

SUMMARY TABLE OF CONTENTS

PREFACE.....	i
CHAPTER 1: MSPB STRUCTURE AND JURISDICTION	1
CHAPTER 2: APPEAL AND DISCOVERY	475
CHAPTER 3: HEARING	797
CHAPTER 4: EVIDENCE	917
CHAPTER 5: INITIAL DECISION AND PETITION FOR REVIEW	1033
CHAPTER 6: ADVERSE ACTIONS	1245
CHAPTER 7: NEXUS AND MITIGATION	1511
CHAPTER 8: SUBSTANTIVE OFFENSES.....	1597
CHAPTER 9: PERFORMANCE CASES.....	1925
CHAPTER 10: REDUCTIONS IN FORCE.....	2001
CHAPTER 11: HARMFUL ERROR.....	2129
CHAPTER 12: DISCRIMINATION.....	2221
CHAPTER 13: PROHIBITED PERSONNEL PRACTICES.....	2427
CHAPTER 14: RETIREMENT AND REEMPLOYMENT — BY EDWARD H. PASSMAN.....	2687
CHAPTER 15: ATTORNEY FEES	2779
CHAPTER 16: SETTLEMENT, REMEDIES, AND ENFORCEMENT.....	2953
CHAPTER 17: JUDICIAL REVIEW	3257
CHAPTER 18: RESEARCH, REFERENCE MATERIALS, AND FORMS.....	3405
TABLE OF CASES.....	3435
INDEX	3545

TABLE OF CONTENTS

PREFACE	i
CHAPTER 1: MSPB STRUCTURE AND JURISDICTION	1
I. REFORM ACT	1
A. CAPSULE HISTORY OF THE REFORM ACT	1
B. OFFICE OF SPECIAL COUNSEL	2
II. ORGANIZATION AND ADMINISTRATIVE OPERATION	3
A. IMPARTIAL ADJUDICATION	3
1. <i>De Novo</i> Review of Agency Actions	4
B. CUSTOMER SERVICE STANDARDS	5
C. ORGANIZATION	5
1. Clerk	6
2. Office of Appeals Counsel	6
D. ADMINISTRATIVE JUDGES	7
1. Delegations of Authority	7
2. Judges' Handbook	7
a. Qualifications of Administrative Judges	7
3. Regulatory Responsibilities	8
a. Waiver of Procedural Regulations	8
b. Judges' Position Descriptions and Performance Standards.....	9
4. Quality Review	10
E. CASES OF PARTICULAR SIGNIFICANCE	11
1. Sensitive and Public Interest Appeals	11
2. Referrals to OPM and to OSC	11
3. Precedential Significance of Decisions of the MSPB, the Civil Service Commission, and the Courts	11
F. MSPB RECORDS	12
1. Gaining Access; Review Procedures	15
2. Precluding Access	15
a. Sanitization of Initial Decisions	15
b. Sealing of Records or Files	15
c. Attempts to Preclude Publication of Decisions.....	18
d. Expungement of Records	19
e. Classified Information	19
G. RESPONSIBILITY OF THE PARTIES IN MSPB CASES	19
III. GENERAL JURISDICTION	20
A. AN OVERVIEW	21
1. Scope of Jurisdiction	22
a. Jurisdiction Through Agency Regulation	22
2. Prohibition Against Advisory Opinions; Internal Guidance; Requests for Advisory Opinions	23
B. JURISDICTIONAL PREREQUISITES TO EMPLOYEE APPEALS	23
1. Summary of Appeal Rights.....	24
a. Adverse Actions	25
b. Performance-Based Actions	25
c. Demonstration Projects	26
2. Employees Who May Appeal; 5 USC 7511.....	26
a. 1990 Civil Service Due Process Amendments; Excepted Service Personnel.....	27
b. Excepted Service Employees Excluded From Coverage of Due Process Amendments.....	28
3. Nature of Civil Service Appointments	32
a. Competitive and Excepted Service	33
4. Preference Eligible Status.....	35
a. Disabled Veteran.....	40
b. Derivative Preference Eligible Status.....	40
c. Current Continuous Service.....	42
d. Same Line of Work; Same or Similar Position	45
C. TEMPORARY AND TERM APPOINTMENTS	51
1. Competitive Service Temporary, Term Appointees	52
2. Excepted Service Preference Eligible Temporary Appointees	56

3.	Excepted Service Nonpreference Eligible Temporary Appointees.....	56
D.	PROBATIONARY APPOINTMENTS.....	58
1.	Probationers With Prior Service That Qualifies for Appeal Rights; <i>McCormick v. Dept. of Air Force</i>	58
a.	Breaks in Service	65
2.	Probationary Classification Problems.....	66
a.	Individuals Hired From Registers	66
b.	Treatment of Transfers	67
c.	TAPER Appointments	69
3.	Calculating One Year of Service	69
a.	Incorrect Determination of End of First Year of Employment	69
b.	Effective Time and Date of Inexplicit Termination Notice	71
c.	Significance of SF-50; Unclear Appointment Date.....	71
4.	Prior Competitive and Excepted Service; Tacking.....	72
a.	WAE Appointments	77
b.	Same Agency; Military Departments	77
c.	Military Service.....	80
5.	Agreement to Serve Probationary Period; Waiver of Preexisting Appeal Rights	81
E.	APPEAL RIGHTS OF PROBATIONERS	82
1.	Appeal of Probationary Termination.....	83
2.	Classification of Probationers and Their Appeals	84
a.	Competitive Service Term Appointees	84
b.	Probationary Supervisors	84
3.	Jurisdictional Issues; Right to Hearing.....	87
a.	Effect of Collective Bargaining Agreement; Agency Regulations.....	88
b.	Other Contracts.....	89
c.	Harmful Error Analysis; <i>Stephen</i>	89
d.	Relationship to Suitability Determinations	91
4.	Constitutional Claims	94
5.	Preappointment Conditions	95
a.	Harmful Error Analysis	96
b.	Entitlement to Hearing	99
c.	Measure of Substantive Review	100
6.	Postappointment Reasons.....	100
a.	Pre- and Postappointment Distinctions.....	100
7.	Defective or Untimely Termination Notice	103
a.	Termination by Unauthorized Official.....	104
8.	Discrimination and Partisan Politics.....	105
a.	Nonfrivolous Allegations	105
b.	Partisan Political Reasons	106
c.	Marital Status	107
d.	Other Discrimination	110
9.	Involuntary Resignations.....	110
F.	LOSS OF APPEAL RIGHTS BY CHANGE IN POSITION.....	110
1.	Movement Between Positions in Same Agency	110
a.	Movement to Positions Through Settlement Agreements	115
2.	Movement From One Agency to Another; Transfers.....	115
G.	STATUS OF EMPLOYEE WHO APPEALS	118
1.	Temporary; Intermittent.....	118
a.	TAPER.....	119
b.	Seasonal; On-Call.....	119
c.	Intermittent	123
d.	Full-Time/Part-Time.....	124
e.	Postal Service Light Duty.....	124
f.	Indefinite Appointments	124
2.	Term Limited.....	124
a.	Appeal Right if Termination Occurs Before End of Term	125
3.	Nonappropriated Fund.....	126
4.	Veterans Readjustment Act.....	126
5.	Reemployed Annuitants.....	130
6.	Senior Executive Service.....	131
7.	Administrative Law Judges.....	131

8.	Disabled Employees	131
9.	Employees in Confidential, Policy-Making, Policy-Determining Positions; Presidential Appointees	134
a.	White House and Executive Office of the President Employees	138
10.	Aliens; Noncitizens	138
11.	Students.....	138
12.	Judicial Branch	139
13.	Government Corporations.....	140
14.	Postal Service	141
a.	One Year of Qualifying Service; Current Continuous Service in Same or Similar Position	145
b.	Postal Supervisors and Managers	151
c.	Postal Personnelists and Confidential Employees.....	155
d.	Postal Service Employees Who Lack Preference Eligibility, Who Have No Negotiated Grievance Procedures, and Who Are Neither Managers nor Personnelists	159
15.	Contractors	162
16.	Others.....	162
H.	AGENCIES WITH SPECIALIZED PERSONNEL SYSTEMS: EXCLUSIONS FROM AND MODIFICATIONS TO MSPB JURISDICTION	162
1.	Department of Homeland Security	162
a.	DHS Regulations Implementing the DHS Human Resources Management System	163
b.	MSPB Regulations Implementing Appeals From Employees Under the DHS Human Resources Management System	169
c.	Transportation Security Agency: Screeners; Other Employees	172
d.	Reduction in Force	179
e.	Federal Aviation Administration	179
2.	Department of Defense National Security Personnel System	184
3.	District of Columbia	185
4.	Central Intelligence Agency; Defense Department Intelligence	185
5.	Federal Bureau of Investigation	186
6.	Canal Zone.....	186
7.	National Archives	186
8.	National Guard Technicians.....	186
9.	Tennessee Valley Authority Employees.....	188
10.	Library of Congress; GAO; Congressional Employees.....	188
a.	Ramspeck Act	189
11.	Smithsonian Institution	189
12.	Bureau of Indian Affairs.....	189
13.	MSPB Employees.....	189
14.	Department of Veterans Affairs Title 38 Employees	189
a.	Actions Against Healthcare Professionals Not Involving Professional Conduct or Competence.....	192
b.	Involuntary Retirements, Resignations.....	193
c.	Veterans Canteen Service.....	195
15.	Agriculture: Stabilization and Conservation Service; Cooperative Extension Services	196
16.	Dependents Schools Personnel.....	197
17.	Office of Independent Counsel.....	198
18.	Foreign Service.....	198
19.	World Bank	198
I.	NATURE OF PERSONNEL ACTION APPEALED.....	199
1.	Possible Adverse Action; Proposals	199
2.	Suspensions	199
a.	Paper Suspensions	200
b.	Consolidation of Short Suspensions.....	200
c.	Calculation of Duration of Suspension	201
d.	Erroneous Imposition of Suspension Exceeding 14 Days	201
e.	Indefinite Suspension	201
3.	Reassignments; Details; Transfers; Nonselections	201
a.	Rank Reductions	203
b.	Loss of Promotional or Earnings Opportunities; Change in Work Schedule.....	203
c.	Disciplinary Reassignments; Unified Penalties	205
d.	Disabled Employees	206
4.	Pay and Classification Changes.....	206
a.	Classification	207

b.	Pay System Conversion	208
c.	Correction of Pay	209
d.	Reduction in Pay	214
e.	Misrepresentations Concerning Pay Rates	215
f.	Termination of Premium Pay; LEAPA; Seniority Roster Adjustments; Severance Pay; Bonuses	216
g.	Retirement Credit, Contributions, and Incentives	220
h.	Mandatory Retirement	220
i.	Debt Collection; Recoupments	221
j.	Leave Disputes; Administrative Leave	223
5.	Pay and Compensation Claims: Role of OPM	224
6.	Promotion Issues	224
a.	Termination of Temporary Promotions	225
b.	Return Rights—Overseas Employees	226
7.	Minor Disciplinary Actions.....	227
8.	Back Pay Disputes	227
a.	Retirement Payments	227
9.	Resignation.....	227
a.	Abandonment of Position	227
10.	OWCP Benefits; Insurance Programs.....	227
11.	Requests for Reinstatement: Non–Military Personnel.....	232
a.	Failure to Rehire	232
b.	Reinstatement Rights—Occupational Illness or Injury; Others.....	232
12.	Performance Standards; Ratings; PIP	233
13.	Prohibited Personnel Practices.....	233
14.	Merit System Principles Violations	234
15.	Constitutional Violations	234
16.	Miscellaneous Matters	235
J.	EFFECT OF COLLECTIVE BARGAINING AGREEMENT GRIEVANCE PROCEDURES	235
1.	Postal Service Employees	238
a.	Effect of EEO Allegations or EEO Complaint	239
2.	Administrative Grievance Systems	239
3.	Statutory Grievance Systems; Foreign Service Grievance Board	240
4.	Employee Choice: Adverse Actions; Performance Cases	240
5.	Contractual Exclusivity; When EEO Allegations Must Be Raised	240
a.	USERRA Claims	243
b.	Reduction in Force	246
c.	Acceptable Level of Competence Determination	247
6.	Problems Arising From Choice of Contractual Procedures.....	247
a.	Incorrect or Inadequate Advice From Agency.....	247
b.	Dispute Over Bargaining Unit Status or Arbitrability; Cross–Filing	249
c.	Defunct Union	251
d.	Union Actions on Behalf of Employees	253
e.	What Constitutes Filing of Grievance	254
f.	Premature or Ineffective Elections	255
g.	Failure to Obtain Arbitration Hearing	256
7.	Allegations of Discrimination	258
8.	Indefinite Suspensions.....	260
9.	Appeal Right With Arbitration Award; Employees of Agencies Other Than Postal Service	260
10.	Unfair Labor Practice Charges	262
K.	GRADE AND PAY RETENTION	263
1.	<i>Atwell</i>	264
a.	Allegations of Discrimination	266
2.	Absence of Retention; Benefits Declined	266
3.	Appeal of RIF; Classification	267
4.	Termination of Pay Retention	269
a.	Restoration Actions.....	269
IV.	SPECIALIZED JURISDICTION	269
A.	RIGHTS OF MILITARY PERSONNEL AND VETERANS.....	269
B.	UNIFORMED SERVICE EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT	273
1.	USERRA Appeal Directly To The Board Or Through the Department of Labor.....	276
2.	Regulations Governing USERRA, VEOA Claims	276

a.	Hearings	278
3.	USERRA Statutory Structure	280
a.	Scope of USERRA	286
b.	Liberal Pleading Standard	289
c.	Burden of Proof	289
d.	Discrimination Because of Military Service	293
e.	Covered Personnel; Agencies.....	296
f.	Disability Incurred While in Military Service	297
g.	Affirmative Defense	298
h.	Related EEO Violations; Prohibited Personnel Practice Allegations	298
4.	Liberal Construction of Pleadings; Jurisdictional Allegations; Avoidance of Summary Disposition	301
a.	Waiver of Right to Appeal	304
5.	Recovery Period for USERRA Claim.....	304
6.	Time for USERRA Appeal	307
a.	Nonretroactive Substantive Application.....	309
b.	Vietnam Era Veterans' Readjustment Assistance Act of 1974.....	312
7.	Judge's Responsibilities in USERRA Appeal	313
8.	Covered Employees.....	313
9.	Covered Personnel Actions, Benefits	314
a.	Dismissal From Employment; Demotion	314
b.	Constructive Adverse Action	315
c.	Suspension	315
d.	Failure to Appoint; Burden of Proof	316
e.	Failure to Consider Employee for Vacant Positions	320
f.	Failure to Promote.....	322
g.	Reassignments	323
h.	Retirement Plans.....	324
i.	Education Benefits	325
j.	Military Leave; <i>Butterbaugh</i>	325
k.	Harassment; Hostile Working Environment.....	329
10.	Changes in Employment Status, Benefits Following Restoration to Duty	330
11.	Charges to Leave	331
12.	Intervening RIF	331
C.	VETERANS EMPLOYMENT OPPORTUNITIES ACT	332
1.	VEOA Statutory Structure.....	340
a.	Remedial Structure; Reconstruction of Selection Actions; Damages.....	342
b.	Protection of Individuals With Veterans' Preference Status; Postal Service; Foreign Service	350
c.	Exclusions From Statutory Coverage	352
d.	Exhaustion of Remedies; Timeliness of Appeal; <i>Kirkendall</i> and Equitable Tolling.....	353
e.	Effect of Settlement Reached by Department of Labor	362
f.	Jurisdictional Allegations	363
g.	Nonfrivolous Jurisdictional Allegations	363
h.	Exclusivity of VEOA Remedy	365
2.	Personnel Actions Challenged Under VEOA	365
a.	Merit Selection Procedures; Reassignments; Promotions	365
b.	Improper Assessment of Qualifications Standards	389
c.	Age Limitations on Appointments.....	390
d.	Excepted Service.....	395
e.	Manipulation of Appointments; Passover Process; Medical Suitability Determinations.....	398
f.	Veterans Readjustment Authority Appointments	406
g.	Federal Career Intern Program Appointments	408
h.	Related EEO Violations.....	411
i.	Disciplinary Cases.....	411
j.	Retirement Benefits	411
D.	SUITABILITY DETERMINATIONS	411
1.	Application to Competitive Service Appointees	417
2.	Suitability Determinations by Agencies Operating Under Authority Delegated by OPM	418
a.	Cases Involving Evidence of Material, Intentional False Statement or Deception or Fraud	419
b.	Nonselection for Position	421
3.	Adjudication Standards	428
a.	Mitigation; EEO Defenses	430

b. Rehabilitation.....	431
4. Evidence	431
a. Collateral Estoppel; <i>Res Judicata</i>	433
5. Bases for Suitability Determinations	434
a. Falsification of Employment Documents	434
b. Involvement With Drugs	435
c. Other Problems	436
6. Defenses; Disparate Treatment	436
7. Remedy in Suitability Cases.....	436
a. Mootness.....	438
8. Relationship of Suitability and Passover Determinations	438
E. OPM REGULATION REVIEW; CHALLENGES TO AGENCY IMPLEMENTATION OF OPM REGULATIONS; TESTS OF OPM EMPLOYMENT PRACTICES	438
1. Review Procedures	438
2. General Criteria for Regulation Review and Regulation Implementation Review	438
a. Distinction Between Regulation Review and Implementation Review.....	440
3. Pleading Requirements; Scope of Review.....	441
a. Discretionary Review; Likelihood of Success.....	443
b. Likelihood of Harm	443
c. Likelihood Issues Will Be Addressed in a Different MSPB Appeal or a Different Forum.....	443
d. Standing; “Interested Person”	445
e. Covered Personnel Actions	446
4. Examples of Regulation Review	446
a. ALJ Examination Authority	446
b. SES Reassignments and Work Schedules	446
c. Administration of Leave	448
d. Scope of Administrative Grievance Procedures	448
e. Other Issues	448
5. Examples of Regulation Implementation Review	450
a. SES Performance Appraisal Disputes	451
6. Employment Practice Challenges	452
a. Agency Misapplication of Valid OPM Requirement	454
b. Standing to Raise Challenge	456
c. General Characteristics of Tests Rather Than Individual Examination Results at Issue	457
d. Failure to Hire.....	458
e. Scope of Competition.....	458
f. Position Qualification Standards; Educational Requirements.....	459
g. Medical and Physical Qualification Requirements	463
h. OPM Involvement in Agency Selections	464
i. Selection and Examination Practices for Administrative Law Judges.....	466
j. Passover Determination.....	471
k. Time-in-Grade Restrictions	472
l. Eligibility Ratings and Suitability Determinations	473
m. Failure to Promote.....	473
n. Remedy	474

CHAPTER 2: APPEAL AND DISCOVERY475

I. INITIATING AN APPEAL.....	475
A. RULES AND PRACTICES OF GENERAL APPLICATION GOVERNING APPEALS	475
1. Dates of Filing	475
2. Service of Pleadings	475
a. Date of Filing; Electronic Filing; Technical Difficulties	475
3. MSPB Processing of the Appeal	478
B. TIME FOR FILING THE APPEAL	479
1. MSPB Treatment of Timeliness Issues	479
2. Jurisdiction or Timeliness as Alternate Bases for Dismissal of Appeal	480
3. Time to Appeal; Regulatory Provisions; Computation of Time.....	482
a. Technical Constructions.....	483
b. Uniform Application.....	484
c. Requests for Extension of Time to Appeal	485
4. Suspension Appeals.....	485

a.	Indefinite Suspensions; Enforced Leave.....	485
5.	Individual Right of Action Appeals.....	489
6.	USERRA Appeals.....	489
7.	Negative OPM Reconsideration Decision Appeals.....	490
a.	Failure to Seek Timely Reconsideration.....	491
b.	Relationship Between Scope of Reconsideration Request and MSPB Appeal.....	494
c.	Failure of OPM to Act Upon Reconsideration Request.....	494
d.	Overpayment Determinations.....	496
8.	Law Enforcement Officer Retirement Credit Appeals.....	496
C.	METHOD AND PLACE OF FILING.....	498
1.	Method of Filing.....	498
a.	Mail.....	498
b.	Commercial Delivery.....	499
c.	Facsimile.....	499
d.	Personal Delivery.....	500
2.	Irregular and Misdirected Filings.....	500
a.	Appeals to or From Congressional Offices.....	500
b.	Misfiled Mixed Case Appeals.....	501
c.	Non-Mixed Appeal Filed With Employing Agency.....	502
d.	Appeals Misdirected Within MSPB, to OPM or OSC.....	503
e.	Incomplete Appeals.....	504
D.	PREMATURE APPEALS.....	504
1.	Premature Appeals That Ripen Into Appealable Actions During Regional Adjudication or During PFR.....	505
2.	Retirement Appeals.....	506
3.	Mixed and Whistleblowing Cases; Actions Initiated in Court.....	507
E.	TIMELINESS OF APPEALS.....	507
1.	Responsibilities of the Judge and the Parties in Appeals Involving Timeliness Issues.....	508
a.	Mental or Physical Illness; <i>Lacy</i> Notice.....	508
b.	Duty of Appellant to Produce Evidence Concerning Timeliness.....	510
c.	Duty of Agency and Judge to Produce and Develop Evidence.....	511
2.	Waiver; <i>Alonzo</i>	513
a.	Prejudice to Respondent.....	515
b.	Laches.....	515
c.	Current Law on Waiver; Multifactor Analysis.....	515
d.	Historical Position on Waiver.....	520
e.	Retirement Appeals.....	521
3.	Application for Waiver.....	522
a.	Hearing Entitlement With Late Appeal.....	523
4.	Due Diligence.....	526
5.	Contractual Stay Provisions; Postal Service Employees.....	526
F.	EXCUSES FOR LATE FILING.....	528
1.	Sickness or Hospitalization.....	528
a.	Supporting Evidence.....	529
b.	Mental Impairment.....	530
c.	Effect of Continuing Mental Disorder on Filing Deadline.....	531
2.	Business or Outside Activities.....	532
3.	Military Service.....	533
4.	Incarceration; Criminal Proceedings.....	535
5.	Need to Obtain Documentation.....	535
6.	Unfamiliarity With MSPB Procedures and Law.....	536
a.	Inability to Obtain Counsel.....	536
b.	Language Difficulties.....	537
c.	Miscalculation of Time for Appeal.....	537
7.	Lack of, Interference With, or Incorrect Notice.....	538
a.	Obligation to Provide Notice.....	538
b.	Belated Receipt of Adverse Action Decision.....	541
c.	Constructive Receipt of Decision Notice.....	543
d.	Proof Concerning Delivery of Notice of Appeal Rights.....	544
e.	Appellant's Obligation of Due Diligence When Removal Notice or Appeal Rights Not Received.....	544
f.	Notice of Appeal Rights to Appellant's Representative.....	544
g.	Constructive Adverse Action; Notice if Agency Learns of Protest.....	545

h.	Constructive Adverse Action Without Agency Notice	547
i.	Initiation of Adverse Action or Performance-Based Appeals Arising From Last Chance or Other Settlement Agreements.....	557
j.	Lack of Notice Concerning Restoration and Reemployment Appeal Rights	559
k.	Enforced Leave	563
l.	Agency on Notice but Fails to Provide Appeal Rights; Secondary Information Concerning Appeal Rights	563
m.	Prior or Subsequent Notice of Filing Deadlines.....	565
n.	Agency Misrepresentation.....	565
o.	Threats by Agency Personnel.....	567
p.	Mixed Case Notice Problems.....	567
q.	Problems With Receipt of Mail; Certified Mail; International Mailings	569
8.	Appeals Lost in the Mails.....	572
9.	Problems Caused by Adjudicators; Misdirected Appeals.....	574
a.	MSPB	574
b.	EEOC	574
c.	OPM.....	575
10.	Uncertainty as to Outcome of a Related Case; Pending Settlement Negotiations	576
a.	Grievances.....	576
b.	Use of Alternate Forum	577
11.	Inadequate Representation.....	577
a.	Not Excused.....	577
b.	Excused; Obstruction or Misrepresentation by Counsel	578
c.	Excused; Inconsequential Delays by Representatives.....	581
12.	Other Problems	582
G.	TIME FOR RAISING NEW APPELLATE ISSUES AND CLAIMS.....	582
1.	Issues and Defenses	582
a.	Liberal Construction of Pleadings	583
b.	EEO Affirmative Defenses	583
2.	Claims	583
H.	MOOT, WITHDRAWN, AND WAIVED APPEALS.....	583
1.	Mootness of Appeal	584
a.	Cancellation of Action Appealed.....	584
b.	Appellant Resigns Prior to Termination	586
c.	Restoration of <i>Status Quo Ante</i>	586
d.	Initiation of New Action Based on Events Leading to Cancelled Action	591
e.	Procedure Followed if Action Not Completely Rescinded.....	591
f.	Collateral Issues Following Rescission of Action; Claims for Counsel Fees or Damages; Interest	592
g.	Procedures for Raising Issues Pertaining to Restoration of <i>Status Quo</i>	593
h.	Procedure Following Remand to Judge.....	594
i.	Settlement Independent of MSPB Appeal	594
j.	Complete Relief Through Other Means; Stays of Pending Litigation	601
k.	Whistleblower Protection Act: Claims for Damages, Other Relief	601
l.	Uniformed Services Employment and Reemployment Rights Act	607
m.	EEO Allegations; Claims for Damages	608
n.	Effect of Resignation	610
o.	Criminal Conviction	610
p.	Consecutive Adverse Actions.....	610
q.	Retirement Appeals, Issues	611
r.	Compliance or Enforcement Issues.....	613
s.	Other Problems	614
2.	Effect of Retirement on Appealable Actions	614
a.	Reductions in Force	621
b.	Law Prior to 1989.....	622
3.	Withdrawal of Appeal.....	623
a.	Withdrawal to Pursue EEO Complaint.....	626
b.	Withdrawal to Pursue a Contract Grievance Procedure	628
c.	Confusion Between Necessity for Withdrawal of Appeal, Continuance, and Withdrawal of Appeal Without Prejudice to Refile	628
d.	Unauthorized Act of Representative	629
e.	Duress; Misrepresentation; Incompetence	632
f.	Misleading or Incomplete Information From Judge.....	634

g.	Attempts to Reinstate Withdrawn Appeals.....	637
4.	Dismissal Without Prejudice.....	638
a.	Pending Criminal Proceedings; Indefinite Suspensions.....	642
b.	Procedures for Obtaining Dismissal; Refiling	643
c.	Refiling Dates.....	644
d.	Effect of PFR	645
e.	Agency–Initiated Requests.....	646
f.	Dismissals Initiated by Judge or MSPB	646
g.	Delays in Refiling	648
h.	Imperfect Attempts to Refile; Confusion Caused by Judge.....	651
5.	Waiver of Appeal Through Last Chance Agreements	652
a.	Jurisdictional Analysis.....	653
b.	Public Policy Considerations; Valid Consideration; Scope of Agreement	658
c.	Ambiguous Terms; Failure to Waive Future Appeal Rights.....	659
d.	Due Process Considerations; Notice	663
e.	Last Chance Agreement Superseded by Independent Adverse Action.....	664
f.	Agreement Preceding Effective Date of Adverse Action; Agreement to Accept Demotion.....	666
g.	Bad Faith, Coercion, or Lack of Mental Capacity in the Inducement of the Agreement as a Condition to MSPB Jurisdiction.....	669
h.	Agency Noncompliance With the Agreement as a Condition of MSPB Jurisdiction	673
i.	Burden of Proof on Issue of Breach of Last Chance Agreement.....	674
j.	Entitlement to a Hearing	676
k.	Illegal or Punitive Terms.....	678
l.	Conditions Unrelated to Underlying Action.....	679
m.	Claims Collateral to Breach of Agreement.....	684
n.	Duration of Agreement	684
6.	Personnel Actions Reached Through Settlements Not Constituting Last Chance Agreements	685
II.	FORMAT AND PRELIMINARY PROCESSING OF APPEAL.....	686
A.	ESSENTIAL INFORMATION.....	686
B.	FORMAT.....	687
1.	Interpretation of the Appeal.....	688
2.	Signature	689
3.	Appeals Filed Through Representatives	689
4.	“John and Jane Doe” Appeals: Protecting the Appellant’s Privacy.....	689
5.	Agency–Initiated Retirement Appeals	692
6.	Class Actions, Consolidated Appeals, and Joinder.....	692
a.	Class Actions.....	692
b.	Consolidation; Joinder; Compulsory Joinder	694
7.	Motions for Substitution; Survival of Claims.....	697
a.	IRA Cases	699
8.	Intervention	699
a.	Intervention of Right: OPM, OSC.....	700
b.	Permissive Intervention Procedures	702
c.	Rights of Intervenors.....	704
d.	<i>Amicus Curiae</i>	704
C.	STEPS TAKEN AFTER THE APPEAL IS FILED	705
1.	Acknowledgment of the Appeal	706
a.	Philippines Retirement Appeals	707
2.	Amendment of the Appeal.....	707
3.	Service of Pleadings	707
4.	Deficient Appeals.....	708
D.	AGENCY RESPONSE TO THE APPEAL.....	709
1.	Narrative Response to the Appeal	710
2.	Motion to Dismiss Appeal.....	710
3.	Delay in Appeal Response.....	711
4.	Designation of Agency Representative.....	711
E.	APPEALS INVOLVING JURISDICTIONAL ISSUES.....	711
1.	Nonfrivolous Jurisdictional Allegations	714
2.	Judge’s Responsibilities to Parties.....	714
3.	Agency Representative’s Responsibilities	717
4.	Hearings on Jurisdictional Issues	717

F.	REPRESENTATIVES.....	718
1.	Right to Representation.....	718
a.	Inadequate Representation.....	719
b.	Service on Representative.....	720
2.	Disqualification of Representative.....	720
3.	Conflicts.....	721
a.	Representatives as Witnesses.....	723
4.	Disciplinary Rules and Proceedings.....	723
G.	PRO SE AND INADEQUATELY REPRESENTED PARTIES.....	724
1.	Pro Se Appellants.....	724
2.	Assistance to Mentally Incompetent Appellants; French Procedures.....	724
H.	EX PARTE COMMUNICATIONS.....	728
1.	What They Are.....	729
2.	How Ex Parte Communications Are Treated.....	731
III.	INTERLOCUTORY APPEALS.....	731
A.	INTERLOCUTORY APPEAL PROCEDURE.....	731
1.	Regulation.....	732
2.	Application of Regulation.....	734
a.	Rulings on Bias and Intervention.....	735
b.	Direct Appeal to MSPB.....	735
3.	Stays of Proceedings.....	735
IV.	DISCOVERY.....	736
A.	AN OVERVIEW OF DISCOVERY PROCEDURES.....	736
1.	Preliminary Steps; Initial Disclosures.....	739
2.	Discovery Limitations.....	740
a.	Jurisdictional Issues.....	741
b.	Department of Homeland Security Cases.....	741
3.	Discovery Disputes; Motions to Compel.....	742
4.	Federal Rules.....	743
a.	Federal Rules of General Application.....	743
5.	Interrogatories.....	745
a.	Use of Interrogatories.....	745
6.	Depositions.....	746
7.	Other Discovery Devices.....	748
a.	Document Requests.....	748
b.	Requests for Admissions.....	749
c.	Medical, Psychiatric Examinations.....	750
d.	Motion for More Definite Statement of Appeal.....	751
8.	Discovery From Nonparties.....	752
B.	STRATEGIC CONSIDERATIONS IN DISCOVERY.....	752
1.	Burdensome Discovery; Effect of EEO, Reprisal Allegations.....	752
a.	Discovery During the Pendency of Criminal Proceedings.....	753
2.	Privileged Information.....	754
a.	In Camera Inspection.....	754
b.	Law Enforcement Privilege.....	755
c.	OSC Files; Executive, and Investigative Privileges.....	756
d.	OPM Suitability Files.....	757
e.	Agency Investigative Files.....	757
f.	Attorney–Client Privilege.....	758
g.	Attorney Work Product Privilege.....	761
h.	Agency Deliberative Process Privilege.....	764
i.	Statutory Confidentiality Limitations.....	765
3.	Privacy Act.....	766
4.	Failure to Use Discovery; Informal Discovery Efforts.....	768
a.	Informal Discovery; Control by Agencies of Employees’ Time.....	769
5.	Protective Orders.....	770
C.	ENTRY OF DISCOVERY MATERIAL INTO THE RECORD.....	770
D.	SUBPOENAS.....	772
1.	When a Subpoena Is Used.....	772
2.	Obtaining and Serving Subpoenas.....	772
3.	Subpoena Enforcement.....	774

4. Witness Fees; Travel Allowances	774
E. REVIEW OF DISCOVERY RULINGS	775
1. Effect of Denial of Discovery	775
a. Preservation of the Issue.....	777
2. Rulings on Discovery Disputes.....	777
a. Synopsis of Testimony	777
b. Relevance	778
c. Mitigation; Disparate Treatment	779
d. Deposition of Agency Head.....	779
3. Discovery in OSC Cases	779
V. SANCTIONS	780
A. MONETARY SANCTIONS; ATTORNEY FEES	781
B. FAILURE TO RESPOND TO APPEAL	781
1. Default Judgments	782
C. FAILURE TO PROSECUTE APPEAL	783
1. Dismissal Warranted	783
a. Failure to Provide Basis for Appeal	783
b. Failure to Designate Representative.....	784
c. Failure to Comply With Prehearing Order.....	784
2. Dismissal Unwarranted	785
a. Failure to Attend Hearing	786
b. Inadvertent or Isolated Failure to Obey Order	786
c. Late Appeals.....	788
D. FAILURE TO COOPERATE IN DISCOVERY	788
1. Discovery Procedures	788
a. Sanctions Against the Agency	790
b. Materials in Control of Third Parties.....	792
c. Sanctions Against the Appellant	792
E. FAILURE TO FOLLOW PREHEARING OR HEARING PROCEDURES	794
1. Sanctions Against the Appellant; Prejudice to the Agency	794
2. Sanctions Against the Agency	796

CHAPTER 3: HEARING797

I. HEARING.....	797
A. RIGHT TO HEARING	797
1. Jurisdictional Hearing; Documentary Evidence.....	798
a. Timeliness Issues	801
b. Issues of Law; No Material Disputed Facts	801
2. Counsel	802
3. Homeland Security Personnel System Appeals	802
4. Control by Judge	802
a. Role of Intervenors	805
b. Official Time; Resources Available to Appellant	805
B. WAIVER OF HEARING.....	805
1. Inability to Travel to Hearing Site	808
2. Failure to Request Hearing	808
3. Untimely Hearing Request.....	810
a. Effect of Amendment of Appeal	811
4. Withdrawal of the Hearing Request	811
5. Failure to Attend Hearing.....	811
a. Failure to Receive Hearing Notice.....	811
b. Continuance Denied	812
c. Events Beyond Appellant’s Control.....	813
6. Strategic Considerations—Intentional Waiver	813
7. Adjudication After Waiver, Failure to Attend Hearing.....	814
8. Cases Adjudicated Without a Hearing; Right to Respond to Evidentiary Submissions	814
C. CONTINUANCE OF THE HEARING	818
1. Timing of the Hearing	818
2. MSPB Policy on Continuances	818
a. Dismissals Without Prejudice to Refile	819
b. Case Suspension Procedure.....	819

3.	Continuance Procedure	820
a.	Request; Form of Sworn Statement	821
b.	Failure to Make Request.....	821
c.	Status of Pending Motion.....	822
d.	Proceeding After Denial of Motion	822
4.	Good Cause Requirement.....	822
a.	Need to Prepare	822
b.	Awaiting Outcome of Another Case.....	822
c.	Unavailability of Representative	823
d.	Appellant Proceeds to Hearing Without Representative	825
e.	Medical Condition of Appellant.....	826
f.	Dismissal Without Prejudice as Alternative to Continuance	826
g.	Prejudice to Criminal Trial; Effect of Appeal of Conviction; Indefinite Suspensions.....	826
h.	Military Service	829
i.	Appellant Incarcerated	829
j.	Change in Hearing Location.....	830
k.	Missing or Unavailable Witness	830
5.	Continuance Denial—Review Standard	831
D.	VENUE OF HEARING.....	832
1.	Change of Venue	832
a.	Cost to Appellant	834
2.	Requesting a Change of Venue.....	834
3.	Venue Determination Review Standard	834
E.	HEARING FUNDAMENTALS	834
1.	Change, Resignation, or Death of Judge	834
2.	Interaction With Judges.....	835
3.	Prehearing Conference	835
a.	Preservation of Objections	838
b.	Stipulations.....	838
c.	Waivers	838
d.	Dismissal of EEO Claims	838
e.	Dismissal of Charges	839
4.	Prehearing Orders and Submissions; Prehearing Conference Memoranda	839
a.	Preservation of Issues for PFR Through Objection to Prehearing Rulings	841
F.	CONDUCT OF HEARING; RESPONSIBILITIES OF JUDGE	842
1.	Hearing Errors: Measure of the Damage.....	843
a.	Timing of Submission of Pleadings	843
b.	Timing of Initial Decisions	844
2.	Control and Exclusion of Representatives and Participants	844
3.	Maintaining Order.....	845
a.	Exclusion From Hearing Room of Individuals Whose Presence May Intimidate Witnesses.....	845
b.	Security Arrangements.....	846
4.	Control of Witnesses; Sequestration	846
5.	Conduct of Questioning	849
a.	Multiple Representatives; Questioning of Witnesses	849
6.	Permitting Record Development	849
a.	Telephone and Videoconference Hearings.....	850
b.	Bifurcated Hearings	855
c.	Hearing Subpoenas	856
7.	Ensuring Record Development; EEO Files.....	856
a.	Retirement Benefit Cases.....	859
b.	Duty of Judge to Inform an Appellant of the Governing Law; Assistance to <i>Pro Se</i> Appellants; Liberal Construction of Pleadings	860
8.	Raising Issues <i>Sua Sponte</i> ; Addressing Legal Issues	862
9.	Preserving Review Rights Through Objections	863
10.	Media Coverage.....	864
11.	Closing the Hearing.....	865
12.	Timing of the Hearing.....	865
13.	Special Hearing Arrangements; Interpreters.....	865
a.	Disability of the Appellant.....	866
14.	Allocation of the Burden of Proof.....	866

15. Opening Statements.....	867
a. Advice to All Representatives	867
b. Advice to Appellant’s Counsel	867
16. Submission of Briefs; Closing Argument	867
G. PREVENTION OF INTERFERENCE WITH MSPB PROCEEDINGS	868
1. Protective Orders.....	868
2. Protective Orders for Appellants	869
3. Interference With and Protection of Witnesses, Representatives; Sanctions	870
H. POSTHEARING ACTIVITIES	874
1. Closing the Record.....	874
a. Ensuring Notice of Record Closing	875
b. Clarifying Scope of Record; Off-the-Record Discussions	876
c. Timing of Evidentiary Submissions and Responses.....	876
d. Effect of Closing the Record	877
2. Regional Authority After Initial Decision	877
a. Judge’s Request to Reopen Record to Correct Error	878
II. MOTION PRACTICE	878
A. USE OF MOTIONS.....	878
1. Dispositive Motions	879
a. Motion to Dismiss Filed Prior to Hearing	879
b. Motion to Dismiss Filed During Hearing.....	880
c. Summary Judgment.....	881
B. FORM AND TIMING OF MOTIONS.....	885
III. WITNESSES	886
A. WITNESS REQUESTS	886
1. Obligation to Permit Relevant Testimony	887
a. Competence to Testify	887
b. Appellant	887
c. Decisionmakers.....	887
d. Agency Head	888
2. Obligation to Request Witnesses	888
a. Use of Witness List.....	889
b. Rebuttal Witnesses.....	890
3. Repetitious Testimony	891
4. Offers of Proof	891
5. Compelling Witness Attendance	891
a. Appellant.....	892
b. Others; Former Employees; Subpoenas	892
c. Duty Status of Federal Employee Witnesses; Entitlement to Pay, Travel Expenses, Per Diem	892
d. Official Time for Federal Employees.....	893
6. Protecting the Record; Missing Witnesses	893
a. Preservation of Objections.....	894
7. Judges May Call Witnesses	895
8. Obtaining Testimony by Alternate Means.....	895
9. Right of Witnesses to Representation.....	895
a. Self-Incrimination	895
10. Witness Denial—Review Standard	895
B. EXAMINATION OF WITNESSES	897
1. Production of Witness Statements and Documents Relied Upon During Testimony	898
2. Taking Witnesses Out of Order	898
3. Leading Questions.....	899
4. Control by the Judge	900
5. Examination by the Judge	900
IV. DISQUALIFICATION OF THE JUDGE	900
A. PRESUMPTION OF HONESTY AND IMPARTIALITY	901
1. Competence of Judges	903
B. TREATMENT OF BIAS ALLEGATIONS.....	903
1. Procedures; Documenting the Record	905
2. Significance of Extrajudicial Source of Bias.....	907
3. Judge’s Treatment of Bias Allegation	907
4. Specific Bias Allegations	908

a. Relationship With Party or Witness	908
b. Improper Communication	908
c. Examination of Witnesses.....	908
d. Criticisms of Counsel, Party, or Position; Settlement Efforts; <i>Ex Parte</i> Communications	908
e. Change in Judges Without Finding of Bias	912
f. Prior Rulings Against Party.....	914
g. Erroneous Rulings	914
h. Incorrect Factual Conclusions.....	914
i. Hasty or Late Decisions	914

CHAPTER 4: EVIDENCE917

I. FUNDAMENTALS	917
A. RELEVANCE, MATERIALITY, AND FAIRNESS	917
1. Informal Adjudication	917
2. Relevance and Materiality	917
a. <i>De Novo</i> Review	918
b. Conditional Admission of Evidence.....	918
3. Record.....	918
a. Offers of Proof.....	918
4. Fairness in Development of Evidence.....	918
a. Erroneous Exclusion of Evidence	918
b. Erroneous Admission of Evidence.....	919
c. Manipulation or Redaction of Evidence.....	919
B. NATURE OF CHARGES	920
1. Evidentiary Value of Charges	920
a. Response to Charges	921
C. PROBLEM OF HEARSAY	922
1. <i>Borninkhof</i>	922
2. Judicial Interpretations	925
3. 5 USC 2302(b)(2): Investigative Statements	925
II. TYPES OF EVIDENCE	926
A. DOCUMENTARY EVIDENCE	926
1. Response to Appeal	926
2. Medical Reports and Records	926
3. Notes of Witnesses; Memoranda of Conversations.....	927
4. Time and Attendance Records; Recollection Recorded	928
5. Production Records and Reports; Business Records	928
6. Regulations; Laws.....	928
7. Evidence From Other MSPB Hearings; Other Judicial Proceedings	928
8. Procedure for Introducing Documents	929
9. Authentication Requirements	930
a. Handwriting	930
b. Copies; Photographs	930
B. PHYSICAL EVIDENCE.....	930
1. Custody and Control	931
2. Use at Hearing	931
C. ADMISSIONS	931
1. Probative Value	931
2. Settlement Offers.....	933
D. CIRCUMSTANTIAL AND SECONDARY EVIDENCE	934
1. Common Possession/Multiple Causation.....	935
2. Flight or Evasion	936
3. Statistical Information	936
E. OPINION AND IMPEACHMENT EVIDENCE	936
1. Physical Condition	937
2. Character	937
a. Past Misconduct	938
b. Arrests, Convictions	939
c. Reputation	939
d. Habit	939
3. Conduct During Hearing	940

4. Evidence in Disability Annuity Cases; <i>Chavez</i>	940
F. RECURRENT EVIDENTIARY PROBLEMS.....	943
1. Polygraph Evidence.....	943
2. Unsworn Statements	944
a. No Hearing.....	945
b. Hearing Held	945
3. Affidavits and Depositions.....	946
a. Affidavits; Form of Attestation	946
b. Depositions	948
4. Investigation Reports.....	948
5. Tapes.....	950
a. Videotapes	950
b. Audio Tapes	950
6. Transcripts of Prior Testimony.....	950
7. Expert Witnesses; Medical Evidence	951
a. Medical Opinion	952
b. Other Experts.....	954
8. Statements of Representatives and Parties	955
9. Testimony of Children	955
10. Interpretation of Collective Bargaining Agreements.....	955
11. Newspaper Articles	956
12. Drug Tests.....	956
III. SUBSTITUTES FOR DIRECT EVIDENCE	957
A. OFFICIAL NOTICE	957
1. Regulations.....	958
a. Federal Personnel Manual; Publications	958
B. ADVERSE INFERENCES AND PRESUMPTIONS	958
1. Silence	958
2. Failure to Produce Evidence; Negative or Adverse Inferences.....	960
a. Negative Evidence	961
3. Presumptions	961
a. Delivery of Mail; Other Documents	961
C. STIPULATIONS	965
1. Issues of Fact and Law	966
2. Stipulations Directed by the Judge	967
D. <i>RES JUDICATA</i> , COLLATERAL ESTOPPEL, AND LAW OF THE CASE—THE DOCTRINES.....	967
1. Elements of <i>Res Judicata</i>	967
a. Identity of Prior Cause of Action and Issues	971
b. Identity of Parties; Privity	971
c. <i>Res Judicata</i> Raised <i>Sua Sponte</i> by MSPB	972
d. Jurisdictional Issues	974
2. Collateral Estoppel.....	976
a. Errors in Law; Changes in Law	978
b. Proof of a Prior Adjudication	979
c. Privity; Appellant as a Party to the Prior Case	979
d. Privity of Agencies	979
e. Identity of Prior Issues	980
f. Settlements.....	981
g. Jurisdictional Issues	981
h. Decisions of Other Tribunals	982
3. Collateral Estoppel Raised <i>Sua Sponte</i> by the MSPB	983
4. Judicial Estoppel	984
5. Law of the Case.....	984
6. <i>Stare Decisis</i>	987
E. <i>RES JUDICATA</i> AND COLLATERAL ESTOPPEL—THE DOCTRINES APPLIED.....	987
1. Criminal Convictions.....	987
2. Pleas to Criminal Charges.....	990
a. Guilty Pleas	990
b. <i>Nolo Contendere</i> and <i>Alford</i> Pleas	990
c. Conviction, Misconduct Distinguished	994
3. Acquittal; Reversal of Criminal Conviction.....	994

4.	Successive MSPB Cases; Dismissal for Adjudicatory Efficiency.....	995
a.	WIGI/Removal	996
b.	Successive RIFs	996
c.	Prohibited Personnel Practice Complaint/Appeal.....	996
d.	Suitability Determinations	1000
5.	Other Judicial and Administrative Proceedings.....	1000
a.	Agency Credentialing Committee.....	1000
b.	Union Trial Board	1001
c.	Contract and Administrative Grievance, Arbitration Cases.....	1001
d.	OPM Annuity Determinations	1004
e.	Unemployment Compensation Awards.....	1005
f.	OWCP Findings; Social Security Determinations	1006
g.	EEOC Determinations	1007
h.	Comptroller General or GAO Decisions	1008
i.	Judicial Determinations	1009
6.	Exceptions to the Application of Collateral Estoppel.....	1010
a.	Pendency of an Appeal	1010
b.	Fraud; Misrepresentation	1011
IV.	EXCLUSION OF EVIDENCE	1012
A.	PROCEDURES.....	1012
1.	Objections, Motions to Strike, Motions <i>in Limine</i>	1012
2.	Witness Exclusion	1013
B.	CONSTITUTIONAL AND STATUTORY CHALLENGES	1013
1.	Search.....	1013
a.	Wiretaps.....	1018
b.	Tape Recordings.....	1018
c.	Drug Testing	1018
2.	Interrogations.....	1021
a.	Misconduct of Investigators.....	1021
b.	Constitutional Objections	1021
c.	Right to Silence; Counsel	1023
3.	Denial of Union Representation	1025
C.	OTHER BASES FOR EXCLUSION OF EVIDENCE	1026
1.	Claims of Privilege.....	1026
a.	Alcoholism Treatment Records.....	1026
b.	Other Medical Records	1026
c.	Privacy; Attorney–Client Communications	1026
2.	Failure to Follow MSPB Procedures	1027
V.	HEARING TRANSCRIPT.....	1027
A.	RIGHT TO AND NECESSITY FOR A TRANSCRIPT.....	1027
1.	Current MSPB Practice.....	1027
2.	Past Treatment of Transcripts.....	1028
3.	Internal MSPB Guidance on Transcripts	1029
4.	Federal Circuit Commentary on Transcripts	1029
a.	Arbitration Cases	1030
5.	Use of Tapes.....	1030
B.	PROBLEMS CONCERNING TRANSCRIPT AND RECORD.....	1031
1.	Off–the–Record Discussions	1031
2.	Hearing Tape Omissions; Transcript Errors.....	1031
3.	Correction of the Transcript.....	1032
4.	Unofficial Transcripts.....	1032
CHAPTER 5: INITIAL DECISION AND PETITION FOR REVIEW		1033
I.	INITIAL DECISION.....	1033
A.	INITIAL DECISION FORMAT	1033
1.	Minimum Requirements.....	1033
a.	Homeland Security Personnel System Appeals	1035
b.	Bench Decisions	1035
c.	Notice of Right to Review	1036
2.	Cases Dismissed by Consent; Mootness of Initial Decision.....	1037
B.	REQUIRED ANALYSIS	1037

1.	Analytical Structure	1037
a.	Analysis of Appeals Presenting Both Timeliness and Jurisdictional Issues	1038
b.	Degree of Analysis Required; Omitted Factual Findings	1039
c.	Incorrect Standard of Adjudication	1041
2.	Ultimate Issues of Law.....	1041
a.	Adverse Actions	1041
b.	Annuity Appeals	1041
3.	EEO and Prohibited Personnel Practice Issues.....	1042
a.	Nondispositive EEO Issues.....	1043
4.	Consolidated Cases	1044
5.	Counsel Fee Determinations	1044
6.	Issues Not Raised in the Appeal	1044
C.	CREDIBILITY FINDINGS	1044
1.	Necessary Findings	1045
a.	Weight of Evidence Equally Balanced	1046
2.	Factors Considered; <i>Hillen</i>	1046
a.	Some Testimony Discredited	1048
b.	Alibi Defense	1048
c.	Inconsistencies; Denials; Memory Lapse; Failure to Provide Statement	1048
d.	Contemporaneous Notations	1049
e.	Self-Serving Testimony; Bias; Criminal Conviction; Past Misconduct	1049
f.	Uncontradicted Testimony.....	1051
g.	Implausible Testimony	1051
h.	Telephonic Hearing.....	1051
i.	Determinations Made Without Hearing.....	1051
3.	Authenticity Issues.....	1051
II.	PETITION FOR REVIEW; RECONSIDERATION	1051
A.	PFR PROCESS	1052
1.	Mandatory Removal Action Appeals of Department of Homeland Security Employees.....	1056
2.	Effect of Judicial Review on PFR	1057
a.	Effect of EEOC Review	1057
3.	Grounds for PFR; 5 CFR 1201.115	1057
a.	Evidentiary Disputes	1057
b.	Other Bases for Review	1058
c.	Frivolous PFRs; Sanctions	1058
d.	Challenges to Settlements	1058
4.	Time for Filing.....	1058
5.	Service	1059
6.	MSPB Processing	1059
a.	Tied Vote; Lack of Quorum	1061
b.	Decision Effective Upon Issuance by Clerk	1061
7.	Cross-Petition for Review	1061
a.	Conditional Cross-Petition for Review	1062
8.	MSPB's Final Decision	1063
9.	Authority to Reopen and Reconsider	1064
a.	Petition for Reopening When PFR Not Previously Filed	1066
b.	Jurisdictional Issues.....	1067
c.	Due Diligence	1067
d.	Reversal of Criminal Conviction	1071
e.	Changes in the Law	1072
f.	Fraud	1073
g.	Retirement Cases	1074
h.	Effect of Judicial Review on Petition to Reopen.....	1075
i.	Reopening in Lieu of Excusing Untimely or Defective PFR	1076
j.	Correction of Case Processing Error	1077
k.	Manifest Injustice	1077
10.	Entry of Settlement Agreement Into Record.....	1077
B.	PFR PROCEDURE	1078
1.	Who May Obtain Review	1078
a.	OPM	1078
b.	OSC	1078

c.	Others; Intervention at PFR Stage	1079
2.	Failure to Prosecute; Withdrawal of PFR.....	1079
a.	Dismissal Without Prejudice	1079
3.	PFR Settlement Program	1080
C.	INTERIM RELIEF	1080
1.	Effective Date of Interim Relief.....	1084
2.	Effect of Supplemental Initial Decision on Interim Relief.....	1084
3.	Obligation to Return Employee to Work and Pay; Undue Disruption Determinations	1084
a.	Necessity for Undue Disruption Determination.....	1087
b.	Form of Undue Disruption Notice	1088
c.	Implicit Undue Disruption Determination; Strong Overriding Interest.....	1090
d.	Notice to Judge of Undue Disruption Determination	1091
e.	Restoration Followed by Job Changes	1091
f.	Restoration Followed by Removal From Workplace or Adverse Action During Interim Relief Period	1094
g.	Restoration Followed by Appellant’s Inability to Work.....	1095
h.	Pay Entitlements; Overtime; Allowances	1095
i.	Deductibility of Interim Earnings or Severance Pay	1097
j.	“Bad Faith” Implementation Standard Prior to Its Demise	1097
4.	Dismissal of PFR for Failure to Provide Interim Relief	1098
a.	Appellant’s Remedy for Inadequate Agency Compliance With Interim Relief Order	1099
b.	Time and Format for Filing Motion to Dismiss PFR for Lack of Proper Interim Relief	1100
c.	PFR Not Mooted by Overbroad Interim Relief	1101
d.	Effect of Jurisdictional Issues	1102
5.	Certification and Proof of Interim Relief	1102
a.	Evidence of Interim Relief	1103
b.	Substantial Compliance but Technical Errors; Supplemental Evidence of Interim Relief	1105
c.	Delay in Payment Following Certification or <i>Prima Facie</i> Evidence of Interim Relief.....	1107
d.	Withdrawal of Interim Relief	1107
6.	Factors Limiting or Warranting Denial of Interim Relief	1108
a.	Receipt of OWCP, Other Benefits	1108
b.	Suitability Appeals	1109
c.	Restrictions on Extension of Appointment	1109
d.	Waiver or Settlement of Interim Relief; Acceptance of Change in Duties or Job	1110
7.	Special Cases	1111
a.	Retirement Cases; Suitability Appeals	1111
b.	Mitigation of Removal to Demotion	1112
c.	Mitigation of Removal to Suspension	1113
d.	Demotion Mitigated to Suspension	1113
e.	Mitigation or Cancellation of Suspension	1114
f.	Unified Penalties Involving Reassignment	1114
g.	Appeal of Within–Grade Increase Denial	1114
h.	Discriminatory Application of Interim Relief	1114
i.	VEOA Appeals	1115
D.	FACTUAL AND CREDIBILITY FINDINGS	1115
1.	Standards of Review of Factual Findings; “Special Deference”	1115
a.	Cases Decided on Affidavits or Documents	1118
b.	Telephonic Hearings	1119
2.	Objections Based on Omitted Findings	1119
3.	Unnecessary Findings	1120
4.	Issue of Mental Competence During Appeal Adjudication	1121
E.	NEW EVIDENCE	1121
1.	What Constitutes Evidence	1123
2.	What Evidence Is New	1123
a.	Evidence Previously Available	1123
b.	Timeliness of Appeal	1124
c.	Jurisdictional Issues	1126
d.	Claims of Surprise	1127
e.	Test of Due Diligence	1127
f.	Evidence Concerning Issues First Raised by Judge	1130
g.	Evidence From Other MSPB Cases	1130
3.	Materiality of New Evidence	1131

a.	Reversal of Criminal Conviction	1131
b.	Impeachment Evidence	1132
c.	Subsequent Corroborative Evidence	1135
d.	Evidence of Disparate Treatment	1136
e.	Subsequent OPM, SSA, OWCP Determinations	1136
f.	Subsequent Adjudication of Past Discipline	1137
F.	NEW LAW	1137
G.	NEW ISSUES	1138
1.	General Rule	1138
a.	Jurisdictional Issues	1139
2.	Determining if an Issue or Argument Was Raised Below	1139
a.	Disability Retirement Claims	1140
b.	Penalty Determinations	1140
c.	Statutory Interpretation Issues	1140
d.	Timeliness of Appeal	1140
e.	Issues of Discrimination	1140
f.	EEOC Treatment Distinguished	1140
g.	Waiver of Issue	1141
H.	TIMELINESS OF PFR	1141
1.	Facsimile Filing	1141
2.	Filing by Commercial Delivery	1142
3.	Delivery by Hand	1142
4.	Deficient but Timely PFR	1142
5.	Date and Place of Filing	1142
a.	Filing by Mail	1143
b.	Proof of Mailing; Rebuttal of the Postmark	1144
c.	Filings by Commercial Couriers	1146
d.	Petitions Lost in the Mails	1146
e.	Misguided Facsimiles	1147
6.	Requests for Extensions of Time	1148
7.	Procedure on Late Submissions	1149
a.	Affidavit or Sworn Statement Required	1150
b.	Strict Application	1150
8.	Reasons for Late Filing	1151
a.	Merits of the Case	1152
b.	Physical or Mental Illness of the Appellant or Counsel	1152
c.	Ignorance of the Law; Late Discovery of a Legal Defense; Subsequent MSPB Decisions in Other Cases	1158
d.	Problems With Settlements	1159
e.	Misinterpretation of or Unfamiliarity With MSPB Regulations	1160
f.	Incorrect Information From MSPB	1162
g.	Delayed Receipt or Misrouting of Initial Decision or PFR; Constructive Receipt of Initial Decision	1162
h.	Failure to Receive Initial Decision; Change of Address; Incomplete Initial Decision	1164
i.	Incomplete Notice of Right to File PFR	1167
j.	Effect of Judge's Remand to Agency for Redetermination of Segment of Case	1167
k.	Mailroom Delays in Posting PFR	1168
l.	Foreign Mail Problems	1168
m.	Withdrawal, Absence of Representative	1169
n.	Inability to Obtain Representation	1169
o.	Unexcused Neglect of Representative	1170
p.	Excused Neglect of Representative; Diligence of the Appellant	1172
q.	Attempts to Obtain Congressional Assistance	1174
r.	Pending Review by Other Adjudicator	1175
s.	Awaiting Transcript, Other Documents	1176
t.	Delays in Internal Decisionmaking	1177
u.	Military Service	1177
v.	Fear of Prosecution; Interference; Fraud	1177
w.	Language Difficulties	1177
x.	Other Problems	1177
9.	Filing PFR With Wrong Agency or MSPB Office	1180
10.	Cases or PFRs Misfiled in Court	1182
I.	FORMAT AND SUBSTANCE OF PFR	1183

1.	No Fixed Format.....	1183
a.	Erroneous Designation of Pleading	1184
b.	Errors in Formal Requirements	1184
c.	<i>Pro Se</i> Form PFR.....	1184
2.	Signature, Designation of Representative Required	1186
3.	Specific and Supported Objections	1187
a.	Factual Error	1187
b.	Adjudicatory Error	1187
4.	Lack of Transcript	1187
5.	Response to PFR	1188
6.	Reply and Supplemental Briefs	1188
a.	Supplemental Authorities	1188
J.	MOOTNESS OF A PFR	1189
1.	Cancellation of Adverse Action; Agency Compliance With Initial Decision	1189
a.	Effect of Employee's PFR if No Agency PFR Filed	1190
2.	Settlement	1190
3.	Regulation Review Proceeding	1190
4.	Disqualification of Representative	1190
K.	PROCEDURE ON REMAND.....	1190
1.	Determining Whether A Remand Is Necessary	1190
2.	Evidence From First Hearing	1191
a.	Effect of MSPB Order Vacating Initial Decision	1192
3.	Remand for Further Discovery	1192
4.	Remand for More Evidence	1192
a.	Subsequent PFR.....	1192
b.	Entry of Interlocutory Relief Upon Remand	1193
5.	Remand for Compliance	1193
L.	OPM RECONSIDERATION REQUESTS	1193
1.	Governing Statute and Regulation	1193
2.	Substantial Impact on Law; Collective Bargaining Agreement Issues and Mixed Cases	1196
3.	Limited to Facts and Issues of Record	1198
4.	Timing of Request; Arbitration Awards	1198
5.	Mootness of Reconsideration Request	1199
6.	EEOC Discrimination Decisions	1199
M.	STAY REQUESTS	1199
1.	By OPM	1200
a.	Pending Reconsideration Request Is Not a Stay	1203
b.	Pending Request for Supreme Court Review	1203
2.	By Agency	1203
a.	Stays of Compliance Proceedings	1205
3.	By or for Individual.....	1206
N.	REVIEW OF ARBITRATION AWARDS	1209
1.	Awards Subject to Review	1212
a.	Governing Statute and Regulation; Time for Review	1213
b.	EEO and Prohibited Personnel Practice Allegations	1214
c.	Counsel Fee Claims	1218
2.	Proper Appellant Before the MSPB; Labor Unions	1218
3.	Method and Scope of MSPB Review	1219
a.	Issue Preclusion	1221
b.	Contract Exclusivity Clauses	1222
c.	Allegations of Bias, Unfair Hearing	1222
d.	Enforcement of Awards Reviewed by MSPB.....	1223
4.	Standard of Review	1223
a.	Penalty, Remedial Determinations; Time-Served Suspensions	1226
b.	Procedural Issues; Timeliness of Grievances	1232
c.	Discrimination Issues	1235
5.	Submissions to the MSPB	1236
6.	MSPB Review Procedures.....	1236
a.	Time to Seek Review.....	1237
7.	Postal Service Employees.....	1238
a.	Effect of Arbitration Award	1240

CHAPTER 6: ADVERSE ACTIONS 1245

- I. ADVERSE ACTIONS DEFINED1245
 - A. CANCELLATION OF APPOINTMENTS, PROMOTIONS1245
 - 1. Appointments1246
 - a. Action by Appointing Authority1248
 - b. Withdrawal of Appointment1249
 - c. Citizenship Issues.....1249
 - d. Nepotism.....1251
 - 2. Cancellation of Promotions, Pay Increases1251
 - 3. Termination by Adverse Action of Appointment Secured by Fraud; Disqualification by OPM or OSC Proceeding; Suitability Disqualification Action1260
 - B. CONSTRUCTIVE ADVERSE ACTIONS1261
 - 1. Jurisdictional Showing1262
 - a. Timing of Operative Events.....1269
 - b. Specific Allegations Control1270
 - c. Analysis of Totality of Circumstances1272
 - d. Obligation of Judge to Inform Appellant of Jurisdictional Requirements1274
 - e. Avoidance of Jurisdictional Analysis in Untimely Appeals1275
 - f. Collateral Attacks on Settlement Agreements and Waiver of Appeal Rights1275
 - g. Allegations of Discrimination1277
 - 2. General Approach to Analysis of Constructive Adverse Actions1279
 - 3. Involuntary Downgradings1279
 - a. Hearing.....1279
 - b. Deceit; Misrepresentation1280
 - c. Action Threatened Without Good Cause1284
 - d. Time Pressure1285
 - e. Improper Reassignment1286
 - f. Withdrawal of Request for Downgrading1286
 - g. Unauthentic Request for Downgrading1286
 - h. Discrimination; Intolerable Working Conditions1286
 - i. External Problems1289
 - j. Correction of Administrative Error1290
 - 4. Involuntary Resignations1291
 - a. Hearing.....1292
 - b. Deceit; Misrepresentation1293
 - c. Action Threatened Without Good Cause1296
 - d. Time Pressure1298
 - e. Improper Reassignment1301
 - f. Withdrawal of Request to Resign.....1302
 - g. Irrevocable Resignation; VSIP1304
 - h. Unauthentic or Ambiguous Resignations1305
 - i. Ineffective Resignation1306
 - j. Mental Disability.....1307
 - k. Intolerable Working Conditions1308
 - l. Discriminatory Working Conditions1314
 - m. Failure to Accommodate Disability1318
 - n. Whistleblowing Reprisal1320
 - o. Denial of Leave1320
 - p. External Problems1321
 - q. Probationers1321
 - r. Technical Errors1321
 - 5. Involuntary Retirements.....1321
 - a. Discontinued Service Retirement1324
 - b. Mandatory Retirement1325
 - c. Jurisdiction Over Appellant.....1325
 - d. Hearing1325
 - e. Employing Agency as Party to a Retirement Appeal Against OPM.....1326
 - f. Deceit; Misrepresentation1327
 - g. Action Threatened Without Good Cause1335
 - h. Time Pressure1336
 - i. Involuntary Reassignment1337

j.	Withdrawal of Request to Retire	1339
k.	Irrevocable Retirement; VSIP	1341
l.	Intolerable Working Conditions	1344
m.	Discriminatory Working Conditions	1347
n.	Failure to Accommodate Disability	1351
o.	Denial of Leave	1359
p.	Whistleblowing Reprisal	1360
q.	Mental Disability	1364
r.	Agency–Initiated Retirement	1364
s.	Correction of Retirement Benefits	1364
6.	Constructive Demotion Through Reassignment; <i>Russell</i> Appeals	1365
a.	Planned Management Action	1369
b.	Position Must Be Upgraded	1371
c.	Identity of Duties	1374
d.	Qualifications for Higher–Graded Position	1374
e.	Judge’s Jurisdictional Analysis	1375
f.	Evidence Demonstrating Classification Error	1375
g.	EEO Allegations	1375
h.	Timeliness of Appeal	1375
7.	Involuntary Transfers	1376
C.	ENFORCED LEAVE	1377
1.	Jurisdictional Analysis; Burden of Proof	1378
a.	Hearing	1379
b.	EEO Allegations	1380
c.	Effect of Receipt of OWCP Benefits on Constructive Suspension Claim	1380
2.	Requirement for Adverse Action Procedures	1382
a.	Leave Status Voluntarily Assumed	1385
b.	Process Due to the Employee	1388
c.	Substantive Evaluation of Leave Enforced Following Notice to Employee	1388
3.	Employees on AWOL, Restricted Leave	1389
4.	Employees Blocked From Working Because of Employer’s Concerns About Fitness	1390
a.	Medical Restrictions Imposed by Appellant’s Physician; Light or Restricted Duty	1393
b.	Employees Returning From LWOP	1394
5.	Light Duty	1394
a.	Postal Service National Collective Bargaining Agreements	1407
6.	Work Release	1408
7.	Bar Order Preventing Entry to Workplace	1408
8.	Constructive Suspension Through Temporary Absence Resulting From Intolerable Working Conditions	1409
D.	INDEFINITE SUSPENSIONS	1412
1.	Use	1412
2.	Procedures; Due Process; Duration	1415
3.	Criminal Activities	1421
a.	Indictment; Filing of Information; Referral for Prosecution	1421
b.	Investigation	1422
c.	Arrest	1422
4.	Security Clearance and Other Investigations	1428
5.	Inquiry Into Other Matters	1433
6.	Nexus	1433
7.	Severity of Penalty	1435
8.	Remedy	1435
II.	EFFICIENCY OF THE SERVICE	1440
A.	BURDEN OF PROOF	1442
1.	Agency Burden of Proof	1443
a.	Suspicion; Belief	1443
b.	Intent	1443
2.	Preponderance of Evidence	1443
a.	Uniformity of Standard	1444
b.	Charge of Violation of Criminal Statute	1445
3.	<i>Prima Facie</i> Case	1445
a.	Use of Presumptions	1445
4.	Employee’s Burden: Affirmative Defenses	1445

B.	PERSONAL FAULT	1446
1.	Demotions to Assist Other Employees	1446
a.	Discrimination	1446
b.	Merit Promotion Grievances	1447
2.	Action Directed by Arbitrator	1447
3.	Correction of Administrative Error	1447
4.	<i>Respondeat Superior</i>	1447
C.	ADVERSE ACTION RELATED TO DISABILITY	1449
1.	Mental Impairment	1449
a.	Agency-Initiated Retirement	1450
b.	Appointment of Counsel	1453
c.	Prior Law: Reasonable Cause to Believe	1454
d.	Service Credit Requirements.....	1455
e.	Permissible Action; Mitigation.....	1455
2.	Evaluation of Physical Impairment	1455
a.	Evidence of Recovery Between Date of Removal and MSPB Decision.....	1458
3.	Effect of Removal for Inability to Work Upon OPM Disability Annuity Determination	1460
a.	Rebuttable Presumption of Annuity Entitlement.....	1460
b.	Social Security Administration Determinations	1469
c.	OWCP Determinations	1470
d.	Department of Veterans Affairs Disability Ratings	1470
e.	Security Clearance Determinations	1471
4.	Allegation of Disability Discrimination; Lack of Reasonable Accommodation	1471
III.	SPECIAL CLASSES OF EMPLOYEES.....	1475
A.	SENIOR EXECUTIVE SERVICE	1475
1.	Mitigation of Disciplinary Actions	1481
2.	Performance Cases	1481
B.	ADMINISTRATIVE LAW JUDGES.....	1481
1.	Scope of MSPB Review	1484
a.	Good Cause	1484
2.	Causes for Discipline	1487
a.	Insubordination	1487
b.	Remarks to Litigants; Comments in Decisions; Conduct of Hearings	1488
c.	Prolonged Absence	1489
d.	Other Misconduct	1490
e.	Poor Performance	1491
3.	Constructive Action Against a Judge: <i>Tunik</i>	1493
a.	Pre- <i>Tunik</i> Decisions	1499
4.	Furloughs; RIF; Interim Relief	1508
5.	Settlement of Complaints	1509
a.	Voluntary Dismissal of Complaints	1510
CHAPTER 7: NEXUS AND MITIGATION.....		1511
I.	CONCEPT OF NEXUS	1511
A.	<i>MERRITT</i> AND SHIFTING PRESUMPTIONS.....	1511
1.	General Approach Toward Proof.....	1513
a.	Actual or Potential Publicity	1514
b.	Investigative Exertions	1514
B.	SPECIFIC NEXUS DETERMINATIONS.....	1515
1.	Arrest	1515
2.	Violent Off-Duty Misconduct	1515
a.	Shootings; Killings	1515
b.	Assault; Threats.....	1517
3.	Violent Conduct on Agency Premises	1518
4.	Off-Duty Drug Offenses	1518
a.	Drug Activity That Involves Agency Time or Facilities	1521
5.	Off-Duty Actions on Agency Premises	1521
6.	Sexual Misconduct.....	1522
7.	Fraud and Theft	1526
a.	Off-Duty Offenses	1526
b.	On-Duty or Job-Related Offenses	1528

c. Gambling.....	1528
8. Failure to Pay Debts	1528
9. Grievance Meetings	1531
10. Conduct Contrary to Agency Mission	1531
a. Real Estate Activities—DHUD	1531
b. Employees' Tax Problems—IRS and Other Agencies	1532
c. Law Enforcement Officers; <i>Giglio</i> Impairment	1537
d. Drivers	1539
e. Strike-Related Conduct	1539
11. AWOL Removal After Criminal Conviction	1539
II. MITIGATION OF PENALTIES	1539
A. GENERAL CONSIDERATIONS	1540
1. <i>Douglas</i> Standards; Decision to Reflect Consideration of Mitigating Factors or MSPB Imposes Maximum Reasonable Penalty.....	1541
a. Failure to Consider Relevant Mitigating Factors	1542
b. Proposal to List Aggravating Factors; Treatment of Warnings	1543
c. Exemplary Penalties	1544
d. Exaggeration of Charge	1544
2. Articulation of Relevant Factors.....	1544
a. By the Agency; Decision Notice	1544
b. By the MSPB	1546
3. Not All Charges Sustained; Maximum Reasonable Penalty	1546
a. Remand to Agency for Redetermination of Penalty	1550
4. All Charges but Not All Specifications Sustained	1551
5. Charge Sustained That Was Not Brought	1552
6. Factors Not Considered Mitigating.....	1552
a. Discrimination; Mental Impairment.....	1552
b. Discriminatory Environment	1552
c. Prohibited Personnel Practice.....	1552
d. Offers of Settlement	1553
7. When Mitigation Must Be Raised	1553
8. Special Counsel Cases.....	1553
9. Impact of Mitigation Through Demotion Upon Collective Bargaining Agreements	1554
B. SPECIFIC MITIGATING FACTORS.....	1554
1. Potential for Rehabilitation	1554
a. Deference to Higher Level Management Assessment.....	1554
b. Forward-Looking Analysis.....	1555
c. Performance Actions	1555
d. Prior Notice of Rules or Policy	1556
e. Temporary Conditions; Stress; Alcoholism	1556
f. Prior Long Service	1557
g. Weight of Prior Performance Evaluation	1557
h. Intervening Good Performance; Misconduct Subsequent to Charges Leading to Adverse Action	1558
i. Misconduct Postdating Adverse Action	1558
j. Display of Contrition; Admission of Misconduct	1559
k. Denial of Misconduct; Vigorous Defense	1560
l. Positions of Trust; Fiduciary Duty; Loss of Trust	1561
m. Repeated Misconduct; Last Chance Agreements.....	1562
2. Psychological Problems, Illness or Treatment, Stress, Job Tensions	1562
3. Progressive Discipline	1566
a. Table of Penalties	1567
4. Disparate Penalties	1569
a. Degree of Consistency Required	1572
b. Substantial Similarity of Offenses	1572
c. Same Work Unit	1574
d. Positions of Similar Levels of Trust and Responsibility	1575
e. Selective Prosecution.....	1575
f. Settlements	1576
g. Comparable Arbitration Awards; Other MSPB Decisions	1578
h. Effect of Criminal Sentence	1578
5. Mandatory Penalties	1579

6.	Staleness of Charges	1580
7.	Agency Bad Faith, Provocation Manipulation; Improper Pressure on the Appellant; Entrapment	1580
8.	Condonation	1581
a.	Favorable Attitude of Coworkers; Supervisors.....	1581
9.	Severity of Misconduct	1581
a.	Sequential Disciplinary Proposals	1582
b.	Multiplicity and Merger of Charges	1582
c.	Zero Tolerance Policy	1582
10.	Employee Job Level.....	1583
a.	Ineffectiveness as Supervisor; Demotion to Nonsupervisory Position	1583
b.	Positions of Trust.....	1585
C.	AGENCY CONSIDERATION OF PAST DISCIPLINE	1585
1.	Notice Requirements; Exceptions	1587
2.	Proof and Rebuttal of Past Discipline	1589
a.	Availability of Challenge to Past Discipline.....	1589
b.	Clearly Erroneous	1589
c.	Reprisal Cases	1590
d.	Pending Challenge to Past Discipline	1590
e.	Past Discipline Reversed Following Initial Decision	1591
f.	Past Discipline Time-Barred	1592
g.	Dissimilar Offenses.....	1593
h.	Nondisciplinary Sanctions.....	1594
3.	Past Discipline Not Mentioned in Adverse Action Proposal but Relied Upon in Penalty or Mitigation Assessment	1595
a.	Past Discipline as Rebuttal to Mitigation	1595
D.	STANDARDS FOR JUDICIAL REVIEW, ADMINISTRATIVE RECONSIDERATION	1596
1.	General Rule.....	1596
2.	Agency Table of Penalties	1596
3.	Application of Relevant Factors	1596
4.	Effect of OPM Reconsideration Requests	1596

CHAPTER 8: SUBSTANTIVE OFFENSES..... 1597

I.	STATUS	1597
A.	ABSENCE	1597
1.	Impact on Service Efficiency	1598
2.	Approved and Disapproved Absence.....	1598
a.	Abuse of Leave	1600
b.	Loafing; Wasting Time.....	1600
c.	Excessive Absences for Reasons Beyond Employee's Control; Excessive Use of Leave Without Pay	1600
d.	Unscheduled but Approved Absences Following Failure to Follow Procedures to Request Leave	1608
3.	Leave-Requesting and Leave-Reporting Requirements	1611
a.	Leave Restriction Letters.....	1614
b.	Medical Certification Requirements	1615
c.	Other Certification Requirements	1616
4.	Proof of AWOL; Leave Entitlement.....	1616
5.	Agency Abuse of Discretion	1618
a.	Ambiguous Leave Policy or Directives	1619
b.	Condonation of AWOL	1619
6.	Evidence of Illness First Submitted to MSPB	1619
7.	Leave Without Pay; Other Leave Arrangements	1621
a.	Advanced Sick Leave.....	1623
b.	Donated Leave.....	1623
8.	Family Leave.....	1623
a.	Burden of Proof Under FMLA; FMLA Requests; Medical Documentation; Constructive Requests	1628
b.	Abuse of Family Leave	1639
9.	Worker's Compensation Cases	1639
a.	Determining Whether Removal Is Based on Reasons Independent of Absence Related to OWCP Entitlement	1640
b.	Leave-Reporting Requirements	1642
c.	No Foreseeable End to Absence	1642
10.	Leave Status Pending Disability Retirement	1645
11.	Incarceration; Work-Release Programs.....	1645
12.	Cancellation or Conversion of Approved Leave	1647

13. Absence Caused by Fear for Safety	1647
14. Military Leave.....	1648
15. Religious Leave	1648
16. Problems Following Reinstatement Through MSPB Order	1649
17. Aggravating Factors	1649
a. Prolonged AWOL	1649
b. Frequent AWOL.....	1649
c. Unreliable Attendance.....	1649
18. Mitigating Factors.....	1650
a. Short, Infrequent AWOL.....	1650
b. Longer AWOL; Other Mitigating Factors	1651
B. REFUSAL TO ACCEPT REASSIGNMENT	1652
1. General Rule.....	1654
a. SES Employees	1655
2. Inconvenience to Employee; Health Problems	1657
a. Failure to Accept Return From Overseas Assignment.....	1657
3. Agency Burden of Proof	1657
a. Misconduct Following Improper Reassignment	1660
4. Application of RIF Procedures; Procedural Errors	1660
C. FAILURE TO MAINTAIN OR OBTAIN CONDITION OF POSITION	1660
1. Lack of License, Certification	1660
a. Lawyers	1661
b. Drivers.....	1661
c. Medical Certification	1662
2. Loss of Credentials.....	1662
3. Failure to Complete Training Course	1663
a. Air Traffic Controllers.....	1663
b. Other Positions.....	1665
4. Lack of or Loss of Minimum Qualifications.....	1666
a. Statutory Conditions to Appointment or Continuation of Employment.....	1667
b. Statutory Inability of Law Enforcement Officer to Carry a Firearm; Lautenberg Amendment	1670
c. Loss of Access to Agency Computer and Network Systems	1672
5. Security Clearance Revocation	1673
a. Clearance Process	1673
b. Agency Security Clearance Proceedings.....	1674
c. Review of Agency Determinations; <i>Egan</i> ; Constitutional Due Process	1680
d. Determination to Classify Position	1686
e. Reassignment to Nonsensitive Position	1686
f. EEO Issues; Whistleblower Reprisal; Disparate Treatment	1688
g. Regulatory Infractions During the Revocation Process.....	1689
h. Proceedings Under 5 USC 7532.....	1690
i. Suitability Determinations and Security Clearance Distinguished	1691
j. Programs Similar to Security Clearances	1691
6. Removal From Reserve Status	1693
7. Lack of Suitability for Continued Employment	1697
D. CONFLICTS OF INTEREST; APPARENT CONFLICTS.....	1698
1. Conflicts; Improper Business Dealings With Others	1699
2. Apparent Conflicts; Use of Government Office for Private Gain	1700
3. Inside Information	1701
4. Transactions With Contractors; Gifts; Bribes; Honoraria; Loans	1701
a. Transactions With Patrons, Vendors, Inmates	1702
b. Transactions With Supervisors	1703
5. Acting as Agent Against the Government.....	1703
E. OUTSIDE EMPLOYMENT	1703
1. Personal Work on Government Time	1704
2. Reporting Requirements	1704
a. Approval Requirements	1704
b. Employment in Violation of Agency Restrictions; Outside Practice of Law	1704
F. SPECIAL CATEGORIES OF EMPLOYEES	1704
1. Guards, Correctional Officers, Police, Investigators, and Security Personnel	1704
2. Immigration Officers	1706

3.	Ship Employees.....	1706
4.	Supervisors	1706
G.	STRIKES.....	1706
1.	Charge of Striking	1706
2.	Grounds for Removal	1707
3.	Proof of Strike Participation	1707
4.	Refuting Strike Participation	1707
5.	Fear for Personal Safety	1708
	a. Threats Held Insufficient.....	1708
	b. Duress and Coercion Established	1709
6.	Association With Strikers	1709
7.	Settlement Agreements	1709
8.	Influence of Political Leaders	1709
9.	Penalty.....	1709
10.	Other Issues.....	1709
II.	RELATIONSHIPS	1709
A.	INSUBORDINATION	1709
1.	Refusal or Failure to Perform Work	1710
	a. Proof of Intent.....	1711
	b. Failure to Follow Instructions	1712
	c. Failure to Follow Policies, Regulations	1713
	d. Lack of Cooperation; Disruptiveness.....	1714
	e. Recording of Conversations	1715
2.	Cumulative Insubordination	1715
3.	Disputes Over Position Responsibilities	1715
	a. Difficulties Following Reinstatement	1716
	b. Breach of Settlement Agreement.....	1717
4.	Insolence and Abusive Language	1717
	a. Abuse of Coworkers, Subordinates	1717
	b. Abuse of Supervisors; Coarse Language.....	1718
	c. Disagreements Over Instructions, Programs	1720
5.	Misuse of Grievance, EEO, or Settlement Procedures	1720
	a. Conduct and Speech.....	1720
	b. Supervisors	1722
	c. Supervisors' Interference With Employee Grievances.....	1722
6.	Refusal to Take Fitness Examination.....	1722
	a. Properly Ordered	1723
	b. Improperly Ordered.....	1724
7.	Refusal to Submit to Search or Drug Tests	1726
8.	Problems During Investigations: Lack of Cooperation; Interference	1729
9.	Administrative Law Judges.....	1738
10.	Defenses	1738
	a. Inability to Comply	1738
	b. Unclear Orders; Unknown Policies	1739
	c. Constitutional Challenges.....	1739
	d. Improper Directives	1739
	e. Federal Labor Law Policies	1743
	f. Fear for Safety	1744
11.	Mitigating Factors.....	1745
B.	SEXUAL MISCONDUCT.....	1746
1.	Sexual Harassment Defined	1748
	a. Past Significance of Psychological Harm	1754
	b. Charges Based Upon Agency Regulations or Standards of Conduct Not Specifically Tied to Title VII	1761
	c. Physical Contact.....	1767
	d. Offensive Remarks; Photos.....	1770
	e. Consensual Conduct Affecting the Workplace	1774
	f. Homosexual Conduct	1775
2.	Misconduct Toward Agency Clients and Affiliates.....	1775
3.	Misconduct Toward Children.....	1776
4.	Penalties for Sexual Misconduct	1776
	a. Demotion or Suspension.....	1776

b. Removal	1776
5. Defenses	1777
C. CONDUCT HARMING OTHERS; CRIMINAL VIOLATIONS	1778
1. Threats.....	1779
a. Metz Test	1780
b. Statements Made to Therapists; EAP Counselors	1784
c. Reaction of Others to Threat	1786
d. Threats Through Others; Rumors	1788
e. Conditional Threats	1790
f. Threat Against a Coworker	1791
g. Threat Against a Supervisor	1792
h. Threat Against Others.....	1792
i. Thoughts of Violence	1792
2. Assault	1793
a. Assault Upon a Coworker	1793
b. Assault Upon a Supervisor	1794
c. Assault Upon a Subordinate	1794
d. Assault Upon Others	1794
e. Defenses	1795
f. Mitigation.....	1795
3. Fighting.....	1797
4. Gambling.....	1798
5. Threats of Legal Action; Publicity	1798
6. Lawsuits	1800
7. Discourtesy; Related Problems.....	1800
8. Improper Conduct Toward Patients, Wards, and Others.....	1802
9. Invidious Discrimination; Offensive Remarks; Preferential Treatment; Reprisal	1803
a. Nepotism; Hiring of Friends	1810
D. CRITICAL STATEMENTS	1812
1. Constitutional Framework Applied in the Federal Sector	1821
a. Private Speech	1823
2. Criticism of the Agency or Its Personnel	1824
a. Constitutional Analysis	1824
b. Prohibited Personnel Practice Analysis	1826
c. Defamation.....	1828
d. Congressional Communications.....	1829
e. Political Activity and Speech	1830
3. Internal Criticism	1832
a. Constitutional Analysis.....	1832
b. Managerial Disagreements	1832
c. Administrative Law Judges.....	1833
d. Criticism of or False Statements About Coworkers, Subordinates, and Supervisors	1833
III. INTEGRITY.....	1837
A. FALSIFICATION AND MISREPRESENTATION	1837
1. Proof of Fraud; Falsification	1838
a. Neglect or Mistake	1841
b. Perjury.....	1844
c. Failure to Correct Report of Another	1844
d. Reliance Upon Advice of Counsel or Other Individual.....	1845
e. Cumulative False Statements.....	1846
2. Employment Application; Security Questionnaire; Duty of Candor	1846
a. Criminal Record.....	1848
b. Education and Experience.....	1850
c. Pre-Employment Medical Inquiries.....	1850
3. Compensation Claims; Vouchers	1852
a. Overtime	1852
b. Travel Vouchers and Associated Documents.....	1854
c. OWCP Claims.....	1856
d. Unemployment Compensation	1858
e. Disability or Leave Claims	1858
f. Pay and Allowances Claims.....	1858

4.	Records of Time, Attendance, and Work; Failures to Monitor Transactions and Follow Directions	1859
5.	Medical Certificates	1860
6.	Alteration, Failure to Preserve Documents and Evidence	1860
7.	Investigative Misrepresentations; "Exculpatory No"	1861
8.	Lack of Candor.....	1863
9.	Failure to Report Misconduct	1864
10.	Disclosure Statements.....	1864
11.	Mitigating Factors	1864
	a. Time, Attendance, and Travel Records.....	1866
	b. Medical Certificates	1867
	c. Employment Applications	1867
B.	REMOVAL AND MISUSE OF PROPERTY	1868
1.	Service Efficiency	1869
2.	Burden of Proof	1869
	a. Conversion.....	1870
	b. Use of Public Office for Private Gain	1870
	c. Unauthorized Possession or Removal of Property	1871
	d. Unauthorized Use.....	1872
	e. Common Possession Cases	1873
	f. Evidence of Intent: Theft and Unauthorized Possession.....	1873
3.	Petty Theft.....	1874
	a. Shoplifting	1875
	b. Significance of Custody and Control of Property	1876
4.	Government Vehicles.....	1878
	a. Deviation From Assigned Route; Minor Personal Use; Public Service Exemption	1883
	b. Nonstatutory Vehicle Misuse Charges	1884
5.	Unauthorized Use, Theft, or Destruction of Specific Property	1884
	a. Computers; Internet	1884
	b. Photocopier; Facsimile.....	1886
	c. Telephone.....	1886
	d. Misuse of Government Credit Card.....	1887
	e. Misuse of Services or Government Funds	1887
	f. Government Records; Official Information	1888
	g. Black Marketing; Diversion of Property	1897
	h. Obstruction or Theft of Mails	1897
	i. Misuse of Official Mail	1899
6.	Concealment of Theft	1899
7.	Mitigating Factors.....	1899
IV.	MEDICAL.....	1901
A.	DRUG AND ALCOHOL OFFENSES	1901
1.	Drug Sale, Possession, and Distribution	1903
	a. Possession or Use	1903
	b. Sale or Distribution	1904
	c. Safe Harbor Provision	1905
	d. Mitigation.....	1907
2.	Alcohol.....	1909
V.	PERFORMANCE.....	1909
A.	POOR PERFORMANCE REQUIRES CORRECTION	1909
1.	Significance of Performance Evaluations	1910
2.	Significance of Performance Standards	1910
	a. Measurement of Work Errors.....	1912
3.	Responsibility for Work Errors.....	1913
4.	Medical Inability to Perform.....	1913
	a. Recovery From Disability	1914
5.	Comparative Performance	1915
6.	Mitigating Factors; Choice of Penalty	1915
	a. New Duties	1916
	b. Details, Special Assignments	1918
	c. Progressive Discipline	1918
	d. Lack of Training	1918
	e. Lack of Improvement Period.....	1919

f.	Demotion; Reassignment	1919
g.	Suspension	1920
B.	NEGLIGENCE	1921
1.	Endangerment of Employees	1921
2.	Public Safety Risks	1922
3.	Destruction or Loss of Property	1922
4.	Medical Errors	1922
5.	Mishandling or Improper Possession of Weapons	1923
6.	Inattention to Duty; Sleeping on the Job	1923
7.	Failure to Follow Procedures	1923
8.	Excessive Expenditures; Waste	1924

CHAPTER 9: PERFORMANCE CASES 1925

I.	UNACCEPTABLE PERFORMANCE CASES	1925
A.	AN OVERVIEW OF THE PERFORMANCE ACTION	1926
1.	Merit Pay Employees	1927
B.	OPM APPROVAL OF APPRAISAL SYSTEM	1927
1.	Changes Directed by OPM	1929
C.	PERFORMANCE STANDARD CRITERIA	1929
1.	Substantive Right	1929
2.	Scope of Review	1930
a.	Deference to Agency Management	1930
3.	Objectivity	1931
a.	Timeliness of Work	1933
b.	Drafts; Intermediate Work Products	1933
c.	Personal Characteristics: Initiative, Reliability	1934
4.	<i>Wilson and Jackson</i> ; Negative or "Backwards" Standards	1934
a.	Communication of Standards	1937
b.	Augmentation of Standards	1938
c.	Use of PIP to Establish Standards	1940
5.	Specific Occupations	1942
a.	Clerical Employees and Secretaries	1942
b.	Voucher Examiners	1942
c.	Inspectors	1942
d.	Social Security Claims Employees	1943
e.	Employee Relations Specialist	1943
f.	Trade Analyst	1943
g.	Medical Technologists; Nurses	1944
h.	Scientists	1944
i.	Trades Employees	1945
j.	Computer Programmer/Analyst	1945
k.	Supervisory Supply Technician	1945
l.	Engineers	1945
m.	Lawyers	1945
n.	Management Analyst	1946
o.	Realty Specialist	1946
p.	Others	1946
6.	Numerical Standards	1946
7.	Multiple Components	1948
8.	Classification of Errors	1950
9.	Relationship of Standards Within Element	1950
10.	Absolute Standards	1951
a.	Standard to Be Viewed as a Whole	1955
b.	Modification of Absolute Standards	1955
c.	Standards That Enumerate Tasks	1956
d.	Level of Performance That May Be Exceeded	1957
11.	Unreasonable Standards	1958
12.	Levels of Performance	1959
a.	Five-Tier Appraisal System	1959
b.	Multiple Appraisal Levels for an Element	1960
c.	Two-Level, or Pass/Fail Appraisal System	1961

13. Standards Development	1962
14. Changes in Standards	1962
a. Changes Through PIP	1963
D. OPPORTUNITY TO IMPROVE	1964
1. Prerequisite of Unsatisfactory Performance	1964
a. Agency Need Not Prove Pre-PIP Unacceptable Performance	1965
2. Elements of Opportunity Period	1966
a. Order and Burden of Proof	1967
b. Control Over Work	1967
c. Assistance to Employee	1967
d. Application of Harmful Error Rule	1968
e. Necessity for Specific Warning	1968
f. Statement of Expectations	1969
3. Time Allowed for Improvement.....	1969
a. One-Year Maximum for Evaluation	1970
b. Pre-PIP Performance	1970
c. Post-PIP Performance and the Roller Coaster Employee	1971
d. Performance During Details	1973
E. PROCEDURE	1973
1. Chapter 43 and 75 Actions Distinguished.....	1974
2. Failure to Use Chapter 43	1974
a. <i>Lovshin</i>	1974
b. Conversion of Actions	1976
c. Limitations on the Use of Chapter 43	1977
3. Proposal and Decision Letters	1977
a. Requirement of Concurrence.....	1978
b. Unstated Charges	1978
c. Necessity for Specific Instances.....	1978
d. Notice Period	1979
F. NECESSARY PROOF: THE SUBSTANTIAL EVIDENCE TEST	1979
1. Test Defined; Scope of Review	1979
2. Weight, Quality of Substantial Evidence	1980
a. Charges as Evidence.....	1981
b. Effect of Prior Evaluation.....	1981
c. Statistics; Sampling Methods.....	1981
d. Other Information	1982
G. DEFENSES	1982
1. Propriety and Comparison of Performance Standards	1983
2. Comparison of Employee Performance	1983
3. Adequacy of PIP; Lack of Control of Work; Agency Bad Faith	1983
4. Training	1985
5. <i>Ex Parte</i> Decisional Communications Within the Agency.....	1986
6. Discrimination	1987
7. Collective Bargaining Agreements	1989
H. MITIGATION.....	1989
II. APPEALS FROM WITHIN-GRADE INCREASE DENIALS.....	1990
A. BASIS FOR MSPB REVIEW.....	1991
B. WHEN MSPB JURISDICTION ATTACHES.....	1991
1. Jurisdictional Effect of Collective Bargaining Agreements	1994
C. BURDEN OF PROOF	1994
1. Proof Required of Poor Performance	1995
a. Role of Performance Standards.....	1995
2. Substantial Evidence Controls.....	1995
a. What Constitutes Evidence	1995
D. DEFENSES	1996
1. Errors in ALOC Procedures	1996
a. Linkage of ALOC and Appraisal System	1996
b. Waiting Period	1997
c. Lack of ALOC Determination	1997
d. Vague ALOC Determination	1997
2. Reconsideration Errors.....	1997

a.	Employee Denied Information	1998
b.	Reconsideration Summary Lacking	1998
c.	Reconsideration Decision Level	1998
d.	Late Reconsideration Decision	1998
3.	Circumstances of Employee	1998
a.	Unfair Work Burdens	1998
b.	Illness or Disability	1998
c.	Comparative Work Production	1999
d.	Lack of Training	1999

CHAPTER 10: REDUCTIONS IN FORCE.....2001

I.	RIF PROCESS	2001
A.	NATURE OF RIF	2001
1.	Furloughs	2005
a.	Emergency Furloughs	2006
b.	Part-Time or Light Duty Status; Intermittent Appointments; Adjustments in Hours of Work	2007
B.	ACTIONS APPEALABLE AS RIF	2009
1.	General Regulatory Application	2009
a.	Demonstration Projects	2010
b.	Postal Service Non-Preference Eligibles	2013
c.	Part-Time Employees.....	2014
d.	Senior Executive Service Employees	2014
e.	Agencies With Independent Statutory Personnel Authority	2017
2.	Possibility of a RIF.....	2018
3.	Actions to Avoid RIF	2018
a.	Transfer to Another Agency	2018
b.	Resignation	2019
c.	Retirement	2019
4.	Reassignment	2019
a.	Reassignment Without Regard to RIF	2019
b.	Detail of Employee.....	2020
c.	Representative Rate.....	2021
d.	Reassignment During or Following RIF	2021
e.	Reassignment With Pay Reduction in Anticipation of RIF; Postal Reorganization and Other Cases	2021
f.	Subsequent Postal Reorganization Cases.....	2032
5.	Pay Rate Changes; Demotion; Grade and Pay Retention	2038
6.	Classification Issues	2038
a.	Erosion of Duties.....	2040
b.	Intentional Changes in Duties	2042
7.	Transfer of Function.....	2043
a.	Identification of Positions for Transfer	2045
b.	Employees Who Decline to Move.....	2048
C.	COMPETITIVE AREA.....	2048
1.	Definition	2048
2.	Criteria	2048
3.	Assignments Across Competitive Areas	2049
4.	Challenge to Competitive Area	2049
a.	Burden of Proof.....	2049
b.	Organizational Structure; One-Person RIF.....	2049
c.	Geographical Structure; Local Commuting Area	2052
D.	COMPETITIVE LEVEL	2053
1.	Defined	2053
2.	Challenges to Competitive Level	2054
a.	Primacy of Position Description	2055
b.	Testimony Concerning Duties in Competitive Level Determinations	2057
c.	Loss of Productivity; Undue Interruption	2058
d.	Role of Collective Bargaining Agreement.....	2059
e.	Challenge to Performance Appraisal	2059
3.	Particular Groups of Employees	2061
a.	Developmental Employees/Trainees	2061
b.	Temporary Employees	2061

c.	Part–Time Employees	2061
d.	Veterans Administration Health–Care Professionals	2062
e.	Bureau of Indian Affairs	2065
4.	Scope of MSPB Review	2065
a.	Impact of Error.....	2065
b.	Right to Hearing	2066
c.	Substantive Review.....	2066
II.	ASSIGNMENT AND RELATED RIGHTS	2067
A.	REGULATORY AND OPERATIONAL BASIS	2067
1.	Veterans and Other Preferences	2069
2.	Type of Appointment	2071
a.	Excepted Service Employees.....	2071
b.	Employees on Detail.....	2071
c.	Intergovernmental Personnel Act	2071
d.	Part–Time/Full–Time	2072
e.	Supervisory Positions	2072
f.	Temporary Positions	2072
3.	Filling of Vacancies.....	2072
4.	Assessment of Qualifications	2075
a.	Updating Qualifications	2077
b.	Qualifications of Displacing Employee	2078
c.	Merit Promotion Issues.....	2078
d.	Undue Interruption	2078
5.	Representative Rates	2079
6.	Amendment of RIF Notice; Change in Positions	2080
B.	BUMPING.....	2081
C.	RETREAT	2083
1.	Prior Rule	2084
2.	Method of Analysis	2084
3.	Burden of Proof	2086
D.	REEMPLOYMENT RIGHTS	2086
1.	RPL Rights Prior to Effective Date of RIF.....	2098
2.	Remedies in RPL Appeals	2100
3.	Transitional Assistance	2101
III.	RIF DEFENSES	2101
A.	BURDENS OF PROOF	2101
1.	Agency Responsibility	2101
2.	<i>Prima Facie</i> Case.....	2102
3.	Qualifications of Employees; Assignment Rights	2102
4.	Classification Disputes.....	2103
B.	<i>BONA FIDE RIFs; LOSURE V. ICC</i>	2103
1.	Substantive Rights/Harmful Error	2104
3.	RIF as Adverse Action.....	2106
4.	Challenges to Reorganizations	2110
a.	Reorganization Defined; Single Position RIF	2110
b.	Managerial Discretion.....	2111
c.	Funding Decisions	2111
d.	Redistribution of Duties	2113
e.	Planning for Future Events	2114
f.	Comparative Qualifications as a Factor in the Selection of Jobs for RIF	2115
g.	Contribution to Agency Mission; Funding of Individual Positions	2115
h.	Contracting Out Challenge	2116
i.	Sham or Paperwork Reorganizations: Old and New Positions Identical; Delayed Reorganization	2116
j.	Merit Promotion and Hiring During RIF	2119
k.	Events Preceding and Subsequent to RIF	2119
C.	DISCRIMINATION DEFENSES	2121
1.	Age	2125
2.	Religion.....	2126
D.	PROCEDURAL MATTERS	2126
1.	Internal Procedures	2127
2.	Timing of Job Offers; Timing of Release of Employees	2127

3. Correction of Retention Standing Errors	2127
a. Allowing Inspection of Records	2127
4. Adequacy of the RIF Notice	2127

CHAPTER 11: HARMFUL ERROR.....2129

I. STATUTORY STANDARD	2129
A. HARMFUL ERROR DEFINED.....	2129
1. <i>Parker</i>	2130
2. Might Have/Would Have Analysis	2131
B. HARMFUL ERROR APPLIED	2132
1. Mixing Harmful Error and Other Doctrines.....	2132
a. Mitigation of Penalties.....	2132
b. Prohibited Personnel Practices	2132
c. Reduction in Force	2132
2. Statutory and Regulatory Violations	2132
a. Unfair Labor Practices.....	2133
b. Privacy Act; Disclosure of Confidential Information	2135
c. Constitution.....	2136
3. Collective Bargaining Agreement Violations	2136
a. Contract Coverage	2139
b. Impact of Arbitration Awards	2139
c. Employment Contracts.....	2139
4. Problems With Representation.....	2139
II. ERROR IN PRELIMINARY PROCEDURES.....	2140
A. AGENCY INVESTIGATIONS.....	2140
1. Notion of Due Process	2141
2. Right to Counsel; Union Representatives	2141
3. Entrapment	2143
4. Agency Predecisional Hearing; Investigation	2143
B. STALE CHARGES; LACHES	2143
1. General Rule	2144
2. Agency Regulations; Collective Bargaining Agreements	2145
3. Performance Cases	2146
C. ESTOPPEL; DOUBLE JEOPARDY	2146
1. Estoppel	2146
2. Double Jeopardy.....	2146
III. ERRORS IN PROPOSAL NOTICE AND REPLY PROCESS	2149
A. BASIC RIGHTS	2149
1. Pre-Decision Proposal Not Required as a Constitutional Requirement	2151
2. Right to Counsel	2153
B. PROPOSAL NOTICE.....	2153
1. Purpose of Notice	2153
a. Technical Deficiencies	2154
b. Failure to Provide Notice of Appeal Rights	2154
c. Errors in Dates	2154
d. Other Minor Errors	2155
e. Assessing Sufficiency of Charge.....	2156
2. Only Conduct Described	2159
a. Conduct After Date of Proposal Notice	2161
b. Amendment of Charges.....	2161
3. Framing of Charges	2161
a. General Charges; Detailed Narratives; <i>Otero</i> and <i>Cross</i>	2162
b. Variation Between Stated Charge and Supporting Narrative or Specifications	2164
c. Splitting of Charges	2169
d. Independent Elements of Single Charge	2171
e. Multiple Specifications Supporting a Single Charge	2174
f. Lesser Included Offenses.....	2176
g. Past Discipline; Performance Record; Aggravating Factors	2176
4. Citation of Conduct Standards.....	2177
a. References to Statutory Rights; Notice of MSPB Appeal Rights	2178
5. Criminal Charges	2178

6.	Mixing Chapters 43 and 75	2178
7.	Cumulative Charges; Merger of Charges; Charge of “Unbecoming Conduct”	2178
8.	Service of Notice.....	2180
C.	INADEQUATE REPLY AND NOTICE PERIOD	2182
1.	Calculation	2182
2.	Not Less Than Seven Days for Reply	2182
3.	30–Day Advance Notice of Action	2183
D.	SHORTENED NOTICE PERIOD.....	2184
1.	Procedure to Invoke Shortened Notice	2185
2.	Reasonable Cause to Believe	2186
a.	Arrest, Warrant	2187
b.	Conduct Caused by Mental Impairment.....	2187
3.	Emergency Suspensions for Reasons Other Than Reasonable Belief of Crime Subject to Penalty of Incarceration	2187
E.	FAILURE TO PROVIDE INFORMATION.....	2188
1.	Loss or Destruction of Evidence	2189
F.	ORAL AND WRITTEN REPLIES.....	2190
1.	Proof of Harm.....	2192
2.	Waiver of Reply Right	2194
a.	Extension Requests	2194
3.	Reply Officer’s Recommendation.....	2196
4.	Right to Confrontation.....	2196
5.	Inadequate Representation.....	2197
G.	AGENCY DECISIONAL PROCEDURES; <i>EX PARTE</i> COMMUNICATIONS.....	2197
1.	Early Law From the Courts	2197
2.	<i>Sullivan</i> ; Regulatory Prohibitions; Adverse External Influences	2200
3.	<i>Stone</i> ; the Broadened Due Process Test	2203
4.	Early Law From the MSPB	2208
5.	Deciding Official Consults Witnesses, Advisors; Information Not Disclosed to the Employee	2209
a.	Information From Witnesses.....	2209
b.	Impact of 5 USC 2302(b)(2).....	2211
c.	Reports and Investigations	2211
d.	Advisors.....	2211
e.	Information Pertaining to Aggravation or Mitigation of Penalty.....	2212
6.	Proposing and Deciding Officials Confer	2212
7.	Predisposition to Initiate Adverse Action; Offers to Permit Resignation; Uninformed Deciding Official	2213
a.	Malicious Initiation of Action	2214
8.	Biased Deciding Official.....	2214
9.	Involvement of OSC.....	2215
10.	Changes in Proposing, Deciding Officials	2216
11.	Lack of Authority.....	2218
a.	Proposing Official.....	2218
b.	Deciding Official.....	2218
12.	Pending Retirement Application	2219
13.	Specificity of Decision Letter.....	2219
a.	No Decision Letter.....	2219

CHAPTER 12: DISCRIMINATION.....2221

I.	DISCRIMINATION ISSUES	2221
A.	PROCEDURES IN MIXED CASES.....	2221
1.	Multiple Agency Review Process.....	2222
a.	Constructive Adverse Actions	2224
2.	Multiple Filing Options; Pleading Requirements; Timing of MSPB Appeal	2224
a.	Withdrawal or Abandonment of EEO Allegations	2225
b.	Authority of Judge to Strike Frivolous EEO Allegations; Summary Judgment	2225
3.	Jurisdictional Problems With EEO Complaints	2228
a.	Filing Dates	2228
b.	Timeliness of EEO Complaint	2228
c.	EEO Class Actions	2231
d.	EEO Complaint Withdrawn.....	2233
e.	What Constitutes a Complaint	2234
f.	Coextensive Issues; Scope of Complaint.....	2234

g.	EEO Complaints Involving Proposed Actions	2235
h.	Premature Appeals	2235
4.	Duty to Resolve Issues and Inform Appellant of Elements of Proof	2236
5.	Jurisdiction Over Appealable Action; Constructive Adverse Actions	2237
a.	Probationary Employees.....	2238
6.	Election of Remedies	2238
a.	Grievances Under Negotiated Agreements.....	2238
b.	EEO Complaints.....	2238
7.	MSPB Remands; EEOC Remands.....	2239
8.	Strategic Considerations	2242
B.	BURDEN OF PROOF	2242
1.	<i>Prima Facie</i> Case.....	2242
2.	Analysis Following Establishment of a <i>Prima Facie</i> Case	2246
a.	Analysis of Motivation, Pretext	2247
b.	Proof That Discriminatory Action Would Have Been Taken Without Impermissible Motive; Dual Motivation	2248
c.	Element of Intent; Employer Error	2254
d.	Significance of Agency's Proof of Charges	2255
e.	Significance of Agency's Failure to Prove Charges	2255
f.	Comparable Employees; Dissimilar Treatment.....	2257
C.	EVIDENCE	2261
1.	Direct Evidence; Taint of Other Officials.....	2262
2.	Circumstantial Evidence; Presumptions	2263
3.	Disparate Impact	2265
4.	Statistics	2266
5.	Supervisory Practices; Remarks.....	2267
D.	FORMS OF DISCRIMINATION	2268
1.	Race	2268
2.	Age	2270
3.	Religion.....	2274
4.	Marital Status.....	2275
5.	Pregnancy.....	2275
6.	Sexual Orientation	2276
7.	Retirement Cases: Application by OPM of Statutory Requirements	2276
E.	REPRISAL.....	2277
1.	Personnel Actions Qualifying for Title VII Protection.....	2285
2.	Taint of Reprisal by Lower Level Officials.....	2286
3.	Rebuttal Evidence; Pretext.....	2287
II.	REHABILITATION ACT: DISABLING CONDITIONS	2287
A.	REGULATORY STRUCTURE.....	2288
B.	<i>PRIMA FACIE</i> CASE	2291
1.	Individuals Regarded or Perceived as Disabled	2293
2.	Substantial Limitation of Major Life Activity	2299
a.	Life Activity of Working	2301
3.	Order and Burden of Proof.....	2305
4.	Causal Connection.....	2311
5.	Transitory or Temporary Disability.....	2314
a.	Corrected or Mitigated Condition.....	2315
6.	Limitation on General Employability	2315
a.	Allergies	2317
b.	Stress Disorders	2319
c.	Other Mental Disability; Proof of Disability.....	2325
7.	Conditions Not Protected by Rehabilitation Act	2326
a.	Gambling Compulsion	2326
b.	Sexual Disorders	2326
8.	Qualified Disabled Employee.....	2326
a.	Dangerousness; Risk Assessment	2327
b.	Lack of Medical Release	2332
9.	Knowledge of Disability.....	2332
a.	When Disability Claim or Defense Must Be Raised	2333
10.	Suggesting Nonapparent Accommodation; Duty of Reasonable Inquiry	2334
a.	Interactive Process	2335

C.	ACCOMMODATION THROUGH JOB RESTRUCTURING.....	2337
1.	Light Duty and Job Modification.....	2337
a.	Lifting Requirements.....	2340
b.	Postal Service Collective Bargaining Agreements.....	2341
c.	Inappropriate Job Modification; Increased Job Burdens	2342
2.	Modifications to Job Equipment	2342
3.	Alteration of Work Schedule, Worksite	2345
a.	Alteration of Training Requirements	2349
D.	ACCOMMODATION THROUGH REASSIGNMENT	2350
1.	<i>Ignacio</i>	2351
2.	Evaluation of Reassignment Efforts	2354
a.	Reassignments Across Organizational Lines	2358
E.	ALTERNATIVE ACCOMMODATIVE REQUIREMENTS	2363
1.	Collective Bargaining Agreements	2363
2.	Agency Regulations	2364
3.	Restoration From Compensable Injury	2364
4.	Demotion; Promotion.....	2364
5.	Modification of Agency Policies, Facilities.....	2366
6.	Required Training; Changes in Supervision	2366
a.	Referral for Counseling	2369
F.	AGENCY DEFENSES	2370
1.	Undue Hardship on Agency.....	2370
a.	Restrictions in Collective Bargaining Agreements	2375
2.	Rebuttal	2376
a.	Lack of Qualifications for Position	2376
b.	Receipt of Disability Annuity.....	2377
3.	Restriction on Remedy	2378
G.	ALCOHOLISM AND SUBSTANCE ABUSE.....	2378
1.	Necessity for Accommodation: <i>Ruzek</i>	2379
a.	Suitability.....	2380
b.	Postal Service Employees	2381
2.	Notice of Disability.....	2381
a.	Agency Informational Requirements	2382
3.	Proof of Disease	2382
4.	Misconduct Caused by Disease	2384
a.	Use of Alcohol or Drugs on the Job	2387
b.	Revocation of Driver's License	2387
c.	Possession of Drugs.....	2388
d.	Misappropriation or Theft of Drugs	2388
e.	Misappropriation of Funds	2388
5.	Qualified Disabled Employee; <i>Hougens</i> and Disqualifying Conduct	2389
a.	Current Substance Abusers	2393
b.	Disqualifying Misconduct: Removal Appropriate.....	2395
c.	Less Serious Conduct: Concurrent Rehabilitation and Discipline.....	2400
6.	Firm Choice and Last Chance Agreements.....	2401
a.	Requirements of Collective Bargaining Agreements, Agency Regulations	2404
b.	Failed Rehabilitation Attempt.....	2406
7.	Undue Hardship	2409
III.	AVENUES OF FURTHER REVIEW OF EEO DEFENSES	2409
A.	EEOC REVIEW.....	2409
B.	SPECIAL PANEL REVIEW.....	2410
C.	JUDICIAL REVIEW.....	2417
1.	Scope of District Court Review.....	2418
a.	Effect of District Court Review	2419
b.	Time for District Court Review	2422
2.	Effect of Waiver of EEO Claims	2425
CHAPTER 13: PROHIBITED PERSONNEL PRACTICES.....		2427
I.	OVERVIEW.....	2427
A.	SIGNIFICANCE OF DISCOVERY.....	2429

II. TYPES OF PROHIBITED PERSONNEL PRACTICES	2429
A. WHISTLEBLOWING REPRISAL.....	2430
1. Statutory Definition Controls.....	2431
a. "Gross" Waste or Mismanagement	2432
b. Violations of Laws, Rules, and Regulations	2438
c. Abuse of Authority.....	2444
d. Threats to Public Health and Safety.....	2447
2. Disputes Over Form of Whistleblowing	2454
a. Complaints to Wrongdoers; Internal Disagreements	2454
b. Information Disclosed Through Normal or Ordinary Duties; Disclosure Through Extraordinary Means	2458
c. Disclosures to Officials Who Cannot Directly Remedy the Matters Disclosed	2466
d. Communications Indirectly Involving the Government	2466
e. Communications to News Media; Congress	2467
f. Disclosure of Information Already Known or Public.....	2468
g. Sequential Allegations	2469
3. Whistleblowing No Shield Against Misconduct.....	2469
a. Abusive Whistleblowers.....	2470
b. Threats To The Blow The Whistle	2472
4. Personnel Treated as Whistleblowers	2473
a. Individuals Perceived as Whistleblowers	2473
b. Whistleblowers' Aides, Associates	2474
c. Individuals Serving as Conduits of Information; Internal Disclosures	2476
d. Annuitants.....	2476
5. Protected Disclosures	2476
a. Reasonableness of Allegations; False Statements; Motivation	2476
b. Information Developed After Disclosure	2481
c. Belief Shared by Other Employees; Disinterested Observer.....	2481
d. Response of Agency to Disclosure	2482
e. Expertise of Whistleblower	2482
f. Specificity Of Disclosures.....	2484
g. Presumed Agency Good Faith; "Irrefragable Proof" Standard.....	2484
6. Unprotected Disclosures; Disputes Concerning Coverage of Disclosures Under 2302(b)(8) or 2302(b)(9)	2487
a. Disclosures Prohibited by Law	2487
b. EEO Complaints.....	2490
c. Other Appeals, Charges, FECA Claims, Grievances, and Complaints.....	2492
7. Disclosures Filed in Multiple Forums	2494
B. PROHIBITED PRACTICES OTHER THAN WHISTLEBLOWING REPRISAL	2497
1. Discrimination Proscribed by Civil Rights Laws; 5 USC 2302(b)(1)(A)	2497
a. Sexual Harassment.....	2497
2. Improper Personnel Recommendations; 5 USC 2302(b)(2)	2497
3. Obstruction of Competition; 5 USC 2302(b)(4)	2498
4. Influencing Employment Decision; 5 USC 2302(b)(5).....	2498
5. Improper Preferences and Promotions; 5 USC 2302(b)(6)	2499
6. 5 USC 2302(b)(9); Appeal Rights; Union Activity; OSC and IG Disclosures Not Qualifying for WPA Protection	2500
7. Discrimination Unrelated to Job Performance; 5 USC 2302(b)(10)	2501
8. Discrimination Against Veterans; 5 USC 2302(b)(11)	2502
9. Violations of Merit System Principles; 5 USC 2302(b)(12).....	2503
a. Failure to Provide Effective Training; 5 USC 2301(b)(7)	2505
III. INDIVIDUAL RIGHT OF ACTION.....	2506
A. STATUTORY AND REGULATORY REQUIREMENTS.....	2508
1. Time for Initiating IRA Appeal.....	2512
a. Case That May Be Either Initiated With OSC or Appealed Directly to MSPB.....	2513
b. Premature Appeal Following Resort to OSC.....	2513
c. Belated Receipt of OSC Closeout Notice	2514
d. Late IRA Appeal; Calculation and Waiver of Appeal Period	2515
e. Laches.....	2519
B. JURISDICTIONAL ISSUES	2520
1. <i>Rusin</i> Model: Nonfrivolous Allegations Establish Jurisdiction	2521
a. Allegations Based on the Written Record	2524
b. Hearing.....	2526
2. Jurisdictional Analysis Prior to <i>Rusin</i>	2526

3.	Variations in Order of Proof	2527
4.	Exhaustion of Remedies	2529
a.	Exception to the Exhaustion Requirement: Otherwise Appealable Actions	2532
5.	Election and Preclusion of Remedies	2532
a.	Grievance or MSPB Appeal.....	2532
b.	Exhaustion of OSC Processes; Direct Appeal to MSPB of Otherwise Appealable Action	2534
c.	EEO Complaint.....	2536
6.	Collateral Jurisdiction Over Discrimination Claims Presented in IRA Appeal Not Involving Otherwise Appealable Action	2536
7.	Jurisdiction Over Collateral Prohibited Personnel Practice and Discrimination Claims in Otherwise Appealable Actions Initiated Through OSC.....	2537
8.	Status of Particular Agencies and Employees.....	2537
a.	Postal Service	2537
b.	Department of Veterans Affairs Title 38 Employees	2538
c.	National Guard Technicians	2543
d.	Federal Bureau of Investigation	2546
e.	Defense Intelligence Agency	2546
f.	Judicial Branch Employees.....	2546
g.	Federal Reserve Board	2546
h.	NAF Employees	2546
i.	Independent Counsel	2547
j.	Federal Aviation Administration	2547
k.	Transportation Security Agency	2547
l.	Foreign Intelligence, Counterintelligence Agencies, Foreign Nationals	2550
m.	Government Corporations	2553
n.	Other Entities	2553
o.	Experts and Consultants; Personnel Appointed Outside Title 5.....	2554
p.	Lawyers	2555
q.	Former Employees	2556
r.	Employees in the Private Sector; Applicants for Employment.....	2556
9.	Retroactivity of Whistleblower Amendments; Continuing Violations	2557
C.	PLEADING REQUIREMENTS	2558
1.	Duty of Judge to Inform Appellant of Jurisdictional Requirements.....	2558
2.	Specificity of Underlying Whistleblower Disclosures.....	2559
3.	Pleading to OSC.....	2562
a.	Classification or Labeling of Disclosures Not Required	2568
b.	Curative Filings With OSC	2569
c.	Proof of Scope of Complaint Made to OSC	2570
d.	OSC Closeout Letter.....	2571
4.	Pleading to the MSPB	2571
D.	EXCLUDED AND COVERED PERSONNEL ACTIONS.....	2572
1.	Threatened Personnel Actions	2573
a.	Proposed Actions; Disputes Arising During Compliance.....	2575
2.	Failure to Take Personnel Action.....	2576
3.	Performance Appraisal; Evaluations of Qualifications or Abilities.....	2578
4.	Awards and Acts Preliminary to Awards	2578
5.	Denial of Salary Step Increase	2579
6.	Promotions	2579
7.	Decisions Concerning Leave; Changes in Duties; Idling; Overtime	2580
a.	Degree of Significance of Change of Duties, Responsibilities, or Working Conditions.....	2581
8.	Reprimands; Admonitions; Counseling; Performance Warnings; Performance Improvement Periods	2581
9.	Suspensions	2583
10.	Probationary Terminations	2583
11.	Failure to Renew Appointment.....	2584
12.	Reassignments, Transfers, and Details.....	2584
13.	Fitness Examinations	2585
14.	Security Clearance Suspension and Revocation; Other Certifications.....	2585
15.	Training	2590
16.	Defamatory Statements; Torts; Arrest; False Allegations	2591
17.	Reductions in Force.....	2591
18.	Classification Matters.....	2592

19.	Constructive Adverse Actions.....	2592
a.	Actions Affecting Private Sector Employment Opportunities	2595
20.	Other Actions.....	2595
E.	REMEDIES.....	2596
IV.	CASES BROUGHT BY OSC	2596
A.	STATUTORY BASES.....	2596
1.	Corrective Action; Individual Right of Action Cases; Stays.....	2596
2.	Disciplinary Cases.....	2598
3.	Hatch Act; FOIA Violations	2599
B.	ORGANIZATION OF OSC.....	2599
1.	Organizational Structure	2599
a.	Representation of Witnesses Interviewed by OSC	2600
2.	Disclosure Unit	2600
3.	MSPB Referrals to OSC.....	2601
4.	Judicial or Administrative Findings of Discrimination by Federal Employees; 5 USC 1216(a)(5)	2601
C.	OSC DISCIPLINARY CASES	2601
1.	Limits on Prosecutorial Authority.....	2601
a.	Employees Who Take or Recommend Personnel Actions.....	2603
b.	Prior Resort to Agency–Employer for Disciplinary Action	2603
2.	OSC Complaint.....	2604
3.	Rights of Employees and Respondents.....	2605
4.	OSC Subpoenas; Discovery Procedures	2605
5.	Hearing by Administrative Law Judge; MSPB Review.....	2606
6.	Disciplinary Penalties.....	2606
D.	OSC CORRECTIVE ACTIONS	2610
1.	Regulatory Provisions	2612
2.	Filing a Complaint With OSC	2613
a.	OSC Deferral Policy on EEO Charges	2614
b.	Proceedings to Compel OSC Action	2615
E.	LITIGATION WITH OSC.....	2616
1.	Purpose of MSPB Hearing	2616
a.	Obtaining Records	2616
b.	Evidence From Other Investigations	2616
c.	Dismissal of OSC Actions	2616
2.	Settlements of OSC Litigation	2616
3.	Judicial Review of OSC and IRA Cases	2617
a.	Stays Pending Judicial Review	2617
V.	BURDENS OF PROOF IN REPRISAL CASES	2617
A.	ANALYSIS UNDER WHISTLEBLOWER PROTECTION ACT	2617
1.	Analysis Required by Judge.....	2618
2.	Statutory and Regulatory Provisions	2618
3.	Contributing Factor Analysis	2618
a.	Sequential Proof Not Required	2619
b.	<i>Per Se</i> Timing Test	2620
c.	Knowledge by Agency Managers of Appellant’s Whistleblowing; Constructive Knowledge	2626
d.	Disclosure Follows the Personnel Action.....	2628
e.	Settlement Offers	2629
f.	Reprisal Without Unlawful Motivation: Reprisal by Investigation—the Atypical Case	2629
g.	OSC Corrective Action Cases	2637
4.	Otherwise Appealable Actions	2638
5.	Agency’s Clear and Convincing Evidence	2638
6.	Evidence of Reprisal	2649
a.	Preliminary Reprisals Leading to Later Personnel Actions	2650
B.	ANALYSIS FOR PROHIBITED PRACTICES NOT COVERED BY WPA.....	2651
1.	<i>Mt. Healthy</i>	2653
a.	Importance of Untainted Deciding Official.....	2655
b.	Timing of Actions.....	2658
c.	Severity of the Charged Misconduct.....	2659
d.	Discipline Related to Refusal of Reassignment.....	2660
e.	Reprisal Against Individuals Involved in Union Activities	2660
f.	Performance Cases	2663

2.	Disciplinary Cases.....	2663
a.	Analysis by Agency Deciding Official	2670
VI.	STAYS OF PERSONNEL ACTIONS	2670
A.	STAYS THROUGH INDIVIDUAL APPEALS.....	2670
1.	Grounds for Stays	2672
a.	Intervention by OPM.....	2675
2.	Scope of Stay	2675
3.	MSPB Review of Regional Stay Decision.....	2675
B.	STAYS THROUGH OSC PROCEEDINGS	2675
1.	Statutory and Regulatory Provisions	2676
a.	OSC Stay Policy.....	2678
2.	Initial Stays.....	2679
a.	Potential for Disruption by Employee Return to Workplace	2680
b.	Obtaining Clarification of Stay Order	2680
3.	Extensions of Stays	2680
4.	Proof Supporting Stay Applications	2683
5.	Nature of Relief.....	2683
6.	Termination of the Stay.....	2684
7.	Relation of Stay and Appeals Proceedings	2685
8.	Use of Stays to Protect Other Proceedings.....	2685
a.	EEO Cases	2685
b.	Union Rights Under Statute.....	2685
9.	Employees Covered by Stays	2685
a.	SES	2685
b.	Presidential Appointees; Policymakers	2685
c.	At Will Employees	2685

CHAPTER 14: RETIREMENT AND REEMPLOYMENT — By EDWARD H. PASSMAN.....2687

I.	NATURE OF DISABILITY AND OTHER RETIREMENT	2687
A.	DISABILITY RETIREMENT	2687
B.	OPTIONAL RETIREMENT.....	2687
1.	Creditable and Covered Service	2688
2.	Retirement Benefits	2689
a.	Conversion to and From FERS.....	2690
b.	Lump Sum Payment; Alternative Annuity	2691
c.	Disqualification	2692
C.	EARLY RETIREMENT; DISCONTINUED SERVICE ANNUITY	2692
D.	DEATH BENEFITS	2692
E.	WORKERS' COMPENSATION.....	2694
1.	Election of Benefits.....	2694
II.	DISABILITY DEFINED AND ELIGIBILITY REQUIREMENTS	2694
A.	STATUTORY REQUIREMENTS	2694
1.	Useful and Efficient Service	2694
2.	Qualified for Reassignment	2694
B.	FEDERAL EMPLOYEES.....	2695
1.	Contract, Nonappropriated Fund Employees	2695
C.	QUALIFYING SERVICE	2696
1.	Regular Employment	2696
a.	Part-Time and WAE Service	2696
b.	Disability Retirement.....	2696
2.	Military Service	2697
3.	International Organizations	2699
4.	Reemployed Annuitants	2699
5.	Workers' Compensation Benefits	2699
6.	Lost Records.....	2700
D.	WITHDRAWAL OF CONTRIBUTIONS	2700
E.	MEDICAL CONDITION AND REASONABLE ACCOMMODATION.....	2701
1.	Medical Condition	2701
a.	Documentation	2701
2.	Disability Accommodation	2702

III. APPLICATION, RECONSIDERATION, AND APPEALS	2703
A. WHO MAY APPLY	2703
1. Legal Representative; Spouse; Substitution	2703
2. Employing Agency	2703
B. WHEN DISABILITY RETIREMENT APPLICATION MUST BE FILED	2704
C. APPLICATION FORM.....	2706
1. Basic Steps	2706
2. Effective Date.....	2706
3. Withdrawal of Application	2707
4. Effect of Misleading Advice	2707
D. RECONSIDERATION BY OPM.....	2708
1. Application	2708
2. Procedure	2708
E. MSPB APPEALS.....	2709
1. Time for Appeal	2709
a. Jurisdictional Issues and Settlements.....	2712
2. MSPB Discovery and Hearing Procedures	2713
3. Burden of Proof	2713
a. <i>Chavez and Bruner</i>	2713
b. Evidence in Employee–Initiated Appeals; Partial Disability	2714
c. Sanctions	2715
d. Agency–Initiated Applications	2715
4. Hearing and Evidence	2716
a. Hearing	2716
b. Objective Evidence	2716
c. Subjective Evidence	2717
d. Evaluation of Evidence and Issues Raised	2717
5. Petitions for Review	2717
a. Timeliness	2717
b. Standards of Review	2720
c. New Evidence	2720
d. Interim Relief.....	2721
6. Remands, Dismissal Without Prejudice, and Reconsideration.....	2721
a. Remands and Dismissal of Without Prejudice.....	2721
b. Reconsideration	2721
c. Stays	2721
7. Judicial Review.....	2722
8. Compliance	2722
IV. SPECIFIC AILMENTS	2723
A. HEART DISEASE.....	2723
B. STRESS AND HYPERTENSION.....	2723
C. NEUROMUSCULAR ILLNESSES	2724
1. Arthritis	2724
2. Back, Neck and Shoulder Problems	2725
3. Pain in or Disability of Extremities	2727
D. PULMONARY DISEASE	2727
E. PSYCHIATRIC PROBLEMS	2728
F. ALCOHOLISM AND DRUG USE.....	2730
G. MISCELLANEOUS	2730
1. Neurological.....	2730
2. Diabetes	2731
3. Visual Problems	2731
4. Hearing Difficulties.....	2731
5. Other Problems	2731
V. TERMINATION OF DISABILITY RETIREMENT	2732
A. STATUTORY PROVISIONS	2732
B. BURDEN OF PROOF.....	2732
1. Estoppel; Settlement Agreements	2733
C. MEDICAL RECOVERY.....	2733
D. RECURRENCE OF DISABILITY	2733
E. RESTORATION OF EARNING CAPACITY	2734

1.	Operative Pay Rate	2734
a.	Basic or Current Rate of Pay	2734
b.	Postal Cost of Living Adjustments	2734
2.	Possibility of Promotion	2734
3.	Effect of Annuity Income	2734
4.	Miscellaneous Income and Deductions	2734
5.	Estoppel	2735
VI.	SURVIVOR ANNUITY PROBLEMS	2735
A.	OVERVIEW OF SURVIVOR ANNUITIES	2735
1.	Election Options	2735
a.	Effective Date of Election.....	2738
2.	Children	2738
3.	Health Benefits.....	2739
4.	Insurable Interest	2739
5.	Allotments; Assignments	2739
B.	REVIEW OF OPM DECISIONS	2740
1.	Jurisdiction	2740
2.	Intervenors	2740
3.	Judicial Review	2740
C.	COMPETENCY TO MAKE ELECTION	2740
D.	PROBLEMS WITH FILING FORMS AND ELECTIONS	2741
1.	Change in Election	2741
a.	Waiver or Estoppel as to Time Limit for Changing Election	2741
2.	Election After New Marriage	2742
E.	QUALIFYING NATURE OF MARITAL STATUS	2743
1.	Community Property Problems	2743
2.	Divorce, Later Marriage, Common-Law Marriage	2744
VII.	ANNUITY COMPUTATION AND DEDUCTION PROBLEMS	2744
A.	COMPUTATION OF BENEFITS	2744
1.	Significance of Individual Retirement Record	2746
2.	Effect of Court Order.....	2747
3.	Conversion to Discontinued Service Annuity	2749
4.	COLAs	2749
5.	Effect of Social Security Benefits.....	2750
6.	Service Computation Problems	2750
7.	Offsets to Annuities.....	2750
B.	WAIVER OF OVERPAYMENTS	2750
1.	Waiver Procedure	2750
2.	Particular Cases of Waiver	2754
3.	Disputes Over Amounts of Overpayments	2755
VIII.	SPECIAL RETIREMENT PROVISIONS	2755
A.	NATIONAL GUARD TECHNICIANS.....	2755
B.	FIREFIGHTERS	2756
C.	LAW ENFORCEMENT OFFICERS	2756
1.	Pre-Application Status Determination and Time Limits for Filing	2756
2.	Actual Duties Performed	2758
3.	What Constitutes Primary Law Enforcement Positions	2758
a.	Position-Oriented Analysis	2760
4.	What Constitutes Secondary Law Enforcement Positions	2761
D.	AIR TRAFFIC CONTROLLER AND AIR TRAFFIC CONTROL SPECIALIST RETIREMENT	2762
E.	EARLY VOLUNTARY RETIREMENT AND DISCONTINUED SERVICE RETIREMENT.....	2762
1.	Burden of Proof.....	2762
2.	Service Credit	2763
3.	Sanctions	2763
IX.	REEMPLOYMENT RIGHTS	2763
A.	STATUTORY AND REGULATORY BASIS	2763
1.	Basis for Separation of Employee	2764
B.	RECOVERED EMPLOYEES	2767
1.	Full Recovery	2769
a.	Timeliness of Request for Restoration, MSPB Appeal	2771
2.	Partial Recovery	2772

C. REASONS FOR DISQUALIFICATION.....	2775
D. MILITARY RETURN RIGHTS	2776

CHAPTER 15: ATTORNEY FEES2779

I. ENTITLEMENT STANDARDS.....	2779
A. STATUTORY AND REGULATORY BASIS FOR FEES	2779
1. Use of Counsel; Licensure.....	2780
2. Governing Statutes and Regulation	2782
a. Civil Rights Statutes	2783
3. Jurisdiction Over Action Under Appeal	2784
4. Miscellaneous Appeals	2784
a. Regulation Review Proceedings	2784
b. Retirement Cases.....	2784
c. OSC Cases: Prohibited Personnel Practice and Hatch Act Litigation	2785
d. USERRA; VEOA Appeals	2792
e. Sanctions	2793
B. PREVAILING PARTY STATUS	2793
1. Mitigation.....	2795
2. Other Relief.....	2795
3. Must Prevail Through MSPB Procedures.....	2797
4. Cancellation of Action Appealed.....	2797
a. Compliance Proceedings Mooted by Agency Action	2801
5. Settlements	2803
a. Prevailing Party Status Through Settlement	2803
b. Relief Through Settlement Must Be Related to MSPB Appeal.....	2805
c. Interest of Justice Criteria	2805
d. MSPB Jurisdiction to Accept and Enforce Settlement Providing for Fees or Supporting Fee Petition	2806
C. INTEREST OF JUSTICE: AN OVERVIEW	2810
1. <i>Allen</i> Decision	2810
a. Financial Hardship.....	2811
2. Preservation of Claims Supporting Entitlement; Significance of Final Decision on Merits	2812
a. Overlapping Fee Entitlement Standards	2812
3. Statutory Examples Not Exclusive	2813
D. BAD FAITH	2813
1. Malicious Action; Inadequate Inquiry	2813
a. Disparate Treatment	2814
b. Mitigation	2814
2. Unreasonable Litigation Tactics; Failure to Settle.....	2814
a. Frivolous PFR	2814
3. Compliance	2815
E. CLEARLY WITHOUT MERIT OR WHOLLY UNFOUNDED	2815
1. Failure to Adhere to Legal Precedent.....	2815
2. Inadequate Initial Inquiry Into Facts	2816
3. Lack of Legitimate Basis for Agency Action	2816
a. Development of Dispositive Information During MSPB Appeal	2816
b. Mitigation	2817
4. Factual Disputes	2817
5. Unacceptable Performance Actions	2819
6. Retirement Cases.....	2819
a. Legal Error by OPM	2823
b. Erroneous Advice From OPM	2823
c. Issue of Mental Incompetence	2823
F. KNEW OR SHOULD HAVE KNOWN	2826
1. Lack of Reasonable Inquiry	2826
2. Disregard of Legal Precedent	2828
3. Regulatory Errors; RIFs.....	2828
4. Performance Cases	2828
5. Mitigation	2828
a. Not All Charges Sustained	2832
6. Negligent Presentation of Case	2832
7. Decision of Another Tribunal	2833

8.	Retirement Cases	2833
a.	Failure of OPM to Evaluate Evidence Available During Reconsideration Process	2833
b.	Legal Error by OPM	2836
9.	Settlements	2836
G.	GROSS PROCEDURAL ERROR.....	2836
1.	Denial of Advance Notice or Appeal Rights	2838
a.	Involuntary and Constructive Adverse Actions	2839
b.	Enforced Leave	2839
c.	Indefinite and Emergency Suspensions	2840
2.	Mitigation.....	2841
3.	Performance Cases	2841
4.	RIF Cases	2841
H.	SUBSTANTIALLY INNOCENT.....	2842
1.	<i>Yorkshire</i>	2844
2.	MSPB Treatment of <i>Yorkshire</i>	2845
3.	Appellant Who Ensnares the Agency	2846
4.	Mitigation: <i>Boese, VanFossen</i>	2846
a.	Prior Law	2850
b.	Factually Close Case.....	2850
5.	Performance Cases	2851
6.	Other Legal Errors	2851
I.	OTHER AUTHORITY FOR FEE AWARDS	2851
1.	Back Pay Act	2852
2.	Equal Access to Justice Act	2852
a.	ALJ Cases	2853
b.	Basis for Compensating Court Time	2855
c.	Prevailing Party	2855
d.	Substantial Justification	2855
e.	Basis for Awarding MSPB Time	2857
f.	Rates Under EAJA; <i>Pro Bono</i> or Contingent Representation; COLA; Expenses	2858
g.	Procedures Under EAJA; Time for Filing; Application	2860
h.	Effect of EAJA on MSPB Litigation	2861
3.	Civil Rights Cases	2861
a.	Results Achieved	2864
4.	Prohibited Personnel Practice Cases	2865
5.	USERRA; VEOA	2866
6.	Miscellaneous Claims; Equitable Assessment of Fees.....	2866
II.	PROCEDURES FOR OBTAINING FEES	2866
A.	WHEN FEES ARE INCURRED	2867
1.	Attorney–Client Relationship; Fee Payment	2867
a.	Law Clerks, Paraprofessionals; <i>Pro Se</i> Appellants.....	2867
2.	Union Counsel	2868
a.	Demise of the Cost–Plus Formula.....	2868
b.	History of the Cost–Plus Rule.....	2870
c.	Repayment of Fees to Union Required	2871
3.	Federally Employed Attorneys	2872
4.	Public Interest Organizations	2872
B.	COMPENSABLE SERVICES	2872
1.	Services Prior to Final Adverse Action or Other Decision	2872
2.	Research	2875
3.	Discovery	2875
4.	Petition for Review	2875
a.	OPM Reconsideration Petition	2875
5.	Time in Court	2877
a.	Appropriate Charges for Court Time	2879
b.	Practice Notes	2880
6.	Preparation of the Fee Petition	2880
7.	Defending the Fee Petition	2880
8.	Enforcement Proceedings.....	2881
9.	Related Proceedings	2884
a.	MSPB	2886

b.	Grievances	2886
c.	Privacy Act	2887
d.	Unemployment Compensation	2887
e.	Criminal Cases	2887
f.	EEO Complaints	2888
g.	Media Contacts; Congressional Activity.....	2890
10.	Anticipated Time; Supplemental Petitions	2890
11.	Unsuccessful Claims, Issues, and Defenses	2890
a.	<i>Hensley v. Eckerhart</i>	2890
b.	Tangentially Related Issues	2894
c.	Clearly Separate Claims	2895
d.	Unsuccessful EEO Claims	2895
C.	REASONABLENESS OF FEES	2896
1.	Hourly Rate.....	2897
a.	Evidence of Reasonableness; Results Achieved	2898
b.	Initial Decisions in Other Appeals; Decisions of Other Tribunals	2905
c.	Settlements.....	2905
d.	Out-of-Town Counsel	2905
e.	Travel Time	2905
2.	Contingency Arrangements, Enhancements; <i>City of Burlington</i>	2906
a.	Early Treatment by MSPB of Contingent Fees	2909
b.	Enhancement for Payment Delay; Interest	2909
c.	Enhancement for Quality Work	2911
d.	Enhancement for Wear and Tear	2912
e.	Traditional Contingency Agreements	2912
3.	Below Market Rates.....	2913
4.	Reasonableness of Time Invested	2916
a.	Responsibility of the Judge	2916
b.	Articulated Analysis Required	2918
c.	Notice to Counsel of Defects in Fee Petition	2919
d.	Expertise and Diligence of Counsel; Likely Outcome	2920
e.	Time at Hearings	2920
f.	Petitions for Review	2920
g.	<i>Amicus</i> Briefs	2921
h.	Time Preparing Counsel Fee Motion	2921
i.	Consolidated Cases	2921
j.	Multiple Counsel; Duplicative Work.....	2921
k.	Clerical or Secretarial Tasks	2924
5.	Examples of Fee Awards	2925
a.	Rates	2925
b.	Amounts	2925
D.	COSTS AND EXPENSES.....	2926
1.	Transcripts.....	2927
2.	Photocopy.....	2928
3.	Travel	2928
4.	Secretarial Payments.....	2928
5.	Postage; Courier	2928
6.	Fees for Experts, Consultants	2928
7.	Investigators.....	2929
8.	Accounting Expenses	2929
9.	Telephone Charges; Facsimiles	2929
10.	Electronic Research	2929
11.	Taxes	2930
12.	EEO, Whistleblower Protection Act, USERRA, and VEOA Cases; Broader Coverage.....	2930
13.	Direct Recovery of Costs by Appellants	2931
E.	FEE MOTION	2933
1.	Who May File	2934
2.	Time and Place of Filing	2934
a.	Premature Fee Motion.....	2935
b.	Timing of Agency Response	2936
c.	Late Fee Petition	2936

3.	Fee Petition Must Be Complete When Filed	2939
a.	Incomplete Fee Petitions	2939
4.	Developing Evidence to Support Fee Request.....	2940
a.	Hearings Concerning Fee Entitlement in Settled Appeals	2940
b.	Hearings and Discovery Concerning Reasonableness	2941
5.	Format of Motion	2941
a.	What to Include	2942
b.	Fee Agreement	2943
c.	Itemization of Time	2943
d.	Retrospective Reconstruction of Time	2944
6.	Supplemental and Corrected Fee Requests	2944
7.	Unopposed, Moot, or Settled Fee Motions.....	2945
8.	Service of Fee Petition	2945
9.	Opposition to Fee Petition	2945
10.	Initial Decisions on Fee Petitions.....	2946
a.	Obligation to Ensure Due Process	2946
b.	Requirements of Decision	2946
c.	Initial Decision Controls Basis for Fee Determination	2947
d.	Change in Judges	2947
e.	Hourly Rate Analysis.....	2947
11.	Waiver of Fees Through Settlement Agreements	2947
a.	Effect of Settlement Upon Claims of Multiple Counsel	2948
12.	Settlement of Fee Petitions	2949
13.	Payment of Fees to Counsel and Client	2950
a.	Payment to Counsel	2950
b.	Repayment of Fees by Counsel to the Client	2951
14.	Petition for Review.....	2951
a.	Interim Fees.....	2952
b.	Reasonableness of Time Spent on PFR	2952

CHAPTER 16: SETTLEMENT, REMEDIES, AND ENFORCEMENT2953

I.	SETTLEMENT.....	2953
A.	PUBLIC POLICY FAVORS SETTLEMENT	2953
1.	Minimum Requirements	2955
2.	Settlement After Issuance of Initial Decision	2956
3.	Jurisdictional Impediments to Acceptance of Settlements.....	2956
a.	Stipulations of Jurisdictional Facts Leading to Settlement.....	2958
b.	Settlements Arising From Disputed Last Chance Agreements.....	2959
4.	Regulatory Process	2960
a.	Department of Homeland Security Appeals	2961
5.	Filing; Acceptance of Settlement for Purposes of Enforcement or Compliance	2961
a.	Intent That Agreement Be Subject to MSPB Enforcement Authority	2961
b.	Unfiled Settlements	2963
c.	Oral Advice of Settlements	2964
d.	Specific Oral Settlement Agreements for Entry Into the Record	2966
e.	Distinguishing Oral Agreements and Ongoing or Incomplete Negotiations	2969
f.	Oral Agreement to Be Followed by Written Agreement	2972
g.	Appellant's Understanding of Agreement	2973
6.	Flexibility, Range of Settlements	2974
a.	Incomplete Settlements; Omitted Terms	2974
7.	Conditional Settlements; Lapsed Offers	2975
8.	Integration or "Zipper" Clauses	2978
9.	Modification or Amendment of Agreements by the Parties	2980
10.	Waivers of Statutory Rights	2980
a.	Unemployment Compensation	2981
b.	Workers' Compensation	2982
c.	Older Workers' Benefit Protection Act	2982
d.	Entitlements Under RIF Regulations	2986
e.	Limitations Upon the Right to Seek Future Federal Employment	2987
11.	Retirement Matters.....	2987
12.	Settlement Provisions Affecting Other Agencies	2987

13. OSC Cases.....	2988
B. SETTING ASIDE A SETTLEMENT	2989
1. Agreement Challenged as Invalid	2989
a. Threats of Unwarranted Action; Duress; Lack of Comprehension; Post–Settlement Remorse	2991
b. Hardship; Stress.....	2993
c. Disappointment; Confusion	2993
d. Lack of Understanding	2994
e. Mental Incapacity; Stress	2995
f. Coercion or Bias by the Judge	2997
g. Coercion by Counsel; Lack of Signature by Counsel	3002
h. Error or Lack of Authority of Appellant’s Counsel—Agreement Sustained	3003
i. Error or Lack of Authority of Appellant’s Counsel— <i>Bona Fide</i> Challenge to Agreement	3006
j. Error or Lack of Authority of Government Counsel.....	3010
k. Fraud; Bad Faith	3012
l. Mutual Mistake.....	3015
m. Lack of Mutual Assent.....	3020
n. Provisions Unlawful or Contrary to Public Policy	3022
o. Unfiled Settlement Agreements	3026
2. Breach of Settlement: Election Between Rescission or Enforcement.....	3029
a. Agency May Rescind	3030
b. Restoration of Benefits; “Tender Back”	3030
c. Use of Enforcement Petition to Rescind Settlement	3032
II. APPELLATE REMEDIES	3033
A. REMEDIAL ORDERS AND RIGHTS	3033
1. Impact of OPM Regulations	3033
2. Statutory Basis for Remedial Authority	3034
a. Ready, Willing, and Able to Work	3034
b. Demands for Unnecessary Documentation	3039
c. Reversal of Criminal Conviction	3040
3. Collateral Results of Restoration Orders; Actions Related to Action Under Appeal	3040
a. Effect on Remedial Orders of Decisions of Other Tribunals	3045
4. Back Pay Remedies	3046
a. Necessary Findings	3046
b. Maximum Recovery Period	3046
c. Liability for Events Preceding Adverse Action	3046
d. Method of Payment	3047
e. Method of Calculation	3047
f. Reinstatement With No or Limited Pay; After–Acquired Evidence; Suspensions; Shortened Notice Periods	3047
g. Effect of Loss of Security Clearance	3049
h. Premium Pay; Bonuses; Differentials; Relocation Expenses	3050
i. Overtime; Holiday Pay	3051
j. Overtime for Postal Service Employees	3054
k. Applicants for Employment	3055
l. Interest—Employees Under Back Pay Act.....	3055
m. Interest—Postal Service Employees	3057
n. Insurance Benefits.....	3058
5. Duty to Mitigate Damages by Finding Interim Employment	3059
a. Employees Other Than Postal Service.....	3059
b. Postal Service Employees	3059
6. Deductions From and Adjustments to Back Pay	3061
a. Retirement, TSP Contributions	3062
b. Leave Accounts; FMLA; Military Leave	3065
c. Official Time, Compensatory Time, or Restoration of Leave for Participation in MSPB or Related Proceedings	3068
d. Health, Life Insurance, Medicare Benefits; Union Dues	3071
e. Tax Deductions; Increased Taxes.....	3075
f. Unemployment, OWCP Compensation Benefits; State Workers’ Compensation Payments	3076
g. Interim Earnings; Job Search, Relocation Costs; Replacement Earnings; Retirement Receipts; Fraudulent Earnings Information	3079
h. Other Deductions	3082
7. Retraining	3083
8. Interim Promotions; Pay Increases	3083

9.	Reemployment Rights.....	3086
10.	Purging of Records; Modification of Documentation, Performance Appraisal	3086
a.	Performance Awards	3088
b.	Adjustments to AWOL Charges	3088
11.	Damages.....	3089
a.	Availability of Compensatory Damages	3091
b.	Awards of Compensatory Damages	3096
c.	Effect of Receipt of FECA and Insurance Benefits on Recovery of Compensatory Damages	3100
d.	Consequential Damages and Costs	3102
e.	Damages Under Veterans Employment Opportunities Act of 1998; USERRA	3109
f.	Monetary Relief for Prohibited Personnel Practices Not Covered by the WPA or the EEO Laws	3110
g.	Punitive Damages	3112
h.	Taxation of Damages	3112
12.	Nontraditional Remedies in Appeal Cases; Waiver of Debt	3113
a.	Apologies; Evidence Destruction	3113
b.	Protection Against Intervening Events	3113
c.	Protection Against Future Events	3114
d.	Front Pay and Other Remedies in Mixed Cases	3114
e.	Equitable Relief; Other Remedies	3114
III.	COMPLIANCE AND ENFORCEMENT	3116
A.	ENFORCEMENT OF MSPB DECISIONS	3116
1.	Authority to Order Compliance; Sanctions.....	3117
2.	Limitations Upon Use of Enforcement Authority to Award Monetary Remedies.....	3118
a.	Mootness	3120
b.	Burden of Proof; Proof of Compliance	3120
3.	Enforcement Procedure	3121
a.	Regulatory Scheme, Guidance	3122
b.	Duty to Supply Information; Accountings.....	3124
c.	Evidence Supplied After Decision or Recommendation of Judge	3125
d.	Time for Initiating Enforcement.....	3126
e.	Agency Requests for Extensions of Time	3129
f.	Unclear or Impossible Compliance; Adjustment of Duration of Settlement Provisions	3129
g.	Proof; Statements of Intent; Representatives' Statements; Hearings	3129
h.	Discovery	3131
i.	Referral to Comptroller General	3132
j.	Sanctions Against Agencies	3132
k.	Multiple Enforcement Petitions; <i>Res Judicata</i>	3133
l.	Analysis by Judge	3134
m.	MSPB Review of Regional Recommendation or Initial Decision	3134
4.	Allegations of Reprisal, Bad Faith, Discrimination and Harassment	3136
a.	Discipline Related to Agency Noncompliance	3137
b.	Performance Appraisal Disputes	3137
5.	Back Pay Disputes	3138
a.	Delay in Payment.....	3140
6.	Reinstatement to the Same Position; <i>Status Quo Ante</i> Remedy	3141
a.	Compelling Reasons for Reassignment; Detail; Different Duties	3143
b.	Administrative Leave	3147
c.	Reasons Related to Original Action	3148
d.	Obligations Under Collective Bargaining Agreement	3150
e.	Other Post-Reinstatement Actions; Medical Certification Requirements.....	3151
f.	Postal Service Reorganization Appeals	3151
g.	Security Clearance Problems.....	3153
h.	Demotions	3154
i.	Term or Temporary Appointment.....	3162
j.	Seniority Adjustments	3163
k.	Pay System Changes	3164
l.	Other Working Conditions	3164
7.	Reinstatement With Accommodation for Disability	3164
8.	Lack of Authority to Enforce Compliance.....	3168
9.	Sovereign Immunity Issues.....	3168
B.	ENFORCEMENT OF SETTLEMENT AGREEMENTS.....	3169

1. Scope of Enforcement Authority	3171
a. Only Filed Settlements May Be Enforced	3171
b. Allegations of Discrimination; Whistleblowing Reprisal	3172
2. Agency Enforcement Initiatives	3174
a. Appellant’s Agreement to Resign or to Take Other Action; Agency Self Help	3174
b. Agreement Not to Reapply for Employment With Agency	3174
c. Violation of Agreement Not to Seek Reemployment	3175
d. Agreement to Withdraw EEOC Case or Other Litigation	3175
e. Agreements That Appellant First Notify Agency of Noncompliance Allegation	3176
3. Election Between Enforcement and Rescission; Pleading in the Alternative	3176
a. Modification of Settlement Provisions	3177
4. Role of the MSPB Regional and Field Offices	3178
a. Treatment of Enforcement Issues, Evidence on PFR	3178
5. Time for Initiating Enforcement.....	3178
6. Burdens of Proof	3184
a. Mutual Breaches	3187
7. Interpretation of Agreements: Legal Principles	3188
a. Materiality of Breach	3189
b. Good Faith Required; Harassment	3192
c. Foreclosure of Future Discipline for Past Conduct	3194
d. Time for Compliance if No Time Set in Agreement	3197
8. Interpretation of Agreements: Extrinsic or Parol Evidence; Ambiguous Terms; History of Performance	3197
a. Back Pay Obligations; Omitted Terms	3201
b. Amendment to Agreement; Counterproposals	3203
9. Specific Settlement Provisions	3203
a. Term of Art	3203
b. Obligation to Reinstate or Restore to Duty; Preconditions to Restoration.....	3203
c. Agreement to Reassign, Demote, Suspend; Light Duty Position	3205
d. Agreement That Employee May Be Terminated or Will Resign or Retire Upon Specified Conditions; Agreement Not to Reapply	3206
e. Promotional, Placement Consideration; Priority Consideration	3208
f. Agreement to Provide Affirmative, Neutral, or Controlled Reference	3212
g. “Clean Record”; Expungement or Withdrawal of Records	3222
h. Nondisclosure or Confidentiality Clauses.....	3229
i. Waiver of Protection of Clauses Requiring Confidentiality, Affirmative Reference	3236
j. Damages Unavailable for Breach of Clause Requiring Affirmative Reference	3237
k. Adjustment of Performance Appraisals, Documentation.....	3237
l. Agreement to Provide Assistance to Employee	3239
m. Agreement to “Cancel” Action; Back Pay, Interest, and Other Entitlements; Bonuses or Awards; Lump Sum Provisions	3239
n. Retirement Entitlements; Unemployment Compensation	3243
o. Other Provisions	3249
10. Debt Recoupment	3249
11. Allegations of Reprisal and Harassment	3249
12. Settlements Reached in Other Tribunals	3252
13. Settlements Involving Actions of Third Parties	3252
14. Unlawful Provisions	3253
C. INTERVENING ABOLITION OF POSITION; SUBSEQUENT ADVERSE ACTION DURING ENFORCEMENT PROCEEDINGS	3254

CHAPTER 17: JUDICIAL REVIEW 3257

I. OVERVIEW OF THE APPELLATE PROCESS	3257
A. NATURE OF THE DECISION UNDER REVIEW	3257
1. Summary Final Decisions	3258
2. Statutory Basis for Review.....	3258
a. Collateral MSPB Orders.....	3259
b. Counsel Fee Awards	3259
3. Proper Parties in Court	3260
a. MSPB Appeals: Historical Development; Subject Matter Jurisdiction	3260
b. OSC Disciplinary Cases	3264
c. Arbitration Awards	3266
d. Authorization to Appeal	3266

e.	Counsel Authorized to Appear in Appeal; Federal Circuit Admission	3266
4.	Government Appellate Review Requests; Cross–Appeals	3266
a.	Review Requests by OPM	3266
b.	Discrimination Issues	3267
5.	Court of Appeals for the Federal Circuit.....	3268
a.	Nonprecedential Decisions.....	3269
b.	Summary Affirmation	3270
c.	Practice Before the Court.....	3270
d.	<i>Pro Se</i> Appeals	3273
e.	Stays Pending Court Review.....	3273
6.	Record Below.....	3274
a.	Appendix	3275
b.	New and Material Evidence	3276
B.	SCOPE OF REVIEW	3276
1.	Arbitrary and Capricious.....	3276
2.	Issues of Law; Jurisdiction; Contracts.....	3277
a.	Decisional Rationale Omitted by MSPB; Departure From Precedent	3277
3.	Procedural Error by the MSPB.....	3279
a.	Rulings on Witnesses and Evidence	3279
b.	Rulings on Discovery	3280
4.	Refusal of MSPB to Reopen Appeal	3281
5.	Substantial Evidence.....	3282
a.	Credibility.....	3285
b.	Nexus	3288
6.	Agency Rules of Conduct.....	3288
7.	Penalty Determinations	3288
a.	Performance Actions.....	3292
8.	Reductions in Force	3292
C.	DEFERENCE; INTERPRETATION OF STATUTES, REGULATIONS, LABOR AGREEMENTS, AND CONTRACTS	3292
1.	Agency Statutory Interpretation	3292
a.	Regulations Interpreting Statutes; Agency Interpretations of Regulations	3294
2.	Agency Handbooks	3297
3.	MSPB Decisions	3298
4.	Deference by MSPB	3299
5.	Principles of Statutory and Regulatory Interpretation	3299
a.	Language Controls.....	3300
b.	Consideration of the Statutory Scheme	3301
c.	Avoidance of Absurd Consequences	3302
d.	Statements of Legislators	3302
e.	Amendments; Failure to Amend.....	3302
f.	Retroactivity.....	3303
g.	Changes in the Law.....	3304
6.	Interpretation of Labor Agreements.....	3304
7.	Settlements; Last Chance Agreements	3304
D.	RETIREMENT CASES	3305
1.	Optional Retirement	3309
E.	DISCRIMINATION ISSUES	3309
1.	Procedural Issues.....	3312
2.	Jurisdictional Issues; Constructive Adverse Actions.....	3312
3.	Timeliness Issues	3315
4.	Transfers to District Courts.....	3318
5.	Scope of District Court Review	3318
a.	Exhaustion of Administrative Remedies	3319
b.	Summary Adjudication of EEO Issues; Disposition of Civil Service Issues	3323
c.	Scope of Review	3324
d.	Compliance With District Court Decisions	3325
6.	Discharges of Probationers.....	3325
F.	REVIEW OF ARBITRATION AWARDS.....	3326
1.	Exclusivity of Review	3326
a.	Mixed Cases.....	3327
2.	Time for Seeking Review	3329

3.	Decisional Standards for Arbitrators	3329
a.	Arbitrability	3332
b.	Bargaining History	3333
4.	OPM Petitions for Review of Awards	3333
5.	Awards Involving Department of Veterans Affairs Title 38 Employees	3334
6.	Awards Reviewed by Federal Labor Relations Authority	3336
G.	VEOA, USERRA CLAIMS.....	3336
II.	PREREQUISITES FOR JUDICIAL REVIEW	3337
A.	TIME FOR INITIATING JUDICIAL REVIEW.....	3337
1.	Equitable Tolling	3339
B.	EXHAUSTION OF MSPB ADMINISTRATIVE REMEDIES	3342
1.	Issues Must Be Raised With the MSPB	3342
a.	Exception to Exhaustion Requirement	3343
b.	Mandamus	3344
2.	Necessity for Administrative PFR	3344
a.	Challenges to Settlements.....	3346
3.	Ripeness for Judicial Review	3347
III.	JUDICIAL REMEDIAL AUTHORITY	3348
A.	AUTHORITY TO REMAND	3348
1.	Remands to Effectuate Settlement	3349
2.	Judicial Control of MSPB Procedures	3350
B.	AUTHORITY TO TRANSFER	3350
C.	SANCTIONS	3350
1.	Examples of Sanctionable Conduct	3352
IV.	JUDICIAL RELIEF OUTSIDE THE REFORM ACT	3354
A.	PARTIES TO THE SUIT	3356
1.	Sovereign Immunity.....	3356
2.	Absolute Immunity.....	3356
3.	Qualified Immunity.....	3356
a.	Actions Against Unions	3356
B.	STATUTORY SUITS AGAINST THE GOVERNMENT	3356
1.	Administrative Procedure Act	3357
a.	Use of the APA	3357
b.	Scope of Review; Preclusive Effect of CSRA	3357
c.	Scope of Relief	3358
2.	Privacy Act	3358
a.	Scope of the Act	3360
b.	Enforcement of the Act	3360
c.	Use of the Privacy Act	3360
d.	Position Classification Issues	3361
3.	Mandamus Act.....	3361
a.	Position Classification Issues	3362
4.	Tucker Act	3365
a.	Position Classification Issues	3367
b.	Overtime Pay Claims	3367
c.	Environmental Differential and Hazard Pay.....	3368
d.	Claims Concerning Tenure, Contract Employment and Promotion.....	3370
e.	Whistleblower Reprisal Claims.....	3372
5.	Back Pay Act.....	3373
a.	Implied Preclusion Under the CSRA	3376
b.	Promotion Claims	3376
6.	Family Medical Leave Act.....	3377
7.	Overtime and Pay Statutes	3378
8.	Constitution	3379
a.	Name Clearing Hearings; Liberty Interest	3380
b.	Termination of Probationer; Term Employee.....	3381
9.	Injunction Actions	3384
C.	ACTIONS FOR DAMAGES AGAINST INDIVIDUALS AND THE GOVERNMENT; <i>BIVENS</i>	3391
1.	Claims Based Upon State Law; Westfall Act; Federal Tort Claims Act; Residual <i>Bivens</i> Liability; Defamation; Tort Actions Arising From Assaults	3399

CHAPTER 18: RESEARCH, REFERENCE MATERIALS, AND FORMS.....3405
I. RESEARCH AND REFERENCES3405
II. FORMS3407
III. BIBLIOGRAPHY.....3428
TABLE OF CASES.....3435
INDEX3545

