Defense Logistics Agency, 1 M.S.P.R. 505 (1980), the MSPB described how it views both standards:

> Unlike the preponderance standard, which requires evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue, the substantial evidence standard requires only evidence of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions. This standard precludes the Board's presiding official from substituting his or her own judgment for that of the agency. It obliges the presiding official to determine only whether, in light of all the relevant and credible evidence before the Board, a reasonable person could agree with the agency's decision (even though other reasonable persons including the presiding official might disagree with that decision).

Appeals to the MSPB of agency denials of within grade pay increases are tested by the same standard of review as Chapter 43 unacceptable performance actions -substantial evidence. Romane v. Defense Contract Audit Agency, 706 F.2d 1286 (Fed. Cir. 1985), White v. Dept. of Army, 720 F. 2d 209, 232 U.S. App D.C. 34 (D.C. Cir 1983). But see Schramm v. Department of Health and Human Services, 682 F.2d 85 (3d Cir. 1982), Stankis v. EPA 713 F. 2d 1181 (5th Cir 1983).

b. Evidentiary Issues.

The agency taking an action against an employee has the burden of proving by substantial evidence (performance actions) or a preponderance of the evidence (all other cases) that the action is justified. The extent to which hearsay evidence may be used to meet that burden is discussed in detail in the following MSPB decision.

Borninkhof v. Department of Justice,
5 M.S.P.R. 77 (1981)

OPINION AND ORDER

> This proceeding is before us on a petition for review of an initial decision sustaining a 40-day suspension imposed under 5 U.S.C. § 7513(b). Appellant, a border patrol agent of the Immigration and Naturalization Service of the Department of Justice, was suspended for 40 days on three charges set forth in a letter of proposed action.
>
> . . . .
>
> Appellant timely appealed the suspension and requested a hearing. In his appeal, appellant, insofar as is pertinent here, denied the specifications underlying the first charge; denied the specifications underlying the second charge, except with respect to the no contest plea; and contended that the allegations in the third charge were "overstated." It is thus clear that

appellant's appeal was based on serious disputes of material facts. Resolution of those facts was essential to a disposition of this appeal.

At the hearing, the agency called two witnesses. Both testified as to the first and second charges based on their reading of the investigatory record. Neither witness had been present at any of the incidents referred to, nor had they talked to anyone who had been present. One witness, the second-line supervisor, also testified as to the third charge on the basis of a conversation he had with the first-line supervisor, who reported appellant's conduct and language to him, and on the basis of which the second-line supervisor had prepared a memorandum in the investigatory record. Appellant repeatedly objected to the testimony by these witnesses as hearsay because he was unable to cross-examine them on the substance of the information in the investigatory report. He was consistently overruled.

The presiding official found that all three charges and the specifications under each had been proved by a preponderance of the evidence; and that, therefore, the agency action promoted the efficiency of the service. He affirmed the agency action. His initial decision relied solely on evidence included in the agency's investigatory file and did not mention the testimony of the agency witnesses.

In his initial decision, the presiding official first addressed the question of the agency's failure to produce any witnesses for cross-examination on the disputed material facts. He concluded that appellant had not been denied due process. The presiding official concluded that the agency had no mandate under 5 U.S.C. § 7701 or 5 C.F.R. § 1201.24(c) to produce any witnesses at the hearing. He further concluded that appellant could have subpoenaed as witnesses the persons knowledgeable about the incidents on which the specifications were based and that appellant's election not to do so defeated his claim of denial of due process.

In resolving the disputed facts under the first two charges, the presiding official relied entirely on statements made during the investigation by the ranch manager, his son (the ranch foreman), the arresting deputy sheriff, two other deputy sheriffs, a guard on the ranch, and a jailer. None of the statements were signed. Each statement contained a preface that it was given freely and voluntarily, that the declarant was under oath, and that the declarant was willing to sign a transcript of the tape, providing it was a true and correct copy. Neither the declarant, nor the transcriber, nor the investigator who conducted the interviews testified at the hearing.

Appellant, who did testify, and three witnesses called by him, whose statements were also included in the investigatory file, disputed materially the hearsay testimony and the other statements with respect to what had transpired at the ranch, the jail, and the bar. Moreover, it was demonstrated at the hearing that two sentences had been omitted from the statement of one witness. The omitted sentences tended to exculpate appellant.

The initial decision states that appellant challenged the use of the statements of the other declarants because he could not verify their accuracy,

and he argued to the presiding official that the statements had little probative value because they were unsigned. The presiding official found that any omission in the prior statements of appellant's witness had been cured by his testimony and found that the statements of the witnesses generally conformed to their testimony, and, thus, the lack of signature on the witnesses' prior statements did not reduce their probative value. He made no similar findings with respect to the other statements and could make none because the other declarants did not testify, and the agency's witnesses had no knowledge other than what they had read in the investigatory file.

The presiding official accepted as accurate and credible almost all the information in the unsigned statements of the other declarants. . . . The presiding official balanced the live testimony of appellant and his three witnesses, all subjected to cross-examination, against the unsigned statements that formed the basis of the agency's case as to events at the ranch and the jail. The presiding official proceeded to discount the live testimony of appellant and his witnesses because there was "evidence that alcohol was involved." This evidence was recited from the unsigned statements and was contradicted by live testimony. The presiding official did not state why unsigned statements without more had sufficient weight to constitute probative evidence that would support the agency's burden of proof.

In his petition for review, appellant contends that the agency's evidence was totally hearsay, lacking in probative value, and insufficient to meet the preponderance of the evidence test and that to affirm the initial decision would constitute a denial of due process. The agency's cryptic response to these arguments is that "the record speaks for itself."

It bears emphasizing that on an appeal from an adverse action under 5 U.S.C. § 7513(b), the agency has the burden of proof and must sustain the burden of proof by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). Contrary to the initial decision, we think it is irrelevant in this case whether appellant could have called the declarants as witnesses. The only question before us is whether the agency has sustained its burden of proof by a preponderance of the evidence it produced in this case.

We note that the agency's hearsay evidence was properly admitted at the hearing under well-settled law that relevant hearsay evidence is admissible in administrative proceedings. We are also fully aware that hearsay evidence has been held to constitute substantial evidence in some circumstances. We conclude nevertheless that the agency's hearsay evidence is insufficient in the circumstances of this case to sustain the agency's burden of proof by a preponderance of the evidence.

Richardson v. Perales is the landmark case recognizing that hearsay may constitute substantial evidence. In that case, the Supreme Court held that hearsay evidence alone was sufficient to defeat a claimant's appeal from a denial of social security disability benefits by the Secretary of Health, Education and Welfare, despite contradictory live testimony of claimant and his personal physician. The hearsay evidence, consisting of five medical

reports by physicians who had examined the claimant, was considered substantial evidence. The Court, first, however, expressed its confidence in the underlying reliability and probative value of the medical reports. The Court then concluded that the integrity of the administrative process was not damaged by reliance on the medical reports to refute the contradictory live testimony. Thus, Perales, while holding that hearsay alone may constitute substantial evidence, has not, we think, changed the traditional test used both before and after that decision, that the assessment of the probative value of hearsay evidence necessarily rests on the circumstances of each case. Rather, Perales has been perceived as a rejection of any rule that hearsay may not per se constitute substantial evidence. We adopt that interpretation of Perales.

It still remains for the trier of fact to weigh the probative value of the hearsay evidence in the circumstances of the case. In Perales, the Court noted that the medical reports had been prepared routinely by unbiased physicians who had examined the claimant, that such reports were regularly used in the agency's adjudication of hundreds of thousands of disability claims, and that courts had recognized their reliability even in formal trials and had admitted them as an exception to the hearsay rule. In other cases where hearsay alone has been held sufficient to sustain an agency action other factors entered into the court's determination of the reliability and trustworthiness and, hence, probative value of the hearsay evidence. For example, in Peters v. United States, an agency action was sustained both on the testimony of persons who had spoken to the absent declarants of signed sworn statements and on the signed sworn statements. The court relied heavily on the fact that the witness who testified had spoken to the affiants, and it was possible to test the credibility of the witness testifying as to the hearsay, the accuracy of his recollection of the hearsay statement, and his ability and opportunity to observe the affiant and hear what was said of the hearsay. The court also noted the lack of subpoena power that disabled the agency from calling the affiants.

In School Board of Broward County, Florida v. Dept. of HEW, the court found substantial hearsay relied on to support an administrative finding denying eligibility for Federal aid. Following the example of Perales, the court looked for assurance of underlying reliability and probative value to determine whether the hearsay evidence constituted substantial evidence. The court stated that two impartial witnesses testified as to statements made to them, that direct evidence was unavailable, that there was no subpoena power for the agency to call witnesses to give direct testimony, and, thus, the case rested on the only available evidence, which was uncontradicted by the School Board.

More recently in Schaefer v. United States, the U.S. Court of Claims affirmed an agency's removal action and held that statements regarding plaintiff's misconduct, signed by three of his co-workers, were of sufficient probative force to constitute substantial evidence. The court found sufficient assurance of the truthfulness of this hearsay evidence, relying on the fact that the individuals signed their respective statements and another person witnessed their doing so and also signed the statement. While noting that in appropriate

cases uncorroborated hearsay could constitute substantial evidence, the court pointed out that the statements in this case all contained corroboration in the administrative record.

In other cases decided since Perales, courts have not hesitated to dismiss hearsay evidence as insubstantial under the circumstances of the case. In Reil v. United States, the court found it could not rationally choose to believe statements that lacked authentication, that conflicted with other statements made by a declarant who was not impartial, and that were denied by live testimony.

In McKee v. United States, the court found the hearsay evidence lacking in sufficient assurance of its truthfulness to overcome sworn live testimony of a claimant where the hearsay evidence (captions on pictures) was unsworn and its authorship was unknown. The court observed, however, that had the hearsay evidence been the best available and had the Government asked the Board to accept it, "the situation could have been entirely different."

In Browne v. Richardson, the court refused to give substantial weight to a medical report prepared by a physician who neither examined the claimant of disability benefits nor testified at the hearing. In Martin v. Secretary of HEW, the court similarly refused to consider a report prepared by a physician who had not examined the claimant as substantial evidence. The court held that "an examination of a claimant adds such significant weight to a medical opinion as to the presence or absence of disability that, without it, the opinion, standing alone, cannot constitute substantial evidence to support a conclusion which relies solely on it. . . .

In Henley v. United States, the court also concluded that the agency's evidence, which was quite similar to the evidence presented in the instant case, was devoid of substantiality. In that case, the agency presented two live witnesses, who were agency employees but who had no direct personal knowledge of the charges against the plaintiff, as well as documentary evidence consisting of mostly unsworn and unsigned statements. The court noted that the entirety of the evidence presented against the plaintiff was non-expert testimony in a situation where the credibility of witnesses was crucial. In criticizing the evidence, the court stated that not only was the evidence primarily unsworn hearsay, but it could not depend on any of the factors that ordinarily redeem hearsay. The court explained: "the already undesirable nature of hearsay was compounded by the inability of the witnesses to verify anything about credibility.

In Cooper v. United States, the Court of Claims recently found that the decision to terminate an employee on the basis of alleged acts of sexual misconduct was not supported by substantial evidence where the removal was based upon information contained in four paragraphs of an investigatory report. The contents of the report consisted of data excerpted from state arrest records, a police officer's report of interviews with witnesses, and an interview with an investigator. The court, noting that the agency's investigator failed to take the stand at plaintiff's hearing, concluded that this type of evidence was

"attenuated and highly unreliable," and at best was "triple hearsay." Although plaintiff never denied the charges against him, and neither testified on his own behalf nor produced any witnesses attesting to his innocence at the hearing, the court believed the inferences from such inaction were insufficient to overcome the lack of evidence supporting plaintiff's removal.

In sum, the judicial precedents examining the weight to be given hearsay evidence, particularly documentary evidence such as an administrative record, included the following facts in considering the probative value of the hearsay evidence:

> (1) the availability of persons with first-hand knowledge to testify at the hearing;
>
> (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing;
>
> (3) the agency's explanation for failing to obtain signed or sworn statements;
>
> (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made;
>
> (5) consistency of declarant's accounts with other information in the case, internal consistency, and their consistency with each other;
>
> (6) whether corroboration for statements can otherwise be found in the agency record;
>
> (7) the absence of contradictory evidence;
>
> (8) credibility of declarant when he made the statement attributed to him.

At the same time, judicial precedent has held no more than that hearsay evidence may be "substantial" evidence to support an administrative determination upon judicial review. As emphasized earlier, we are bound by the statutory standard that precludes our sustaining an agency adverse action under Chapter 75 unless the agency's action is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(2)(B).

Hearsay evidence that meets the "substantial" standard may not have sufficient probative value or weight to meet the preponderance standard. These standards have been distinguished and set forth by the Board in Parker v. Defense Logistics Agency for the benefit of presiding officials. The substantial evidence standard requires evidence only of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions, while the preponderance standard requires evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue.

It must therefore be determined whether the agency's evidence in this case has sufficient reliability in the face of contradictory sworn live testimony to meet the preponderance standard. That determination must be made on the basis of the entire record before the Board.

By not relying on the testimony of the agency's witnesses to support any of his findings of fact, the presiding official presumably did not accord the testimony any probative value. If that was his intention, then he was correct. The agency witnesses' testimony on the first and second charges was wholly without probative value. The declarants had never made any statements on the subject in the presence of the witnesses. The witnesses were therefore unable to verify the accuracy of the transcriptions or recount what they heard and saw, or in any way assess the probativeness of the statements when they were being made. The Board's judgment in this case is consistent with the judgments in Browne and Martin, in which the court refused to accept as substantial evidence reports of physicians who had not examined the claimant.

But in ignoring the agency's testimony and relying on the investigatory record, the presiding official did not avoid the problem of hearsay. The presiding official has, in effect, subsequent to the hearing, treated the agency's case as if it had simply offered the investigatory record at the hearing without introducing witnesses.

The statements that form the basis for the presiding official's findings of fact are hearsay, nevertheless, and the circumstances in which they are relied on dictate what weight they should have in this case. Before accepting the statements as sufficient to sustain the agency's action, a reasonable judgment must be made as to their probative value, using the factors outlined above. The presiding official failed to make that judgment. We do so now.

The case is before us in this posture: In the face of contradictory live testimony at the hearing, the presiding official has accepted the agency's unsigned hearsay statements, without more, as dispositive of disputed facts that the agency must prove. The agency has offered no explanation as to why it did not obtain the declarant's signatures on their statements and/or have someone witness the statements; neither has the agency explained why it failed to present any witnesses with first-hand knowledge at the hearing. These statements are patently not like medical reports. Although the statements were consistent with each other, the declarants were actors to a greater or lesser degree in the incidents at issue and cannot be considered disinterested; the statements were not routinely made; nor have statements of this kind traditionally enjoyed judicial acceptance at hearings.

Moreover, here the evidence must be sufficient to sustain the burden of proof, not merely meet a claimant's evidence. The statements are fundamentally of a kind that cannot, without more, be accorded the weight of substantial evidence. In addition, by being unsigned, not even the declarants have signified the accuracy of the transcriptions or the truth of the statements. Furthermore, the fact that two sentences tending to exculpate appellant were omitted from the transcripts diminishes the probative value of these statements. While appellant apparently had the opportunity to review the statements prior to the hearing and to subpoena the declarants to appear at the hearing, the burden is not upon appellant to call witnesses that the agency needs to prove its case.

We are therefore not prepared to find on this record that the agency's evidence is sufficient to establish that the contested facts are more probably true than untrue. We agree with the court's criticism in Henley of an agency's reliance on evidence merely consisting of two live witnesses without first-hand knowledge of the charges against plaintiff and unsworn and unsigned statements. It serves no purpose to speculate what other evidence might have satisfied the agency's burden in this case. It should be apparent, however, that direct testimony by the declarants, if available, would have avoided the pitfalls of reliance on hearsay evidence.

On the basis of the whole record, including appellant's and his witnesses's sworn, contradictory testimony, the agency's unsigned statements do not rise to a probative value sufficient to resolve the factual disputes favorably to the agency. We hold that the agency has failed to sustain its burden of proof on the first two charges by a preponderance of the evidence.

On the third charge, insubordination, appellant did not materially dispute what happened as set out in the memorandum in the investigatory report. In his appeal, he challenged the charge on the ground that it was "overstated." His testimony and that of his witnesses showed that despite his opposition to the detail, he did go; that the language he used was common among the male employees where he was stationed; that the supervisor to whom he had used the language also used obscene or profane language as much as anyone else. The evidence introduced by appellant on this charge was thus mitigating of any effects his conduct and speech might have had. The initial decision held, nevertheless, that even if commonly used at appellant's duty station, four-letter words were not an acceptable form of verbal communication by an employee, even in anger, to his supervisor and concluded that the charge of insubordination had been proven by a preponderance of the evidence.

Because the incident was not materially disputed and the presiding officer credited the substance of the live testimony, we do not have here the question of the probative value of hearsay testimony. Appellant's undisputed testimony was that his immediate supervisor did not react to appellant's language and did not warn appellant that he might be subject to discipline for using such language. The record shows that it was not the immediate supervisor who provided discipline, but rather the second-line supervisor who testified at the hearing. There is no showing as to how the incident affected the efficiency of the service and under the circumstances we can discern none. Thus, the agency has failed to meet its burden of proof on the third charge.

The petition for review is granted and the initial decision is reversed. This is a final decision of the Merit Systems Protection Board.

The agency is hereby ordered to cancel the appellant's 40-day suspension and to submit evidence of compliance with this decision to the appropriate field office within five days of issuance of this decision.

See also Woodward v. OPM 74 M.S.P.R. 389 (1997). (Results of background investigations conducted in connection with employee's application for position were admissible, even though hearsay,

even though administrative judge failed to assess whether those investigative reports, showing prior job terminations and misconduct, criminal conduct, false statements and dishonesty, had probative value, names of investigators were not provided, reports contained no sworn statements, and record did not reflect that hearing was held as part of either investigation.)

In Woodward, two investigative reports, which were composed largely of hearsay evidence, were properly admitted into evidence under well-settled law that relevant hearsay evidence is admissible in administrative hearings. Marable v. Department of the Army, 52 M.S.P.R. 622, 626 (1992); Biberstine v. Department of Defense Dependents Schools; 37 M.S.P.R. 248, 258 (1988); Borninkhof v. Department of Justice, 5 MSPB 150, 5 M.S.P.R. 77, 83-87 (1981). Hearsay evidence may meet the "substantial" evidence standard which requires evidence only of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions. 5 C.F.R. § 1201.56(c)(1). It may not, however, have sufficient probative value or weight to meet the higher standard of "preponderant" evidence. 5 U.S.C. § 7701(c)(1)(B). Preponderant evidence is defined as evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue. 5 C.F.R. § 1201.56(c)(2); Tamburello v. U.S. Postal Service, 45 M.S.P.R. 455, 466 (1990).

Accordingly, under Borninkhof, to the extent that an agency relies on hearsay evidence to support its action, the administrative judge must first determine whether such evidence has significant probative value according to the circumstances of the case. Scroggins v. U.S. Postal Service, 48 M.S.P.R. 558, (1991). If so, the administrative judge must then determine whether the other evidence of record outweighs the value of that hearsay evidence, including the appellant's oral testimony. Stewart v. Office of Personnel Management, 7 MSPB 746, 8 M.S.P.R. 289, 294 (1981).

7.4 Interim Relief.

Following the hearing and closing of the record, the MSPB administrative judge prepares an initial decision. Under the Whistleblower Protection Act of 1989, 5 U.S.C. § 7701(b)(2), an employee who prevails in the initial decision "shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review." Interim relief will generally include an order returning the employee to the job pending a final decision. An agency is not required, however, to award back pay or attorney fees before a final decision. 5 U.S.C. § 7701(b)(2)(C). If the agency determines that returning the employee to the job would be unduly disruptive, the agency has several options: (1) elect to provide the employee with front pay and benefits pending a final decision. See 5 U.S.C. § 7701(b)(2)(B); (2) place the employee in paid, non-duty status if agency determines that employee's presence at the worksite would be unduly disruptive. 5 U.S.C. § 7701(b)(2)(A)(ii) See Schultz v. U.S. Postal Svc., 70 M.S.P.R. 633 (1996); DeLaughter v. U.S. Postal Svc., 3 F.3d 1522 (Fed. Cir. 1993); Scofield v. Dep't of Treasury, 53 M.S.P.R. 179 (1992) (MSPB has no authority to review determination that reinstatement would be unduly disruptive); Hanner v. Dep't of Army, 55 M.S.P.R. 113 aff'd 48 F.3d 1236 (Fed Cir 1995); or (3) detail or assign the employee to a position other than the former position, or return him to the former position with restricted duties. The employee must receive the same pay and benefits as in the former position. The reinstatement of the employee can and should be achieved through a temporary appointment pending outcome of the petition

of review. Wilson v. Dep't of Justice, 68 M.S.P.R. 303 (1995); Avant v. Dep't of Navy, 60 M.S.P.R. 467 (1994).

The MSPB will dismiss an agency's petition for review of the initial decision unless the agency has complied with the requirements for interim relief before the date the petition for review is due and submits the proof with the petition for review. 5 C.F.R. § 1201.115(b)(4). Shaishaa v. Dep't of Army, 60 M.S.P.R. 359 (1994); White v. U.S. Postal Svc. 60 M.S.P.R. 314 (1994); Reid v. U.S. Postal Svc., 61 M.S.P.R. 84 (1994); Ralph v. Department of Treasury, 55 M.S.P.R. 566 (1992); Labatte v. Department of Air Force, 55 M.S.P.R. 37 (1992); Ginocchi v. Department of Treasury, 53 M.S.P.R. 62 (1992); Schulte v. Department of Air Force, 50 M.S.P.R. 126 (1991); Dean v. Department of Air Force, 50 M.S.P.R. 103 (1991); Baughman v. Department of Army, 49 M.S.P.R. 415 (1991). An employee may challenge the agency's compliance with an interim relief order by moving to dismiss the agency's petition for review. DeLaughter v. U.S. Postal Svc., 3 F.3d 1522 (Fed. Cir. 1993); Ginocchi v. Dep't of Treasury, 53 M.S.P.R. 62 (1992); Crespo v. United States Postal Service, 53 M.S.P.R. 125 (1992).

The Board has held, however, that an agency's inadvertent, minor mistake in providing a prevailing appellant with interim relief can be excused if promptly corrected. See, e.g., Woodford v. Dep't of the Army, 75 M.S.P.R. 350, 355-56 (1997) (the agency's petition for review was not dismissed where it submitted evidence with its petition showing that, having made an "undue disruption" determination, it had detailed the appellant to another position effective as of the date of the initial decision, and where, although it failed to pay him for the first two days of the interim relief period and withheld taxes from his pay at a rate higher than appropriate, it promptly took steps to restore those amounts; and where it inadvertently disenrolled him from the health benefits plan he held at the time of the termination, it corrected that error within several weeks). See also Franklin v. Dep't of Justice, 71 M.S.P.R. 583, 589-90 (1996) (the agency's petition for review was not dismissed where it submitted evidence with its petition showing that it had given the appellant an interim appointment effective as of the date of the initial decision, and where, although the agency erred in not requesting that his health coverage be reinstated, or providing that deductions be withheld from his Thrift Savings Plan, until two months later, there was no showing that such errors were intentional or not corrected when brought to the agency's attention). Avant v. Department of the Navy, 60 M.S.P.R. 467, 472-75 (1994) (the agency's petition for review was not dismissed where it submitted evidence with its petition showing that it reinstated the appellant effective as of the date of the initial decision, it later discovered that it had failed to pay him for twelve hours during the interim relief period, and it "promptly corrected" its "inadvertent" error). See also Johnson v. Department of Justice, 67 M.S.P.R. 494, 497 (1995); Robinson v. Department of Veterans Affairs, 67 M.S.P.R. 334, 338-39 (1994); Hanner v. Department of the Army, 62 M.S.P.R. 677, 681-82 (1994), aff'd, 48 F.3d 1236 (Fed.Cir.1995) (Table).

It is key to remember, do NOT cancel the underlying action if the AJ orders interim relief. The appeal then becomes moot! Gevaert v. Dep't of Navy, 65 M.S.P.R. 65 (1994); Cain v. Defense Commissary Agency, 60 M.S.P.R. 629 (1994); Archuleta v. Dep't of Air Force, 59 M.S.P.R. 202 (1993); Trotter v. Dept of Defense, 54 M.S.P.R. 563, 564 (1992).

7.5 Award of Attorney's Fees in MSPB Cases.

The MSPB may require an agency to pay reasonable attorney fees incurred by an appellant, employee, or applicant who prevails before the Board. The employee must prove that fees are "warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." 5 U.S.C. § 7701(g)(1).

In order to establish entitlement to an award of attorney fees, the appellant must show that he is a prevailing party, he incurred attorney fees, an award of fees is warranted in the interest of justice, and the amount of fees claimed is reasonable. Peek v. Office of Personnel Management, 63 M.S.P.R. 430, 432 (1994), aff'd, 59 F.3d 181 (Fed.Cir.1995) (Table).

When is an employee a prevailing party? When is an award warranted in the interest of justice? The Court of Appeals for the Federal Circuit discussed the availability of attorney fees under both the CSRA and the WPA in the following case.

Hamel v. President's Commission on Executive Exchange,
987 F.2d 1561 (Fed. Cir.), cert. denied,
114 S.Ct. 342 (1993).

On November 29, 1990, the Director of the PCEE issued a notice of proposed removal to petitioner. The grounds stated in the notice were misconduct and insubordination. On December 18, 1990, petitioner filed an individual right of action appeal with the Board, pursuant to the Whistleblower Protection Act of 1989, Pub.L. No. 101-12, 103 Stat. 16 (1989) (WPA). Among other things, petitioner contended that his proposed removal was in retaliation for what he claimed were whistleblowing activities.

On May 2, 1991, President Bush signed an Executive Order abolishing the PCEE and charging the Director of OPM with the responsibility of winding down the PCEE's functions. On May 7, 1991, OPM issued reduction-in-force notices to the PCEE's competitive service employees. Thereafter, on May 13, 1991, it sent a letter to petitioner rescinding the notice of proposed removal and clearing the allegations of misconduct from his personnel file. On June 10, 1991, an administrative judge of the Board issued an initial decision dismissing petitioner's appeal as moot. His decision became the final decision of the Board on July 15, 1991.

On July 22, 1991, petitioner moved for an award of attorney's fees under the WPA. In the alternative, he sought an award of such fees under the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1138 (1978) (CSRA). The administrative judge denied the motion because he determined that petitioner was not a "prevailing party" within the meaning of either of the statutes. On March 17, 1992, the Board denied petitioner's petition for review. 53 M.S.P.R. 177. This appeal followed.

In reaching his decision on the prevailing party issue, the administrative judge used the test set forth by this court in Cuthbertson v. Merit Sys. Protection

Bd., 784 F.2d 370 (Fed.Cir.1986), and on appeal both parties take the position that Cuthbertson enunciates the proper test. Cuthbertson, however, involved the attorney's fees provision of the CSRA. Thus, as a preliminary matter, we must decide whether the Cuthbertson test also should apply in a claim for attorney's fees under the WPA, since it was under that statute that petitioner challenged his proposed removal, although petitioner sought to recover attorney's fees under both the WPA and the CSRA. The pertinent part of the attorney's fees provision in the WPA states as follows:

> If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee or applicant for reasonable attorney's fees and any other reasonable costs incurred.
> 5 U.S.C. § 1221(g)(1) (Supp. III 1991).

The CSRA provides that the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice...
5 U.S.C. § 7701(g)(1) (1988).

We conclude that the Cuthbertson test for a prevailing party is appropriate in connection with claims for attorney's fees under the WPA. Although the WPA and the CSRA attorney's fees provisions differ in some respects, they have in common the threshold requirement that there be an initial determination as to whether the person seeking the fees was a prevailing party in the proceedings before the Board. At the same time, there is nothing in the language of the statutes which suggests that Congress intended the term "prevailing party" to mean one thing under the CSRA and another thing under the WPA. Accordingly, we hold that the prevailing party test enunciated in Cuthbertson for attorney's fees claims under the CSRA also applies to attorney's fees claims under the WPA.

Under Cuthbertson, a petitioner is a prevailing party if (1) "he obtained all or a significant part of the relief he sought from the Board" and (2) "the relief achieved is significantly due to the initiation of the Board proceeding." 784 F.2d at 372-73. The administrative judge held, and there is no dispute, that the first part of the Cuthbertson test was satisfied in petitioner's case. After President Bush signed the Executive Order abolishing the PCEE, OPM rescinded the notice of proposed removal directed to petitioner and cleared the allegations of misconduct from petitioner's personnel file. Petitioner clearly obtained "all or a significant part of the relief he sought from the Board."

In holding that petitioner had failed to satisfy the second prong of the Cuthbertson test, the administrative judge stated:

[T]he rescission by OPM of the ... notice of proposed removal is shown to be consistent with its duty to conclude the agency's business. For this reason and because there is absolutely no evidence suggesting that the agency/OPM would have abandoned the adverse action against appellant if the Executive Order had not been issued, I find that appellant has failed to establish that his appeal was a significant causal factor in the relief he ultimately obtained. Appellant consequently has not established that he was a prevailing party.

.....

For the foregoing reasons, the decision of the Board denying petitioner's motion for attorney's fees is affirmed.

[footnotes deleted].

The MSPB has refined the test concerning prevailing parties in attorney fee awards as the following two cases show.

Ray v. Department of Health and Human Services,
64 M.S.P.R. 100 (1994).

[Facts deleted].

In order to establish entitlement to an award of attorney fees under 5 U.S.C. § 7701, an employee must first show that he is the prevailing party. The Supreme Court held in Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), that the prevailing party standard requires only that a party succeed on any issue in the litigation which achieves some of the benefit that he sought in bringing the action sufficient to change the legal relationship between the parties. In reaching this conclusion, the Court rejected a "central issue" test that measures prevailing party status based on whether the party has prevailed on the central issue in the litigation by acquiring the primary relief sought. The Court held that the central issue test is contrary to the thrust of Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), which indicated that the degree of a party's success in relation to the lawsuit's overall goals is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award.

In Farrar v. Hobby, 506 U.S. 103, 110, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992), the Court adhered to its "generous formulation" of the term "prevailing party" in civil rights attorney fee statutes announced in Hensley, and held that, to qualify as the prevailing party, a plaintiff must simply obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement, and that this was effective to change the legal relationship between them. The plaintiff in Farrar

was deemed the prevailing party although he won a judgment for only one dollar through litigation in which he first sought $17 million in compensatory damages. The degree of success obtained was not a consideration in determining whether the plaintiff was the prevailing party.

The Board has held that the civil rights attorney fee statute prevailing party concept is equally applicable in awarding attorney fees under 5 U.S.C. § 7701(g)(1) and (g)(2), the two bases of awarding fees in the Civil Service Reform Act of 1978. Additionally, we follow the more recent guidance provided by the Supreme Court in Farrar, and find that an appellant who obtains an enforceable judgment against the agency, or enforceable relief through a settlement agreement, is the prevailing party. In making this finding, we specifically overrule our decisions holding that, to be a prevailing party, an appellant must have substantially prevailed or have prevailed on a significant portion of his claims.

The appellant in this case, however, is not a prevailing party. He did not obtain an enforceable judgment against the agency, or comparable relief through a consent decree or settlement. See Farrar, 506 U.S. 103, 110, 113 S.Ct. at 573. Although the terms of the administrative judge's compliance initial decision would confer such status, that decision was merely a "recommended" decision. The Board need not accept this recommendation and, in fact, the Board never did.

If the Board had issued a decision either finding that the agency's post-recommended decision actions put it in compliance, or agreeing with the appellant that the declared compliance was not compliance, the appellant would have been a prevailing party. The Board, however, never addressed the recommended decision, and there is therefore no "enforceable judgment" in this case.

.....

Pursuant to the terms of the settlement agreement, the appellant is not a prevailing party. Although the agreement is an enforceable judgment against the agency, it did not "benefit" the appellant, nor did it materially alter the legal relationship of the parties. Garland, 489 U.S. at 790-92, 109 S.Ct. at 1493. It merely constituted an enforceable acceptance by the appellant of the agency's pre-petition for enforcement placement of the appellant in a GS-13 position.

The fact that the appellant had retired before the Board's 1993 acceptance of the settlement agreement is irrelevant to the determination of whether it was an enforceable agreement. Certainly, the agreement is enforceable with respect to the appellant's status prior to his June 1992 retirement. If the agency had agreed, in the settlement agreement, to place the appellant in a GM-14 position, and the appellant had retired eight months later, prior to the Board's issuance of an Opinion and Order dismissing the petition for enforcement and accepting the agreement into the record, the appellant would have been a "prevailing party" with respect to the agreement. Here, however, he is not a "prevailing party" because the terms of the agreement did not "directly benefit the [appellant] at the time of the settlement." See Farrar, 506 U.S. 103, 110, 113 S.Ct. at 573.

The language of the Ray decision tolls a warning bell to those agency attorneys involved in preparation of settlement agreements. It has never been a sound practice to leave open the issue of attorney fees in a settlement agreement. After Ray, it is all the more foolish. Wise counsel will address the issue of fees specifically in any settlement agreement. The Ray decision must also be read in the context of the Board's prior and subsequent decisions concerning "settlement" of a complainant's case, however.

Edward Joyce v. Department of the Air Force
74 M.S.P.R. 112 (1997).

The appellant filed a petition for appeal from what he characterized as a constructive suspension and removal from his GS-11 Computer Specialist position, effective November 1, 1994. The appellant alleged that certain changes the agency made in accommodating his disability, quadriplegia, made it unsafe for him to return to work after the agency instructed him to do so. The appellant also claimed that the agency discriminated against him based on his disability.

The administrative judge found that the appellant had made a nonfrivolous allegation that the matter he sought to have reviewed was within the Board's jurisdiction. Before the scheduled jurisdictional hearing was held, however, the agency indicated that it would give, for some period of time, the accommodations the appellant had requested, would attempt to resolve the issue of permanent accommodations in a manner acceptable to both sides, and would provide the appellant with backpay. The administrative judge canceled the scheduled hearing and dismissed the appeal as not within the Board's jurisdiction, finding that the agency had restored the appellant to the status quo ante. The appellant filed a petition for review of the initial decision, but later withdrew the petition. The full Board dismissed the petition as withdrawn, and the initial decision became final. See Joyce v. Department of the Air Force, 67 M.S.P.R. 580 (1995) (Table).

The appellant then filed a timely motion for attorney fees. Relying on Shaw v. Department of the Navy, 39 M.S.P.R. 586 (1989), the administrative judge determined that resolving the jurisdictional issue was necessary because the Board does not have the authority to award attorney fees in cases over which it lacks jurisdiction. Without holding a jurisdictional hearing, as requested by the appellant, the administrative judge found that the Board lacked jurisdiction over the underlying appeal because the appellant voluntarily absented himself from work. The administrative judge therefore denied the appellant's motion for attorney fees.

. . . . . .

Thus, under the specific circumstances of this appeal, we find that the Board has the authority under 5 U.S.C. S 7701(g)(1) to grant a motion for attorney fees without making a finding of jurisdiction. . . . Thus, in accord with our legal analysis above, the Board has authority to grant the appellant attorney fees.

In order to establish entitlement to an award of attorney fees, the appellant must show that he is a prevailing party, he incurred attorney fees, an award of fees

is warranted in the interest of justice, and the amount of fees claimed is reasonable. Peek v. Office of Personnel Management, 63 M.S.P.R. 430, 432 (1994), aff'd, 59 F.3d 181 (Fed.Cir.1995) (Table).

In Hodnick v. Federal Mediation & Conciliation Service, 4 MSPB 431, 4 M.S.P.R. 371, 373-75 (1980), overruled by Ray v. Department of Health & Human Services, 64 M.S.P.R. 100, 105 (1994), we found that an appellant was a prevailing party under 5 U.S.C. S 7701(g) where, after the appellant had filed an appeal, the agency voluntarily granted the appellant the within-grade salary increase it had initially denied, and the administrative judge dismissed the appeal as moot. We held that an appellant may be deemed a prevailing party for purposes of an attorney fee award if he or she obtained all or a significant part of the relief sought in petitioning for appeal, regardless of whether a final decision had been issued. See id., 4 M.S.P.R. at 375. In the absence of a Board final decision, the relief obtained must be found to be causally related to the initiation of the appeal before fees may be awarded. Id.; see Quintanilla v. Department of the Navy, 59 M.S.P.R. 547, 550 (1993). We reasoned in Hodnick that permitting an agency to avoid liability for fees merely by conceding an appeal before a final decision was issued would greatly diminish the purpose of the fee provision to ease the financial burden of bringing meritorious appeals, and would tend to discourage settlements, which would be contrary to the public policy favoring the speedy resolution of appeals to the Board. Hodnick, 4 MSPB 431, 4 M.S.P.R. at 375.

More recently, the Board has followed the prevailing party test as set forth by the U.S. Supreme Court in Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). See, e.g., Ray, 64 M.S.P.R. at 104-05. In so doing, the Board overruled Hodnick, but only to the extent that Hodnick required an appellant to show that he or she "substantially prevailed or ... prevailed on a significant portion of his claims." Id. at 105. Under the new test, an appellant is a prevailing party if he or she obtains an enforceable judgment against the agency, or comparable relief through a consent decree or settlement agreement, regardless of whether he or she substantially prevailed or prevailed on a significant portion of his or her claims. See id.

Thus, the Board's decision to follow Farrar liberalized the prevailing party test by holding that parties, who win nominal damages, or less than a significant portion of the relief they are seeking, may still be prevailing parties. Despite the apparent requirement that there be an enforceable judgment, settlement agreement, or consent decree that changes the parties' legal relationship, we find that the reasoning set forth in Hodnick still carries weight in Board cases where an agency, as a result of an appellant's petition for appeal, returns the appellant to the status quo ante, thereby granting all of the relief sought. Under these circumstances, we find that the instant appellant is a prevailing party because he obtained, as a result of his initiation of a Board appeal, "at an absolute minimum, 'actual relief on the merits of [the] claim' which 'affects the behavior of the defendant towards the plaintiff.' " Farrar, 506 U.S. at 116, 113 S.Ct. at 576 (O'Connor, J., concurring) (citations omitted).

Finally, in cases such as this, where the agency has unilaterally rescinded its action, i.e., returned the appellant to the status quo ante, and the appellant has set forth a prima facie case of jurisdiction and has incurred attorney fees, we find that a rebuttable presumption is established that an award of attorney fees is warranted in the interest of justice. See Allen v. U.S. Postal Service, 2 MSPB 582, 2 M.S.P.R. 420, 433-35 (1980) (the Board is accorded "substantial discretion" in determining when an award is warranted; the five circumstances "considered to reflect 'the interest of justice' " are not exhaustive, but illustrative). The presumption that attorney fees are warranted in the interest of justice, however, should not be construed as a determination with respect to the merits of the underlying agency action. Thus, any award of attorney fees may not be relied upon in any future Board litigation should the agency renew its challenged policy. See also Thomas v. U.S. Postal Service 1998 WL 39281.

a. Notes and Discussion.

Note 1. The MSPB, in Rose v. Department of Navy, 36 M.S.P.R. 352 (1988), awarded attorney fees where an employee's removal was mitigated to a 60-day suspension. The Board found that the Navy had acted arbitrarily, capriciously, or otherwise unreasonably in imposing a removal. The Board further found that the agency knew or should have known that its decision to remove the employee could not withstand Board scrutiny. See also Lambert v. Department of Air Force, 34 M.S.P.R. 501 (1987). See also Dunn v. United States Postal Service, 49 M.S.P.R. 144, 147-48 (1991), where the Board denied an award of fees, holding that the mitigation of the penalty did not in itself warrant a finding that an award of attorney fees was warranted in the interest of justice.

Note 2. In cases where a decision is based on a finding of discrimination or a prohibited personnel practice, the employee recovers attorney fees as a prevailing party. No specific showing that an award of fees is in the interest of justice is required in such cases. See 5 U.S.C. §§ 1221(g)(1) and 7701(g)(2); Kean v. Stone, 966 F.2d 119 (3d Cir. 1993) (market rate where discrimination found). See also Attorneys' Fee Awards Under 5 USCS sec.7701(g), Which Allows Award of Attorneys' Fees to Prevailing Employee for Appeal to Merit Systems Protection Board from Adverse Employment Decision, 143 A.L.R. Fed. 145 (1998).

Note 3. The Board recently amended its interpretation of what constitutes a "prevailing party" under 5 U.S.C. §§ 7701(g)(1) and (g)(2). It previously had required an appellant to "substantially prevail," or receive all or a significant portion of the relief sought. See, e.g., Roth v U.S. Postal Svc., 54 M.S.P.R. 298 (1992). The Board now will award fees to an appellant "who obtains an enforceable judgment against the agency, or enforceable relief through a settlement agreement." Ray v. Dept of Health and Human Svcs., 64 M.S.P.R. 100,105 (1994). The Federal Circuit Court of Appeals, however, has recently held that Board mitigation after sustaining all of the charges does not create a presumption that fees are warranted. See Dunn v. Department of Veterans Affairs, 98 F.3d 1308, 1313 (Fed.Cir.1996).

Note 4. A "prevailing" employee may only recover "reasonable" fees. For a general discussion of how reasonable fees are calculated, see Blum v. Stenson, 465 U.S. 886 (1984); McLane v. Dep't of Navy, 33 M.S.P.R. 404 (1987); Ferebee v. Dep't of Navy, M.S.P.R. 447 (1987); Kling v. Department of Justice, 2 M.S.P.R. 464 (1980). For a discussion of how fees are calculated when a salaried union attorney represents an employee, see Goodrich v. Department of Navy, 733 F.2d 1578 (Fed. Cir. 1984), cert. denied, 469 U.S. 1189 (1985); Kean v. Department of Army, 966 f. 2D 119 (3RD Cir. 1992); Ward v. Brown, 899 F. Supp 123 (2nd Cir. 1995); AFGE, Local 3882 v. FLRA, 944 F.2d 922 (D.C. Cir. 1991). (market rate for union attorney in FLRA proceeding).

Note 5. For a case in which a "prevailing" employee's attorney is sanctioned, and receives no fees, due to an inflated petition; see Keener v. Department of Army 136 F.R.D. 140 (1991) affirmed, 956 F.2d 269 (1992). See also Grossly Excessive Attorney's Fee Requests under the Civil Rights Attorney's Fees Awards Act: Should the Entire Fee Request be Denied?, 24 U.BALT. L. REV. 149, 176 (1994).

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CHAPTER 8

JUDICIAL REVIEW OF PERSONNEL ACTIONS

8.1. Judicial Review of MSPB Actions.

a. Statutory Provision. In cases involving decisions or orders by the Merit Systems Protection Board, Congress has specifically outlined by statute, at 5 U.S.C. § 7703, the applicable standards, scope, and appropriate venue for review. The jurisdiction of the MSPB and the U.S. Court of Appeals for the Federal Circuit to review Federal personnel actions is limited to actions made reviewable by law and regulation, such as serious adverse actions and reductions-in-force.

Note. The U.S. Court of Appeals for the Federal Circuit's jurisdiction over MSPB final orders became effective 1 October 1982. That jurisdiction is exclusive and replaces the jurisdiction previously exercised by the various Courts of Appeals and the Court of Claims. The Federal Court Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25 (1982)).

b. Subject Matter Jurisdiction. The Court of Appeals for the Federal Circuit, in Rosano v. Department of the Navy, 699 F.2d 1315 (Fed. Cir. 1983), and in the case which follows, established that the scope of its subject matter jurisdiction is identical to the scope of the subject matter jurisdiction of the Board except for discrimination cases. *See also* Drumheller v. Department of Army, 49 F.3d 1566, 1571 (Fed.Cir. 1995), Manning v. Merit Systems Protection Board, 742 F.2d 1424 (Fed.Cir.1984).

Carroll v. Department of Health and Human Services
703 F.2d 1388 (Fed. Cir. 1983).

COWEN, Senior Circuit Judge:

Petitioner in this case seeks review of the final decision of the Merit Systems Protection Board (MSPB or Board) denying her a within-grade pay increase.

. . . .

II. THE JURISDICTIONAL ISSUE

At the threshold we are met with the Government's suggestion that we lack jurisdiction and its assertion that the court's only recourse

is to transfer the case to the Court of Appeals for the Eleventh Circuit or the District of Columbia Circuit. The Government's position is based upon the decision of the Court of Claims in Holder v. Department of the Army, 670 F.2d 1007 (Ct. Cl. 1982), that determinations concerning the granting or denying of within-grade step increases pursuant to section 5335 lie within the discretion of the employing agency and consequently are beyond the scope of the Tucker Act (28 U.S.C. ' 1491). When counsel for the Government urged us to transfer the case, he was unaware of this court's decision in Rosano v. Dept. of the Navy (Fed. Cir. No. 32-82, slip op. Feb. 14, 1983), which was handed down after this case was submitted. It appears that he also overlooked the fact that The Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25 (1982)), not only granted this court exclusive jurisdiction in all appeals from the Board under 7703(b)(1), but also removed the limitations which the Tucker Act had theretofore imposed upon the Court of Claims. As this court stated in Rosano, that Act removed from section 7703 the reference to the Tucker Act which is the basis for the holding in Holder. The legislative history of the 1982 Act demonstrates the clear intent of the Congress to confer jurisdiction on this court of all appeals from the Board "including cases in which the Court of Claims did not have jurisdiction." Furthermore, this court pointed out in Rosano that "with respect to cases brought under section 7701, the scope of the subject matter jurisdiction of this court is identical to the scope of the jurisdiction of the Board." 5 U.S.C. § 7701 gives the Board jurisdiction over "any action which is appealable to the Board under any law, ruling, or regulation." By the provisions of 5 C.F.R. § 1201.3, a regulation which was in effect at all times pertinent to this action, the Board's appellate jurisdiction includes "(2) denial of within-grade step increases."

Finally, in rejecting the Government's challenge to our jurisdiction, we call attention to the fact that The Federal Courts Improvement Act of 1982 removed all jurisdiction over Board appeals from the other circuits. 5 U.S.C. § 7703.

Consider, however, the possible limitations on this jurisdiction as discussed in the following case. This is one of the classic "rubber ball" cases; it began in 1982 when the Department of Education removed the appellant for unsatisfactory performance. He alleged failure to accommodate handicap in his removal. The case went through the MSPB five times, to the EEOC once, to the Special Panel, into federal district court, and

to the Federal Circuit three times. Excerpts of the third decision in the circuit, which reviewed the court's jurisdiction over a request for reconsideration, are reproduced below.

King v. Lynch,
21 F.3d 1084 (Fed. Cir. 1994)

In March of 1982, the Department of Education (agency) removed Lynch from his position based on charges of unsatisfactory work product and writing skills, failure to submit work in a timely manner and failure to follow through on work, and unauthorized absences. This case has had a long history in which Lynch's allegations of handicap discrimination have been considered by the MSPB, the Equal Employment Opportunity Commission (EEOC), a Special Panel convened pursuant to 5 U.S.C. § 7702(d)(1), and the United States District Court for the District of Columbia, as briefly described below. Lynch appealed his removal to the MSPB where he raised an affirmative defense of handicap discrimination based on his epilepsy which the agency allegedly failed to accommodate. See 5 U.S.C. § 7702(a)(1)(B)(iii) (providing for MSPB decision on discrimination issue in agency actions involving discrimination). In an initial decision of the MSPB, a presiding official sustained the agency's action in removing Lynch, finding that the agency had proved the latter two of the above three grounds for its actions. On Lynch's affirmative defense of unlawful discrimination, the presiding official held that Lynch was not a "qualified handicapped employee" under 29 C.F.R. § 1613.202(f) because of the side-effects of drugs required to treat his condition. As a result of this holding, the presiding official did not consider whether the agency had reasonably accommodated Lynch's condition. (Lynch I.)

Lynch did not petition the MSPB for review and the initial decision became the final decision of the MSPB. In accordance with 5 U.S.C. § 7702(b)(1), Lynch then petitioned the EEOC to review the MSPB's decision on the discrimination issue. The EEOC ruled that in holding that Lynch was not a qualified handicapped employee the MSPB had applied an improper legal analysis based on an erroneous interpretation of the Rehabilitation Act and 29 C.F.R. § 1613.202(f). Pursuant to 5 U.S.C. § 7702(b)(5)(B), the EEOC referred the case back to the MSPB for further consideration.

The MSPB then reviewed and reaffirmed its decision in Lynch I. Contrary to the finding in Lynch I, the MSPB concluded that the agency had proved all three of the grounds for its action. Based on this determination, the MSPB sustained the presiding official's finding that Lynch was not a qualified handicapped employee because the agency had provided reasonable accommodation and yet Lynch could still not perform

the essential functions of his position. Lynch v. Department of Educ., 31 M.S.P.R. 627 (1986) (Lynch II).

Because the MSPB's decision appeared to be in disagreement with the EEOC's decision, the case was referred to a Special Panel, as required by 5 U.S.C. § 7702(d)(1). The Special Panel affirmed the MSPB's decision in Lynch II, finding that the MSPB had applied the EEOC's standards. Lynch v. Department of Educ., 31 M.S.P.R. 519 (1986).

Lynch then filed suit under 5 U.S.C. § 7703(b)(2) in the United States District Court for the District of Columbia. Count I alleged that the MSPB in Lynch II had overstepped its statutory authority by reopening the performance decision in Lynch I. Count II alleged that Lynch had been discriminated against and, pursuant to 5 U.S.C. § 7702(e)(3), sought de novo review of the discrimination decisions of the MSPB and Special Panel. The district court granted summary judgment for Lynch on Count I of his complaint; as to Count II, the district court remanded to the MSPB for additional proceedings in light of the EEOC's decision. In doing so, the district court retained jurisdiction over the case, including the merits of Count II. Lynch v. Bennett, 665 F.Supp. 62 (D.D.C.1987).

On remand, the MSPB defined the issue before it solely as "whether the agency had made reasonable accommodations to appellant's handicap" under the Rehabilitation Act. The MSPB held the agency had not accommodated Lynch's epilepsy, that the presiding official in Lynch I erred in her analysis of the issue of handicap discrimination, and that Lynch met his burden of proving discrimination. Accordingly, it ordered Lynch reinstated with full relief. Lynch v. Department of Educ., 37 M.S.P.R. 12 (1988) (Lynch III). After Lynch received his favorable decision in Lynch III, the Director petitioned the MSPB for reconsideration. The MSPB denied the Director's petition, holding that the Director's right to seek review of an MSPB decision under 5 U.S.C. § 7703(d) extended only to board decisions interpreting civil service laws, rules, and regulations under the jurisdiction of OPM. Finding that the Rehabilitation Act was a discrimination law under 5 U.S.C. § 7702 and not a civil service law, the MSPB held that the Director lacked authority to seek review in the case. Lynch v. Department of Educ., 39 M.S.P.R. 319 (1988) (Lynch IV).

The Director then sought review in this court. We vacated the MSPB's dismissal of the Director's petition, ruling that the MSPB did not have authority to determine whether the Director's decision to petition for reconsideration was proper and instructed the MSPB to consider the petition on the merits. This court did not consider the question whether the Rehabilitation Act is a discrimination law or a civil service law for purposes of this court's jurisdiction. Newman v. Lynch, 897 F.2d 1144 (Fed.Cir.1990).

On January 31, 1992, the MSPB decided the merits of the Director's petition for reconsideration in favor of Lynch. It held that its decision in Lynch III that the Department of Education had discriminated against Lynch in violation of the Rehabilitation Act "did not articulate an erroneous legal standard" under the Rehabilitation Act and 29 C.F.R. § 1613.202(f). Lynch v. Department of Educ., 52 M.S.P.R. 541 (1992) (Lynch V). The Director now petitions this court under 5 U.S.C. § 7703(d) for review of the MSPB's decision in Lynch V.

Both the MSPB and Lynch have filed oppositions to the Director's petition for review of the MSPB's decision, contending that this court lacks jurisdiction to entertain the Director's petition because this is a discrimination case and the Rehabilitation Act, 29 U.S.C. § 794, is not a "civil service law" within the meaning of 5 U.S.C. § 7703(d). The Director has filed a response to the oppositions of the MSPB and Lynch and urges that under the decisions of this court the reference to "civil service law" in § 7703(d) is given broad scope and should include the Rehabilitation Act at issue in this case.

The Director's argument essentially is that any law that can be applied to the civil service should be considered a civil service law for purposes of the Director's right to petition under § 7703(d). Citing the broad definition of "civil service" contained in 5 U.S.C. § 2101(1) (1988), covering "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services," the Director's petition then observes:

[L]ogic dictates that the term "civil service law ... or regulation" as used in section 7703(d) be given an equally broad reading, so as to ensure that OPM's views upon laws that directly affect Federal civilian personnel management are fully considered.

Because these decisions, in the Director's view, broadly interpret "civil service law, rule, or regulation" as used in § 7703(d) and because the "Director's statutory right to seek judicial review is circumscribed only by the terms of section 7703(d)" the Director contends that the MSPB's decision interpreting the Rehabilitation Act should be considered as interpreting a civil service law and therefore should be appealable by OPM. In support of this, the Director argues that the MSPB's allegedly erroneous interpretation of the Rehabilitation Act and regulation was made pursuant to its authority under 5 U.S.C. § 7702, which is within Title 5, was enacted as a part of the CSRA, and bears upon civil servants. See 5 U.S.C. § 7702(a)(1) (giving the MSPB initial authority to decide discrimination issues). Further, the Director argues that the Rehabilitation Act, although enacted prior to CSRA and not within Title 5, was "incorporated" as part of the CSRA because 5 U.S.C. § 2302, which is a civil service law, prohibits among other things discrimination in violation

of the Rehabilitation Act. See 5 U.S.C. § 2302(b)(1)(D) (discrimination in violation of the Rehabilitation Act is a prohibited personnel practice); see also id. § 2301(b)(2) (merit system principle to provide fair and equitable personnel management treatment to employees without regard to handicapping condition). Based on these factors, the Director concludes that the Rehabilitation Act, under this court's decisions, is a civil service law for purposes of § 7703(d). Upon examination, however, it is plain that the Director's arguments fail to consider the clear lines drawn, and the carefully crafted scheme created, by Congress for the judicial review of specified government employment discrimination cases. Thus, for the reasons set forth below, we conclude that "interpret[ation of] a civil service law, rule, or regulation" as used in 5 U.S.C. § 7703(d) does not encompass interpretation of statutes and regulations relating to employment discrimination as set forth in 5 U.S.C. § 7702(a)(1)(B).

.....

The Rehabilitation Act and the other discrimination laws, although made applicable to federal employers, have broader application and are not themselves civil service laws. The Senate Report and statutory scheme for dealing with discrimination issues demonstrates that Congress intended that there be a consistent interpretation of these laws whether their alleged violation arises within or without the federal government. OPM's petition to this court to review the MSPB's decision, which it views as an erroneous interpretation of the Rehabilitation Act and EEOC regulation, is therefore contrary to the judicial review procedure prescribed by Congress for that consistent interpretation.

Our precedent also affirms the exclusivity of the district courts' jurisdiction over government employment discrimination cases and holds that this court lacks such jurisdiction. In Williams v. Department of the Army, 715 F.2d 1485 (Fed.Cir.1983) (in banc), this court rejected an employee's attempt to obtain bifurcated review of the MSPB's decision by bringing his discrimination claims in the district court and seeking review of his civil service claims in this court. This court held that where jurisdiction lies in the district court under 5 U.S.C. § 7703(b)(2), the entire action falls within the jurisdiction of that court and this court has no jurisdiction, under 5 U.S.C. § 7703(b)(1), over such cases. 715 F.2d at 1491. Because 5 U.S.C. § 7703 provides for exclusive jurisdiction in the district courts in discrimination cases and because this court found that unitary review of MSPB decisions was intended, the court refused to entertain Williams's civil service claims.

.....

In view of the careful distinctions made by 5 U.S.C. § 7702 and § 7703 between discrimination laws and civil service laws, the legislative history of the CSRA, and the different procedural and jurisdictional provisions for judicial review of discrimination cases and other employment cases under the CSRA and this court's decisions, we are convinced that the question left open in the earlier appeal of this case, Newman v. Lynch, 897 F.2d at 1145, must now be answered in the negative. This court does not have jurisdiction to entertain a petition for judicial review under 5 U.S.C. § 7703(d) where OPM's assertion is only that the MSPB erred in interpreting a discrimination law, rule, or regulation. Accordingly, we dismiss the Director's petition for judicial review for want of jurisdiction.

Costs to Lynch.

[footnotes deleted].

See also Hendrix v. U.S. Dept. of Agriculture, 1997 WL 407841, (10th Cir.(N.M.) 1997) (Table, text in WESTLAW) (The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from final orders of the Merit Systems Protection Board. See 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9); see also Long v. United States Dep't of Air Force, 751 F.2d 339, 342 n. (10th Cir.1984); Bergman v. Department of Commerce, 3 F.3d 432, 434 (Fed.Cir.1993); Afifi v. United States Dep't of Interior, 924 F.2d 61, 62 (4th Cir.1991). However, if a case is a "mixed case," in which "the employee is challenging judicially the board's determinations of both the discrimination and the nondiscrimination issues," then jurisdiction lies solely in the district court pursuant to 5 U.S.C. S 7703(b)(2). Williams v. Department of Army, 715 F.2d 1485, 1491 (Fed.Cir.1983); see also Williams v. Rice, 983 F.2d 177, 179-80 (10th Cir.1993); Hill v. Department of Air Force, 796 F.2d 1469, 1470 (Fed.Cir.1986). In such a "mixed case" the entire action must be brought in district court, and bifurcated proceedings are prohibited. See Afifi, 924 F.2d at 62-63; Williams, 715 F.2d at 1490-91.

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c. Scope of Review. While 5 U.S.C. § 7703(c) clearly limits the court's review to the record, appellants have requested a de novo consideration of the evidence in the record. Consider the response to such a request in the following case.

Polcover v. Secretary of the Treasury
477 F.2d 1223 (D.C. Cir. 1973),
cert. denied, 414 U.S. 1001 (1973)

II.

On November 30, 1964, appellant, a Grade GS-12 Internal Revenue Agent with eighteen years experience in the Federal service and a Veterans Preference Act beneficiary, received a Notice of Proposed Adverse Action from his District Director. The Notice stated, in pertinent part:

It is proposed to both suspend you for not more than thirty days and remove you from the Service in order to promote the efficiency of the Revenue Service for the following reasons:

Charge I: Acceptance of a Bribe

Specification: On or about May 19, 1961, you accepted the sum of $1,000.00 from Mr. Albert M. Goldstein, an accountant of 4 E. 43rd Street, New York, New York, to influence your decision and action in your audit of the 1959 income tax return of his client, R. Carl and Sarah M. Chandler.

Charge II: Failure to Report the Offer of a Bribe

Specification: You failed to report the offer of the bribe set forth in the specification to Charge I above.

III.

Appellant's challenge is not focused solely on the substantiality of the evidence supporting the Commission's determination of removal, but includes allegations of a multitude of procedural errors which he asserts violated his rights under either the Veterans' Preference Act or the United States Constitution. We have considered all (although all are not specifically discussed), and reject all.

We decline to enter into a lengthy discussion of the facts and underlying evidence supportive of the Commission's action. We recognize the limits imposed on our scope of review . . . which bind us to the agency record and preclude a de novo consideration of the evidence. The test is not how we would decide the issue based on the evidence in the record, but whether substantial evidence in the record supports the decision of the Commissioner. See, e.g., Moore v. Administrator, 155 U.S.App.D.C. 14, 475 F.2d 1283 (1973).

The evidence before the Commission's Board of Appeals and Review consisted primarily of that presented to the hearing officer on January 9, 1968, pursuant to the appeal taken to the Regional

Commissioner. Included therein is the transcript of the criminal trial testimony of Mr. Goldstein (reasserting that a bribe was given), and Mr. Chandler (disclaiming knowledge of a bribe), a sworn affidavit of Goldstein to the effect that he had given a $1,000 bribe to appellant in exchange for a favorable audit of Chandler's 1959 income tax return, and various work papers of Goldstein and Chandler tending to support the bribe allegation. Undoubtedly the hearing officer and the various appellate levels after him gave significant weight to the sworn affidavit and testimony of Goldstein. Appellant's evidence consisted chiefly of a complete denial of involvement, his own work papers (which supported the taxpayer's claimed liability, but which were not submitted to the IRS until the day of the alleged bribe), and an attack (which was of some merit) upon Goldstein's credibility. Although we might otherwise view the evidence were we in the legal position of the hearing officer or the Commission, we have little difficulty finding that substantial evidence supports their conclusion that the preponderance of the evidence sustains the specifications and consequent removal. As such, that conclusion must not be altered.

Appellant makes much of the fact that he was acquitted of the parallel criminal charges filed against him, and that the acquittal was in the face of evidence identical to that before the Commission. The difference between proof to a "preponderance" of the evidence, the burden assumed by the agency in administrative proceedings of this nature, and proof "beyond a reasonable doubt," the burden assumed by the Government in criminal prosecutions, is critical. As the second circuit court of appeals stated in Finfer v. Caplin, 344 F.2d 38, 41 (2d Cir. 1965), cert. denied, 382 U.S. 833 . . .(1965):

> The law does not require that the proof which might lead to an administrative determination that removal would be for the best interests of the IRS be of the same quality as would be necessary to convince a jury beyond a reasonable doubt to convict in a criminal case. The jury, to be sure, had not been convinced beyond a reasonable doubt but the Commissioner could well have concluded that the evidence was substantial enough to justify a refusal to reinstate.

See also Silver v. McCamey, 95 U.S.App.D.C. 318, 221 F.2d 873, 875 (1955).

. . . .

Ample opportunity was given to the appellant to raise the existence of procedural defects in the proper forum, at the agency and Commission levels, so that evidentiary hearings and a thorough sounding of the matter could be initiated. Appellant did raise several specific challenges, notably those relating to delay, cross-examination,

and substantiality, but until now any infirmities in the powers of the oral reply hearing officer have not even been hinted. The boiler plate language of challenge to all procedures is not the minimum specification of issues we deem necessary.

The fluctuating state of the law could excuse a misdirected challenge to the authority of the oral reply officer, but not the absence of a challenge altogether. Litigation must end somewhere. In this scheme of judicial review that somewhere (as to the issues to be considered on appeal) is the Commission. "Great is the art of beginning, but greater the art is of ending." Finding no good reason to divert from the general rule the opinion of the district court is Affirmed.

For a later interpretation of this standard, *see* Etelson v. Office of Personnel Management, 684 F.2d 918,(D.C.Cir. 1982) "[W]hatever the District Court did on remand, this court would on any subsequent appeal take 'a fresh look at the record and (make) an independent judgment based thereon.' Polcover v. Secretary of the Treasury, 477 F.2d 1223, 1226 n.5 (D.C.Cir.1973). The District Court record is complete, the case was resolved below on cross-motions for summary judgment, and the parties have briefed the merits in this court. Cf. Murray v. Buchanan, 674 F.2d 14, 16 n.5 (D.C.Cir.1982) (remanding for development of 'a more complete record' a case dismissed by the District Court on threshold grounds), vacated for rehearing en banc (May 25, 1982). We therefore reach the merits. See Commissioner v. Gordon, 391 U.S. 83, 95 n.8, 88 S.Ct. 1517, 1524 n.8, 20 L.Ed.2d 448 (1967)."

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d. Standard of Review. While courts have consistently refused to consider the evidence in the record de novo, courts have not always agreed on the particular standard by which they would review the agency's decision based on that evidence. The 1978 Civil Service Reform Act, at 5 U.S.C. § 7703(c), established the standard of review for appeals from decisions of the MSPB.

Consider the representative judicial interpretation of that standard in the following case.

Boylan v. U.S. Postal Service
704 F.2d 573 (11th Cir. 1983)

PER CURIAM:

Vincent Boylan, a City Letter Carrier for the United States Postal Service in Orlando, Florida, appeals a final order of the Merit Systems

Protection Board sustaining his suspension and removal from employment because he allegedly disposed of third-class mail scheduled to be delivered on his route. This Court has jurisdiction to review such final orders under 5 U.S.C.A. § 7702(b) (superseded) and 28 U.S.C.A. § 2342(6) (repealed). In this appeal, Boylan claims that the Board's decision is not supported by substantial evidence, . . . and that the suspension and removal were effected without compliance with required procedures.

SUBSTANTIAL EVIDENCE

The incident resulting in Boylan's suspension and removal occurred on January 17, 1981, when the manager of the Moselle Manor Apartments discovered a large quantity of third-class mail under a U-Haul trailer next to a trash dumpster in the apartment complex parking lot.

Boylan's first contention on appeal is that the Board's finding that he disposed of the mail is unsupported by substantial evidence. In reviewing final decisions of the Merit Systems Protection Board, the Civil Service Reform Act of 1978 directs this Court to:

> . . . review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence. . . .

5 U.S.C.A. § 7703(c). Under this standard of review, a court will not overturn an agency decision if it is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Brewer v. United States Postal Service, 647 F.2d 1093, 1096 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The question is not what the court would believe on a de novo appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole. Brewer, 647 F.2d at 1096. Evidence supporting the agency's finding, as well as evidence offered in opposition, must be examined. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950).

The record contains evidence that (1) 163 of the 172 pieces of mail recovered under the trailer were scheduled for delivery on Boylan's route, (2) the postal inspector who collected the mail recognized some of the mail as being the same kind of third-class mail available for delivery that morning from Boylan's postal station, (3) the

mail was found in a "fresh and unsoiled" condition, and (4) Boylan had not observed any signs of forced entry into his mail truck or any indication that the mail had been disturbed. Although Boylan suggested that children playing in the area might have been responsible for the incident, he also stated that he had seen no children in the area, and had offered the explanation "simply in a manner of speculation."

Under these circumstances, we conclude that the Board's decision was supported by substantial evidence.

. . . .

PROCEDURAL ISSUES

Boylan contends the Board should have set aside his removal because of four procedural errors committed by the Postal Service. Under 5 U.S.C.A. § 7701(c)(2), the Board may set aside an adverse action against an employee if the employee demonstrates harmful error in the application of the procedures invoked to arrive at that decision. "Harmful error" is defined by regulation as follows:

> Harmful error: Error by the agency in its application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon 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.

5 C.F.R. § 1201.56(c)(3).

First, Boylan alleges harmful error in that he received only 16 days notice of his proposed suspension, rather than the 30-day notice required under 5 U.S.C.A. § 7513(b)(1). In upholding the Postal Service, the Board relied on the so-called "crime exception" to the required notice period which allows immediate action when "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. . . ." 5 U.S.C.A. § 7513(b)(1).

Under the regulations, Boylan had the burden of showing that the 16-day notice prejudiced his rights. Although the Postal Service had relied on another invalid exception in giving the short notice, the Board's determination that Boylan suffered no prejudice because the 16-day notice was justified by the crime exception was not an abuse of discretion.

Boylan contends that the crime exception to the notice requirement cannot be invoked without a showing of criminal intent. The Board has determined in previous decisions that direct proof of criminal intent is unnecessary where the evidence presented to the Board demonstrates that the agency's action was based upon a

"reasonable cause to believe" that a crime had been committed. Filson v. department of Transportation, FAA, MSPB Order No. AT075209304 (July 14, 1981), at 8. This interpretation by the Board of its own regulations is entitled to deference. See Udall v. Tallman, 380 U.S. 1, 18 85 S. Ct. 792, 802, 13 L.Ed.2d 616 (1965); Adkins v. Hampton, 586 F.2d 1070, 1073 (5th Cir. 1978). Here, the Postal Service had "reasonable cause to believe" a crime had been committed without a specific showing of intent, and was not required to show a criminal conviction or bring formal criminal charges in order to invoke the crime exception of the notice requirement. See Schapansky v. Department of Transportation, FAA, SPB Order No. DA075281F1130 (October 28, 1982), at 7.

Although Boylan contends he was denied access to the mail involved in this incident in violation of 5 U.S.C.A. § 7513(e), which requires copies of the agency's proposed action "together with any supporting material" to be furnished to the employee upon request, the record indicates that Boylan examined the mail at his initial interview with the postal inspector on January 21, 1981. A letter dated March 11, 1981 advised the Board that the mail was in the Postal Service's possession and Boylan's representative could examine it by making an appointment to do so. The letter indicated that a copy was sent to Boylan's attorney at that time. In addition, a copy of the letter was served on Boylan and his attorney on April 7, 1981. The Board did not abuse its discretion in concluding that Boylan suffered no harmful error.

Finally, Boylan argues that he was not provided with a copy of the carrier by-pass record introduced at the hearing. This document reflected the number of pieces of mail returned by a carrier to the post office each day. The document's evidentiary impact was cumulative and its introduction into evidence was without objection. It was not mentioned in the Board's initial decision or in its final order. In administrative disciplinary proceedings, where a removal action is based upon substantial evidence and conforms with the law, courts have refused to hold "that every deviation from specified procedure, no matter how technical, automatically invalidates a discharge, especially in the absence of any showing of prejudice." Dozier v. United States, 473 F.2d 866, 868 (5th Cir. 1973); see Anonymous v. Macy, 398 F.2d 317, 318 (5th Cir. 1968), cert. denied, 393 U.S. 1041, 89 S. Ct. 666, 21 L.Ed.2d 588 (1969). Boylan has made no showing that any harm resulted from the procedures followed.

AFFIRMED.

See also The D.C. Circuit Struggles with Standards of Reviewability, 56 Geo. Wash. L. Rev. 960, 998 (1988)

8.2 Judicial Review of Actions Involving Discrimination. The 1978 Civil Service Reform Act established an entirely new procedure for reviewing administratively and judicially those actions involving allegations of employment discrimination. Three levels of administrative review are established, and interlocutory judicial review is permitted at numerous stages in the procedure. The statute and regulations outlining this review are set out in Chapter 9.

8.3 Judicial Review of Other Personnel Actions.

All personnel actions are not appealable to the MSPB under 5 U.S.C. § 7701, and thus are not reviewable under 5 U.S.C. § 7703. Of particular note are actions taken against probationary employees. Consider the limited circumstances when courts will review agency actions against probationary employees.

Wren v. MSPB
681 F.2d 867 (D.C. Cir. 1982)

WALD, Circuit Judge:

This is a petition by a former probationary employee of the Department of the Army ("Army") seeking review of an order of the Merit Systems Protection Board ("MSPB" or "Board") dismissing her appeal from a job termination for lack of jurisdiction. Petitioner claims that her discharge was in retaliation for "whistleblowing" on official mismanagement, waste, abuse of authority and violation of regulations and was therefore a prohibited personnel practice under 5 U.S.C. § 2302(b)(8). She requests that the Board's order be vacated and the case remanded to the Board so that it can review the decision of the Office of Special Counsel of the Board ("OSC") refusing to investigate petitioner's allegation of reprisal for whistleblowing. The OSC's decision to terminate its investigation into the cause of petitioner's dismissal was rendered as a result of a separate petition filed by petitioner at the same time she sought MSPB review. After petitioner's appeal to the Board had been dismissed, the OSC refused to exercise 5 U.S.C. ' 1206 authority to investigate petitioner's allegation, finding that it was more appropriately resolved "under an administrative appeals procedure or applicable grievance procedure." Although we agree that the OSC's failure to investigate the petition in this case was

not justified by the reasons given, we cannot afford petitioner any relief in this appeal. If judicial relief from the OSC's inaction lies at all, it must be sought in a separate action. The only matter properly before this court is the Board's decision that it had no jurisdiction over Wren's appeal from the Army's adverse personnel action. We find that decision a correct one. Accordingly, we must affirm the decision of the Board.

I. BACKGROUND

The Army appointed petitioner, Celia A. Wren, Guidance Counselor, GS-1710, Grade 9 at the Wertheim Educational Center, West Germany, on August 21, 1978, and dismissed her on March 9, 1979. The notice of termination stated that petitioner's job performance was unsatisfactory, that petitioner was uncooperative and that she failed to attend job performance seminars. The notice also informed petitioner that she had no right to appeal the Army's decision unless she alleged that it was based upon discrimination. Nevertheless, on March 7, 1979, petitioner appealed to the MSPB, claiming that her termination was a reprisal for whistleblowing regarding agency regulatory violations and mismanagement, and therefore a prohibited personnel practice under Title I, section 101(a) of the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 2302(b)(8). Simultaneously, petitioner requested the OSC to undertake an investigation into her allegation pursuant to 5 U.S.C. § 1206(a).

II. THE AGENCY DECISION

After examining the CSRA and regulations promulgated thereto, the Presiding Official held that there was no "right of appeal to the MSPB for excepted service employees who are terminated during a trial period." . . . Consequently, he dismissed the petition for lack of jurisdiction.

On appeal, the Board affirmed the dismissal for the same reason. . . . The Board also observed, however, "that procedures do exist whereby [Wren's] . . . allegation may be investigated by the Special Counsel . . ." Accordingly, the Board referred the petition to the Acting Special Counsel "for such action as she may find appropriate." But by the time the Board referred the petition to the OSC, that office had, apparently, already determined not to conduct any investigation.

As previously noted, petitioner had sought an OSC investigation in March, 1979 at the same time she filed her MSPB appeal. On August 27, 1979, the Special Counsel requested further information regarding the complaint. Documents were sent by petitioner's counsel

from West Germany on October 22, 1979, but not received by the OSC until November 19, 1979, four days after the case had been closed for failure to submit the requested information. It does not appear from the record that the case was reopened upon receipt of the documents, or even that petitioner was notified at that time that the case had been closed. Nor was the case later reopened after the Board referred it to the OSC in April, 1980. On September 24, 1980, petitioner wrote to inquire about the status of the OSC investigation, and on October 15, 1980, was informed that her case had been closed almost a year earlier, shortly before the requested information had been received. In addition, the OSC informed petitioner that

> [T]his Office is authorized to receive and investigate allegations of certain activities prohibited by civil service law, rule, or regulation (primarily the prohibited personnel practices set forth in 5 U.S.C. § 2302) and may recommend (but not order) corrective action when it is determined that a prohibited personnel practice has been or is being committed. This Office, however, is not authorized to deal with or seek redress for employee complaints or grievances which may be resolved more appropriately under established complaint, grievance, or appeals procedures unless it involves a prohibited personnel practice specified in 5 U.S.C. § 2302. [5 U.S.C. §§ 1206(a)(1) and (3)]
>
> Upon review of the information you provided, we have determined that your allegations deal with matters that may be resolved more appropriately under an administrative appeals procedure or applicable grievance procedure. We, therefore, will not undertake an investigation in your case at this time.

Thus, so far as it appears on the record, the merits of petitioner's allegation that she had been fired in retaliation for whistleblowing, a prohibited personnel practice, were never investigated by the OSC. Instead, a year after closing the investigation, the OSC directed petitioner to pursue her grievance along a "more appropriate" route, although that route had, in fact, already been declared inaccessible to her (and all probationary employees) by the MSPB.

III. WREN'S PETITION

On June 16, 1980, Wren filed a timely petition in this court for review of the Board's decision dismissing her appeal for lack of jurisdiction. After filing this appeal, petitioner received notice from the OSC that it had closed her case one year earlier. Thus, although this

appeal is from the Board's decision to dismiss, petitioner also argues that the case must be remanded to the Board so that it can direct the OSC to fulfill its statutory responsibility to investigate petitioner's prohibited personnel practice allegation, which had been referred to it by the Board. Petitioner stresses the irony of being denied relief by the MSPB which assumed that OSC relief was available and then being denied relief by the OSC which assumed that MSPB relief was available.

Petitioner concedes on appeal that as a non-tenured employee she is "not statutorily entitled, per se, to direct review of her termination by the MSPB." The statute grants only "employees" the right to appeal to the MSPB from an adverse agency personnel action. 5 U.S.C. § 7701(a); see also Piskadlo v. Veterans' Administration, 668 F.2d 82 (5th Cir. 1982). An employee is defined as "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less. . . ." 5 U.S.C. § 511(a)(1)(A); see also 5 C.F.R. §§ 315.801-.802. At the time of her termination, petitioner had been employed for approximately nine months. However, petitioner reasons: the Board has jurisdiction over cases involving reprisals against whistleblowers brought to it by the OSC, 5 U.S.C. § 1206(c)(1)(A); and once such matters have been brought to the Board, it rather than the OSC has power to take "final agency action," 5 U.S.C. § 1205(a)(1); therefore the Board's jurisdiction over worthy whistleblower cases will be undermined if petitions to the OSC are not investigated sufficiently to determine whether they have merit. Thus, she argues, the Board has authority here at least to order the OSC to undertake a proper investigation of petitioner's allegation.

Unfortunately, we cannot accept petitioner's statutory construct. Although we agree that the OSC must, under the terms of the Act, investigate an alleged prohibited personnel practice involving reprisals against whistleblowing to the extent necessary to determine whether there is a reasonable probability that the allegation is meritorious, and that it must issue reasons for terminating an investigation, we can find no MSPB authority to enforce these statutory requirements. Therefore, if the OSC fails to perform its statutory duties, as here, relief--if it lies at all--must be sought in a separate action in the district court to compel the OSC to perform its statutory duties. Cf. Dunlop v. Bachowski, 421 U.S. 560 (1975) (5 U.S.C. §§ 702 and 704).

IV. STATUTORY ANALYSIS

A primary purpose of the CSRA was to safeguard employees--tenured and non-tenured-who "blow the whistle" on illegal or improper official conduct. Title I, section 101(a) of the Act proclaims:

> (9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--
>
> > (A) a violation of any law, rule, or regulation, or
> >
> > (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2301(b)(9). Under the Act, it is a prohibited personnel practice for an official to retaliate against an employee for

> (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--
>
> > (i) a violation of any law, rule, or regulation, or
> >
> > (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--
>
> > (i) a violation of any law, rule, or regulation, or
> >
> > (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. . . .

5 U.S.C. § 2302(b)(8). "Protecting employees who disclose Government illegality, waste, and corruption" was regarded as "a major step toward a more effective civil service." S. Rep. No. 969, 95th Cong., 2d Sess. 8 (1978), reprinted in U.S. Code Cong. & Admin. News 1978, p. 2723, 2730. II House Committee on Post Office and Civil Service, 95th Cong. 1st Sess., Legislative History of the Civil Service Reform Act of 1978 at 1632 (1979) (hereinafter Legislative History). The Senate Report explained:

> In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

Id., U.S. Code Cong. & Admin. News 1978, p. 2730. In a similar vein, the House Report, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 386, reprinted in I Legislative History 760, explained:

> Right now, a Federal employee who "blows the whistle" (sometimes even to a congressional committee) on activities at his agency which are a violation of law, mismanagement, abuse of authority, waste of funds or a danger to the public may be more likely to be harassed or fired than praised or rewarded. There is no effective means other than drawn out administrative and court proceedings for a whistleblower to set things right. We all lose when reasonable and constructive criticism of agencies by those who know them best is stifled.

Congress designated the MSPB and the OSC to protect whistleblowers against reprisal.

The MSPB was entrusted with the appellate review authority over agency personnel action formerly vested in the Civil Service Commission. . . . As this court, per Bazelon, J., recently detailed in Frazier v. Merit Systems Protection Board, 672 F.2d 150, 154-55 (D.C. Cir. 1982) (hereinafter Frazier), there are two routes by which whistleblowing controversies can reach the Board for review: (1) a Chapter 77 appeal from an adverse agency personnel action, which can only be brought by tenured employees, 5 U.S.C. §§ 7701-03; and (2) a section 1206(c)(1)(B) petition for "corrective action" by the OSC. The only route to MSPB review open to petitioner, a non-tenured employee, was via the OSC.

The OSC was modeled after the Office of General Counsel of the National Labor Relations Board ("NLRB"). . . . Both offices are filled by Presidential appointment, 5 U.S.C. § 1204; 29 U.S.C. § 153(d), and operate substantially independently of the agency with which they are

associated. 5 U.S.C. § 1206; 29 U.S.C. § 60. The semi-autonomous nature of the OSC, like that of the General Counsel of the NLRB, was deemed necessary to allow it to fulfill its investigative and prosecutorial functions--to investigate illegal employment practices and seek their correction before the MSPB. . . . The sponsors of the CSRA expected the OSC to "serve first and foremost as the protector of employees' rights and as a conduit to prevent reprisals and help agencies purge wrongdoing." Thus, the Special Counsel is, as this court has recently remarked, "an ombudsman responsible for investigating and prosecuting violations of the Act." Frazier, 672 F.2d at 162.

In fulfilling its ombudsman or prosecutorial responsibility, the OSC is required by the Act to investigate an alleged prohibited personnel practice, and, if it terminates that investigation for lack of merit, to issue a written statement of reasons:

> (1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.
>
> (2) If the Special Counsel terminates any investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation and the reasons therefor.

5 U.S.C. § 1206(a) (emphasis added); see also 5 C.F.R. 1250. Yet, in this case, petitioner was not informed that her case had been closed until a year later, when it was explained that requested documentation had arrived four days too late and that, in any event, her case was "more appropriately" resolved elsewhere--although by this time the MSPB had dismissed the petitioner's appeal for lack of jurisdiction. . .. So far as we can tell from the record, petitioner's case was never investigated, as the statute requires. Moreover, OSC's belated reasons for termination of the investigation were apparently based upon an inapplicable provision of the statute, and thus were erroneous in law.

The plain language of the statute and the legislative history clearly indicate that while the scope of an initial OSC investigation need only be extensive enough to determine whether there are reasonable grounds to believe a prohibited personnel practice is occurring, has occurred, or will occur, "[s]ome preliminary inquiry will . . . be necessary . . . to determine whether a charge warrants a thorough inquiry." Further, although the legislative history indicates that the

statement of reasons for termination of the OSC's investigation need not be "detailed" and that the OSC has discretion to decide what form notice should take, it is equally clear that "a brief notification of the summary reasons for the termination" is required. Informing petitioner a year after closing the investigation that her case was more appropriately resolved elsewhere, particularly after the MSPB had held that it had no jurisdiction over her appeal, did not, in our view, conform to the statutory mandate. Although the OSC may routinely defer action on a prohibited personnel practice when a matter is pending before the MSPB, 5 C.F.R. § 1251.2, that was not the situation here when the OSC issued a statement of reasons. Further, the OSC's reason for termination, i.e., the availability of other processes, erroneously relied upon a provision of the statute, 5 U.S.C. § 1206(e)(2), which is inapplicable to petitioner's case. That provision states that "no investigation" is allowed, if more appropriate avenues of relief are available, of allegations involving

> (D) activities prohibited by any civil service law, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and
>
> (E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

It is apparent from our reading of the statute and the legislative history that section 1206(e)(2) was an additional grant of authority to the OSC to investigate practices which would not come within its section 1206(a) prohibited personnel practice jurisdiction. Thus, we disagree with the Government's argument that the OSC's response in this case was justified under 5 U.S.C. § 1206(e). The authority vested in the OSC under that "special" situation provision is "[i]n addition to" the OSC's primary authority and responsibility to investigate and to seek correction of prohibited personnel practices, such as whistleblowing. 5 U.S.C. §§ 1206(a) and 2302(b); . . . ("The new section 1206(e) authorizes the Special Counsel to investigate allegations of the Hatch Act and certain other special matters.") (emphasis added). This additional authority in no way detracts from the OSC's duty under section 1206(a). Indeed, we find nothing in the statute to qualify the OSC's authority and responsibility to investigate an employee's allegation of retaliation for whistleblowing at least to the extent of ascertaining if that complaint is meritorious.

V. DISPOSITION

The case is here on review of the MSPB's order dismissing a probationary employee's appeal for lack of jurisdiction. The petitioner understandably wants some remedy for the OSC's failure to perform its statutory duty to initiate some kind of inquiry into the merits of an allegation of retaliation for whistleblowing. As we see it, this is a non-discretionary aspect of the OSC's statutory responsibility. Seemingly, then, there should be a remedy for petitioner where the OSC has failed to perform even that initial inquiry into the whistleblowing allegation, and its reasons for inaction are legally invalid. However, the proper remedy for the OSC's failure cannot be an appendage to this appeal from a legally correct decision of the Board that it had no jurisdiction to consider petitioner's appeal from her job termination.

We remain troubled, however. In enacting the CSRA, Congress sought to create an efficient system for protecting all employees from reprisals for whistleblowing. The only remedy available under the CSRA for a probationary employee alleging a dismissal in reprisal for whistleblowing is OSC oversight. By failing to investigate petitioner's complaint and to issue a valid statement of reasons for termination, the OSC has not fulfilled its charge and has thereby cast doubt upon the efficacy of a new and promising statutory system for protecting whistleblowers.

It is possible--although obviously we do not decide the point--that petitioner may have an action for mandamus in the district court to compel some form of inquiry into the merits. [Footnote deleted]. Quicker still would be a voluntary reopening of Wren's case by the OSC in order to conduct whatever inquiry is necessary to determine whether her allegation of retaliatory discharge for whistleblowing is meritorious.

For the foregoing reasons, the petition is denied.

So ordered.

See also Poorsina v. U.S. Merit Systems Protection Bd., 726 F.2d 507, 508 (9th Cir. 1984) (Probationary employee's "whistle-blowing" did not constitute engaging in partisan politics to render his discharge by the Department of Health and Human Services reviewable by Merit Systems Protection Board under the regulation allowing probationary employees terminated for unsatisfactory performance to appeal if they can show their discharge was based on partisan politics. 5 U.S.C.A. §§ 7511(a)(1)(A), 7701(a), 7703(c).)

Note. The Whistleblower Protection Act of 1989 allows whistleblowers (i.e., employees who allege a violation of 5 U.S.C. § 2302(b)(8)) to take their own case to the Merit Systems Protection Board, if OSC fails to act within 120 days. See 5 U.S.C. § 1214(a)(3). This is commonly referred to as the individual right of action (IRA).

8.4 Constitutional Tort Actions.

Federal employees have also attempted constitutional tort claims against their supervisors under Bivens v. Six Unknown Names Agents, 403 U.S. 38 (1971), to obtain review of personnel actions. This approach has largely been unsuccessful because of the Supreme Court's decision in Bush v. Lucas, 403 U.S. 367 (1983), in which the Court stated that claims arising out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States preclude supplementing that regulatory scheme with new nonstatutory damages remedy. Following the Bush decision, however, several circuit courts refused to apply Bush to personnel practices that Congress had elected to exclude from coverage under civil service rules. Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) (Bush does not preclude Bivens claims by probationary employee whose remedies under Civil Service Reform Act are very limited). See also Doe v. Department of Justice, 753 F.2d 1092 (D.C. Cir. 1985) (excepted service employee); Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983); McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987). The rationale for these decisions was largely undercut by the Supreme Court's subsequent decision in Schweiker v. Chilicky, 487 U.S. 412 (1988). In Schweiker, the Supreme Court held that courts must give "appropriate deference to indications that congressional inaction has not been inadvertent," and should not create Bivens remedies when "design of Federal Government programs suggests that Congress has provided what it considers to be adequate remedial mechanisms for constitutional violations that may occur in course of its administration." As the Eighth Circuit noted in McIntosh following remand from the Supreme Court for consideration in light of Schweiker, Schweiker creates "a sort of presumption against judicial recognition of direct [Bivens] actions for violations of the Constitution by Federal officials or employees." McIntosh v. Turner, 861 F.2d 524, 526 (8th Cir. 1988). Hill v. Department of Air Force, 884 F.2d 1318, (10th Cir. (N.M.) 1989) (employee's allegations that former supervisor violated his due process rights by interfering with his security clearance and his job possibilities were allegations of prohibited personnel practices, and employee thus did not have Bivens remedy therefor). See also Steele v. United States, 19 F.3d 531 (10th Cir. 1994) (finding FTCA suit by former Air Force employee for "whistleblowing" was preempted by CSRA's comprehensive scheme of redress); Albright v. United States, 10 F.3d 790 (Fed. Cir. 1993); Jones v. Tennessee Valley Auth., 948 F.2d 258 (6th Cir. 1991) (holding CSRA provides comprehensive system to protect rights of employees).

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CHAPTER 9

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

9.1 Substantive Law.

a. Title VII, 1964 Civil Rights Act. Before 1972 a Federal employee's only recourse for an incident of employment discrimination was to lodge an administrative complaint with the Civil Service Commission. Title VII of the Civil Rights Act of 1964 provided statutory administrative and judicial remedies for employees in the private sector, but excluded Federal employees from its coverage. The United States was not included within the definition of "employer" for purposes of the Act.

The sole administrative remedy for Federal employees before 1972 was created by Executive Order 11478. This executive order is still in effect, although it has been amended several times since it was first issued. Under the current version of this executive order, an aggrieved employee is entitled to an initial agency review of the complaint followed by a right to appeal to the Equal Employment Opportunity Commission (EEOC). The executive order outlines this remedy, highlights the Federal policy toward equal opportunity, and empowers the EEOC to issue regulations and hear complaints.

The original executive order and its implementing regulations created a tedious, time-consuming complaint procedure that was generally ineffective. Enforcement of equal opportunity requirements by the old Civil Service Commission was uneven, and the system was frequently said to impede rather than enhance the attainment of equal opportunity in the Federal Government. Federal employees who were dissatisfied with the resolution of their complaints had no statutory basis upon which to seek judicial review of the administrative procedure; they were also faced with insurmountable obstacles, such as sovereign immunity defenses, when they attempted to sue.

Congress remedied this in 1972 with the enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, which amended numerous sections of Title VII and added Sections 717 and 718. Section 717, codified at 42 U.S.C. § 2000e-16, extended to certain Federal employees the statutory right to file civil actions alleging discrimination on the basis of race, color, religion, sex, or national origin, if resolution of their administrative complaints was unsatisfactory. Section 718 (42 U.S.C. §2000e-17) imposed the requirement on Federal contractors to have affirmative action plans. As you read the excerpt of the statute and the materials that follow, consider the extent to which the shortcomings of the old regulatory system were remedied by the statute.

(1) Disparate Treatment Analysis. In a disparate treatment case of employment discrimination, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 334 (1977). The employee must prove the action taken was motivated by prohibited discrimination. Because there is seldom sufficient direct evidence of discrimination ("I don't like _____ class and that's why I didn't promote employee X"), the Supreme Court has developed a test for circumstantial evidence of employment discrimination cases.

Under the "shifting burdens" analysis, the employee must first establish a *prima facie* case of discrimination. The elements of this test vary, depending on the employment matter in dispute. In a job selection or promotion case, the employee must be a member of a protected class (only those matters protected by federal discrimination law); be qualified for the position involved; be passed over for selection; and someone outside the protected class is selected (treated more favorably). In other employment decisions, the final two elements are replace by the inquiry of whether the circumstances give rise to an inference of discrimination. *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 420 U.S. 248 (1981); U.S. Postal Serv. v. Aikens, 460 U.S. 711 (1983); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

The key to a *prima facie* case is different treatment from similarly situated employees outside the complainant's protected class. In a job application action, other applicants are similarly situated; employees seeking promotion are not. In reductions in force, employees within a competitive level and competitive area are similarly situated; employees in other competitive levels and areas are not similarly situated. *See* Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1994) (where the court misapplied the similarly situated test to find a GS09 and a GS12 were similarly situated in a RIF).

Once the employee establishes the *prima facie* case, the burden of production shifts to the agency to articulate a valid, nondiscriminatory reason for its action. The stated reason must, if true, state a valid defense to the allegations. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Burdine.

The ultimate burden of proof always remains on the plaintiff in an employment discrimination case. After the employer (agency) articulates a valid, nondiscriminatory reason for its actions, the employee must prove that reason is mere pretext for discrimination: in other words, the employer's explanation is unworthy of belief and prohibited discrimination is the more likely reason (keeping in mind that the employee must prove discriminatory intent). St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).

(2) Mixed Motive. When there is direct evidence of discrimination, but the employer also has an independent, valid reason for its actions, mixed motive analysis applies. Once the employee proves discrimination was "a motivating factor" in an action, the employer must prove by clear and convincing evidence it would have taken the same action even absent discrimination. 42 U.S.C. § 2000e-2(m). Fuller v. Phipps, 67 F.3D 1137 (4th Cir. 1995). The employee may still, however, receive declaratory and injunctive relief and recover attorney's fees and costs.

(3) Disparate Impact. Employment practices that are facially neutral but affect one group disproportionately are said to have a disparate impact. An employee who establishes such a practice has proven employment discrimination unless the employer can prove the practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). These cases nearly always turn on statistics. For the appropriate analysis of statistics, see Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)(reversing disparate impact finding for improper use of statistics); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)(the appropriate analysis is comparison of the percentage of group's employees to the number of qualified applicants, not the number of the protected group in the geographic area); Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991); Valentino v. U.S. Postal Serv., 674 F.2d 56 (D.C. Cir. 1982); Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985).

(4) Reprisal. An employee who either engages in protected activity under discrimination laws (files or participates in a complaint) or otherwise opposes discriminatory practices is protected by law from retaliation. An employee can prove reprisal discrimination against the employer (agency) by demonstrating a protected activity; an adverse employment action: and, a causal connection between the protected activity and the adverse action. 42 U.S.C. § 2000e-3; Atkinson v. Bd. of Regents, 4 F.3d 984 (4th Cir. 1993); Malarky v. Texaco, Inc., 983 F.2d 1204 (2d Cir. 1993); Miller v. Williams, 590 F.2d 317 (9th Cir. 1979). The causal connection can be presumed where the employee shows the employer was aware of the protected activity and the adverse action follows the protected activity closely in time. The employer can successfully defend against the allegation by proving a legitimate, non-retaliatory reason for the adverse action, Atkinson v. Bd. of Regents, 4 F.3d 984 (4th Cir. 1993); Butler v. Dep't of Agric. 826 F.2d 409 (5th Cir. 1987), or that the decision to take the adverse action was made before the protected activity. Newton v. Leggett, 7 F.3d 1042 (8th Cir. 1993). An employer who was unaware of the protected activity can not, of course, be guilty of reprisal. Jackson v. Brown, 5 F.3d 546 (10th Cir. 1993); Malarky v. Texaco, Inc., 983 F.2d 1204 (2d Cir. 1993); Acosta v. Univ. of the District of Columbia, 528 F. Supp. 1215 (D.D.C. 1981).

b. Age Discrimination in Employment Act. A prohibition against age discrimination in Federal employment was added to the equal employment opportunity

requirements imposed on the Federal Government by Pub. L. No. 93-259, the Age Discrimination in Employment Act (ADEA). As codified in 29 U.S.C. § 33a, ADEA, which became effective on 1 May 1974, incorporates procedures similar to those required by 42 U.S.C. § 2000e-16.

As under Title VII, the EEOC is now authorized to enforce the age provisions "through appropriate remedies, including reinstatement or hiring of employees with or without backpay." The ADEA applies only to Federal employees and applicants who are at least 40 years old, not, as in same state laws, to employees under age 40.

Under the age discrimination provisions, a Federal employee may either file an administrative complaint of age discrimination or bypass the administrative avenues of recourse and bring a civil action directly in Federal district court for legal or equitable relief. If the employee fails to file an administrative age discrimination complaint with the EEOC, the statute requires the employee to give the EEOC at least 30 days' advance notice of intent to file the civil action. This advance notice must also be filed within 180 days after the alleged discriminatory act occurred. 29 U.S.C. § 633a(d). See Stevens v. Department of Treasury, 111 S. Ct. 1562 (1991). This 180-day provision acts like a statute of limitations on age discrimination actions.

c. Rehabilitation Act of 1973. Discrimination on the basis of physical or mental handicap was prohibited by the Rehabilitation Act of 1973, codified at 29 U.S.C. § 791. The 1978 Rehabilitation Act Amendments extended the remedies, procedures, and rights under Title VII to employees encountering discrimination based on such a handicap (29 U.S.C. § 794a). The Rehabilitation Act has been amended several time since its inception, most notably by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, and the 1992 Rehabilitation Act Amendments. Extracts of the current Act are reproduced below. Note that the amended Rehabilitation Act refers to individual with a "disability." The terms "handicap" and "handicapped" are no longer used. This indicates no change in substance, only a reflection of societal use.

Section 791(b) has been held to require agencies and the Civil Service Commission (now The Equal Employment Opportunity Commission) to provide opportunity for individuals to raise claims of employment discrimination based on physical or mental handicap (disability). Ryan v. Federal Deposit Insurance Corp., 565 F.2d 762 (D.C. Cir. 1977). The EEOC regulations in this area are currently codified at 29 C.F.R. Part 1614. In the 1978 amendments to the Rehabilitation Act, Congress granted aggrieved disabled employees the same procedures for processing their complaints as available to title VII complainants. The 1992 amendments require application of the substantive provisions of the Americans with Disabilities Act (subsection (g) above).

(1) Reasonable Accommodation The Rehabilitation Act, *as amended,* prohibits discrimination against a qualified individual with a disability and requires

employers to reasonably accommodate the qualified disabled who can perform the essential functions of a position with or without reasonable accommodation. An allegation of failure to reasonably accommodate an employee can arise in hiring, placement, or advancement opportunities. In these cases, the employee must have, have a record of, or be regarded as having a physical or mental impairment that substantially limits one or more major life activity. 29 U.S.C. §§ 706, 709; 29 C.F.R. § 1614.203; 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2; Cook v. State of Rhode Island, 10 F.3d 17 (1st Cir. 1993); Ruiz v. U.S. Postal Svc., 59 M.S.P.R. 76 (1993); Ingles v. Neiman Marcus Group, 974 F.Supp. 996 (S.D.Tex. 1997); Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047(5th Cir.(Tex.)(1998)(Former employee failed to present evidence that his post traumatic stress disorder (PTSD) was impairment that substantially limited major life activity, and thus he failed to make threshold showing of ADA-qualified disability, where employee's earlier symptoms, affecting work and non-work functions, were merely temporary, no facts indicated that employee was unable to perform class of jobs or broad range of jobs, and he retained ability to compete successfully with similarly skilled individuals. Americans with Disabilities Act of 1990, § 3(2), 42 U.S.C.A. § 12102(2); 29 C.F.R. § 1630.2(j)). The employee must be able "with or without reasonable accommodation, [to] . . . perform the essential functions of the position in question without endangering the health and safety of the individual or others. . . ." 29 C.F.R. § 1614.203(a)(6)(1996). An impairment is--

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h)(1996). Major life activities are things like "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." C.F.R. § 1630.2(i)(1996). Employees who can not perform in only one specific job do not suffer an impairment of the major life activity of working. Heilwell v. Mount Sinai Hospital, 32 F.3d 718 (2d Cir. 1994) cert. denied 513 U.S. 1147, 115 S.Ct. 1095, 130 L.Ed.2d 1063, 63 USLW 3617, 63 USLW 3625, (1995)(asthma exacerbated only in one particular location did not constitute an impairment); Kuehl v. Wal-Mart Stores, Inc., 909 F.Supp. 794, (D.Colo. 1995)(Inability of employee diagnosed with chronic tibula tendinitis to return to her particular job as door greeter at store without some accommodation, such as sitting on stool, did not demonstrate substantial limitation in the major life activity of working and thus, employee who did not have impairment that precluded her from performing any other job or duty within a class of jobs did not meet the definition of a disabled person under the ADA. Americans with Disabilities Act

of 1990, § 3(2), 42 U.S.C.A. § 12102(2); 29 C.F.R. § 1630.2(i); Byrne v. Board of Educ., 979 F.2d 560, 565-66 (7th Cir. 1992); Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1255 (1993); Miller v. AT&T Network Sys., 915 F.2d 1404, 1404 (9th Cir. 1990) (adopting district court opinion at 722 F.Supp. 633 (D.Or. 1989)); Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989); Jasany v. United States Postal Service, 755 F.2d 1244, 1250 (6th Cir. 1985). *Contra,* Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993)(finding without analysis firefighters with skin condition were limited in major life activity of working by no-beard rule). For a case that decided asymptomatic HIV infection is not an impairment that substantially limits one of the major life activities, see Runnebaum v. Nationsbank of Maryland, 123 F.3d 156 (4th Cir. 1997).

(2) Essential Functions and Reasonable Accommodation. Essential functions of a position are determined by the employer and derived from the position description and other materials. ". . .[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 29 U.S.C. § 12111(8)(1995). *See also* 29 C.F.R. § 1630.2(n)(1996).

Reasonable accommodation of an employee's handicap is at 29 C.F.R. § 1630.2(o) (1996). Closely tied to the issue of reasonable accommodation is undue hardship on the employer. An accommodation that would cause undue hardship need not be provided. *See* 29 U.S.C. § 1630.2(p) (1996). Vande Zande v. State of Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995) (finding that the financial condition of an employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship); Whillock v. Delta Air Lines, Inc., 926 F.Supp. 1555, (N.D.Ga. 1995) (Even assuming that employee who allegedly suffered from multiple chemical sensitivity syndrome could perform essential functions of job as airline reservation sales agent if "accommodated" by allowing her to work at home, such an accommodation was not reasonable, and, accordingly, employee was not entitled to relief on ADA claims. Reservations mini-office at someone's home would prevent computer terminal from being used other than during that individual's work hours, reservation sales agents necessarily had access to large amount of airline's classified and confidential information and security of that information could not be maintained in reservation sales agent's home, and agents did not work in isolated unsupervised environment but, instead, airline provided extensive in-person and on the job training, monitoring, evaluating and counseling that was essential to proper functioning of job. Americans with Disabilities Act of 1990, § 102(b)(5)(A), 42 U.S.C.A. § 12112(b)(5)(A)). Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983); Bolstein v. Dep't of Labor, 55 M.S.P.R. 459 (1992); Cohen v. Dep't of Army, 46 M.S.P.R. 369 (1990); Widger v. VA, 37 M.S.P.R. 368 (1988). See also, Accommodating the Handicapped Federal Employee, 35 A.F. L. Rev. 69, (1991).

An agency that attempts to reasonably accommodate an employee and fails will not be liable for compensatory damages. 42 U.S.C. § 1981a(a)(3); Hocker v. Dep't of Transp., 63 M.S.P.R. 497 (1994) cert. denied, 516 U.S. 1116, 116 S.Ct. 918, 133 L.Ed.2d 848, 64 USLW 3556, 64 USLW 3557 (1996).

(3) Drug use. The Rehabilitation Act amendments of 1992 excludes from the definition of a disabled individual any one who claims disability based on current use of illegal drugs. 29 U.S.C. § 706(8)(F)(iii). *See also* 42 U.S.C. § 12114(a) ("For purposes of this subchapter, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.").

(3) Alcoholism. Both the EEOC and MSPB have determined that federal employers are no longer required to provide reasonable accommodation to an alcoholic and may hold the alcoholic employee to the same qualification standards for employment, or job performance and behavior as other employees. See Johnson v. Babbitt EEOC Appeal No. 03940100 (March 28, 1996); Kimble v. Navy, 70 MSPR 617(1996). *But see* Humphrey v. Dept. of Army (While agencies are no longer obligated by the ADA and the Rehabilitation Act Amendments of 1992 to provide accommodations formerly required for alcoholics, they may voluntarily do so because the wording of the law is that they "may" hold such employees to the same standards to which they hold others; moreover, where employee shows that he has a right to such accommodation under agency's own rules, collective bargaining agreements, or policy, and that such right has been denied, he has proven affirmative defense of harmful procedural error rather than disability discrimination. Rehabilitation Act of 1973, § 2 et seq., as amended, 29 U.S.C.A. § 701 et seq.; Americans with Disabilities Act of 1990, § 104(c)(4), 42 U.S.C.A. § 12114(c)(4). 76 M.S.P.R. 519(1997)).

9.2 Complaint Processing.

EEOC regulations implementing Title VII are currently codified at 29 C.F.R., Part 1614. Every agency is required by 29 C.F.R. § 1614.102 to include in its regulations a procedure for accepting and processing administrative discrimination complaints from employees or applicants for employment who believe they have been discriminated against because of race, color, religion, sex, or national origin. The general structure for agency complaint procedures and rights to appeal to EEOC and obtain judicial review are described in the following regulations.

The first stop in the EEOC administrative complaints process is the equal employment opportunity (EEO) counselor, who works for the agency that allegedly discriminated and performs the counseling function either full-time or as a collateral duty.

Counselors normally are not attorneys, and they have widely-varying degrees of training and expertise in employment discrimination law.

The counseling process resolves most discrimination cases before a formal complaint is ever filed. The counselor meets with the complainant to explain the complaints process and identify issues; meets with witnesses and gathers information; and attempts to resolve the employment dispute at the lowest level possible. Historically about 80 percent of all disputes are resolved during the counseling process.

The complainant generally must contact an EEO counselor within 45 days of the discriminatory act or the effective date of a discriminatory personnel action. The counselor then has 30 days to complete counseling unless the complainant agrees to an extension of up to 60 days, or the agency and the individual agree to pursue an alternative dispute resolution procedure. The counselor provides the complainant a "notice of final interview" at the end of the counseling period, following which the complainant may file a formal discrimination complaint within 15 days.

The respondent agency determines whether to accept or dismiss the complaint. It *shall* dismiss when the complaint fails to state a claim upon which relief can be granted; the complaint states a claim already pending before the EEOC, or that has already been decided by the EEOC; the complainant fails to meet the deadlines described above (counselor contact within 45 days, formal complaint within 15 days of notice of final interview); or the claim is moot or not yet ripe.

The complainant may appeal to the EEOC within 30 days of the agency's dismissal of part or all of the complaint. Any statement or brief in support of the appeal is due 30 days after filing the appeal. The respondent agency then has 30 days to forward the complaint file to the EEOC along with any agency statement or brief in opposition. The EEOC reviews the record and any supplemental information it may request from the parties, and determines whether the agency should have accepted the complaint.

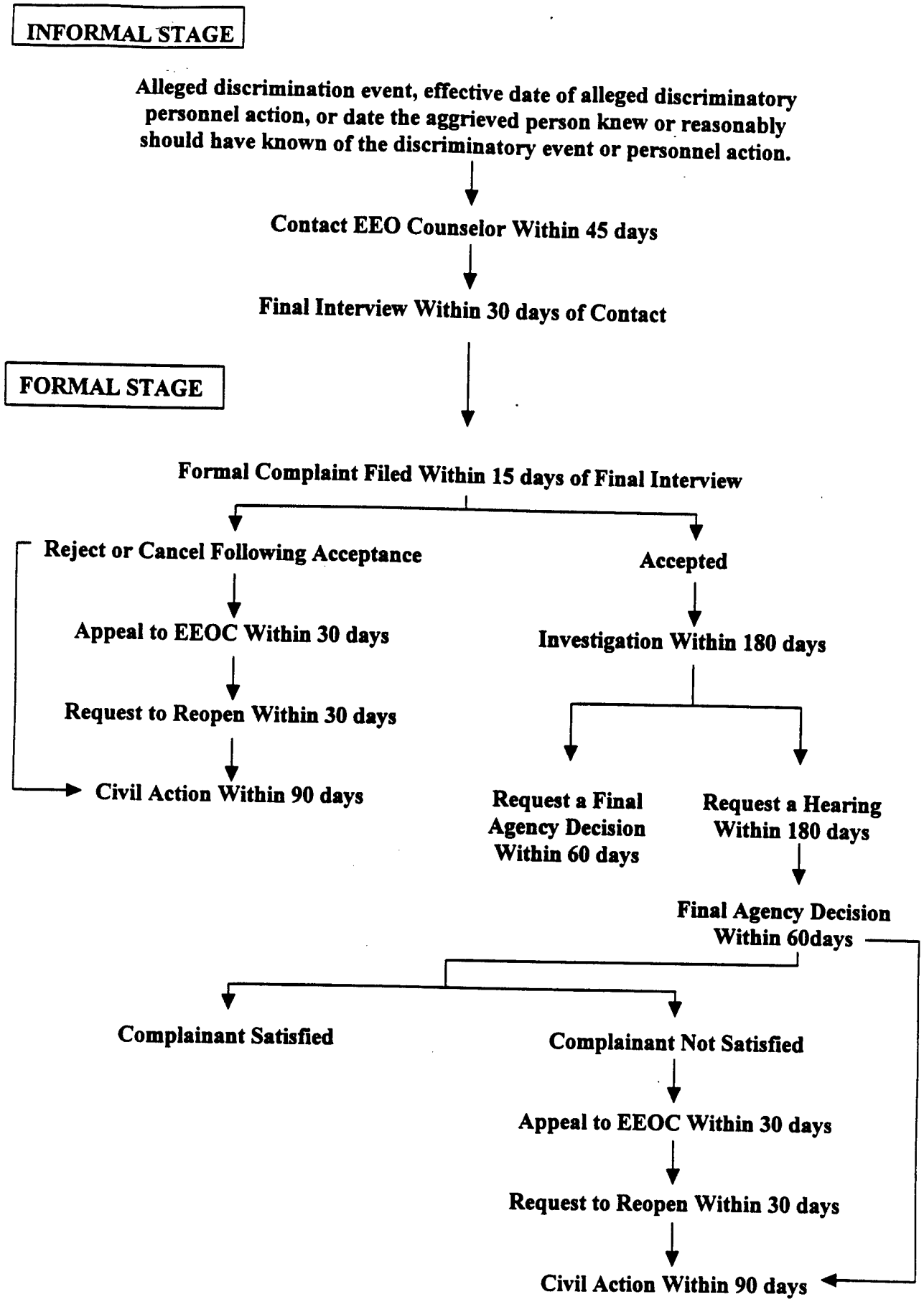
The process moves to the investigation stage if the agency accepts any allegation of discrimination or loses the appeal from a dismissal. The agency investigates the complaint, developing "a complete and impartial factual record upon which to make findings on the matters raised by the written complaint." The agency must complete the investigation within 180 days from the date the complainant files the formal complaint, or from the date that the EEOC orders acceptance of the complaint, unless the parties agree to an extension of up to 90 days.

The agency forwards a copy of the completed investigation to the complainant, who then has 30 days to request either a hearing before an EEOC administrative judge or a final agency decision without a hearing. The agency head makes the decision based on the administrative record if the complainant elects a final agency decision without a

hearing. The complainant then has 30 days to appeal to the EEOC if the agency head finds no discrimination, or grants less than all the relief requested.

If the complainant requests a hearing, the EEOC Regional Office assigns an administrative judge who then permits discovery, holds a closed hearing, issues findings of fact and conclusions of law on the merits of the complaint, and "order[s] appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint." The administrative judge's decision, however, is merely a recommendation to the agency. The agency head has 60 days to issue a final agency decision adopting, rejecting, or modifying the administrative judge's decision. A disappointed complainant may appeal the final agency decision to the EEOC.

The following chart illustrates how the individual complaint system currently works.


INFORMAL STAGE
Alleged discrimination event, effective date of alleged discriminatory personnel action, or date the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.
Contact EEO Counselor Within 45 days
Final Interview Within 30 days of Contact
FORMAL STAGE
Formal Complaint Filed Within 15 days of Final Interview
Reject or Cancel Following Acceptance
Appeal to EEOC Within 30 days
Request to Reopen Within 30 days
Civil Action Within 90 days
Accepted
Investigation Within 180 days
Request a Final Agency Decision Within 60 days
Request a Hearing Within 180 days
Final Agency Decision Within 60days
Complainant Satisfied
Complainant Not Satisfied
Appeal to EEOC Within 30 days
Request to Reopen Within 30 days
Civil Action Within 90 days

The EEOC has also published in 29 C.F.R. § 1614.204, special procedures for processing administrative class complaints of discrimination. These regulations are considerably more complex than those pertaining to individual complaints. For example, the EEOC, not the agency, makes the initial determination under the class complaint procedure of whether a class complaint may be maintained by the person initiating the complaint. This involves an evaluation of the complaint to see if the tests of numerosity, typicality, commonality, and adequate representation are met so that the interests of the class will be adequately protected and fairly represented.

In contrast to an individual complaint, however, a class complaint may be initiated up to 90 days after the alleged incident of discrimination occurred. The general outline of the proceedings is then the same as those used in individual complaints: informal counseling, final interview, formal complaint, investigation, attempt at informal resolution, appeal to the Office of Federal Operations of the EEOC, and finally civil suit. Whether an individual or a class complaint is initiated, the complainant must be personally aggrieved by the personnel action that is the substance of the complaint to have "standing" to complain. Under current regulations, there is no provision for a third party complaint. The former third party procedure was eliminated when the class complaint regulations were published.

Since the implementation of administrative class procedures, courts have generally required exhaustion of the administrative class requirements before filing a judicial class complaint. See McIntosh v. Weinberger, 810 F.2d 1411, 1423-25 (8th Cir. 1987); Wade v. Secretary of Army, 796 F.2d 1369, 1373 (11th Cir. 1986).

9.3 Mixed Cases. The procedures discussed in sections 9.1 and 9.2 are applicable to discrimination cases that contain no issue appealable to the Merit Systems Protection Board. A "mixed case" is one based on an action that is appealable to the MSPB and includes an allegation of discrimination.

a. Statutory Basis. Congress developed a very detailed and intricate procedure for the processing of such cases by the MSPB, the EEOC, and the courts. The procedure provides the employee with several options to pursue administration and judicial relief: file an appeal with the MSPB and later receive EEOC review; or file an EEOC administrative complaint and later receive an MSPB hearing on the personnel action.

b. Regulatory Implementation. Both the MSPB and the EEOC have published regulations establishing detailed procedures, consistent with 5 U.S.C. § 7702, for the processing of "mixed cases." MSPB regulations are at 5 C.F.R. Part 1201, Subpart D. EEOC regulations are at 29 C.F.R. Part 1614, Subpart C.

9.4 Exclusivity of Title VII Remedy.

In the private sector, the Federal courts have recognized that certain post-Reconstruction civil rights statutes, e.g., 42 U.S.C. § 1981, may provide alternative theories upon which to attack discriminatory employment practices. The Supreme Court reviewed the applicability of these laws to federal employees in the following case:

Brown v. General Services Administration
425 U.S. 820 (1976)

MR. JUSTICE STEWART delivered the opinion of the Court.

The principal question presented by this case is whether § 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in Federal employment.

The petitioner, Clarence Brown, is a Negro who has been employed by the General Services Administration since 1957. He is currently classified in grade GS-7 and has not been promoted since 1966. In December 1970 Brown was referred, along with two white colleagues, for promotion to grade GS-9 by his supervisors. All three were rated "highly qualified," and the promotion was given to one of the white candidates for the position. Brown filed a complaint with the GSA Equal Employment Opportunity Office alleging that racial discrimination had biased the selection process. That complaint was withdrawn when Brown was told that other GS-9 positions would soon be available.

Another GS-9 position did become vacant in June 1971, for which the petitioner along with two others was recommended as "highly qualified." Again a white applicant was chosen. Brown filed a second administrative complaint with the GSA Equal Employment Opportunity Office. After preparation and review of an investigative report, the GSA Regional Administrator notified the petitioner that there was no evidence that race had played a part in the promotion. Brown requested a hearing, and one was held before a complaints examiner of the Civil Service Commission. In February 1973, the examiner issued his findings and recommended decision. He found no evidence of racial discrimination; rather, he determined that Brown had not been advanced because he had not been "fully cooperative."

The GSA rendered its final decision in March 1973. The Agency's Director of Civil Rights informed Brown by letter of his conclusion that considerations of race had not entered the promotional process. The Director's letter told Brown that if he chose, he might carry the administrative process further by lodging an appeal with the Board of Appeals and Review of the Civil Service Commission and that, alternatively, he could file suit within 30 days in Federal district court.

Forty-two days later Brown filed suit in a Federal District Court. The complaint alleged jurisdiction under Title VII . . ."with particular reference to" § 717; under 28 U.S.C. § 1331 (general Federal-question jurisdiction); under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202; and under the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981.

The respondents moved to dismiss the complaint for lack of subject-matter jurisdiction, on the ground that Brown had not filed the complaint within 30 days of final agency action as required by § 717(c) The District Court granted the motion.

The Court of Appeals for the Second Circuit affirmed the judgment of dismissal. 507 F.2d 1300 (1974). It held, first, that the § 717 remedy for Federal employment discrimination was retroactively available to any employee, such as the petitioner, whose administrative complaint was pending at the time § 717 became effective on March 24, 1972. The appellate court held, second, that § 717 provides the exclusive judicial remedy for Federal employment discrimination, and that the complaint had not been timely filed under that statute. Finally, the court ruled that if § 717 did not pre-empt other remedies, then the petitioner's complaint was still properly dismissed because of his failure to exhaust available administrative remedies. We granted certiorari, 421 U.S. 987 (1975), to consider the important issues of Federal law presented by this case.

The primary question in this litigation is not difficult to state: Is § 717 . . . the exclusive individual remedy available to a Federal employee complaining of job-related racial discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe § 717's position in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways. As Mr. Chief Justice Marshall once wrote for the Court: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." United States v. Fisher, 2 Cranch 358, 386 (1805).

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex, or national origin. . . . Until it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect Federal employees. . . . Although Federal employment discrimination clearly violated both the Constitution, Bolling v. Sharpe 347 U.S. 497 (1954), and statutory law, 5 U.S.C. § 7151, before passage of the 1972 Act, the effective availability of either administrative or judicial relief was far from sure. Charges of racial discrimination were handled parochially within each Federal agency. . . . Although review lay in the Board of Appeals and Review of the Civil Service Commission, Congress found "skepticism" among Federal

employees "regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement."

If administrative remedies were ineffective, judicial relief from Federal employment discrimination was even more problematic before 1972. Although an action seeking to enjoin unconstitutional agency conduct would lie, it was doubtful that backpay or other compensatory relief for employment discrimination was available at the time that Congress was considering the 1972 Act. For example, in Gnotta v. United States, 415 F.2d 1271, the Court of Appeals for the Eighth Circuit had held in 1969 that there was no jurisdictional basis to support the plaintiff's suit alleging that the Corps of Engineers had discriminatorily refused to promote him. Damages for alleged discrimination were held beyond the scope of the Tucker Act, 28 U.S.C. § 1346, since no express or implied contract was involved. . . . And the plaintiff's cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Mandamus Act, 28 U.S.C. § 1361, was held to be barred by sovereign immunity, since his claims for promotion would necessarily involve claims against the Treasury.

. . . .

Concern was evinced during the hearings before the committees of both Houses over the apparent inability of Federal employees to engage the judicial machinery in cases of alleged employment discrimination. . . . Although there was considerable disagreement over whether a civil action would lie to remedy agency discrimination, the committees ultimately concluded that judicial review was not available at all or, if available, that some forms of relief were foreclosed. . . . .

The conclusion of the committees was reiterated during floor debate. Senator Cranston, co-author of the amendment relating to Federal employment, asserted that it would, "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases . . . ." 118 Cong. Rec. 4929 (1972). Senator Williams, sponsor and floor manager of the bill, stated that it "provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court." Id., at 4922.

The legislative history thus leaves little doubt that Congress was persuaded that Federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that conclusion was entirely reasonable. Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act to cover Federal

employees. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.

This unambiguous congressional perception seems to indicate that the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of Federal employment discrimination. We need not, however, rest our decision upon this inference alone. For the structure of the 1972 amendment itself fully confirms the conclusion that Congress intended it to be exclusive and pre-emptive.

. . . .

Sections 717(b) and (c) establish complementary administrative and judicial enforcement mechanisms designed to eradicate Federal employment discrimination. . . . [The Court reviews the organization of ' 717 and the enforcement scheme established.]

The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

The petitioner relies upon our decision in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In Johnson the Court held that in the context of private employment Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the Johnson case. Second, the holding in Johnson rested upon the explicit legislative history of the 1964 Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and Federal statutes."

421 U.S., at 459, quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). Congress made clear "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1886, 42 U.S.C. ' 1981, and that the two procedures augment each other and are not mutually exclusive." 421 U.S., at 459, quoting H.R. Rep. No. 92-238, p. 19 (1971). See also Jones v. Alfred H. Mayer Co., 392 U.S. 409 415-417 (1968). There is no such legislative history behind the 1972 amendments. Indeed, as indicated above, the congressional understanding was precisely to the contrary.

In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies. . . .

In the case at bar . . .the established principle leads unerringly to the conclusion that § 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in Federal employment.

We hold, therefore, that since Brown failed to file a timely complaint under § 717(c), the District Court properly dismissed the case. Accordingly, the judgment is affirmed.

It is so ordered.

Note. One of the reasons Federal employees have attempted to use legal theories other than Title VII to obtain judicial review is the restrictive 90-day limit on filing suit in Federal court.[1] How successful would a plaintiff be in reviving an EEO claim (and thereby obtaining an additional 30 days within which to sue) by filing a request to reopen with the EEOC? In Chickillo v. Commanding Officer, 406 F. Supp. 807 (E.D. Pa. 1976), aff'd without opinion, 547 F.2d 1159 (3d Cir. 1977), the court would not permit this sort of attempt to skirt the timeliness requirements. Since then, however, the Supreme Court has recognized a limited equitable tolling of many statutes of limitation, particularly those

[1]Complainants previously had 30 days to file a civil action in federal court; this was extended to 90 days by the Civil Rights Act of 1991, Pub. L. 102-166 (codified at 42 U.S.C. § 2000e-16). Many of the courts that previously considered the question concluded that the 30-day requirement was a jurisdictional prerequisite to maintain the action. See Eastland v. Tennessee Valley Authority, 553 F.2d 364 (5th Cir. 1977). Recently, however, the Supreme Court held that the 30-day suit filing period in 42 U.S.C. § 2000e-16(c) was not jurisdictional but was more in the nature of a statute of limitations, which, in appropriate circumstances, could be subject to equitable tolling. Irwin v. Veterans Administration, 111 S. Ct. 453 (1990).

in title VII. In Irwin v. Veterans Admin., 111 S. Ct. 453 (1990), the Court found that an attempted, but defective, pleading or affirmative deceit by the employer can be grounds for an appropriate equitable extension of the filing deadline in Title VII cases.

9.5 Scope of Judicial Review - Federal EEO Complaints.

When Congress amended Title VII in 1972 to include Federal employees, it directed that certain of the existing procedural provisions in Title VII should govern civil actions by Federal employees, "as applicable." 42 U.S.C. § 2000e-16(d). The referenced provisions established the specific rules and guidelines for private sector litigation, and the meaning of the phrase "as applicable" caused confusion in the lower Federal courts. One of the primary issues was whether a Federal employee was entitled to a trial de novo or merely a review of the administrative record in Federal court. The U.S. Supreme Court resolved this issue in Chandler v. Roudebush, 425 U.S. 840 (1976), where it found a right to trial de novo in district court.

When an employee seeks judicial review of a mixed case, the district court will hear the discrimination issues de novo, but performs only a record review of the nondiscrimination issues of the mixed case. See Morales v. MSPB, 932 F.2d 800 (9th Cir. 1991); Rana v. United States, 812 F.2d 887 (4th Cir. 1987); Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986); Hayes v. Government Printing Office, 684 F.2d 137 (D.C. Cir. 1982); Kirkland v. Runyon, 876 F.Supp. 941 (S.D.Ohio, 1995); Riehle v. Stone, 41 F.3d 1507 (6th Cir.1994) (Table, text in WESTLAW). .

9.6 Analysis of EEO Litigation.

Seldom does a plaintiff alleging discrimination have the benefit of direct evidence of discrimination. Because of the difficulty of litigating cases of discrimination based on circumstantial evidence, the Supreme Court established a method of analysis for these cases. In a series of cases beginning with McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court developed an order of proof and allocation of burdens under a "shifting burdens test." The Court later redefined the test in Texas Dep't of Community Affairs v. Burdine, 420 U.S. 248 (1981). The combination of the two cases has given rise to the name often associated with the test; McDonnell-Douglas/Burdine test. Despite its name, however, the Court probably best explained the test in U.S. Postal Service v. Aikens, 460 U.S. 711 (1983).

The McDonnell-Douglas/Burdine test begins with the employee bearing the burden of proof to establish a "prima facie" case of discrimination. The elements of such a case vary based on the employment action involved. In a failure to hire case, for

example, a black applicant alleging a racially discriminatory refusal to hire would show that (1) he was black, (2) he was qualified for the position for which he applied, (3) he was not offered the position, and (4) the position was filled with someone not black or the employer continued to seek persons who were not black while the position remained open. The burden then shifts to the employer to "articulate" a valid, nondiscriminatory reason for its actions. This is a burden of production, not persuasion. The stated reason must be one that, if true, would explain the employer's actions. If the employer fails to produce a facially valid reason for its actions, the employee wins.

After twenty years of litigation and three Supreme Court cases, the federal courts still disagreed over the proper application of the McDonnell-Douglas/Burdine test when the employer succeeded in presenting a facially valid, nondiscriminatory reason for its actions. The Court attempted to resolve the dispute in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), portions of which are reproduced below.

ST. MARY'S HONOR CENTER, et al., Petitioners
v.
Melvin HICKS.

113 S.Ct. 2742 (1993)

Justice SCALIA delivered the opinion of the Court.

Petitioner St. Mary's Honor Center (St. Mary's) is a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). Respondent Melvin Hicks, a black man, was hired as a correctional officer at St. Mary's in August 1978 and was promoted to shift commander, one of six supervisory positions, in February 1980.

In 1983 MDCHR conducted an investigation of the administration of St. Mary's, which resulted in extensive supervisory changes in January 1984. Respondent retained his position, but John Powell became the new chief of custody (respondent's immediate supervisor) and petitioner Steve Long the new superintendent. Prior to these personnel changes respondent had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions. He was suspended for five days for violations of institutional rules by his subordinates on March 3, 1984. He received a letter of reprimand for alleged failure to conduct an adequate investigation of a brawl between inmates that occurred during his shift on March 21. He was later demoted from shift

commander to correctional officer for his failure to ensure that his subordinates entered their use of a St. Mary's vehicle into the official logbook on March 19, 1984. Finally, on June 7, 1984, he was discharged for threatening Powell during an exchange of heated words on April 19.

Respondent brought this suit in the United States District Court for the Eastern District of Missouri, alleging that petitioner St. Mary's violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e- 2(a)(1), and that petitioner Long violated Rev.Stat. s 1979, 42 U.S.C. § 1983, by demoting and then discharging him because of his race. After a full bench trial, the District Court found for petitioners. 756 F.Supp. 1244 (E.D.Mo.1991). The United States Court of Appeals for the Eighth Circuit reversed and remanded, 970 F.2d 487 (1992), and we granted certiorari, 506 U.S. ____, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993).

II

[1] Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

> "It shall be an unlawful employment practice for an employer-- "(1) . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a).

With the goal of "progressively sharpen[ing] the inquiry into the elusive factual question of intentional discrimination," Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 8, 101 S.Ct. 1089, 1094, n. 8, 67 L.Ed.2d 207 (1981), our opinion in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases. [FN1] The plaintiff in such a case, we said, must first establish, by a preponderance of the evidence, a "prima facie" case of racial discrimination. Burdine, supra, at 252-253, 101 S.Ct., at 1093-1094. Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a prima facie case (set out in McDonnell Douglas, supra, at 802, 93 S.Ct. at 1824 - 1825) by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position

remained open and was ultimately filled by a white man. 756 F.Supp., at 1249-1250.

.....

Under the McDonnell Douglas scheme, "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." Burdine, supra, at 254, 101 S.Ct., at 1094. To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). 1 D. Louisell & C. Mueller, Federal Evidence s 67, p. 536 (1977). Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case--i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." Burdine, 450 U.S., at 254, 101 S.Ct., at 1094. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. Id., at 254-255, and n. 8, 101 S.Ct., at 1094-1095, and n. 8. It is important to note, however, that although the McDonnell Douglas presumption shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," id., at 253, 101 S.Ct., at 1093. In this regard it operates like all presumptions, as described in Rule 301 of the Federal Rules of Evidence:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

Respondent does not challenge the District Court's finding that petitioners sustained their burden of production by introducing evidence of two legitimate, nondiscriminatory reasons for their actions: the severity and the accumulation of rules violations committed by respondent. 756 F.Supp., at 1250. Our cases make clear that at that point the shifted burden of production became

irrelevant: "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," Burdine, 450 U.S., at 255, 101 S.Ct., at 1094-1095, and "drops from the case," id., at 255, n. 10, 101 S.Ct., at 1095, n. 10. The plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," id., at 256, 101 S.Ct., at 1095, and that race was. He retains that "ultimate burden of persuading the [trier *2748 of fact] that [he] has been the victim of intentional discrimination." Ibid.

The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. It found that respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's coworkers were either disregarded or treated more leniently; and that Powell manufactured the final verbal confrontation in order to provoke respondent into threatening him. 756 F.Supp., at 1250-1251. It nonetheless held that respondent had failed to carry his ultimate burden of proving that his race was the determining factor in petitioners' decision first to demote and then to dismiss him.

In short, the District Court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." Id., at 1252.

.....

> The Court of Appeals set this determination aside on the ground that "[o]nce [respondent] proved all of [petitioners'] proffered reasons for the adverse employment actions to be pretextual, [respondent] was entitled to judgment as a matter of law." 970 F.2d, at 492. The Court of Appeals reasoned: "Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race." Ibid.

That is not so. By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a "better position than if they had remained silent."

If, on the other hand, the defendant has succeeded in carrying its burden of production, the McDonnell Douglas framework--with its presumptions and burdens--is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in Burdine that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. "450 U.S., at 254, 101 S.Ct. at 1094. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. Id., at 255, 101 S.Ct., at 1094-1095. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race, id., at 253, 101 S.Ct., at 1093. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, [FN4] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required," 970 F.2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." See, e.g., United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (citing Burdine, supra, at 256, 101 S.Ct., at 1095); Patterson v. McLean Credit Union, 491 U.S. 164, 187, 109 S.Ct. 2363, 2378, 105 L.Ed.2d 132 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228, 245-246, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989) (plurality opinion of Brennan, J., joined by Marshall, BLACKMUN, and STEVENS, JJ.); id., at 260, 109 S.Ct., at 1795-1796 (WHITE, J., concurring in judgment); id., at 270, 109 S.Ct., at 1801 (O'CONNOR, J., concurring in

judgment); id., at 286-288, *2750 109 S.Ct., at 1809-1810 (KENNEDY, J., joined by THE CHIEF JUSTICE and SCALIA, J., dissenting); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); cf. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659-660, 109 S.Ct. 2115, 2125-2126, 104 L.Ed.2d 733 (1989); id., at 668, 109 S.Ct., at 2130 (STEVENS, J., dissenting); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986, 108 S.Ct. 2777, 2784, 101 L.Ed.2d 827 (1988).

We reaffirm today what we said in Aikens:

"[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof,' Burdine, 450 U.S., at 252 [101 S.Ct., at 1093], in deciding this ultimate question." Aikens, 460 U.S., at 716, 103 S.Ct., at 1482.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justices Souter, White, Blackmun, and Stevens joined in a dissenting opinion to the Hicks majority. The dissent believed a plaintiff who shows pretext is entitled to judgment as a matter of law and supported its theory based on language from the original McDonnell-Douglas decision instead of its clarification in Aikens cited often by the majority. The dissent also argued policy grounds for focusing litigation on a specific reason stated by the employer for its actions and not every possible explanation for the personnel action. The dissent failed to address the majority's brief analysis of the applicability of Fed. R. Civ. Pro. 301 regarding proper application of presumptions.

Many civil rights groups criticized the Hicks decision as a degradation of employee rights and a distortion of the test previously applied, although a majority of the Circuits had applied the test as the Court interpreted in Hicks. Shortly after this decision, opponents in Congress proposed § 1776 to legislatively overrule Hicks and allow a discrimination plaintiff to prevail by simply rebutting the employer's stated reason for its actions. Although this bill never went through the required committees, the Department of Justice has announced its support for the proposal in future legislation. See Letter

from Assistant Attorney General Sheila F. Anthony to Sen. Edward M. Kennedy on §. 1776, 1994 Daily Lab. Rep. 193 d37 (Oct. 7, 1993). This legislation, in effect, would allow a finding of discrimination without proof by a preponderance of the evidence that discrimination motivated the action.

APPENDIX A

FORMS FOR USE

IN

MSPB DISCOVERY PROCEEDINGS

The following is by no means intended to be a complete list of all of the discovery forms that the Agency may utilize during the discovery period. It is intended solely to provide sample formats. Note that Appellants frequently are represented by attorneys who are accustomed to using the discovery procedures and techniques and you, as Agency representative, must be prepared to respond.

1. Motion for the Issuance of Subpoenaes.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES, Appellant,	)	
vs.	)	MSPB Case No: Date: _____
DEPARTMENT OF THE ARMY, Agency.	)	

MOTION FOR THE ISSUANCE OF SUBPOENAES DUCES TECUM

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, and hereby requests that subpoenaes duces tecum be issued to the persons named below, directing them to appear at the hearing in the above-named appeal for the purpose of giving their testimony and producing for review, inspection and copying, all letters, memoranda, notes, summaries, or other written records in whatever nature or form, which in any way pertain to (specify the reason or reasons for which you are requesting the records; e.g., records of arrest and conviction, etc.):

(List here the names and addresses of the witnesses for whom subpoenaes are being requested. If you have not done so already, provide a brief summary of the testimony you expect each witness to give.)

The Agency believes that the testimony and documents sought are relevant to the matters at issue in this appeal and that subpoenaes duces tecum are necessary to compel the attendance of the above-named witnesses.

WHEREFORE, the Agency respectfully requests that the Board issue the aforementioned subpoenaes duces tecum.

Respectfully submitted,

_____
Richard Roe
Agency Representative

2. Motion to Compel Answers to Interrogatories and/or Production of Documents

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No.:
	)	
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
	)	
Agency.	)	

MOTION TO COMPEL ANSWERS TO INTERROGATORIES

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, and pursuant to 5 C.F.R. 1201.72(c)(2), moves for an Order from the administrative judge requiring John A. Jones, Appellant in the above-named appeal, to provide answers to the Agency's First Set of Interrogatories, dated (date).

The Interrogatories were served upon the Appellant and his designated representative on (date). The Appellant has not filed answers to the Interrogatories and has not filed an objection to them.

The evidence and/or information sought is relevant to matters at issue in this appeal, or will lead to the discovery of relevant evidence and/or information. Accordingly, the Agency moves for an Order directing the Appellant forthwith to respond to each and every question set forth in the Agency's First Set of Interrogatories, mentioned above.

For the Agency:

_____
Richard Roe
Agency Representative

(The Motion to Compel Production of Documents is substantially similar to that for compelling answers to Interrogatories.)

3. Motion for the Imposition of Sanctions

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,)
Appellant,)
)
vs.) MSPB Case No.:
)
) Date: _____
DEPARTMENT OF THE ARMY,)
Agency.)

MOTION FOR IMPOSITION OF SANCTIONS

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, pursuant to 5 C.F.R. 1201.43 and, for the reasons set forth below, moves for the imposition of sanctions against the Appellant.

The Agency's First Set of Interrogatories were served upon the Appellant on (date). When the Appellant failed to answer said Interrogatories and filed no objection to them, the Agency sought and obtained an Order from the administrative judge directing the Appellant to submit his/her answers to the Agency on or before (date).

The Appellant has not submitted answers to the Interrogatories and otherwise has failed to respond to the Board's Order.

In view of the Appellant's willful failure to comply with the Order of the administrative judge, the Agency prays that the Board issue an Order dismissing the appeal with prejudice, or imposing such other sanctions against the Appellant as the administrative judge deems appropriate.

Respectfully submitted,

_____
Richard Roe
Agency Representative

4. Motion for Extension of Time

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No.:
	)	Date _____
DEPARTMENT OF THE ARMY,	)	
Agency.	)	

MOTION FOR EXTENSION OF TIME TO ANSWER INTERROGATORIES

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, and moves the administrative judge for an Order granting an extension of time for the reasons set forth below:

On (date), John A. Jones, Appellant, served the Agency with interrogatories pursuant to 5 C.F.R. 1201.72, et seq.

There are 48 of these interrogatories, many of them requiring the Agency to examine its books and records and to compile data, all of which will require a great deal of time.

The Agency is ready and willing to answer said interrogatories, but cannot do so within the period of time fixed by the administrative judge. As shown by the affidavits of the Personnel Officer and the Finance Officer, attached hereto, it will require at least 60 days for the Agency to compile the information necessary to answer said interrogatories.

WHEREFORE, the Agency prays that the Board issue an Order granting the Agency an enlargement of time within which to answer said Interrogatories or, alternatively, to relieve the Agency of the responsibility for providing answers to these interrogatories within the time specified by the administrative judge.

Respectfully submitted,

Richard Roe
Agency Representative

(Be sure to attach the affidavits setting forth a full explanation of the reasons for the Agency's inability to answer the Interrogatories requested.)

INTERROGATORIES/PRODUCTION OF DOCUMENTS

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES, Appellant,	)	
vs.	)	MSPB Case No.:
	)	Date: _____
DEPARTMENT OF THE ARMY, Agency.	)	

AGENCY'S FIRST SET OF INTERROGATORIES

THE DEPARTMENT OF THE ARMY, by and through its designated representative, herewith serves upon JOHN A. JONES and his representative, SAM SMITH, the following written interrogatories under the provisions of 5 C.F.R. 1201.72, et seq.

You are required to answer these Interrogatories separately and fully in writing, under oath, and to serve a copy of your answers to the Agency's representative within _____ days after service hereof.

All of the following interrogatories shall be continuing in nature until the date of the hearing, and you are required to supplement your answers as additional information becomes known or available to you.

No. 1

Were you scheduled for duty during the hours from 8 A.M. to 4:30 P.M., on January 2, 3, 4, 7, 8, 9, 10 and 11, 19___?

No. 2

If you were not scheduled for work during the hours cited in Interrogatory No. 1 above, what was your duty schedule for each day listed?

No. 3

Did you report for work for each of the days on which you were scheduled to work, as described in your answers to Interrogatories No. 1 and No. 2?

No. 4

If the answer to Interrogatory No. 3 is "no," please state the reason(s) why you did not report to work on the dates set forth therein, including:

a. whom you advised of these reasons and when;

b. each fact which supports each reason;

c. the identity of each and every document which supports your reasons; and

d. whether you possess any of these documents; if so, which ones.

(Continue with questions designed to elicit information to show that Appellant's absences were unauthorized. You may also ask other questions.)

No ( )

Do you contend that the Agency, in taking the action to remove you from your position, committed harmful error? If your answer is "yes," please state:

a. each fact which supports your contention, including specific references to all statutes, regulations, and procedures which you contend were violated;

b. in what way this alleged error was "harmful;"

c. the identity of each document which supports your contentions; and

d. whether you possess any of the documents; if so, which ones.

For the Agency:

_____

Richard Roe
Agency Representative

REQUEST FOR ADMISSIONS

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
vs.	)	MSPB Case No.:
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
Agency.	)	

REQUEST FOR ADMISSION OF MATTERS AND GENUINENESS OF DOCUMENTS

THE DEPARTMENT OF THE ARMY, by and through its representative, requests that JOHN A. JONES, and his designated representative, SAM SMITH, make the following admissions for the purpose of this appeal only:

That each of the following documents, attached to this Request, is genuine. (Here list the documents and briefly describe each document.)

That each of the following statements is true. (Here list the statements, based upon the reasons stated in the Notice, including statements regarding the past record.)

For the Agency:

_____
Richard Roe
Agency Representative

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

This is to certify that I have this day served (name) in the foregoing case with a copy of these pleadings: Agency's First Set of Interrogatories, Motion to Produce Documents and Request for Admissions, by depositing in the United States mail a copy of the same in a properly addressed envelope as follows with adequate postage:

(Address)

This _____ day of _____, 19___.

_____

Richard Roe
Agency Representative

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