

SUMMARY TABLE OF CONTENTS

VOLUME I

PREFACE	i
CHAPTER 1: MSPB STRUCTURE AND JURISDICTION.....	1
CHAPTER 2: APPEAL AND DISCOVERY.....	779
CHAPTER 3: HEARING.....	1181
CHAPTER 4: EVIDENCE.....	1309
CHAPTER 5: INITIAL DECISION AND PETITION FOR REVIEW.....	1457
CHAPTER 6: ADVERSE ACTIONS	1709
CHAPTER 7: NEXUS AND MITIGATION	2089
CHAPTER 8: SUBSTANTIVE OFFENSES.....	2219

VOLUME II

CHAPTER 9: PERFORMANCE CASES	2633
CHAPTER 10: REDUCTIONS IN FORCE.....	2741
CHAPTER 11: HARMFUL ERROR.....	2883
CHAPTER 12: DISCRIMINATION	3039
CHAPTER 13: PROHIBITED PERSONNEL PRACTICES.....	3293
CHAPTER 14: RETIREMENT AND RESTORATION RIGHTS.....	3707
CHAPTER 15: ATTORNEY FEES.....	4115
CHAPTER 16: SETTLEMENT, REMEDIES, AND ENFORCEMENT.....	4313
CHAPTER 17: JUDICIAL REVIEW.....	4699
CHAPTER 18: RESEARCH, REFERENCE MATERIALS, AND FORMS.....	4901
BIBLIOGRAPHY	4923
TABLE OF CASES	4931
INDEX	5081

TABLE OF CONTENTS

VOLUME I

PREFACE	i
CHAPTER 1: MSPB STRUCTURE AND JURISDICTION.....	1
I. REFORM ACT.....	1
A. CAPSULE HISTORY	1
B. OFFICE OF SPECIAL COUNSEL	3
II. MSPB ORGANIZATION AND ADMINISTRATIVE OPERATION.....	4
A. IMPARTIAL ADJUDICATION	5
1. <i>De Novo</i> Review of Agency Actions	5
a. Deference to OPM Regulations	7
b. Consideration of Agency Regulations	7
2. Prohibition Against Advisory Opinion; Internal Guidance; Request for Advisory Opinion	8
B. CUSTOMER SERVICE STANDARDS	9
C. ORGANIZATION	9
1. Clerk	10
2. Office of Appeals Counsel	10
D. ADMINISTRATIVE JUDGES	13
1. Delegations of Authority	13
a. Administrative Law Judges Adjudicating Specialized Cases	14
2. <i>Judges' Handbook</i>	14
a. Qualifications of Administrative Judge	14
3. Regulatory Responsibilities	14
a. Waiver of Procedural Regulations	15
b. Judges' Position Description, Performance Standards	16
c. Regional Director (Chief Administrative Judge) Position Description and SES Performance Plan	17
4. Quality Review	19
E. BOARD DECISIONS; PRECEDENTIAL SIGNIFICANCE	20
1. Nonprecedential Final Orders.....	20
2. Arbitration Award.....	21
F. CASES OF PARTICULAR SIGNIFICANCE	21
1. Sensitive, Public Interest Appeal	21
2. Referral to OPM, OSC	21
G. MSPB RECORDS	22
1. Gaining Access; Review Procedure	25
2. Precluding Access	25
a. Redaction of Initial Decision	25
b. Sealing of Record or Files	26
c. Attempt to Preclude Publication of Decision.....	29
d. Expungement of Record	29
e. Classified Information	29
H. RULEMAKING PETITIONS.....	30
I. RESPONSIBILITY OF PARTIES IN MSPB CASES	30
III. JURISDICTIONAL OVERVIEW	30
A. SOURCES OF JURISDICTION	32
1. Original Jurisdiction Cases.....	33
2. Jurisdiction Through Agency Regulation	33
3. Appealable Actions	33
a. Adverse Action	35
b. Performance-Based Action	35
c. Demonstration Project	35
B. PRELIMINARY APPELLATE JURISDICTIONAL ANALYSIS	36
1. Lack of Jurisdiction; Failure to State a Claim	37
IV. EMPLOYEES WHO MAY APPEAL; APPEALABLE ISSUES	38
A. NATURE OF CIVIL SERVICE APPOINTMENTS	39

B.	CONCEPTS COMMON TO DEFINITION OF “EMPLOYEE” FOR COMPETITIVE AND EXCEPTED SERVICE	40
1.	Current Continuous Service	40
a.	Break in Service	41
b.	Service During Detail or in Acting Position.....	45
2.	Not Serving a Probationary or Trial Period Under an Initial Appointment.....	45
3.	Counting Service Time in a Prior Position or Appointment; <i>McCormick</i>	46
a.	Time in Nonpermanent Appointment as a Component of Current Continuous Service.....	52
C.	COMPETITIVE SERVICE EMPLOYEES	57
1.	Other Than a Temporary Appointment Limited to One Year or Less.....	60
D.	EXCEPTED SERVICE EMPLOYEES.....	61
1.	1990 Civil Service Due Process Amendments; Nonpreference Eligible Employees.....	62
a.	Excepted Service Employees Excluded From Due Process Amendments.....	62
2.	Preference Eligible Status.....	68
a.	Documentation.....	73
b.	Disabled Veteran.....	74
c.	Derivative Preference Eligible Status.....	75
3.	Effect of Grievance Settlement; Labor Agreement	76
4.	Period of Non-Pay Status.....	77
5.	Same or Similar Position	77
a.	Factual Dispute Concerning Similarity of Positions	84
b.	In an Executive Agency	86
6.	Appointment Pending Conversion to Competitive Service	89
E.	DETERMINATION OF PROBATION	92
1.	Probationary Classification Problems.....	93
a.	Appointment From Register	93
b.	Transfer	94
c.	Temporary Appointment Pending Establishment of a Register (TAPER).....	96
d.	Career Reinstatement	96
2.	Calculating Year of Service.....	98
a.	Incorrect Determination of End of First Year of Employment	100
b.	Effective Time and Date of Inexplicit Termination Notice	104
c.	Significance of SF-50; Unclear Appointment Date.....	104
d.	WAE Appointment	105
e.	Military Service.....	105
3.	Tacking of Prior Service: Competitive Service Probation.....	106
a.	Same Agency	112
b.	Same Line of Work.....	113
4.	Agreement to Serve Probationary Period; Waiver of Preexisting Appeal Right	116
5.	Imposition of Probation Following Break in Service	118
6.	Representation by Agency That Probation Is Not Required; Equitable Estoppel	119
a.	Lack of Notice of Probationary Period	120
b.	Creation of Probationary Period Not Required by Statute or Regulation	120
F.	APPEAL RIGHTS OF PROBATIONER.....	122
1.	Appeal of Probationary Termination.....	123
a.	Actions Other Than Termination.....	124
2.	Classification of Probationers and Their Appeals	124
a.	Competitive Service Term Appointee; Trial Period.....	125
b.	Probationary Supervisor	126
3.	Jurisdictional Issue; Right to Hearing.....	129
a.	Effect of Collective Bargaining Agreement; Agency Regulation.....	132
b.	Other Contract.....	132
c.	Harmful Error Analysis; <i>Stephen</i>	132
d.	Relation to Suitability Determination	134
4.	Preappointment Conditions	137
a.	Harmful Error Analysis: Lack of Proper Advance Notice, Other Procedural Error	138
b.	Entitlement to Hearing.....	143
c.	Measure of Substantive Review	143
5.	Postappointment Reasons.....	144
a.	Pre- and Postappointment Distinctions.....	144
6.	Defective or Untimely Termination Notice	150
a.	Termination by Unauthorized Official.....	151

7.	Discrimination and Partisan Politics	152
a.	Nonfrivolous Allegations	152
b.	Partisan Political Reason	154
c.	Marital Status	156
d.	Other Discrimination	163
8.	Constitutional Claim	163
9.	Involuntary Resignation.....	164
G.	LOSS OF APPEAL RIGHTS BY CHANGE IN POSITION.....	165
1.	Movement Between Positions in Same Agency; Lack of Notice of Requirement of Probation.....	165
a.	Movement to Position Through Settlement Agreement	172
2.	Movement From One Agency to Another; Transfer; Lack of Notice of Requirement of Probation	172
H.	TEMPORARY AND TERM APPOINTMENTS	176
1.	Competitive Service Temporary, Term Appointees	179
2.	Excepted Service Preference Eligible Temporary Appointees	184
3.	Excepted Service Nonpreference Eligible Temporary Appointees.....	184
4.	Particular Temporary or Irregular Schedule Appointments.....	185
a.	TAPER	185
b.	Seasonal; On-Call	185
c.	Intermittent	188
d.	Full-Time/Part-Time.....	190
e.	Postal Service Light Duty.....	190
f.	Indefinite Appointment	190
g.	Federal Career Intern Program	190
h.	Student Temporary Employment Program; Student Career Experience Program	196
5.	Jurisdictional Effect of Lapse of Term or Temporary Appointment	196
6.	Appeal Right if Termination Occurs Before End of Expiration of Limited Appointment.....	198
I.	PARTICULAR APPOINTMENTS.....	199
1.	Nonappropriated Fund	199
2.	Veterans Readjustment Act.....	200
3.	Reemployed Annuitant.....	205
a.	Exceptions.....	207
4.	Senior Executive Service.....	209
5.	Administrative Law Judge.....	209
6.	Disabled Employee.....	209
7.	Employees in Confidential, Policy-Making, Policy-Determining Positions; Presidential Appointee.....	212
a.	White House, Executive Office of the President Employees	216
8.	Alien; Noncitizen	216
9.	Students.....	216
10.	Judicial Branch	218
11.	Government Corporation.....	219
12.	Postal Service	220
a.	One Year of Qualifying Service; Current Continuous Service in Same or Similar Position	224
b.	Postal Supervisors, Managers	229
c.	Postal Personnelists, Confidential Employees.....	235
d.	Postal Service Employees Who Lack Preference Eligibility, Who Have No Negotiated Grievance Procedures, and Who Are Neither Managers nor Personnelists	239
13.	Contractors.....	242
14.	Others.....	242
J.	AGENCIES WITH SPECIALIZED PERSONNEL SYSTEMS: MSPB JURISDICTIONAL EXCLUSIONS AND MODIFICATIONS	243
1.	Department of Homeland Security	243
a.	Human Resources Management System's Rise and Demise	244
b.	Transportation Security Agency: Screeners; Other Employees	244
(i)	Probationer	247
(ii)	Other TSA Employees.....	247
c.	RIF.....	251
2.	Federal Aviation Administration.....	251
a.	2012 Legislation Restoring Back Pay Authority as a Component of MSPB Jurisdiction	253
b.	2000 Legislation Restoring MSPB Jurisdiction; Back Pay Issues	254
c.	1996 Legislation Removing MSPB Jurisdiction.....	262
3.	Department of Defense National Security Personnel System	262
4.	District of Columbia	262

5.	Central Intelligence Agency; Defense Department Intelligence; Other Intelligence or Security Agencies.....	263
6.	Federal Bureau of Investigation	264
7.	Canal Zone.....	264
8.	National Archives	265
9.	National Guard Technicians.....	265
10.	Tennessee Valley Authority Employees.....	266
11.	Library of Congress; GAO; Congressional Employees.....	267
a.	Ramspeck Act	267
12.	Smithsonian Institution	267
13.	Bureau of Indian Affairs.....	268
14.	MSPB Employees	268
15.	Department of Veterans Affairs Title 38 Medical Professional	268
a.	USERRA Coverage.....	272
b.	Actions Against Healthcare Professionals Not Involving Professional Conduct or Competence.....	272
c.	Involuntary Retirement, Resignation	273
16.	Department of Veterans Affairs Veterans Canteen Service.....	276
17.	Agriculture: Stabilization and Conservation Service; Cooperative Extension Services	278
18.	Department of Defense Education Activity.....	278
19.	Office of Independent Counsel.....	279
20.	Foreign Service.....	279
21.	World Bank	280
K.	NATURE OF PERSONNEL ACTION APPEALED.....	280
1.	Possible Adverse Action; Proposal	280
2.	Suspension	281
a.	Paper Suspension.....	281
b.	Consolidation of Short Suspensions.....	282
c.	Calculating Duration of Suspension	283
d.	Erroneous Imposition of Suspension Exceeding 14 Days	283
e.	Indefinite Suspension	284
3.	Reassignment; Detail; Transfer; Nonselection.....	285
a.	Rank Reduction	288
b.	Loss of Promotional or Earnings Opportunities; Change in Work Schedule.....	288
c.	Disciplinary Reassignment; Unified Penalties	290
d.	Disabled Employee	291
4.	Pay and Classification Changes.....	291
a.	Classification	292
b.	Pay System Conversion; Grade Reduction	293
c.	Correction of Pay; Grade	297
d.	Reduction in Pay; Locality Pay Issue; Pay System Change; Failure to Obtain Pay Increase.....	303
e.	Misrepresentation Concerning Pay Rates	308
f.	Termination of Premium Pay; LEAPA; Seniority, Overtime Adjustments; Severance Pay; Bonus; Basic Pay	309
g.	Retirement Credit, Contributions, and Incentives; Individual Retirement Record.....	314
h.	Debt Collection; Recoupment	316
i.	Leave Dispute; Administrative Leave	319
5.	Pay and Compensation Claims: Role of OPM.....	321
6.	Promotion Claim	321
a.	Termination of Temporary Promotion	322
b.	Return Right—Overseas Employee	323
7.	Back Pay Dispute	324
a.	Retirement Payment	324
8.	Resignation.....	324
a.	Abandonment of Position.....	324
9.	Mandatory Retirement	325
10.	OWCP Benefits; Insurance Programs.....	326
11.	Requests for Reinstatement: Non-Military Personnel.....	333
a.	Failure to Rehire	334
b.	Reinstatement Rights—Occupational Illness or Injury; Others.....	334
12.	Performance Standard; Rating; PIP.....	335
13.	Prohibited Personnel Practices; Allegations of Discrimination	335
14.	Merit System Principles Violations	337
15.	Constitutional Violation	338

16. Miscellaneous Issues	342
L. EFFECT OF COLLECTIVE BARGAINING AGREEMENT GRIEVANCE AND RELATED PROCEDURES.....	342
1. Postal Service Employees	346
a. Effect of EEO Allegation or EEO Complaint.....	347
2. Administrative Grievance System	347
3. Statutory Grievance System; Foreign Service Grievance Board	348
4. Employee Choice: Adverse Action; Performance Case.....	348
5. Labor Contract Exclusivity: WIGI Denial and RIF Challenge.....	348
a. Appeal Right With EEO Allegation.....	350
b. USERRA Claim	351
c. RIF.....	355
d. Acceptable Level of Competence Determination; Within-Grade Increase.....	356
6. Problems Arising From Choice of Labor Contract Procedure	356
a. Incorrect or Inadequate Advice From Agency.....	356
b. Dispute Over Bargaining Unit Status or Arbitrability; Ineffective Elections; Cross-Filing; Withdrawal of Grievance	358
c. Defunct Union	360
d. Union Action on Behalf of Employee	362
e. What Constitutes Filing of Grievance	365
f. Premature Elections.....	365
g. Belated Grievance	366
h. Failure to Obtain Arbitration Hearing	367
7. Allegation of Discrimination	369
8. Indefinite Suspension.....	371
9. Appeal Right With Arbitration Award; Employees of Agencies Other Than Postal Service	372
10. Unfair Labor Practice Charge	373
M. GRADE AND PAY RETENTION	374
1. <i>Atwell</i>	377
a. Allegation of Discrimination	378
b. Restoration Action	378
2. Absence of Retention; Benefits Declined	379
3. Appeal of RIF; Classification	380
4. Termination of Pay Retention	381
V. UNIFORMED SERVICE EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT; VETERANS EMPLOYMENT OPPORTUNITIES ACT ...	382
A. BOARD APPEAL RIGHTS OF MILITARY PERSONNEL AND INDIVIDUALS WITH VETERANS PREFERENCE	382
1. Regulations Governing USERRA, VEOA Claims	386
2. Judge's Responsibility.....	388
3. Hearing Entitlement; Board Disposition	389
4. Exclusivity of VEOA Appeal; Joinder of USERRA Claim	393
B. UNIFORMED SERVICE EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT	393
1. USERRA Statutory Structure.....	398
a. Related EEO Violation; Prohibited Personnel Practice Allegation.....	403
b. Affirmative Defense.....	405
2. Time for USERRA Appeal	406
a. Laches.....	408
b. Waiver of Right to Appeal	409
3. Permissive Exhaustion of Labor Department Remedy	410
4. Liberal Pleading Standard.....	413
a. Nonfrivolous Jurisdictional Allegations	418
b. Summary Disposition of Claim	419
5. Burden of Proof	419
a. Analysis of Alleged Discrimination or Reprisal Based on Military Service	423
b. Circumstantial Evidence.....	428
c. Discrimination Motivated by Lower-Level Supervisor; Cat's Paw	430
d. Disability Incurred While in Military Service	432
e. Disparate Impact Theory Inapplicable.....	433
f. Reprisal Against the Exercise of USERRA Rights.....	435
6. Recovery Period	436
a. Nonretroactive Substantive Application.....	438
b. Vietnam Era Veterans' Readjustment Assistance Act of 1974.....	440
7. Covered Personnel; Agencies	442

a.	Contractor Employee	447
b.	Relatives of Service Members	449
8.	Military Restoration Rights	449
a.	National Guard Return Rights; 38 USC 2024(d)	452
b.	Maximum Length of Service Before Loss of Restoration Right.....	457
c.	Conditions of Discharge From Military Service	458
d.	Effect of Release From Service for Disability.....	458
e.	Delay in Requesting Restoration Following Military Service.....	462
f.	Elimination of Position Through RIF	462
9.	Other Personnel Action, Benefits	464
a.	Dismissal From Employment; Demotion; Abandonment of Civilian Career.....	464
b.	Constructive Adverse Action	468
c.	Suspension	468
d.	Failure to Appoint.....	468
e.	Failure to Consider Employee for Vacant Positions; Manipulation or Abolition of Positions.....	474
f.	Denial of Priority Consideration.....	477
g.	Performance Appraisal.....	477
h.	Noncompetitive Promotion; Bid Assignment; Escalator Principle; Interim Promotion.....	478
i.	Reassignment	485
j.	Retirement Benefits	486
k.	Education Benefits	486
l.	Military Leave; <i>Butterbaugh</i>	487
m.	Charge to Leave	495
n.	Harassment; Hostile Working Environment.....	495
o.	Reprisal.....	498
p.	Change in Employment Status; Reemployment; Benefits Following Restoration to Duty.....	499
q.	Ready Reserve Status	507
C.	VETERANS EMPLOYMENT OPPORTUNITIES ACT	507
1.	Statutory Structure	510
a.	Burden of Proof	511
b.	Related EEO Violation, Prohibited Personnel Practice, Other Challenges.....	511
2.	Covered Personnel.....	512
a.	Statutory Exclusions	520
3.	Definition of Agency	524
4.	Time for VEOA Appeal	526
5.	Mandatory Exhaustion of Department of Labor Remedy; Time for Complaint	526
a.	Specificity Required for Labor Department Complaint.....	531
b.	Equitable Tolling of Time Limits; Waiver of Administrative Exhaustion Requirement.....	532
c.	Effect of Settlement Reached by Department of Labor.....	543
d.	Termination of Proceedings to Pursue Case in Court.....	543
6.	Liberal Pleading Standard.....	543
7.	Basis for Veterans Preference	546
8.	General Operation and Application of Veterans Preference on Appointment Process.....	547
a.	Category Rating System.....	548
b.	Excepted Service Position; "Positive Factor"; Attorneys.....	551
c.	Title 10 Intelligence Position	565
d.	Geographic Extent of Competition.....	566
e.	Qualifications for Position; Exclusion from Consideration; Consideration of Experience	566
f.	Education Requirement	576
g.	Time-In-Grade Requirement	577
h.	Assessment of Medical Fitness	578
i.	Consideration for Position but Nonselection; Limitation on Consideration Imposed by the Applicant.....	579
j.	Improper Assessment of Qualifications	580
k.	Disabled Veteran.....	583
l.	Age Limit on Appointment.....	583
9.	Disciplinary Case	588
10.	Reassignment; Transfer	588
11.	Retirement Benefit.....	590
12.	Other Benefits.....	590
13.	Appointment and Promotion Processes Challenges	590
a.	Necessity for Application.....	590

b.	Competitive Appointment Procedures; Exceptions to Competitive Requirements	591
c.	Appointment Through Reinstatement	595
d.	Merit Promotion With Internal Candidates Only; Reassignment; Reinstatement	596
e.	Merit Promotion, Open to External Candidates; Canceled Announcement; "Right to Compete" Claim	598
f.	Position Announced Under Both Open Competition and Merit Promotion Procedures.....	608
g.	Impact of Collective Bargaining Agreement	613
h.	Background Investigation	614
i.	Veterans Readjustment Authority Appointment	614
j.	Federal Career Intern Program	616
k.	Outstanding Scholar Program	624
l.	Pathways, Recent Graduates Program	631
m.	Foreign Service.....	637
n.	Failure to Provide Proper Veterans Preference.....	637
14.	Remedial Structure; Reconstruction of Selection Process; Removal of Selectee	639
a.	Use of Improper Appointment Authority.....	652
b.	Manipulation of Appointments; Cancellation of Vacancy	653
c.	Rule of Three.....	662
d.	Passover Process	663
e.	Mootness; Review of Agency-Initiated Reconstruction Effort	667
15.	Damages, Performance Award.....	668
VI.	SUITABILITY DETERMINATION.....	673
A.	APPLICATION TO COMPETITIVE SERVICE APPOINTEES.....	679
1.	Employees Serving in Probationary or Trial Periods.....	680
B.	SUITABILITY DETERMINATIONS BY AGENCIES OPERATING UNDER AUTHORITY DELEGATED BY OPM	680
1.	Constructive Suitability Determination	683
2.	Evidence of Material, Intentional False Statement, or Deception or Fraud.....	683
3.	Nonselection for Position; Constructive Suitability Determination Under Delegated Authority	685
a.	Cases Decided Under OPM Regulations Predating 2008.....	690
4.	Impact of 2008 OPM Suitability Regulations.....	697
C.	ADJUDICATION STANDARDS	698
1.	Mitigation; EEO Defenses	701
2.	Disparate Treatment	701
3.	Rehabilitation	701
D.	EVIDENCE	702
1.	Collateral Estoppel; <i>Res Judicata</i>	703
E.	BASES FOR SUITABILITY DETERMINATIONS.....	704
1.	Falsification of Employment Document	705
2.	Drug Involvement	706
3.	Post-Appointment Conduct.....	706
4.	Criminal or Dishonest Conduct.....	709
5.	Other Problems	710
F.	REMEDIES	710
1.	Mootness.....	712
G.	RELATION OF SUITABILITY AND PASSOVER DETERMINATIONS	712
H.	RELATION OF OPM-DIRECTED SUITABILITY REMOVAL AND ADVERSE ACTION APPEAL RIGHTS, MITIGATION ANALYSIS; <i>AGUZIE</i>	714
VII.	OPM REGULATION REVIEW; CHALLENGES TO AGENCY IMPLEMENTATION OF OPM REGULATIONS; CHALLENGES TO OPM EMPLOYMENT PRACTICES	724
A.	REGULATION AND REGULATION IMPLEMENTATION REVIEW PROCEDURES	724
1.	General Criteria for Regulation Review and Regulation Implementation Review	724
a.	Distinction Between Regulation Review and Implementation Review.....	728
2.	Pleading Requirements; Scope of Review.....	729
a.	Discretionary Review; Likelihood of Success.....	730
b.	Likelihood of Harm	731
c.	Likelihood Issues Will Be Addressed in a Different MSPB Appeal or a Different Forum.....	731
d.	Standing; "Interested Person"	733
e.	Covered Personnel Action.....	733
3.	Examples of Regulation Review	733
a.	Administrative Law Judge Examination Authority	733
b.	SES Reassignment, Work Schedule	734
c.	Administration of Leave	735

d. OPM Qualification Standards	735
e. Scope of Administrative Grievance Procedure	736
f. Other Issues	737
4. Examples of Regulation Implementation Review	738
a. SES Performance Appraisal Dispute	739
B. EMPLOYMENT PRACTICE CHALLENGES	740
1. Time and Place for Filing Appeal	746
2. Agency Misapplication of Valid OPM Requirement; Agency Employment Practices; Nonselections	747
3. Standing to Raise Challenge	751
4. General Characteristics of Tests Rather Than Individual Examination Results at Issue	752
5. Failure to Hire	753
6. Scope of Competition	754
7. Position Qualification Standard; Educational Requirement	755
8. Medical and Physical Qualification Requirements	761
9. OPM Involvement in Agency Selection	762
10. Selection and Examination Practices for Administrative Law Judges	765
a. Rule of Three	771
11. Passover Determination	772
12. Time-In-Grade Restriction	774
13. Eligibility Rating and Suitability Determination	775
14. Failure to Promote	776
15. Remedy	776
VIII. CHALLENGES TO ADVERSE PERSONNEL RECORDS NOTATIONS	776

CHAPTER 2: APPEAL AND DISCOVERY 779

I. INITIATING AN APPEAL	779
A. RULES AND PRACTICES OF GENERAL APPLICATION GOVERNING APPEALS	779
1. Dates of Filing	779
2. Service of Pleadings	779
3. Electronic Filing Regulation, Dates of Electronic Filing; Technical Difficulties	780
4. MSPB Processing of Appeal	785
B. TIME FOR FILING APPEAL	786
1. MSPB Treatment of Timeliness Issues	786
2. Jurisdiction or Timeliness as Alternate Bases for Dismissal of Appeal	787
3. Time to Appeal; Regulatory Provisions; Computation of Time	790
a. Allegations of Discrimination—Mixed Case	790
b. Effect of Grievance Procedure	790
c. Computation of Time	791
d. Technical Constructions	791
e. Request for Extension of Time to Appeal	792
4. Suspension Appeals	793
a. Indefinite Suspension; Enforced Leave	793
5. Individual Right of Action Appeals	796
6. USERRA Appeal	797
7. Negative OPM Reconsideration Decision Appeal	798
a. Failure to Seek Timely Reconsideration; Requests to Extend Time to Request Reconsideration	800
b. Relation Between Scope of Reconsideration Request and Appeal	806
c. Failure of OPM to Act on Reconsideration Request; Failure of OPM to Advise of Reconsideration Right	806
d. Overpayment Determinations	812
8. Law Enforcement Officer Retirement Credit Appeal	812
C. METHOD AND PLACE OF FILING	813
1. Method of Filing	814
a. Mail	814
b. Significance of Postmark: Presumptive Filing Date	814
c. Significance of Actual Mailing Date; Mailstream Rule: Actual Filing Date	814
d. Commercial Delivery	815
e. Facsimile	815
f. Personal Delivery	815
g. Electronic Filing	816
2. Irregular and Misdirected Filings	816
a. Appeal To or From Congressional Office	816

b.	Misfiled Mixed Case Appeal	817
c.	Non-Mixed Appeal Filed With Employing Agency	819
d.	Appeal Misdirected Within MSPB, to OPM, or to OSC	819
e.	Incomplete Appeal	820
D.	PREMATURE APPEALS	820
1.	Abeyance Arrangement.....	821
2.	Premature Appeal That Ripens Into Appealable Action During Regional Adjudication or During PFR	822
3.	Retirement Appeal.....	823
4.	Mixed and Whistleblowing Cases; Actions Initiated in Court	825
E.	TIMELINESS OF APPEALS	825
1.	Judge’s Responsibility to Provide Notice Concerning a Timeliness Issue	826
a.	Mental or Physical Illness; <i>Lacy</i> Notice	829
b.	Duty of Appellant to Produce Evidence Concerning Timeliness	830
c.	Duty of Agency and Judge to Produce and Develop Evidence Concerning Timeliness	831
2.	Waiver; <i>Alonzo</i>	834
a.	Prejudice to Respondent; <i>Laches</i>	835
b.	Current Law on Waiver; Multifactor Analysis	835
c.	Historical Position on Waiver.....	841
d.	Retirement Appeals	842
3.	Application for Waiver	843
a.	Hearing Entitlement on a Timeliness Issue	844
b.	Due Diligence	847
4.	Labor Contract Stay Provision; Postal Service Employee; Agency-Initiated Stay.....	847
F.	EXCUSES FOR LATE FILING	849
1.	Sickness or Hospitalization	849
a.	Supporting Evidence.....	850
b.	Mental Impairment.....	851
c.	Effect of Continuing Mental Disorder on Filing Deadline	853
2.	Business or Outside Activities.....	854
3.	Military Service.....	854
4.	Incarceration; Criminal Proceeding	857
5.	Need to Obtain Documentation.....	858
6.	Unfamiliarity With MSPB Procedures and Law; Ambiguous Agency Communications	858
a.	Inability to Obtain Counsel	859
b.	Language Difficulties	860
c.	Miscalculation of Time for Appeal	860
7.	Lack of, Interference With, or Incorrect Notice	861
a.	Obligation to Provide Notice; Appeal Form.....	861
b.	Belated Receipt of Adverse Action Decision.....	866
c.	Constructive Receipt of Decision Notice.....	868
d.	Proof Concerning Delivery of Notice of Appeal Right	870
e.	Notice of Appeal Right to Appellant’s Representative.....	870
f.	Appellant’s Responsibility When Decision Notice or Information About Appeal Rights Is Not Received	871
g.	Constructive Adverse Action; Notice if Agency Learns of Employee’s Protest.....	872
h.	Constructive Adverse Action Without Notice of Employee’s Protest to Agency	874
i.	Adverse Action or Performance-Based Appeal Arising From Last Chance or Other Settlement Agreement	885
j.	Lack of Notice Concerning Restoration and Reemployment Appeal Rights	887
k.	Enforced Leave	891
l.	Agency on Notice but Fails to Provide Appeal Rights; Secondary Information Concerning Appeal Rights	891
m.	Prior or Subsequent Notice of Filing Deadline	892
n.	Agency Misrepresentation.....	893
o.	Threats by Agency Personnel.....	895
p.	Mixed Case Notice Problems.....	895
q.	Problem With or Delayed Receipt of Domestic, Certified, or International Mail, or Commercial Delivery; Address Change	897
8.	Appeal Lost in the Mail.....	903
9.	Facsimile Problems	905
10.	Electronic Filing Problem	905
11.	Problem Caused by Adjudicators; Misdirected Appeal.....	906
a.	MSPB	906
b.	EEOC.....	906

c. OPM.....	906
12. Uncertainty as to Outcome of a Related Case; Pending Settlement Negotiations or Investigation; Case Taken to Court.....	908
a. Grievances.....	909
13. Inadequate Representation.....	909
a. Delay Not Excused	910
b. Delay Excused; Counsel's Delay Balanced Against Appellant's Best Efforts; Retirement Cases	911
c. Delay Excused; Obstruction or Misrepresentation by Counsel.....	913
d. Delay Excused; Inconsequential Delay by Representative	917
14. Other Problems	918
G. TIME FOR RAISING NEW APPELLATE ISSUES AND CLAIMS.....	918
1. Issues and Defenses	918
a. Liberal Construction of Pleadings; Issues Raised at Hearing	918
b. EEO Affirmative Defenses	918
2. Claims	919
H. MOOT, WITHDRAWN, AND WAIVED APPEALS.....	919
1. Mootness of Appeal	919
a. Cancellation of Action Appealed.....	920
b. Appellant Resigns or Retires Prior to Termination	922
c. Restoration of <i>Status Quo Ante</i>	922
d. Initiation of New Action Based on Events Leading to Canceled Action	929
e. Procedure Followed if Action Not Completely Rescinded.....	930
f. Procedure Following Remand to Judge.....	931
g. Settlement Independent of MSPB Appeal	931
h. Complete Relief Through Other Means; Stay of Pending Litigation.....	941
i. Collateral Issues Following Rescission of Action; Claims for Counsel Fees or General Damages; Interest.....	941
j. EEO Allegation; Claim for Compensatory Damages	942
k. Whistleblower Protection Act: Claims for Damages, Other Relief	945
l. Uniformed Services Employment and Reemployment Rights Act	951
m. Effect of Resignation	952
n. Criminal Conviction	952
o. Consecutive Adverse Actions.....	952
p. OPM Rescinds Reconsideration or Final Decision; Overpayment Recovery; Withdrawal of or Additional Retirement Application.....	953
q. Administrative Law Judge Case	959
r. Other Problems	959
2. Effect of Retirement on Appealable Removal.....	959
a. Effect of Rescission of the Appealed Action and Cleansing Personnel File When the Adverse Action Decision Is Accompanied by Retirement	966
b. Reduction in Force	969
c. Prior Law	970
3. Withdrawal of Appeal.....	971
a. Withdrawal to Pursue EEO Complaint; Withdrawal of EEO Claim	974
b. Withdrawal to Pursue a Labor Contract Grievance Procedure.....	976
c. Confusion Between Necessity for Withdrawal of Appeal, Continuance, and Withdrawal of Appeal Without Prejudice to Refile	977
d. Unauthorized Act of Representative	978
e. Duress; Misrepresentation; Incompetence	981
f. Mistake	983
g. Misleading or Incomplete Information From Judge.....	984
h. Attempts to Refile, Reinstate, or Reopen Withdrawn Appeals.....	987
4. Dismissal Without Prejudice to Refile ("DWOP").....	990
a. Pending Criminal Proceeding; Indefinite Suspension.....	995
b. Procedures for Obtaining Dismissal; Refiling	997
c. Refiling Date	998
d. Effect of PFR	1000
e. Agency-Initiated Request; Prior Practice.....	1001
f. Dismissal Initiated by Judge or MSPB	1001
g. Delay in Refiling; Retirement Case	1003
h. Late Refiling; Independent Right of Appeal	1007
i. Imperfect Attempt to Refile; Confusion Caused by Judge	1008

5.	Waiver of Appeal Through Last Chance or Other Preappeal Agreement	1008
a.	Jurisdictional Analysis.....	1011
b.	Public Policy Considerations; Complete Preclusion of Appeal; Conflict With Agency Regulation; Valid Consideration; Scope of Agreement.....	1019
c.	Ambiguous Term; Failure to Waive Future Appeal Right.....	1021
d.	Due Process Considerations; Notice	1025
e.	Last Chance Agreement Superseded by Independent Adverse Action	1027
f.	Lack of Authority of Representative to Enter Agreement.....	1028
g.	Agreement to Accept Demotion	1028
h.	Bad Faith, Coercion, or Lack of Mental Capacity	1029
i.	Agency Breach of Agreement or Appellant's Compliance With Agreement as a Jurisdictional Condition	1035
j.	Burden of Proof on Breach of Agreement	1036
k.	Hearing Entitlement	1038
l.	Illegal or Punitive Term	1042
m.	Condition Unrelated to Underlying Action; Vague or Ambiguous Condition; Condition Described in Notice of Violation of LCA.....	1042
n.	Claim Collateral to Breach of Agreement.....	1048
o.	Duration of Agreement	1048
6.	Personnel Action Resulting from Settlement Not Constituting Last Chance Agreement	1049
7.	Settlement Reached During Board Appeal	1051
II.	FORMAT AND PRELIMINARY PROCESSING OF APPEAL	1051
A.	ESSENTIAL INFORMATION.....	1051
B.	FORMAT.....	1052
1.	Interpretation of Appeal.....	1053
2.	Signature	1054
3.	Appeal Filed Through Representative	1054
4.	"John Doe" Appeal: Protecting Appellant's Privacy.....	1055
5.	Agency-Initiated Retirement Appeal	1058
6.	Class Action, Consolidated Appeals, and Joinder; Bifurcated Appeals.....	1058
a.	Consolidation	1058
b.	Joinder; Compulsory Joinder	1060
c.	Class Action	1062
d.	Bifurcated Appeals.....	1063
7.	Substitution; Survival of Claim	1064
a.	IRA Case.....	1065
C.	INTERVENTION	1066
1.	Intervention of Right: OPM, OSC	1066
2.	Permissive Intervention	1068
3.	Rights of Intervenor.....	1070
4.	<i>Amicus Curiae</i>	1070
D.	STEPS TAKEN AFTER APPEAL IS FILED	1071
1.	Acknowledgment of Appeal.....	1072
a.	Philippines Retirement Appeal	1073
2.	Amendment of Appeal.....	1073
3.	Service of Pleadings	1073
4.	Deficient Appeal.....	1074
E.	AGENCY RESPONSE TO APPEAL.....	1075
1.	Narrative Response to Appeal	1076
2.	Motion to Dismiss Appeal.....	1077
3.	Delay in Appeal Response.....	1077
4.	Designation of Agency Representative.....	1077
F.	APPEALS INVOLVING JURISDICTIONAL ISSUES.....	1078
1.	Nonfrivolous Jurisdictional Allegation	1081
2.	Judge Must Ensure Jurisdictional Issues Are Identified; <i>Burgess</i> Notice	1082
3.	Agency Representative's Responsibilities	1085
4.	Hearing on Jurisdictional Issue	1086
G.	REPRESENTATIVES.....	1087
1.	Right to Representation.....	1087
a.	Inadequate Representation.....	1089
b.	Service on Representative.....	1090
2.	Disqualification of Representative; Application of State Disciplinary Rules.....	1090

3.	Conflicts.....	1091
a.	Representative as Witness.....	1094
4.	Disciplinary Rules and Proceedings	1094
H.	<i>PRO SE</i> AND INADEQUATELY REPRESENTED PARTIES	1095
1.	<i>Pro Se</i> Appellant	1095
2.	Assistance to Mentally Incompetent Appellant; <i>French</i> Procedure	1096
I.	<i>EX PARTE</i> COMMUNICATIONS	1099
1.	What They Are	1101
2.	How <i>Ex Parte</i> Communications Are Treated	1103
III.	INTERLOCUTORY APPEALS	1103
A.	INTERLOCUTORY APPEAL PROCEDURE.....	1103
1.	Regulation.....	1103
2.	Application of Regulation	1105
a.	Rulings on Bias and Intervention.....	1107
b.	Direct Appeal to MSPB.....	1107
3.	Stay of Proceeding.....	1107
IV.	DISCOVERY	1108
A.	AN OVERVIEW OF DISCOVERY PROCEDURES	1109
1.	Regulatory Structure.....	1110
2.	Initial Disclosures.....	1112
3.	Preliminary Steps in Discovery	1112
4.	Discovery Limitations	1113
a.	Jurisdictional or Timeliness Issue	1114
5.	Discovery Dispute; Motion to Compel	1115
6.	Federal Rules	1117
a.	Federal Rules of General Application	1117
7.	Interrogatories.....	1119
a.	Use of Interrogatories	1119
8.	Deposition	1120
9.	Other Discovery Devices	1122
a.	Document Request	1122
b.	Request for Admission.....	1123
c.	Medical, Psychiatric Examinations	1124
d.	Motion for More Definite Statement of Appeal	1126
10.	Discovery From Nonparties	1126
B.	STRATEGIC CONSIDERATIONS IN DISCOVERY	1127
1.	Burdensome Discovery	1127
a.	Effect of EEO, Reprisal Allegations.....	1128
b.	Discovery During Pendency of Criminal Proceedings	1128
2.	Privileged Information	1129
a.	<i>In Camera</i> Inspection	1129
b.	Law Enforcement Privilege	1130
c.	OSC File; Executive and Investigative Privileges	1131
d.	OPM Suitability File.....	1132
e.	Agency Investigative File	1132
f.	Attorney-Client Privilege	1133
g.	Attorney Work Product Privilege	1137
h.	Agency Deliberative Process Privilege.....	1139
i.	Statutory Confidentiality Limitations.....	1140
3.	Privacy Act	1141
4.	Failure to Use Discovery; Informal Discovery Efforts.....	1143
a.	Informal Discovery; Control by Agencies of Employees' Time	1145
5.	Protective Order	1146
C.	ENTRY OF DISCOVERY MATERIAL INTO RECORD	1146
D.	SUBPOENAS	1147
1.	When a Subpoena Is Used	1147
2.	Obtaining, Serving Subpoena	1148
a.	Witnesses Outside the United States	1149
3.	Enforcement.....	1149
4.	Witness Fees; Travel Allowances	1150
E.	REVIEW OF DISCOVERY RULINGS	1151

1.	Effect of Denial of Discovery	1151
a.	Preservation of Issue	1154
2.	Rulings on Discovery Disputes	1155
a.	Synopsis of Testimony	1155
b.	Relevance, Overbroad Request	1155
c.	Mitigation; Disparate Treatment	1156
d.	Deposition of Agency Head	1156
e.	Electronic Records	1157
f.	Inspection Rather Than Production of Documents	1157
3.	Discovery in OSC Case	1158
V.	SANCTIONS	1158
A.	MONETARY SANCTIONS; ATTORNEY FEES	1160
B.	FAILURE TO RESPOND TO APPEAL	1160
1.	Default Judgment	1161
C.	FAILURE TO PROSECUTE APPEAL	1161
1.	Dismissal Warranted	1163
a.	Failure to Provide Basis for Appeal	1164
b.	Failure to Designate Representative	1164
c.	Failure to Comply With Judge's Order	1164
2.	Dismissal Unwarranted	1166
a.	Failure to Attend Hearing	1167
b.	Inadvertent or Isolated Failure to Obey Order	1168
c.	Late Appeal	1170
D.	FAILURE TO COOPERATE IN DISCOVERY	1170
1.	Discovery Procedures	1170
a.	Sanction Against Agency	1171
b.	Material in Control of Third Party	1173
c.	Sanction Against Appellant	1174
E.	FAILURE TO FOLLOW PREHEARING OR HEARING PROCEDURES	1176
1.	Sanction Against Appellant; Prejudice to Agency	1177
2.	Sanction Against Agency	1178

CHAPTER 3: HEARING..... 1181

I.	HEARING.....	1181
A.	RIGHT TO HEARING	1181
1.	<i>De Novo</i> Hearing	1182
2.	Jurisdictional Hearing; Documentary Evidence	1182
a.	Timeliness Issue	1185
b.	Issue of Law; No Material Disputed Facts; Summary Judgment	1186
3.	Counsel	1188
4.	Control by Judge	1188
a.	Role of Intervenor	1190
5.	Official Time; Resources Available to Appellant	1190
B.	WAIVER OF HEARING	1190
1.	Inability to Travel to Hearing Site	1193
2.	Failure to Request Hearing	1194
a.	New Decisional Standard; Remanded Case	1195
3.	Untimely Hearing Request	1195
a.	Effect of Amendment of Appeal	1196
4.	Withdrawal of Hearing Request	1196
a.	Failure to Receive Hearing Notice	1197
b.	Postponement Denied	1198
c.	Events Beyond Appellant's Control	1199
5.	Strategic Considerations—Intentional Waiver	1199
6.	Adjudication After Waiver, Failure to Attend Hearing	1199
7.	Case Adjudicated Without a Hearing; Right to Respond to Evidentiary Submission	1200
C.	POSTPONEMENT OF HEARING	1204
1.	Timing of Hearing	1204
2.	MSPB Policy on Postponement	1204
a.	Dismissal Without Prejudice to Refile	1206
b.	Case Suspension	1206

3.	Postponement or Continuance Procedure	1206
a.	Request; Form of Sworn Statement	1207
b.	Failure to Make Request.....	1207
c.	Status of Pending Motion.....	1208
d.	Proceeding After Denial of Motion	1208
4.	Good Cause Requirement.....	1208
a.	Need to Prepare	1208
b.	Awaiting Outcome of Another Case.....	1209
c.	Unavailability of Representative; New Representative	1209
i.	Case Proceeds to Hearing	1212
d.	Medical Condition of Appellant.....	1212
e.	Effect of Criminal Proceeding on Appeal; Indefinite Suspension	1212
f.	Appellant Incarcerated	1215
g.	Military Service	1217
h.	Change in Hearing Location.....	1217
i.	Missing or Unavailable Witness	1217
5.	Postponement or Continuance Denial—Review Standard	1217
D.	VENUE OF HEARING.....	1218
1.	Change of Venue	1218
a.	Cost to Appellant	1220
2.	Requesting a Change of Venue.....	1220
3.	Venue Determination Review Standard	1220
E.	HEARING FUNDAMENTALS	1220
1.	Change, Resignation, or Death of Judge	1221
2.	Interaction With Judge.....	1221
3.	Prehearing Submission	1221
4.	Prehearing Conference	1222
a.	Stipulations.....	1225
b.	Waiver or Withdrawal of Affirmative Defense	1225
c.	Dismissal of Charge	1225
5.	Memorandum or Order Summarizing Conference.....	1226
a.	Preservation of Objection; Incomplete Summary.....	1227
b.	Treatment of EEO and Other Affirmative Defenses; Summary Judgment.....	1229
F.	CONDUCT OF HEARING; RESPONSIBILITIES OF JUDGE	1231
1.	Hearing Error: Measure of Damage	1231
a.	Timing of Submission of Pleadings	1232
b.	Timing of Initial Decision	1232
2.	Control and Exclusion of Representative or Participant.....	1233
3.	Maintaining Order.....	1234
a.	Exclusion From Hearing Room of an Individual Whose Presence May Intimidate a Witness	1234
b.	Security Arrangement	1234
4.	Witness Control; Sequestration.....	1235
5.	Conduct of Questioning	1237
a.	Multiple Representatives.....	1238
6.	Permitting Record Development	1238
a.	Telephone, Videoconference Hearing.....	1239
b.	Bifurcated Hearing	1243
c.	Hearing Subpoena	1245
7.	Ensuring Record Development; <i>Pro Se</i> Appellant; EEO File	1245
a.	Annuity Appeal	1247
b.	Duty of Judge to Inform an Appellant of Governing Law; Assistance to <i>Pro Se</i> Appellant; Liberal Construction of Pleadings	1248
8.	Raising Issue <i>Sua Sponte</i> ; Addressing Legal Issues	1250
9.	Preserving Review Right Through Objection.....	1252
10.	Media Coverage.....	1252
11.	Public Hearing; Closing the Hearing	1253
12.	Timing of Hearing	1253
13.	Hearing Accommodation for Disabled Appellant; Interpreter	1254
14.	Allocation of Burden of Proof	1255
15.	Opening Statement.....	1255
a.	Advice to All Representatives	1255

b.	Advice to Appellant’s Counsel	1255
16.	Brief, Oral Argument	1256
a.	Closing Argument	1256
G.	PREVENTION OF INTERFERENCE WITH MSPB PROCEEDINGS	1256
1.	Protective Order.....	1257
2.	Protective Order for Appellant	1258
3.	Interference With and Protection of Witness, Representative; Sanctions.....	1259
a.	Agency Regulatory Restriction on Appearance of Employee as Witness	1262
H.	POSTHEARING ACTIVITIES	1263
1.	Closing Record	1263
a.	Ensuring Notice of Record Closing	1264
b.	Clarifying Scope of Record; Off-The-Record Discussions	1265
c.	Timing of Evidentiary Submissions, Responses.....	1265
d.	Effect of Closing Record	1267
2.	Regional Authority After Initial Decision	1267
a.	Judge’s Request to Reopen Record to Correct Error	1268
II.	MOTION PRACTICE	1268
A.	USE OF MOTIONS.....	1268
1.	Dispositive Motion	1270
a.	Motion to Dismiss Filed Prior to Hearing	1270
b.	Motion to Dismiss Filed During Hearing.....	1270
c.	Summary Judgment.....	1271
d.	Affirmative Defense Order; Requirement of Specific Factual Allegations	1276
B.	FORM AND TIMING OF MOTIONS.....	1277
III.	WITNESSES	1278
A.	WITNESS REQUEST	1278
1.	Obligation to Permit Relevant Testimony	1279
a.	Competence to Testify	1279
b.	Appellant	1279
c.	Decisionmaker.....	1279
d.	Agency Head	1280
2.	Obligation to Request Witness	1280
a.	Witness List.....	1281
b.	Rebuttal Witness.....	1282
3.	Repetitious Testimony.....	1283
4.	Offer of Proof	1283
5.	Compelling Witness Attendance	1284
a.	Appellant.....	1284
b.	Others; Former Employee; Subpoena.....	1284
c.	Duty Status of Federal Employee Witness; Entitlement to Pay, Travel Expense, Per Diem.....	1284
d.	Official Time for Federal Employee	1285
6.	Protecting Record; Missing Witness	1286
a.	Preservation of Objection.....	1286
7.	Judge May Call Witness.....	1287
8.	Obtaining Testimony by Alternate Means.....	1287
9.	Right of Witness to Representation	1287
a.	Self-Incrimination	1287
10.	Witness Denial—Review Standard	1287
B.	EXAMINATION OF WITNESSES	1289
1.	Production of Witness Statement, Document Relied on During Testimony	1290
2.	Taking Witness Out of Order	1291
3.	Leading Questions.....	1291
4.	Control of Questioning by Judge	1292
5.	Examination by Judge.....	1292
IV.	DISQUALIFICATION OF JUDGE	1292
A.	PRESUMPTION OF HONESTY AND IMPARTIALITY	1293
1.	Competence of Judge	1294
B.	TREATMENT OF BIAS ALLEGATIONS.....	1295
1.	Procedure; Documenting Record.....	1297
2.	Significance of Extrajudicial Source of Bias.....	1299
3.	Judge’s Treatment of Bias Allegation	1299

4.	Specific Bias Allegations	1300
a.	Relation With Party or Witness.....	1300
b.	Relation With Counsel.....	1300
c.	Improper Communication	1301
d.	Examination of Witness.....	1301
e.	Criticism of Counsel, Party, or Position; Settlement Effort; <i>Ex Parte</i> Communication.....	1301
f.	Prior Ruling Against Party.....	1305
g.	Erroneous Ruling	1306
h.	Incorrect Factual Conclusion.....	1306
i.	Hasty or Late Decision	1306
j.	Change in Judge Without Finding of Bias	1307

CHAPTER 4: EVIDENCE..... 1309

I.	FUNDAMENTALS	1309
A.	RELEVANCE, MATERIALITY, AND FAIRNESS	1309
1.	Informal Adjudication	1309
2.	Relevance and Materiality	1309
a.	<i>De Novo</i> Review	1310
b.	Conditional Admission of Evidence.....	1310
3.	Record.....	1310
a.	Offer of Proof.....	1310
4.	Fairness in Development of Evidence.....	1310
a.	Erroneous Exclusion of Evidence.....	1310
b.	Erroneous Admission of Evidence.....	1311
c.	Manipulation or Redaction of Evidence.....	1311
B.	NATURE OF CHARGES	1312
1.	Evidentiary Value of Charge	1312
a.	Response to Charge	1313
C.	HEARSAY	1314
1.	<i>Borninkhof</i>	1315
2.	Judicial Interpretations	1317
3.	5 USC 2302(b)(2): Investigative Statement	1318
II.	EVALUATION OF EVIDENCE	1318
A.	DOCUMENTARY EVIDENCE	1319
1.	Response to Appeal	1319
2.	Medical Report, Records.....	1319
3.	Notes of Witness; Memorandum of Conversation	1320
4.	Time and Attendance Record; Recollection Recorded	1320
5.	Production Record, Report; Business Record.....	1321
6.	Regulation; Law	1321
7.	Evidence From Other MSPB Hearing; Other Judicial Proceeding.....	1321
8.	Procedure for Introducing Document; Demonstrative Evidence	1321
9.	Authentication Requirement	1323
a.	Handwriting	1323
b.	Significance of Signature.....	1323
c.	Copy; Photograph	1323
B.	PHYSICAL EVIDENCE.....	1323
1.	Custody and Control	1323
2.	Use at Hearing	1324
C.	ADMISSIONS	1324
1.	Probative Value	1324
a.	Repudiated or Recanted Admission	1325
2.	Settlement Offer.....	1326
D.	CIRCUMSTANTIAL AND SECONDARY EVIDENCE	1327
1.	Common Possession/Multiple Causation.....	1329
2.	Contemporaneous Statement.....	1329
3.	Flight or Evasion	1330
4.	Statistics.....	1330
E.	OPINION AND IMPEACHMENT EVIDENCE	1330
1.	Physical Condition	1330
2.	Character.....	1330

a.	Past Misconduct	1332
b.	Arrest, Conviction	1333
c.	Reputation	1333
d.	Habit	1333
3.	Department or Demeanor During Hearing	1334
4.	Evidence in Disability Annuity Appeal; <i>Chavez</i> ; Post-Separation Evidence	1334
F.	RECURRENT EVIDENTIARY PROBLEMS	1341
1.	Polygraph	1341
2.	Unsworn and Sworn Statements	1342
a.	No Hearing	1343
b.	Hearing Held	1343
c.	Affidavit; Sworn Statement; Declaration; Form of Attestation	1344
d.	Deposition	1346
3.	Investigation Reports	1347
4.	Recordings	1349
a.	Video	1349
b.	Audio	1349
5.	Transcript of Prior Testimony	1349
6.	Expert Witness; Medical Evidence	1349
a.	Medical Expert Opinion	1351
b.	Other Experts	1354
7.	Statements of Representative, Party	1354
8.	Testimony of Child	1355
9.	Interpretation of Collective Bargaining Agreement	1355
10.	Newspaper Article	1355
11.	Drug Test	1355
III.	SUBSTITUTES FOR DIRECT EVIDENCE	1359
A.	OFFICIAL NOTICE	1359
1.	Regulations	1360
a.	Federal Personnel Manual; Agency Handbook, Publication	1360
2.	Related Board Case Records	1361
B.	ADVERSE INFERENCES AND PRESUMPTIONS	1361
1.	Silence	1361
2.	Failure to Produce Evidence; Loss of Evidence or Spoliation; Negative or Adverse Inferences	1362
a.	Negative Evidence	1366
3.	Presumption	1366
a.	Delivery of Mail, Other Documents	1367
C.	STIPULATIONS	1371
1.	Issues of Fact and Law	1372
2.	Stipulations Directed by Judge	1373
D.	<i>RES JUDICATA</i> , COLLATERAL ESTOPPEL, AND LAW OF THE CASE—THE DOCTRINES	1373
1.	Elements of <i>Res Judicata</i>	1374
a.	Identity of Prior Cause of Action and Issues	1378
b.	Identity of Parties; Privity	1379
c.	Complete Relief Available	1380
d.	<i>Res Judicata</i> Raised <i>Sua Sponte</i> by MSPB; Waiver of Defense	1380
e.	Jurisdictional Issue	1382
f.	Settlement	1384
g.	Withdrawal of Appeal	1385
2.	Collateral Estoppel	1386
a.	Error in Law; Change in Law	1388
b.	Proof of a Prior Adjudication	1389
c.	Privity; Appellant as a Party to Prior Case	1389
d.	Privity of Agencies	1390
e.	Identity of Prior Issue	1391
f.	Jurisdictional, Timeliness Issues	1392
g.	Decision of Another Tribunal	1394
h.	Collateral Estoppel Raised <i>Sua Sponte</i> by MSPB	1396
3.	Judicial Estoppel	1396
4.	Law of the Case; Mandate Rule	1398
5.	<i>Stare Decisis</i>	1402

E.	RES JUDICATA AND COLLATERAL ESTOPPEL—THE DOCTRINES APPLIED	1402
1.	Criminal Conviction.....	1402
2.	Pleas to Criminal Charges.....	1405
a.	Guilty Plea	1405
b.	<i>Nolo Contendere</i> and <i>Alford</i> Pleas	1407
c.	Pretrial Diversion	1410
d.	Conviction, Misconduct Distinguished	1411
3.	Acquittal; Reversal of Criminal Conviction.....	1411
4.	Successive MSPB Cases	1412
a.	Dismissal for Adjudicatory Efficiency.....	1413
b.	WIGI/Removal	1413
c.	Successive RIFs	1413
d.	Whistleblowing Prohibited Personnel Practice Complaint or Appeal.....	1413
e.	USERRA Claims	1419
f.	Suitability Determination	1420
g.	Regulation Review	1420
h.	Prior Action Reversed for Lack of Due Process.....	1420
5.	Other Judicial and Administrative Proceedings.....	1421
a.	Agency Credentialing Committee.....	1421
b.	Union Trial Board	1422
c.	Labor Contract and Administrative Grievance, Arbitration Cases; Postal Service Employees.....	1422
d.	OPM Annuity Determination	1425
e.	Unemployment Compensation Award	1427
f.	OWCP Finding; Social Security Determination	1429
g.	EEOC Decision.....	1429
h.	Comptroller General or GAO Decision	1430
i.	Judicial Determination	1432
6.	Exceptions to Application of Collateral Estoppel, <i>Res Judicata</i>	1433
a.	Pendency of an Appeal	1433
b.	Fairness of Adjudication; New Evidence	1433
c.	Fraud; Misrepresentation	1433
d.	Change in Law	1435
IV.	EXCLUSION OF EVIDENCE	1435
A.	PROCEDURES.....	1435
1.	Objection, Motion to Strike, Motion <i>in Limine</i>	1435
2.	Witness Exclusion	1436
a.	Disapproval of Proposing Official.....	1436
B.	CONSTITUTIONAL AND STATUTORY CHALLENGES	1437
1.	Search.....	1437
a.	Wiretap.....	1441
b.	Recording	1441
c.	Drug Testing	1442
2.	Interrogation.....	1445
a.	Misconduct of Investigator	1445
b.	Compelled Testimony; <i>Kalkines</i> Warning	1445
c.	Right to Silence, Counsel	1447
3.	Denial of Union Representation	1449
C.	OTHER BASES FOR EXCLUSION OF EVIDENCE	1450
1.	Claims of Privilege.....	1450
a.	Alcoholism Treatment Records.....	1450
b.	Other Medical Records	1450
c.	Privacy; Attorney-Client Communication	1450
2.	Failure to Follow MSPB Procedure	1450
V.	HEARING RECORD	1451
A.	RIGHT TO AND NECESSITY FOR A RECORD OR TRANSCRIPT	1451
1.	Current MSPB Practice.....	1452
2.	Past Treatment of Transcript.....	1452
3.	Past Internal MSPB Guidance on Transcript.....	1453
4.	Federal Circuit Commentary on Transcript	1453
a.	Arbitration Case	1454
5.	Use of Recording	1454

B. PROBLEMS CONCERNING TRANSCRIPT AND RECORD	1454
1. Off-The-Record Discussion	1454
2. Hearing Recording or Computer Recording Omission; Transcript Error	1455
3. Correction of Transcript	1456
4. Unofficial Transcript.....	1456

CHAPTER 5: INITIAL DECISION AND PETITION FOR REVIEW 1457

I. INITIAL DECISION.....	1457
A. INITIAL DECISION FORMAT	1457
1. Minimum Requirements.....	1457
a. Bench Decision	1459
b. Notice of Right to Review	1460
2. Case Dismissed by Consent; Mootness of Initial Decision	1460
B. REQUIRED ANALYSIS	1461
1. Analytical Structure	1461
a. Analysis of Appeal Presenting Both Timeliness and Jurisdictional Issues	1462
b. Analysis Required; Omitted Factual or Legal Findings.....	1462
c. Incorrect Adjudication Standard.....	1464
2. Issue of Law	1464
a. Adverse Action	1465
b. Annuity Appeal	1465
3. EEO, Prohibited Personnel Practice Issue	1465
a. Nondispositive EEO, Prohibited Personnel Practice Issue.....	1467
4. Consolidated Cases	1469
5. Counsel Fee Determination	1469
6. Issue Not Raised in Appeal	1469
C. CREDIBILITY FINDINGS	1469
1. Necessary Findings	1469
a. Weight of Evidence Equally Balanced	1470
2. Factors Considered; <i>Hillen</i>	1470
a. Some Testimony Discredited	1472
b. Alibi Defense	1473
c. Inconsistencies; Denials; Memory Lapse; Failure to Provide Statement	1473
d. Contemporaneous Notation, Statement; <i>Post Hoc</i> Explanation.....	1474
e. Self-Serving Testimony; Bias; Criminal Conviction; Past Misconduct	1474
f. Uncontradicted Testimony.....	1475
g. Implausible, Inherently Improbable, Imprecise Testimony	1476
h. Telephonic Hearing.....	1476
i. Determination Made Without Hearing.....	1476
3. Authenticity Issue.....	1476
II. PETITION FOR REVIEW; RECONSIDERATION	1476
A. PFR PROCESS	1477
1. Statutory and Regulatory Structure	1478
a. Scope of Reply to PFR Response.....	1480
b. Internal Board Guidance	1480
2. Board Treatment of PFR, Reopening Request.....	1481
a. Enforcement Issue.....	1483
3. Effect of Judicial Review on PFR	1483
4. Effect of EEOC Review on PFR	1483
5. Who May Obtain Review	1484
a. OPM	1484
b. OSC	1484
c. Others; Intervention at PFR Stage	1484
6. Grounds for PFR	1485
a. Evidentiary Disputes	1485
b. Other Bases for Review; Ineffective Counsel	1486
c. Frivolous PFR; Sanction	1487
d. Challenges to Settlement	1487
7. Time for Filing.....	1488
8. Service	1488
9. MSPB Processing	1489

a.	Tied Vote; Lack of Quorum	1490
b.	Decision Effective Upon Issuance by Clerk	1491
c.	Joinder	1491
10.	Cross-PFR.....	1491
a.	Conditional Cross-PFR	1492
11.	Failure to Prosecute; Withdrawal of PFR; Failure to Respond	1492
a.	Dismissal Without Prejudice	1493
12.	PFR Settlement Program	1493
13.	MSPB Final Decision	1494
a.	Short Form Order.....	1494
14.	Authority to Reopen and Reconsider	1495
a.	Jurisdictional Issue.....	1498
b.	Due Diligence	1499
c.	Reversal of Criminal Conviction	1503
d.	Change in Law	1504
e.	Fraud	1506
f.	Retirement Case	1507
g.	Effect of Judicial Review on Petition to Reopen.....	1508
h.	Reopening in Lieu of Excusing Untimely or Defective PFR; Manifest Injustice	1509
i.	Discovery of Additional Legal Argument.....	1510
j.	Correction of Case Processing Error	1510
k.	Manifest Injustice	1511
15.	Entry of Settlement Agreement Into Record.....	1511
B.	INTERIM RELIEF	1511
1.	Effective Date of Interim Relief.....	1514
2.	Effect of Remand or Supplemental Initial Decision on Interim Relief.....	1515
3.	Obligation to Return Employee to Work and Pay; Undue Disruption Determination	1515
a.	Necessity for Undue Disruption Determination.....	1518
b.	Form of Undue Disruption Notice	1519
c.	Implicit Undue Disruption Determination; Strong Overriding Interest.....	1521
d.	Restoration Followed by Removal From Workplace or Adverse Action During Interim Relief Period; Return to Work With Changed Duties	1525
e.	Restoration Followed by Appellant’s Inability to Work.....	1526
f.	Pay Entitlement; Overtime; Allowances	1526
g.	Deductibility of Interim Earnings or Severance Pay	1528
h.	Prior “Bad Faith” Implementation Standard	1529
4.	Dismissal of PFR for Failure to Provide Interim Relief	1529
a.	Appellant’s Remedy for Inadequate Agency Compliance With Interim Relief Order	1530
b.	Time and Format for Filing Motion to Dismiss PFR for Lack of Proper Interim Relief; Enforcement Procedures ...	1531
c.	PFR Not Mooted by Overbroad Interim Relief	1532
d.	Effect of Jurisdictional Issue	1533
5.	Certification and Proof of Interim Relief	1533
a.	Evidence of Interim Relief	1534
b.	Substantial Compliance but Technical Error; Supplemental Evidence of Interim Relief	1537
c.	Delay in Payment Following Certification or <i>Prima Facie</i> Evidence of Interim Relief.....	1538
d.	Withdrawal of Interim Relief	1539
6.	Factors Limiting or Warranting Denial of Interim Relief	1539
a.	Receipt of OWCP Compensation	1540
b.	Effect of Retirement.....	1540
c.	Restriction on Extension of Appointment	1541
d.	Waiver or Settlement of Interim Relief; Change in Duties or Employment Status	1542
7.	Special Situations	1544
a.	Retirement Appeals	1544
b.	Suitability Appeal	1544
c.	Mitigation of Removal to Demotion	1544
d.	Mitigation of Removal to Suspension	1545
e.	Demotion Mitigated to Suspension	1545
f.	Mitigation or Cancellation of Suspension	1546
g.	Enforced Leave Concluded by the Date of the Initial Decision.....	1546
h.	Unified Penalty Involving Reassignment	1546
i.	Appeal of Within-Grade Increase Denial	1546

j.	Discriminatory Application of Interim Relief	1546
k.	VEOA Appeals	1547
C.	FACTUAL AND CREDIBILITY FINDINGS	1547
1.	Review of Factual Findings; “Special Deference”	1547
a.	Case Decided on Affidavits or Documents	1552
b.	Telephonic or Videoconference Hearing	1552
2.	Objection Based on Omitted Finding	1553
3.	Unnecessary Finding	1554
4.	Issue of Mental Competence During Appeal Adjudication	1554
D.	NEW EVIDENCE	1555
1.	What Constitutes Evidence	1558
2.	What Evidence Is New	1558
a.	Evidence Previously Available	1558
b.	Timeliness of Appeal, Pleading, or Other Submission	1559
c.	Jurisdictional Issue; Exhaustion of Remedies in IRA, VEOA Cases	1561
d.	Claim of Surprise	1563
e.	Test of Due Diligence	1563
f.	Evidence Concerning Issue First Raised by Judge	1566
g.	Evidence From Another MSPB Case	1566
3.	Materiality of New Evidence	1567
a.	Reversal of Criminal Conviction	1567
b.	Impeachment Evidence; Rebuttal to Hearing Evidence	1568
c.	Subsequent Corroborative Evidence	1571
d.	Evidence of Disparate Treatment	1572
e.	Subsequent OPM, SSA, OWCP, VA Determination; Evidence of Mental Incapacity	1572
f.	Subsequent Adjudication of Past Discipline.....	1573
E.	NEW LAW	1574
F.	NEW ISSUES; ISSUES NOT RAISED WITH THE JUDGE	1575
1.	General Rule	1575
a.	Jurisdictional Issue	1576
b.	Order Directing Payment in Violation of Federal Statute.....	1577
2.	Determining if an Issue or Argument Was Raised Below	1577
a.	Annuity Issue	1578
b.	Penalty Determination	1578
c.	Statutory or Constitutional Interpretation Issue	1578
d.	Timeliness of Appeal	1578
e.	Issue of Discrimination	1578
f.	EEOC Treatment Distinguished	1579
g.	Waiver of Issue	1579
G.	TIMELINESS OF PFR	1579
1.	Date and Place of Filing	1580
a.	Deficient but Timely PFR.....	1580
2.	Filing by Facsimile	1580
a.	Misguided Facsimile	1581
3.	Filing by Commercial Delivery.....	1582
4.	Filing by Hand.....	1582
5.	Filing by Mail.....	1582
a.	Proof of Mailing; Rebuttal of Postmark; Letterbox Rule; Sworn Statement Concerning Mailing	1584
b.	PFR Lost in the Mail.....	1586
6.	Electronic Filing.....	1588
7.	Request for Extension of Time	1589
8.	Procedure on Late Submission.....	1590
a.	Affidavit or Sworn Statement Required	1591
b.	Strict Application	1592
c.	Retirement Appeal.....	1594
9.	Justification for Late Filing	1594
a.	Merits of Case.....	1595
b.	Physical or Mental Illness of Appellant, Counsel	1595
c.	Ignorance of Law; Late Discovery of a Legal Defense; Subsequent MSPB Decision in Another Case	1602
d.	Problem With Settlement	1604
e.	Misinterpretation of or Unfamiliarity With MSPB Regulation or Instruction.....	1605

f.	Incorrect Information From MSPB, Others	1607
g.	Incomplete Notice of Right to File PFR.....	1608
h.	Delayed Receipt or Misrouting of Initial Decision or PFR; Constructive Receipt of Initial Decision	1608
i.	Failure to Receive Initial Decision; E-Filer; Change of Address; Incomplete Initial Decision	1610
(i)	Responsibility to Notify Board of Physical or E-mail Address Change.....	1614
j.	Electronic Filing Problem.....	1616
k.	Effect of Judge's Remand to Agency for Redetermination of Segment of Case	1618
l.	Mailroom Delay in Posting PFR	1618
m.	Foreign Mail Problem	1619
n.	Withdrawal, Absence of Representative	1619
o.	Inability to Obtain Representation	1620
p.	Unexcused Delay or Neglect of Representative.....	1620
q.	Excused Neglect of Representative; Diligence of Appellant	1623
r.	Attempt to Obtain Congressional Assistance	1626
s.	Pending Review by Another Adjudicator	1626
t.	Awaiting Transcript, Other Document.....	1627
u.	Delay in Internal Decisionmaking	1628
v.	Military Service.....	1628
w.	Fear of Prosecution; Agency Misrepresentation	1629
x.	Language Difficulties	1629
y.	Office Equipment, Technology, E-Filing Mishap, Related Problems.....	1629
z.	Other Problems.....	1630
10.	Filing PFR With Wrong Agency or MSPB Office	1632
11.	Case or PFR Misfiled in Court	1635
H.	FORMAT AND SUBSTANCE OF PFR; REPLY.....	1635
1.	Length Limitation; Format	1636
a.	Erroneous Designation of Pleading	1637
b.	Error in Formal Requirements	1637
c.	<i>Pro Se</i> Form PFR.....	1638
2.	Signature, Designation of Representative Required	1639
3.	Specific and Supported Objection	1640
a.	Factual Error	1640
b.	Adjudicatory Error	1640
4.	Lack of Transcript	1641
5.	Response to PFR	1641
6.	Reply Brief.....	1642
7.	Supplemental Authority.....	1642
I.	MOOTNESS OF PFR	1642
1.	Cancelation of Adverse Action; Agency Compliance With Initial Decision	1642
a.	Effect of Appellant's PFR if No Agency PFR Filed	1643
2.	Settlement; Vacatur of Initial Decision	1643
3.	Regulation Review Proceeding	1644
4.	Retirement Appeal.....	1644
5.	Disqualification of Representative	1644
J.	PROCEDURE ON REMAND.....	1644
1.	Determining Whether a Remand Is Necessary.....	1644
a.	Board Obtains Evidence During PFR	1645
2.	Evidence, Findings From First Hearing.....	1645
a.	Effect of MSPB Order Vacating Initial Decision	1647
3.	Remand for Further Discovery	1647
4.	Remand for More Evidence	1647
a.	Subsequent PFR.....	1647
b.	Entry of Interlocutory or Interim Relief on Remand	1647
5.	Remand for Compliance	1648
K.	OPM RECONSIDERATION REQUESTS	1648
1.	Governing Statute and Regulation	1648
2.	Substantial Impact on Law; Collective Bargaining Agreement Issue, Mixed Case	1650
a.	Decisions Prior to 1990.....	1652
3.	Limited to Facts and Issues of Record	1653
4.	Timing of Request; Arbitration Award	1653
5.	Mootness of Reconsideration Request	1653

6.	EEOC Discrimination Decision	1653
L.	STAY REQUESTS	1654
1.	Requested by OPM	1655
a.	Pending Reconsideration Request Is Not a Stay	1657
b.	Pending Request for Supreme Court Review	1657
2.	Requested by Agency	1658
a.	Stay of Enforcement Proceeding	1660
3.	Requested by or for Individual	1660
a.	Special Counsel Disciplinary Case	1662
b.	Other OSC Litigation	1663
M.	REVIEW OF ARBITRATION AWARDS	1663
1.	Award Subject to Review	1669
a.	Governing Statute and Regulation; Time for Review	1670
b.	EEO Allegation—Ordinarily to Be First Raised With the Arbitrator	1671
c.	Compensatory Damages Claim; Inadequate Analysis by Arbitrator; Remand	1676
d.	Other Prohibited Personnel Practice Issue; Remand	1676
e.	Counsel Fee Claim	1677
2.	Proper Appellant Before MSPB; Labor Union; VA Medical Professional	1677
3.	Method and Scope of MSPB Review	1678
a.	Issue Preclusion	1680
b.	Labor Contract Exclusivity Clause.....	1681
c.	Allegation of Bias, Unfair Hearing	1681
d.	Enforcement of Award Reviewed by MSPB.....	1682
4.	Standard of Review	1683
a.	Penalty, Remedial Determination; Time-Served Suspension	1686
b.	Procedural Issue; Timeliness of Grievance	1693
c.	Discrimination Issue	1696
5.	MSPB Review Procedure	1697
a.	Time to Seek Review.....	1699
6.	Postal Service Employees.....	1701
a.	Effect of Arbitration Award on Board Appeal.....	1703

CHAPTER 6: ADVERSE ACTIONS 1709

I.	ADVERSE ACTIONS DEFINED	1709
A.	CANCELATION OF APPOINTMENT, PROMOTION	1709
1.	Appointment	1710
a.	Entry on Duty; Action by Appointing Authority; Reliance	1713
b.	Citizenship Issue	1713
c.	Nepotism	1715
d.	Selective Service Registration	1715
2.	Cancellation of Promotion, Pay Increase	1717
a.	Withdrawal of Offer to Extend Term Appointment	1730
3.	Termination by Adverse Action of Appointment Secured by Fraud; Disqualification by OPM or OSC Proceeding; OPM Suitability Disqualification Action	1730
B.	CONSTRUCTIVE ADVERSE ACTION	1731
1.	Jurisdictional Showing	1733
a.	Specific Allegations Control	1742
b.	Analysis of Totality of Circumstances	1744
c.	Obligation of Judge to Inform Appellant of Jurisdictional Requirements	1746
d.	Avoidance of Jurisdictional Analysis in Untimely Appeal	1747
e.	Collateral Attack on Settlement Agreement and Waiver of Appeal Right	1747
f.	Allegation of Discrimination	1749
2.	General Approach to Analysis of Constructive Adverse Actions	1752
a.	Timing of Operative Events.....	1753
3.	Involuntary Downgrading	1754
a.	Hearing.....	1754
b.	Deceit; Misrepresentation	1755
c.	Action Threatened Without Good Cause	1762
d.	Time Pressure	1764
e.	Improper Reassignment	1764
f.	Withdrawal of Request for Downgrading	1765

g.	Unauthentic Request for Downgrading	1765
h.	Discrimination; Intolerable Working Conditions	1765
i.	External Problems	1769
j.	Correction of Administrative Error	1770
4.	Involuntary Resignation	1770
a.	Hearing.....	1773
b.	Deceit; Misrepresentation	1774
c.	Action Threatened Without Good Cause	1779
d.	Time Pressure	1781
e.	Improper Reassignment	1785
f.	Withdrawal of Request to Resign.....	1785
g.	Irrevocable Resignation; VSIP.....	1788
h.	Unauthentic, Ambiguous or Conditional Resignation	1788
i.	Ineffective Resignation	1789
j.	Mental Disability.....	1790
k.	Intolerable Working Conditions	1791
l.	Whistleblowing Reprisal	1799
m.	Discriminatory Working Conditions	1800
n.	Failure to Accommodate Disability	1804
o.	Denial of Leave	1806
p.	External Problems	1807
q.	Probationer	1808
r.	Technical Error	1808
5.	Involuntary Retirement.....	1808
a.	Hearing	1811
b.	Deceit; Misrepresentation	1812
(i)	Correction of Retirement Benefit; Placement in the Wrong Retirement System	1824
c.	Action Threatened Without Good Cause	1825
d.	Time Pressure	1827
e.	Involuntary Reassignment	1828
f.	Withdrawal of Request to Retire	1831
g.	Irrevocable Retirement; VSIP	1832
h.	Intolerable Working Conditions	1836
i.	Whistleblowing Reprisal	1844
j.	Discriminatory Working Conditions	1847
k.	Failure to Accommodate Disability	1851
l.	Discriminatory Conduct Causes the Disability Leading to Retirement.....	1863
m.	Denial of Leave	1864
n.	Mental Disability.....	1865
o.	Agency-Initiated Retirement	1865
p.	Discontinued Service Retirement	1865
q.	Mandatory Retirement	1868
r.	Employing Agency as Party to a Retirement Appeal Against OPM.....	1868
6.	Constructive Demotion Through Reassignment; <i>Russell</i> Appeal	1868
a.	Planned Management Action	1872
b.	Position Must Be Upgraded	1874
c.	Identity of Duties.....	1877
d.	Qualification for Higher-Graded Position	1877
e.	Jurisdictional Analysis; Hearing	1878
f.	Evidence of Classification Error	1878
g.	EEO Allegation	1878
h.	Timeliness of Appeal	1878
7.	Involuntary Transfer	1879
C.	ENFORCED LEAVE; CONSTRUCTIVE SUSPENSION	1880
1.	Jurisdictional Analysis; Burden of Proof	1883
a.	Hearing.....	1885
b.	EEO Allegation	1887
c.	Effect of Receipt of OWCP Benefit on Enforced Leave or Constructive Suspension Claim.....	1887
d.	Dispute Over Reemployment Right.....	1888
2.	Requirement for Adverse Action Procedure.....	1889
a.	Leave Status Voluntarily Assumed	1892

b.	Process Due to Employee	1896
c.	Substantive Evaluation of Leave Enforced Following Notice to Employee	1896
d.	Disability Accommodation	1896
3.	Employee on AWOL, Restricted Leave	1900
4.	Employee Blocked From Working Because of Employer's Concern About Fitness	1901
a.	Employee on LWOP	1906
5.	Light and Limited Duty; Medical Restriction.....	1906
a.	Historical Development of Light Duty Analysis.....	1910
b.	Collective Bargaining Agreement	1915
c.	Disability Accommodation	1919
d.	EEO Settlement	1923
e.	Termination of Light Duty	1924
f.	Postal Service National Collective Bargaining Agreements; Other Labor Agreements.....	1926
g.	Furlough	1927
6.	Work Release.....	1927
7.	Bar Order Preventing Entry to Workplace	1927
8.	Temporary Absence Resulting From Intolerable Working Conditions	1929
D.	INDEFINITE SUSPENSION.....	1932
1.	Use	1933
2.	Procedure; Duration	1936
a.	Due Process	1942
b.	Regulatory Error.....	1945
3.	Criminal Activity	1946
a.	Indictment; Filing of Information; Referral for Prosecution	1947
b.	Investigation.....	1948
c.	Arrest	1950
4.	Security Clearance or Other Investigation.....	1957
a.	Due Process: Separation of Officials Denying Access and Deciding Suspension; Change in Basis for Clearance Suspension.....	1962
b.	Indefinite Prolongation of Suspension.....	1976
5.	Inquiry Into Other Issues	1979
6.	Nexus.....	1984
7.	Severity of Penalty; Reassignment	1986
a.	Alternative to Indefinite Suspension for Clearance Suspension or Medical Inability to Perform; Comparators, Discrimination	1986
b.	Accommodation for Disability.....	1993
8.	Remedy	1993
a.	Action Following Termination of Criminal Proceeding.....	1997
II.	SERVICE EFFICIENCY	1998
A.	BURDEN OF PROOF	2000
1.	Agency Burden of Proof	2001
a.	Suspicion; Belief	2001
b.	Intent	2001
2.	Preponderance of Evidence	2002
a.	Uniformity of Standard	2003
b.	Charge of Violation of Criminal Statute	2003
3.	<i>Prima Facie</i> Case	2003
4.	Presumption.....	2004
5.	Employee's Burden: Affirmative Defense.....	2004
B.	PERSONAL FAULT	2004
1.	Adverse Action to Assist Another Employee	2004
a.	Discrimination	2004
b.	Merit Promotion Grievance	2005
c.	Action Directed by Arbitrator.....	2005
2.	Correction of Administrative Error	2005
3.	<i>Respondeat Superior</i>	2005
C.	ADVERSE ACTION RELATED TO DISABILITY	2008
1.	Medical Standard	2009
2.	Medical Impairment	2010
a.	Agency-Initiated Retirement	2011
b.	Assistance in Securing Counsel.....	2014

c.	Prior Law: Reasonable Cause to Believe	2014
d.	Service Credit Requirement.....	2016
e.	Permissible Action; Mitigation.....	2016
3.	Evaluation of Physical Impairment	2016
a.	Evidence of Recovery Between Date of Removal and MSPB Decision.....	2019
4.	Effect of Removal for Inability to Work on OPM Disability Annuity Determination	2020
a.	Rebuttable Presumption of Annuity Entitlement.....	2021
b.	Social Security Administration Determination	2029
c.	OWCP Determination	2030
d.	Department of Veterans Affairs Disability Rating.....	2031
e.	Security Clearance Determination	2031
5.	Allegation of Disability Discrimination; Lack of Reasonable Accommodation	2032
III.	SPECIAL CLASSES OF EMPLOYEES.....	2035
A.	SENIOR EXECUTIVE SERVICE	2035
1.	Mitigation of Disciplinary Action	2040
2.	Performance Case	2041
3.	Department of Veterans Affairs.....	2041
B.	ADMINISTRATIVE LAW JUDGES.....	2045
1.	Scope of MSPB Review	2048
a.	Good Cause	2048
b.	Penalty Determination	2053
c.	Affirmative Defenses.....	2054
2.	Cause for Discipline	2055
a.	Insubordination	2056
b.	Poor Performance	2057
c.	Failure to Follow Performance-Related Directive	2061
d.	Remarks to Litigant; Comments in Decision; Conduct of Hearing.....	2064
e.	Prolonged Absence; Attendance	2065
f.	Other Misconduct	2066
3.	Constructive Action Against Judge: <i>Tunik</i>	2068
a.	Forced Retirement.....	2076
b.	Enforced Leave	2077
c.	Pre- <i>Tunik</i> Decisions; Judicial Independence.....	2077
4.	Furlough; RIF	2085
5.	Settlement of Complaint	2088
6.	Voluntary Dismissal of Complaint	2088

CHAPTER 7: NEXUS AND MITIGATION2089

I.	CONCEPT OF NEXUS	2089
A.	MERRITT AND PRESUMPTIONS OF NEXUS; OFF-DUTY CONDUCT.....	2089
1.	General Approach Toward Proof.....	2091
a.	Actual or Potential Publicity, Notoriety	2092
b.	Potential for Future Harm.....	2093
c.	Investigative Exertion	2093
B.	SPECIFIC NEXUS DETERMINATIONS.....	2093
1.	Arrest	2094
2.	Violent Off-Duty Misconduct	2094
a.	Shooting; Killing	2094
b.	Assault; Threat.....	2096
3.	Violent Conduct on Agency Premises	2097
4.	Off-Duty Drug Offense	2097
a.	Drug Activity Involving Agency Time or Facilities	2101
5.	Off-Duty Alcohol-Related Offense	2101
a.	Off-Duty Action Involving Agency Premises	2102
6.	Sexual Misconduct.....	2103
7.	Fraud and Theft	2114
a.	Off-Duty Offense	2114
b.	Preemployment Offense.....	2116
c.	On-Duty or Job-Related Offense	2116
d.	Gambling.....	2117
8.	Failure to Pay Debt	2117

9.	Grievance Meeting	2120
10.	Conduct Contrary to Agency Mission	2120
	a. Real Estate Activity—DHUD	2120
	b. Employee’s Tax Problem—IRS, Other Agencies	2120
	c. Law Enforcement Officer; <i>Giglio</i> Impairment	2125
	d. Driver.....	2130
	e. Strike-Related Conduct	2130
11.	AWOL Removal After Criminal Conviction.....	2130
II.	MITIGATION OR AGGRAVATION OF PENALTIES	2130
A.	GENERAL CONSIDERATIONS	2131
	1. <i>Douglas</i> Standards; Decision to Reflect Consideration of Mitigating Factors or MSPB Imposes Maximum Reasonable Penalty.....	2133
	a. Consideration of Mitigating Factors	2134
	b. Proposal to List Aggravating Factors; Treatment of Warnings; Due Process Considerations	2135
	c. Exemplary Penalty.....	2137
	d. Exaggeration of Charge	2137
	2. Articulation of Relevant Factors.....	2137
	a. By Agency; Decision Notice	2138
	b. By MSPB	2139
	3. Not All Charges Sustained; Maximum Reasonable Penalty	2140
	a. Remand to Agency for Redetermination of Penalty	2144
	4. All Charges but Not All Specifications Sustained; Part of a Specification Sustained	2146
	5. Charge Sustained That Was Not Brought	2147
	6. Factors Not Considered Mitigating.....	2147
	a. Disability Discrimination; Mental Impairment.....	2147
	b. Discriminatory Environment	2148
	c. Prohibited Personnel Practice.....	2148
	d. Offer of Settlement	2148
	7. When Mitigation Must Be Raised	2148
	8. Special Counsel Disciplinary Case.....	2149
	9. Impact of Mitigation Through Demotion on Collective Bargaining Agreement Requirement	2149
B.	SPECIFIC MITIGATING OR AGGRAVATING FACTORS	2149
	1. Potential for Rehabilitation	2149
	a. Deference to Higher Level Management Assessment.....	2149
	b. Forward-Looking Analysis.....	2150
	c. Performance Action	2150
	d. Prior Notice of Rule or Policy	2151
	e. Temporary Condition; Stress; Alcoholism	2152
	f. Prior Long Service	2153
	g. Weight of Prior Performance Evaluation	2153
	h. Intervening Good Performance; Misconduct Subsequent to Charge Leading to Adverse Action	2154
	i. Post-Removal Conduct or Evidence of Rehabilitation	2155
	j. Display of Contrition or Remorse; Admission of Misconduct	2156
	k. Denial of Misconduct; Vigorous Defense	2157
	l. Position of Trust; Fiduciary Duty; Loss of Trust; Notoriety	2158
	m. Repeated Misconduct; Last Chance Agreement.....	2160
	2. Psychological Problem; Medical Condition, Illness or Treatment; Medication; Stress, Job Tension	2161
	3. Intent	2166
	4. Progressive Discipline	2166
	a. Table of Penalties; Classification of Offense	2167
	5. Disparate; Comparable Penalties	2170
	a. Degree of Consistency Required	2174
	b. Substantial Similarity of Offenses; Totality of the Circumstances	2175
	c. Proximity in Time	2180
	d. Same Work Unit; Evolving Case Law: <i>Woebcke</i> ; <i>Lewis</i>	2180
	e. Positions of Similar Levels of Trust and Responsibility	2188
	f. Selective Prosecution.....	2190
	g. Settlement	2190
	h. Comparable Arbitration Awards; Other MSPB Decisions	2193
	i. Effect of Criminal Sentence	2193
	j. Assertion of Discrimination	2194

k. Duty of Agency to Inquire into Comparable Offenses and Penalties.....	2194
l. Post-Removal Comparability Analysis	2195
6. Mandatory Penalty	2195
7. Staleness of Charge	2198
8. Agency Bad Faith, Provocation, Manipulation; Improper Pressure on Appellant; Entrapment	2198
9. Condonation	2199
10. Favorable Attitude of Coworker; Supervisor	2200
11. Severity of Misconduct	2200
a. Sequential Disciplinary Proposals	2200
b. Multiplicity and Merger of Charges	2200
c. Zero Tolerance Policy	2201
12. Employee Job Level.....	2203
a. Ineffectiveness as Supervisor; Demotion to Nonsupervisory Position; Other Demotion	2203
b. Reassignment to a Different Position.....	2204
c. Position of Trust; Loss of Confidence in Employee	2205
C. AGENCY CONSIDERATION OF PAST DISCIPLINE	2206
1. Notice Requirement; Exceptions	2207
a. Failure to Include Past Discipline in Proposal: Due Process and Harmful Error.....	2208
2. Proof and Rebuttal of Past Discipline	2209
a. Availability of Challenge to Past Discipline.....	2210
b. Clearly Erroneous	2210
c. Reprisal	2210
d. Pending Challenge to Past Discipline	2211
e. Past Discipline Reversed Following Initial Decision	2213
f. Discipline Imposed After the Appealed Adverse Action.....	2214
g. Past Discipline Time-Barred	2214
h. Dissimilar Offense.....	2215
i. Nondisciplinary Sanction	2216
D. STANDARDS FOR JUDICIAL REVIEW, ADMINISTRATIVE RECONSIDERATION	2216
1. General Rule.....	2216
2. Agency Table of Penalties	2217
3. Application of Relevant <i>Douglas</i> Factors	2217
4. Effect of OPM Reconsideration Request	2217

CHAPTER 8: SUBSTANTIVE OFFENSES.....2219

I. STATUS	2219
A. ABSENCE	2219
1. Impact on Service Efficiency	2219
a. Assigned Post of Duty; Travel Requirement.....	2220
b. Irregular Attendance: Postal Service	2221
2. Approved and Disapproved Absence.....	2221
a. Abuse of Leave	2222
b. Loafing; Wasting Time.....	2223
c. Excessive Leave, LWOP, Absences Beyond Employee's Control; Failure to Maintain a Regular Work Schedule; OWCP Coverage	2223
(i) Historical Application of <i>Cook</i> and Related Decisions.....	2227
d. Unscheduled but Approved Absence Following Failure to Follow Procedure to Request Leave	2234
3. Tardiness.....	2236
4. Leave-Requesting, Leave-Reporting Requirement	2236
a. Leave Restriction Notice	2241
b. Medical Certification Requirement	2241
c. Other Certification or Documentation Requirement	2242
d. Accommodation for Leave Issue.....	2242
5. Proof of AWOL; Leave Entitlement.....	2243
6. Agency Abuse of Discretion.....	2244
a. Ambiguous Leave Policy or Directive	2245
b. Condonation of AWOL	2245
c. Jury Duty.....	2245
7. Evidence of Illness First Submitted to MSPB	2245
a. FMLA	2247
8. LWOP; Other Leave Arrangement; Compensable Injury.....	2247

a.	Executive Order 5396; Disabled Veteran	2251
b.	Advanced Sick Leave	2251
c.	Donated Leave.....	2252
9.	Family Leave.....	2252
a.	Burden of Proof Under FMLA; FMLA Request; Medical Documentation	2257
b.	Constructive Request for FMLA Leave	2265
c.	Belated Submission of FMLA Request, Documentation.....	2268
d.	Abuse of Family Leave	2270
10.	Worker's Compensation Issue.....	2270
a.	Determining Whether Removal Is Based on Reason Unrelated to OWCP Entitlement.....	2272
b.	Leave-Reporting Requirement	2273
c.	No Foreseeable End to Absence; Absence When Compensation Ends	2274
11.	Disability Discrimination	2276
12.	Leave Status Pending Disability Retirement	2277
13.	Incarceration; Work-Release Program.....	2277
14.	Cancellation or Conversion of Approved Leave	2279
15.	Absence Caused by Fear for Safety	2279
16.	Military Leave.....	2279
17.	Religious Leave	2280
18.	Problem Following Reinstatement Through MSPB Order	2280
19.	Aggravating Factors	2280
a.	Prolonged AWOL	2280
b.	Frequent AWOL	2281
c.	Unreliable Attendance.....	2281
20.	Mitigating Factors	2281
a.	Short, Infrequent AWOL.....	2282
b.	Longer AWOL; Other Mitigating Factors	2283
c.	Leave Status Caused by Agency's Wrongful Action.....	2284
B.	REFUSAL TO ACCEPT REASSIGNMENT	2285
1.	General Rule.....	2286
a.	SES Employee	2292
2.	Inconvenience to Employee; Health Problem	2293
a.	Failure to Accept Return From Overseas Assignment.....	2294
3.	Agency Burden of Proof; Legitimate Reason for Reassignment	2294
a.	Mobility Agreement; Condition of Employment	2297
b.	Misconduct Following Improper Reassignment	2298
4.	Application of RIF Procedures; Procedural Errors	2298
C.	FAILURE TO MAINTAIN OR OBTAIN CONDITION OF POSITION	2298
1.	Lack of License, Certification	2298
a.	Lawyer	2299
b.	Driver.....	2299
c.	Others.....	2300
d.	Medical Certification or Standard.....	2300
e.	Certification by Military Authority.....	2300
2.	Loss of Credential.....	2301
3.	Failure to Complete Training Course; Validity of Examination	2301
a.	Air Traffic Controller	2301
b.	Other Positions.....	2304
4.	Lack of or Loss of Minimum Qualification	2306
a.	Indian Child Protection and Family Violence Prevention Act	2307
b.	Lautenberg Amendment	2310
c.	Loss of Access to Agency Computer, Network	2312
5.	Security Clearance Revocation; Sensitive Position	2312
a.	Clearance Process	2313
b.	Agency Security Clearance Proceeding	2313
c.	Review of Agency Determination; <i>Egan</i> ; Constitutional Due Process	2318
d.	Decision to Require a Clearance	2324
e.	Reassignment to Nonsensitive Position; Mitigation	2328
f.	EEO Issue; Whistleblower Reprisal; Disparate Treatment; USERRA	2330
g.	Regulatory Infraction During Revocation Process.....	2333
h.	Suspension, Removal Under 5 USC 7532.....	2339

i.	Suitability Determination, Security Clearance Distinguished	2340
j.	Sensitive Duties Not Requiring a Clearance: <i>Conyers</i>	2340
k.	Decisions Postdating <i>Conyers</i>	2361
l.	Requirement Similar to Security Clearance; Public Trust Position	2364
m.	TSA Sensitive Security Information	2366
n.	Retirement Issue Related to Removal for Loss of Clearance	2367
6.	Removal From Reserve Status	2368
7.	Lack of Suitability for Continued Employment	2372
D.	CONFLICTS OF INTEREST; APPARENT CONFLICTS	2373
1.	Conflicts; Improper Business Dealings	2374
2.	Apparent Conflicts; Use of Government Office for Private Gain	2376
3.	Agency Internal Information	2377
a.	Nondisclosure Agreements	2377
4.	Transaction With Another; Gift; Bribe; <i>Honorarium</i> ; Loan	2377
a.	Transaction With Patron, Vendor, Inmate	2378
b.	Transaction With Supervisor	2379
c.	Compensation for Government Service From Another Source	2379
5.	Acting as Agent or Attorney Against Government	2380
E.	OUTSIDE EMPLOYMENT	2380
1.	Personal Work on Government Time	2380
a.	Reporting Requirements	2380
b.	Approval Requirements	2380
c.	Employment in Violation of Agency Restriction; Outside Practice of Law	2381
F.	SPECIAL CATEGORIES OF EMPLOYEES	2381
1.	Guard, Correctional Officer, Police, Investigator, Security Official	2381
2.	Immigration Officer	2382
3.	Ship Employee	2382
4.	Supervisor	2382
G.	STRIKES	2382
1.	Charge of Striking	2383
2.	Basis for Removal	2383
3.	Proof of Participation	2383
4.	Refuting Participation	2384
5.	Fear for Personal Safety	2384
a.	Insufficient Threat	2384
b.	Duress, Coercion Established	2384
6.	Association With Strikers	2385
7.	Settlement Agreement	2385
8.	Influence of Political Leader	2385
9.	Penalty	2385
10.	Other Issues	2385
II.	RELATIONSHIPS	2385
A.	INSUBORDINATION	2385
1.	Refusal or Failure to Perform Work	2386
a.	Proof of Intent	2387
b.	Failure to Follow Instruction	2388
c.	Failure to Follow Policy, Regulation	2389
d.	Disruptiveness; Lack of Cooperation	2390
e.	Prohibited Recording of Conversation	2391
2.	Cumulative Insubordination	2391
3.	Dispute Over Position Responsibilities	2392
a.	Difficulty Following Reinstatement	2392
b.	Breach of Settlement Agreement	2393
4.	Insolence, Abusive Language	2393
a.	Abuse of Coworker, Subordinate	2393
b.	Abuse of Supervisor; Disrespectful or Coarse Language	2394
c.	Disagreement Over Instruction, Program	2396
5.	Misuse of Dispute Resolution Procedure	2396
a.	EEO Process	2397
b.	Congressional Communication	2397
c.	Grievance Proceeding	2397

d. Supervisor	2399
e. Interference With Employee Grievance.....	2399
6. Refusal to Take Fitness Examination.....	2399
a. Properly Ordered	2400
b. Improperly Ordered.....	2400
7. Failure to Provide Medical Information; Position Requirement	2404
8. Refusal to Submit to Search or Drug Test	2406
9. Problems During Investigations: Lack of Cooperation; Interference; Self-Incrimination	2409
10. Administrative Law Judge.....	2418
11. Defenses	2418
a. Inability to Comply	2418
b. Unclear Order; Unknown Policy.....	2418
c. Constitutional, Similar Challenge	2419
d. Improper Directive; Command Influence	2419
e. Federal Labor Law Policy; Labor Contract	2423
f. Fear for Safety or Other Harm	2425
12. Mitigating Factors.....	2427
B. SEXUAL MISCONDUCT.....	2428
1. Sexual Harassment Defined	2429
a. Past Significance of Psychological Harm	2435
b. Charge Based on Agency Regulation or Standard of Conduct Not Specifically Tied to Title VII	2441
c. Physical Contact	2446
d. Offensive Remarks; Photos.....	2449
e. Consensual Conduct Affecting Workplace	2454
f. Homosexual Conduct	2455
2. Misconduct Toward Agency Client, Affiliate.....	2455
3. Misconduct Toward Child.....	2456
4. Penalties for Sexual Misconduct	2456
a. Demotion, Suspension	2456
b. Removal	2456
5. Defenses	2457
C. CONDUCT HARMING OTHERS; CRIMINAL VIOLATIONS	2458
1. Threat; Inappropriate Conduct.....	2458
a. Metz Test	2460
b. Statement Made to Therapist; EAP Counselor	2462
c. Statement to Union Representative	2465
d. Reaction of Others to Threat	2466
e. Threat Through Another; Rumor	2468
f. Conditional Threat	2470
g. Threat Against a Coworker	2472
h. Threat Against a Supervisor	2472
i. Threat Against Others.....	2473
j. Thought of Violence	2473
k. Inappropriate or Disruptive Statement Not Charged as Threat	2473
l. Mitigation.....	2476
2. Assault	2476
a. Assault on a Coworker	2477
b. Assault on a Supervisor	2477
c. Assault on a Subordinate	2477
d. Assault on Others	2477
e. Defenses	2478
f. Mitigation; Aggravation.....	2479
3. Fighting; Self Defense.....	2481
4. Gambling.....	2481
5. Threat of Legal Action, Whistleblowing, or Publicity	2482
6. Lawsuit	2483
7. Discourtesy; Related Problems.....	2484
a. Profanity.....	2485
8. Improper Conduct Toward Patient, Ward, Others	2485
9. Invidious Discrimination; Offensive Remark; Preferential Treatment; Reprisal	2487
a. Nepotism; Hiring of Friend	2494

D. CRITICAL STATEMENTS	2496
1. Constitutional Framework Applied in Federal Sector	2504
a. Private Speech	2506
2. Criticism of Agency or Its Personnel	2507
a. Constitutional Analysis	2507
b. Prohibited Personnel Practice Analysis	2509
c. Defamation.....	2511
d. Congressional Communication.....	2512
e. Political Activity and Speech	2513
f. Concept of Loyalty	2515
3. Internal Criticism	2516
a. Constitutional Analysis.....	2516
b. Managerial Disagreement	2517
c. Administrative Law Judge.....	2517
d. Criticism, False Statement About Coworker, Subordinate, or Supervisor	2517
III. INTEGRITY.....	2520
A. FALSIFICATION AND MISREPRESENTATION	2520
1. Proof of Fraud; Falsification	2523
a. Neglect or Mistake	2527
b. Perjury.....	2530
c. Failure to Correct Report of Another	2530
d. Reliance on Advice of Counsel or Other Individual	2530
e. Cumulative False Statements.....	2531
2. Employment Application; Security Questionnaire; Duty of Candor	2532
a. Criminal Record.....	2535
b. Education and Experience.....	2537
c. Pre-Employment Medical Inquiry.....	2538
3. Compensation Claim; Voucher	2540
a. Overtime	2540
b. Travel Voucher, Related Documentation.....	2541
c. OWCP Claim.....	2543
d. Unemployment Compensation	2545
e. Disability or Leave Claim	2545
f. Pay and Allowances Claim.....	2545
4. Records of Time, Attendance, and Work; Negligence	2546
5. Medical Certificate	2548
6. Alteration, Failure to Preserve Documentation and Evidence	2548
7. Investigative Misrepresentation; “Exculpatory No”	2548
8. Lack of Candor.....	2550
9. Failure to Report Misconduct	2554
10. Disclosure Statement.....	2554
11. Mitigating Factors	2554
a. Time, Attendance, Travel Record.....	2557
b. Medical Certificate	2557
c. Employment Application	2558
B. REMOVAL AND MISUSE OF PROPERTY	2559
1. Service Efficiency	2559
2. Burden of Proof	2559
a. Conversion	2560
b. Unauthorized Possession or Removal of Property; Theft	2560
c. Unauthorized Use.....	2562
d. Common Possession Cases	2562
e. Evidence of Intent: Theft and Unauthorized Possession.....	2562
3. Petty Theft.....	2563
a. Shoplifting	2565
b. Significance of Custody and Control of Property	2565
4. Government Vehicle.....	2568
a. Deviation From Assigned Route; Minor Personal Use; Public Service Exception	2572
b. Nonstatutory Vehicle Misuse Charge; Impaired Driver.....	2573
5. Unauthorized Use, Theft, or Destruction of Specific Property	2573
a. Computer; Internet.....	2573

b.	Photocopier; Facsimile.....	2575
c.	Telephone.....	2576
d.	Misuse of Government Credit Card.....	2576
e.	Misuse or Misdirection of Government Services or Funds.....	2577
f.	Government Records; Official Information; Privacy Act.....	2578
g.	Black Marketing; Diversion of Property	2592
h.	Obstruction, Theft, or Mistreatment of Mail	2592
i.	Misuse of Official Mail, Delivery Service.....	2593
6.	Concealment of Theft	2594
7.	Mitigating Factors	2594
8.	Use of Public Office for Private Gain.....	2595
IV.	MEDICAL.....	2596
A.	DRUG AND ALCOHOL OFFENSES	2596
1.	Drug Possession, Use, Distribution	2597
a.	Possession or Use	2597
b.	Sale or Distribution	2599
c.	Safe Harbor Provision	2599
d.	Mitigation.....	2601
2.	Alcohol.....	2604
V.	PERFORMANCE.....	2605
A.	POOR PERFORMANCE REQUIRES CORRECTION	2605
1.	Significance of Performance Evaluations	2606
2.	Significance of Performance Standard.....	2606
a.	<i>Ad Hoc</i> Measure.....	2606
b.	Assigned Standard.....	2608
c.	Measurement of Work Error.....	2609
3.	Responsibility for Work Error.....	2610
4.	Medical Inability to Perform.....	2610
a.	Specific Medical or Physical Standard.....	2618
b.	Recovery From Disability.....	2619
5.	Mitigating Factors; Choice of Penalty	2622
a.	Comparative Performance	2623
b.	New Duties	2623
c.	Detail, Special Assignment	2625
d.	Progressive Discipline	2625
e.	Lack of Training	2625
f.	Lack of Improvement Period.....	2625
g.	Demotion or Reassignment.....	2626
h.	Suspension	2627
B.	NEGLIGENCE	2627
1.	Endangerment of Employee.....	2628
2.	Public Safety Risk.....	2628
3.	Destruction or Loss of Property	2629
4.	Medical Error	2629
5.	Mishandling or Improper Possession of Weapon	2629
6.	Inattention to Duty; Sleeping on Job	2630
7.	Failure to Follow Procedure	2630
8.	Excessive Expenditure; Waste	2631

VOLUME II

CHAPTER 9: PERFORMANCE CASES.....2633

I.	UNACCEPTABLE PERFORMANCE CASES	2633
A.	STATUTORY AND REGULATORY PROVISIONS: EMPLOYEE AND AGENCY COVERAGE	2634
B.	AN OVERVIEW OF PERFORMANCE ACTIONS	2636
1.	Merit Pay Employee	2637
C.	OPM APPROVAL OF APPRAISAL SYSTEM.....	2638
1.	Change in Appraisal System.....	2639
2.	Flexibility Permitted by Appraisal System.....	2643

3.	Extent of OPM Review; Subordinate Organization Within Agency.....	2643
4.	Change Directed by OPM.....	2644
D.	PERFORMANCE STANDARD CRITERIA	2645
1.	Substantive Right	2646
2.	Scope of Review	2646
a.	Deference to Agency Management	2647
3.	Objectivity	2648
a.	Timeliness of Work	2651
b.	Draft; Intermediate Work Product	2652
c.	Personal Characteristic: Initiative, Reliability.....	2652
4.	<i>Wilson and Jackson</i> ; Negative or “Backwards” Standard.....	2652
5.	Communication of Standard.....	2655
6.	Augmentation of Standard.....	2656
7.	Use of PIP to Establish Standard	2658
8.	Specific Occupations	2660
a.	Clerical Employee, Secretary	2660
b.	Voucher Examiner	2661
c.	Inspector.....	2661
d.	Social Security Claims Employee	2662
e.	Employee Relations, Human Relations Specialist	2662
f.	Trade Analyst.....	2662
g.	Medical Technologist; Nurse.....	2663
h.	Scientist	2663
i.	Trades Employee	2664
j.	IT Specialist	2664
k.	Supervisory Supply Technician	2664
l.	Engineer	2664
m.	Lawyer	2664
n.	Paralegal	2665
o.	Management Analyst	2665
p.	Realty Specialist	2665
q.	Others	2665
9.	Numerical Standard	2665
10.	Multiple Components.....	2667
11.	Classification, Significance of Error	2669
12.	Relation of Standards Within Element	2670
13.	Absolute Standard; <i>Guillebeau</i>	2671
a.	Law Before <i>Guillebeau</i>	2674
b.	Standard to Be Viewed as a Whole.....	2675
c.	Modification of Absolute Standard	2675
d.	Standard That Enumerates Tasks	2675
e.	Level of Performance That May Be Exceeded	2676
14.	Unreasonable Standard	2677
15.	Levels of Performance	2679
a.	Five-Tier Appraisal System; Marginal, Minimally Successful, or “Needs Improvement” Level of Performance	2679
b.	Multiple Appraisal Levels Derived From Ratings for Critical Elements	2683
c.	Two-Level; Pass/Fail Appraisal System	2684
16.	Standards Development; Employee Involvement	2685
17.	Change in Standard.....	2686
a.	Change Through PIP.....	2687
E.	OPPORTUNITY TO IMPROVE	2688
1.	Prerequisite of Unacceptable Performance	2689
a.	Agency Need Not Prove Pre-PIP Unacceptable Performance	2689
2.	Elements of Opportunity Period	2690
a.	Order, Burden of Proof	2691
b.	Control Over Work	2691
c.	Assistance to Employee.....	2691
d.	Necessity for Specific Warning	2693
e.	Statement of Expectations; Job Responsibilities Not Described in PIP	2693
f.	Impossibility of Improvement	2694
g.	Harmful Error Rule.....	2695

3.	Time Allowed for Improvement.....	2696
a.	One-Year Maximum for Evaluation	2697
b.	Pre-PIP Performance.....	2698
c.	Post-PIP Performance; Roller Coaster Employees	2699
d.	PIP Extension.....	2702
e.	Performance During Detail	2703
F.	PROCEDURE	2703
1.	Chapter 43 and 75 Actions Distinguished.....	2703
2.	Failure to Use Chapter 43	2704
a.	<i>Lovshin</i>	2705
b.	Conversion of Action	2706
c.	Limitations on Use of Chapter 43	2710
3.	Proposal, Decision Letter	2710
a.	Requirement of Concurrence.....	2710
b.	Unstated Charge	2711
c.	Necessity for Specific Instances.....	2711
d.	Notice Period	2712
G.	NECESSARY PROOF: SUBSTANTIAL EVIDENCE	2713
1.	Test Defined; Scope of Review	2713
2.	Weight, Quality of Substantial Evidence	2714
a.	Charges, Work Papers as Evidence	2714
b.	Effect of Prior Performance Evaluation; Rating Issued in Error	2715
c.	Statistics; Sampling Method.....	2716
d.	Other Documentation; Testimony.....	2717
H.	DEFENSES	2718
1.	Propriety and Comparison of Performance Standards	2718
2.	Comparison of Employees' Performance.....	2718
3.	Adequacy of PIP; Lack of Control of Work; Agency Bad Faith	2719
4.	Training	2721
5.	Discrimination; Disparate Treatment	2722
6.	Reprisal.....	2725
7.	Collective Bargaining Agreement	2726
I.	PRECLUSION OF MITIGATION	2726
II.	APPEALS FROM WITHIN-GRADE INCREASE DENIALS.....	2727
A.	BASIS FOR MSPB REVIEW.....	2729
B.	WHEN MSPB JURISDICTION ATTACHES.....	2729
1.	Jurisdictional Effect of Collective Bargaining Agreement	2733
C.	BURDEN OF PROOF	2734
1.	Proof of Poor Performance	2734
a.	Role of Performance Standards.....	2734
2.	Substantial Evidence Controls.....	2735
a.	What Constitutes Evidence.....	2735
D.	DEFENSES	2735
1.	Error in ALOC Procedure	2735
a.	Linkage of ALOC and Appraisal System	2736
b.	Waiting Period	2737
c.	Lack of ALOC Determination.....	2737
d.	Vague ALOC Determination	2738
2.	Reconsideration Errors.....	2738
a.	Employee Denied Information	2738
b.	Reconsideration Summary Lacking	2738
c.	Reconsideration Decision Level	2738
d.	Late Reconsideration Decision	2738
3.	Circumstances of Employee	2738
a.	Unfair Work Burden	2738
b.	Illness or Disability	2738
c.	Comparative Work Production	2739
d.	Lack of Training	2739

CHAPTER 10: REDUCTIONS IN FORCE.....2741

I. RIF PROCESS	2741
A. NATURE OF RIF	2741
1. Statutory Provisions	2741
2. OPM Regulations, Guidance.....	2742
a. Other Descriptions of the RIF Process.....	2744
3. Validity of RIF Statute, Regulations	2745
4. Furlough	2745
a. Exemptions	2757
b. Emergency Furlough	2758
c. Part-Time or Light Duty Status; Intermittent Appointment; Adjustment in Work Schedule	2759
d. Discovery in Furlough Appeal.....	2761
B. ACTIONS APPEALABLE AS RIF; MSPB JURISDICTION	2763
1. Regulatory Structure.....	2763
2. Specific Groups of Employees	2764
a. Temporary	2764
b. Probationer.....	2764
c. Demonstration Project	2764
d. Postal Service Non-Preference Eligible	2767
e. Part-Time.....	2768
f. Senior Executive Service	2768
g. Agencies With Independent Statutory Personnel Authority.....	2771
3. Possible RIF.....	2772
4. Action to Avoid RIF	2772
a. Transfer to Another Agency	2772
b. Resignation	2773
c. Retirement	2773
d. Detail.....	2773
e. Reassignment Without Regard to RIF	2773
(i) Representative Rate	2774
f. Reassignment During or Following RIF	2776
g. Reassignment With Pay Reduction in Anticipation of RIF	2776
(i) Postal Reorganizations: 1990s.....	2777
(ii) Postal Reorganizations: 2000 Onward.....	2784
(iii) Other Agencies	2789
5. Grade and Pay Retention; Pay Rate Change; Demotion	2792
6. Classification Issue	2793
a. Erosion of Duties.....	2795
b. Intentional Changes in Duties	2797
7. Transfer of Function.....	2797
a. Identification of Positions for Transfer	2799
b. Employee Who Declines to Move	2802
C. COMPETITIVE AREA.....	2802
1. Definition	2802
2. Criteria	2802
3. Assignment Across Competitive Area	2803
4. Challenge to Competitive Area	2803
a. Burden of Proof.....	2803
b. Organizational Structure; One-Person RIF.....	2803
c. Geographical Structure; Local Commuting Area	2806
D. COMPETITIVE LEVEL	2806
1. Defined	2807
2. Challenge to Competitive Level	2809
a. Primacy of Position Description	2809
b. Testimony Concerning Duties	2812
c. Loss of Productivity; Undue Interruption	2813
d. Collective Bargaining Agreement	2814
e. Challenge to Performance Appraisal	2815
3. Particular Groups of Employees	2816
a. Developmental/Trainee	2816
b. Temporary.....	2816

c.	Part-Time	2817
d.	VA Health Care Professional.....	2817
e.	Bureau of Indian Affairs; Indian Health Service	2820
4.	Scope of MSPB Review	2820
a.	Impact of Error.....	2820
b.	Right to Hearing	2821
c.	Substantive Review.....	2821
II.	ASSIGNMENT AND RELATED RIGHTS	2821
A.	REGULATORY AND OPERATIONAL BASIS	2821
1.	Veteran, Other Preferences.....	2824
2.	Appointment Qualifying for Assignment Right	2825
a.	Excepted Service.....	2825
b.	Detail	2826
c.	Intergovernmental Personnel Act	2826
d.	Part-Time/Full-Time	2826
3.	Position Subject to Displacement.....	2826
a.	Supervisory	2826
b.	Temporary.....	2826
4.	Filling of Vacancies.....	2826
5.	Assessment of Qualifications	2829
a.	Updating Qualifications	2832
b.	Qualifications of Displacing Employee	2832
c.	Merit Promotion Issue.....	2832
d.	Undue Interruption	2832
6.	Representative Rate	2834
7.	Amendment of RIF Notice; Change in Position Offer.....	2835
B.	BUMPING.....	2835
C.	RETREAT	2837
1.	Prior Rule	2838
2.	Method of Analysis	2838
3.	Burden of Proof	2840
D.	REEMPLOYMENT RIGHTS	2840
1.	Reemployment Priority List Right Before RIF Effective Date	2852
2.	Remedy in Reemployment Priority List Appeal	2854
3.	Transitional Assistance	2855
III.	RIF CHALLENGES.....	2855
A.	BURDEN OF PROOF.....	2855
1.	Agency Responsibility	2855
2.	<i>Prima Facie</i> Case.....	2856
3.	Qualifications; Assignment Right	2856
4.	Classification Dispute	2856
B.	<i>BONA FIDE</i> RIF: <i>LOSURE</i>	2857
1.	Substantive Rights, Harmful Error.....	2858
2.	RIF as Adverse Action.....	2860
3.	Challenge to Reorganization	2864
a.	Reorganization Defined; Single Position RIF	2864
b.	Managerial Discretion.....	2864
c.	Funding Decision	2865
d.	Redistribution of Duties	2867
e.	Planning for Future Events	2867
f.	Comparative Qualifications as a Factor in Selection of Positions for RIF	2868
g.	Contribution to Agency Mission; Funding of Individual Position	2868
h.	Contracting Out Challenge	2869
i.	Sham, Paperwork Reorganization: Old, New Position Identical; Delayed Reorganization	2869
j.	Merit Promotion, Hiring, Placement During RIF.....	2872
k.	Events Preceding, Subsequent to RIF	2872
C.	DISCRIMINATION DEFENSES	2874
1.	Age	2878
2.	Religion.....	2879
D.	PROCEDURAL ISSUES	2879
1.	Internal Procedures	2879

2. Timing of Job Offer; Timing of Release of Employees	2879
3. Correction of Retention Standing Error	2880
a. Inspection of Records	2880
4. Adequacy of RIF Notice	2880

CHAPTER 11: HARMFUL ERROR.....2883

I. STATUTORY STANDARD	2883
A. HARMFUL ERROR DEFINED.....	2883
1. <i>Parker</i>	2884
2. Might Have/Would Have Analysis	2885
B. HARMFUL ERROR APPLIED	2886
1. Mixing Harmful Error and Other Doctrines.....	2886
a. Mitigation of Penalty	2886
b. Prohibited Personnel Practice	2886
c. RIF.....	2886
2. Statutory, Regulatory Violation; Action Not in Accordance With Law	2886
a. Unfair Labor Practice	2888
b. Privacy Act; Disclosure of Confidential Information	2890
c. Constitution.....	2891
d. Invalid Regulation	2891
3. Labor Contract Violation.....	2891
a. Disputed Coverage	2894
b. Impact of Arbitration Award	2894
c. Employment Contract	2894
4. Problem With Representation	2895
a. Cautionary Notes to Counsel	2895
5. Treatment of Affirmative Defense If Action Is Set Aside As Erroneous	2896
II. ERROR IN PRELIMINARY PROCEDURES.....	2896
A. AGENCY INVESTIGATION	2896
1. Due Process	2897
2. Right to Counsel; Union Representative.....	2897
3. Entrapment	2899
4. Agency Predecisional Hearing	2900
5. Security Clearance Investigation	2900
B. STALE CHARGES; LACHES	2901
1. General Rule	2901
2. Agency Regulation; Collective Bargaining Agreement	2902
3. Performance Case	2903
C. ESTOPPEL; DOUBLE JEOPARDY	2903
1. Estoppel	2903
2. Double Jeopardy	2903
a. Reinitiation of a Proposal After an Adverse Action Is Canceled.....	2911
b. Action Initiated After Earlier Action Invalidated for Procedural Reason.....	2912
c. Consecutive Adverse Actions.....	2912
d. Action Following Acquittal	2913
III. ERRORS IN PROPOSAL NOTICE AND REPLY PROCESS	2913
A. BASIC RIGHTS	2913
1. Pre-Decision Proposal Not Mandated in Some Cases When Due Process Is Provided Following Decision	2915
2. Right to Counsel	2917
B. PROPOSAL NOTICE.....	2918
1. Purpose, Sufficiency of Notice; Due Process	2918
a. Supporting Evidence.....	2919
b. Technical Deficiencies	2920
c. Failure to Provide Notice of Appeal or Statutory Right	2920
d. Error in Date	2920
e. Other Minor Error	2921
f. Assessing Sufficiency of Charge.....	2922
2. Specific Charge; Only Conduct Described	2926
a. Conduct After Date of Proposal Notice	2928
b. Amendment of Charge.....	2929
3. Framing of Charge	2929

a.	General Charge; Charge Label; Detailed Narrative; <i>Otero and Cross</i>	2929
b.	Variation Between Stated Charge and Supporting Narrative or Specification; <i>Nazelrod and Lachance</i>	2932
c.	Splitting of Charge	2938
d.	Independent Elements of Single Charge	2941
e.	Multiple Specifications Supporting a Single Charge	2944
f.	Lesser Included Offense	2947
g.	Past Discipline; Performance Record; Aggravating Factors	2947
4.	Citation of Standards of Conduct	2948
5.	Charge Tied to Penalty Table Classification	2948
6.	Criminal Charge	2949
7.	Mixing Chapters 43 and 75	2949
8.	Cumulative Charges; Merger of Charges	2950
9.	Charge of Unbecoming or Improper Conduct	2952
10.	Service of Notice	2954
C.	INADEQUATE REPLY AND NOTICE PERIOD	2956
1.	Calculation	2956
2.	Not Less Than Seven Days for Reply	2956
3.	30-Day Advance Notice of Action	2959
D.	SHORTENED NOTICE PERIOD	2960
1.	Procedure to Invoke Shortened Notice	2961
2.	Reasonable Belief of Crime	2961
a.	Arrest, Warrant	2962
b.	Conduct Caused by Mental Impairment	2963
3.	Emergency Suspension for Reason Other Than Reasonable Belief of Crime	2963
4.	Indefinite Suspension	2964
E.	FAILURE TO PROVIDE EVIDENCE FILE, OTHER INFORMATION	2964
1.	Loss or Destruction of Evidence	2966
F.	ORAL AND WRITTEN REPLIES	2967
1.	Proof of Harm; Failure to Consider a Reply; Due Process	2968
a.	Investigation of Information Provided By The Employee	2973
b.	Criminal Proceeding Pending	2974
2.	Waiver of Reply Right	2974
a.	Extension Request	2975
3.	Decisionmaker, Reply Officer	2978
4.	Right to Confrontation	2978
5.	Right to Information	2979
6.	Inadequate Representation	2979
G.	AGENCY DECISIONAL PROCEDURES; <i>EX PARTE</i> COMMUNICATIONS	2979
1.	Early Law From Courts	2979
2.	<i>Sullivan</i> ; Regulatory Prohibitions; Adverse External Influences	2982
3.	<i>Stone</i> ; Current, Broadened Due Process Test	2985
a.	Reinitiation of Action Following Due Process Reversal	2991
4.	Early Law From MSPB	2991
5.	Deciding Official Consults Witness, Advisor; Information Not Disclosed to Employee	2994
a.	Information From Witness	2994
b.	Impact of 5 USC 2302(b)(2)	2995
c.	Report, Investigation	2996
d.	Advisor	2996
e.	Past Discipline as Rebuttal to Mitigation	2996
6.	Proposing and Deciding Official Confer	2996
7.	Information Pertaining to Aggravation or Mitigation of Penalty; <i>Ward</i>	2997
a.	Potential Publicity, Notoriety, Other Harm	3016
b.	Information or Documents in the Evidence File Not Referenced in the Proposal	3018
c.	Information Provided to the Deciding Official Before the Reply Process Begins	3019
d.	Evaluation Of Information Presented During The Reply	3020
e.	Penalty Table, Standard of Conduct Reference	3020
f.	Performance Cases	3023
8.	Predisposition to Take Adverse Action; Offer to Permit Resignation; Uninformed Deciding Official	3025
a.	Biased Proposing Official	3029
b.	Malicious Initiation of Action	3030
9.	Deciding Official Who Is Biased or Whose Decision Is Directed	3030

10. Involvement of OSC.....	3031
11. Changes in Proposing, Deciding Official	3031
12. Lack of Authority	3035
a. Deciding Official	3035
b. Proposing Official.....	3036
13. Lack of Discretion.....	3036
14. Pending Retirement Application	3036
15. Specificity of Decision Letter.....	3037
a. No Decision Letter.....	3037
b. Retroactive Decision Letter.....	3037

CHAPTER 12: DISCRIMINATION3039

I. DISCRIMINATION ISSUES	3039
A. PROCEDURES IN MIXED CASES.....	3039
1. Multiple Agency Review Processes.....	3041
a. Constructive Adverse Action	3042
2. Multiple Filing Options; Pleading Requirements; Timing of MSPB Appeal	3042
a. Withdrawal or Abandonment of EEO Allegation	3043
b. Authority of Judge to Strike Frivolous EEO Allegation; Summary Judgment	3043
3. Jurisdictional Problems With EEO Complaints	3047
a. Filing Dates	3047
b. Timeliness of EEO Complaint	3048
c. EEO Class Action	3051
d. EEO Complaint Withdrawn.....	3053
e. What Constitutes a Complaint	3054
f. Coextensive Issues; Scope of Complaint.....	3054
g. Effect of Subject Matter of Preexisting Complaint on Subsequent Appeal; EEO Complaint Involving Proposed Action	3055
h. Premature Appeal	3056
4. Duty to Resolve Issues and Inform Appellant of Elements of Proof.....	3057
5. Jurisdiction Over Appealable Action; Constructive Adverse Action	3058
a. Probationary Employee.....	3059
b. Restoration Appeal Involving Employee Partially Recovered From Compensable Injury	3059
6. Election of Remedies	3060
a. Grievance Under Negotiated Agreement.....	3060
b. EEO Complaint.....	3060
7. MSPB Remand; EEOC Remand	3062
8. Strategic Considerations	3064
B. BURDEN OF PROOF	3065
1. <i>Prima Facie</i> Case.....	3065
2. Analysis Following the <i>Prima Facie</i> Case	3069
a. Analysis of Motivation, Pretext	3071
b. Mixed Motives; Proof That Action Would Have Been Taken Without Discriminatory Motive	3072
c. Element of Intent; Employer Error	3079
d. Significance of Agency's Proof of Charges	3081
e. Significance of Agency's Failure to Prove Charge	3082
f. Comparable Employees; Disparate Treatment	3083
C. EVIDENCE	3089
1. Direct Evidence; Comparators; Taint of Agency Official; Cat's Paw	3090
2. Circumstantial Evidence; Pretext; Presumption.....	3093
3. Disparate Impact	3095
4. Statistics	3096
5. Supervisory Practices; Remarks.....	3097
D. FORMS OF DISCRIMINATION	3098
1. Race	3098
2. Age	3100
3. Religion	3104
4. Marital Status.....	3106
5. Pregnancy	3106
6. Sex; Sexual Orientation; Equal Pay Act	3106
7. Retirement Cases: Application by OPM of Statutory Requirements	3107

E.	REPRISAL.....	3107
1.	The Convincing Mosaic; Evidence Considered as a Whole	3118
2.	Collateral Personnel Action of Evidentiary Weight in an EEO Affirmative Defense.....	3122
3.	Taint of Reprisal by Lower Level Official; Cat's Paw	3123
4.	Rebuttal Evidence; Pretext.....	3124
II.	REHABILITATION ACT: DISABLING CONDITIONS	3124
A.	REGULATORY STRUCTURE.....	3125
B.	PRIMA FACIE CASE; ACCOMMODATION REQUIREMENTS	3130
1.	Individual Regarded or Perceived as Disabled	3132
2.	Individual Associated With Disabled Person	3139
3.	Substantial Limitation of Major Life Activity	3139
a.	Life Activity of Working	3141
4.	Order and Burden of Proof.....	3145
a.	Disparate Treatment	3153
b.	Mixed Motive Analysis.....	3154
5.	Causal Connection.....	3157
6.	Transitory or Temporary Disability.....	3159
a.	Corrected or Mitigated Condition	3161
7.	Limitation on General Employability	3161
a.	Allergy.....	3163
b.	Stress Disorder	3165
c.	Other Mental Disability; Proof of Disability.....	3170
8.	Conditions Not Protected by Rehabilitation Act	3171
a.	Gambling Compulsion	3172
b.	Sexual Disorder	3172
c.	Pregnancy	3172
9.	Qualified Disabled Employee	3173
a.	Dangerousness; Risk Assessment; Direct Threat	3174
b.	Lack of Medical Release	3180
10.	Knowledge of Disability.....	3180
a.	When Disability Claim or Defense Must Be Raised	3180
11.	Suggesting Nonapparent Accommodation; Duty of Reasonable Inquiry	3183
a.	Interactive Process	3185
C.	ACCOMMODATION THROUGH JOB RESTRUCTURING, ASSISTANCE	3187
1.	Light Duty and Job Modification.....	3187
a.	Lifting Requirements.....	3192
b.	Postal Service Collective Bargaining Agreements.....	3194
c.	Inappropriate Job Modification; Increased Job Burden	3194
2.	Provision or Modification to Job Equipment	3195
3.	Alteration of Work Schedule, Worksite; Telework	3197
a.	Alteration of Training Requirement	3208
D.	ACCOMMODATION THROUGH REASSIGNMENT	3209
1.	<i>Ignacio</i>	3210
2.	Evaluation of Reassignment Effort	3213
a.	Reassignments Across Organizational Lines	3218
E.	ALTERNATIVE ACCOMMODATIVE REQUIREMENTS	3224
1.	Collective Bargaining Agreement	3224
2.	Agency Regulation	3225
3.	Restoration From Compensable Injury	3225
4.	Demotion; Promotion.....	3226
5.	Modification of Agency Policy, Facility.....	3227
6.	Job Training; Change in Supervision	3228
7.	Referral for Counseling.....	3231
F.	AGENCY DEFENSES	3231
1.	Disqualifying Misconduct	3231
2.	Undue Hardship.....	3232
a.	Unreasonable Accommodation.....	3235
b.	Restrictions in Collective Bargaining Agreement	3237
3.	Lack of Qualification for Position.....	3238
a.	Failure to Provide Evidence of Fitness for Position With Medical Standard	3239
4.	Receipt of Disability Annuity.....	3240

5. Rebuttal	3240
6. Restriction on Remedy	3241
G. ALCOHOLISM AND SUBSTANCE ABUSE.....	3241
1. Necessity for Accommodation: <i>Ruzek</i>	3243
a. Suitability.....	3244
b. Postal Service Employee	3245
2. Notice of Disability.....	3245
a. Agency Request for Information.....	3245
3. Proof of Disease	3246
4. Causal Connection: Misconduct Caused by Disease	3247
a. Use of Alcohol or Drugs on the Job	3250
b. Revocation of Driver's License	3251
c. Possession of Drugs.....	3251
d. Misappropriation or Theft of Drugs.....	3252
e. Misappropriation of Funds	3252
5. Qualified Disabled Employee; <i>Hougens</i> and Disqualifying Conduct	3253
a. Current Substance Abuser	3256
b. Disqualifying Misconduct: Removal Appropriate.....	3258
c. Less Serious Conduct: Concurrent Rehabilitation and Discipline.....	3263
6. Firm Choice, Last Chance Agreement.....	3265
a. Requirement of Collective Bargaining Agreement, Agency Regulation	3267
b. Failed Rehabilitation Attempt.....	3269
7. Undue Hardship	3272
III. AVENUES OF FURTHER REVIEW OF EEO DEFENSES	3272
A. EEOC REVIEW	3272
B. SPECIAL PANEL REVIEW.....	3273
C. JUDICIAL REVIEW	3281
1. Scope of District Court Review.....	3283
a. Effect of District Court Review	3284
b. Time for District Court Review; Tolling or Estoppel; Exhaustion of Remedies	3288
2. Effect of Waiver of EEO Claim	3291

CHAPTER 13: PROHIBITED PERSONNEL PRACTICES.....3293

I. OVERVIEW.....	3293
A. SIGNIFICANCE OF DISCOVERY.....	3295
II. TYPES OF PROHIBITED PERSONNEL PRACTICES	3296
A. WHISTLEBLOWING REPRISAL.....	3297
1. Whistleblower Protection Enhancement Act of 2012; Retroactivity	3298
2. Statutory Definitions Control	3300
a. "Gross" Waste or Mismanagement	3301
b. Violation of Law, Rule, or Regulation	3308
c. Abuse of Authority	3316
d. Threat to Public Health and Safety.....	3320
e. Disclosure of Censorship Related to Research, Analysis, or Technical Information.....	3347
3. Dispute Over Form of Whistleblowing	3347
a. Disclosure of Potential Harm or Wrongdoing	3347
b. Complaint to Wrongdoer.....	3348
c. Disclosure to Someone Who Cannot Directly Remedy the Problem.....	3350
d. Minor Personal Grievance	3353
e. Internal, Policy Disagreement.....	3353
f. Information as Part of Normal or Ordinary Duties; Disclosure Through Extraordinary Means	3357
g. Required Report Under Office of Government Ethics Rules, E.O. 12675	3369
h. Communication Indirectly Involving the Government; Private Wrongdoing	3369
i. Communication to News Media; Congress.....	3372
j. Disclosure in Court.....	3373
k. Complaint to the Inspector General	3373
l. Disclosure of Information Already Known or Public.....	3374
m. Sequential Allegations	3376
4. Whistleblowing No Shield Against Misconduct.....	3377
a. Abusive Whistleblower; Robust Language; Chain of Command.....	3377
b. Threatened Disclosure.....	3380

5.	Personnel Treated as Whistleblowers	3382
a.	Individual Perceived as Whistleblower	3382
b.	Whistleblower's Aide, Associate	3386
c.	Individual Serving as Conduit of Information; Internal Disclosure	3387
d.	Former Employee	3387
e.	Contractor Employee	3388
6.	Protected Disclosure: Reasonableness	3388
a.	"Reasonably Believes"; False Statement	3388
b.	Motivation of Whistleblower	3394
c.	Information Developed After Disclosure	3394
d.	Belief Shared by Other Employees; Disinterested Observer	3394
e.	Response of Agency to Disclosure	3395
f.	Expertise of Whistleblower	3396
g.	Specificity of Disclosure	3397
h.	Presumed Agency Good Faith; "Irrefragable Proof" Standard	3399
7.	Unprotected Disclosure; Dispute Concerning Coverage of Disclosure Under 2302(b)(8) or 2302(b)(9).....	3402
a.	Disclosure Prohibited by Law; Regulation Incorporating Statutory Provision.....	3405
b.	EEO Complaint.....	3415
c.	Other Appeals, Charges, FECA Claims, Grievances, and Complaints.....	3418
8.	Disclosures in Multiple Forums	3422
B.	PROHIBITED PRACTICES OTHER THAN WHISTLEBLOWING REPRISAL	3425
1.	Discrimination Proscribed by Civil Rights Laws; 5 USC 2302(b)(1)(A)	3425
a.	Sexual Harassment.....	3425
2.	Improper Personnel Recommendation; 5 USC 2302(b)(2).....	3425
3.	Obstruction of Competition; 5 USC 2302(b)(4)	3426
4.	Influencing Employment Decision; 5 USC 2302(b)(5).....	3426
5.	Improper Preference, Promotion; 5 USC 2302(b)(6)	3427
6.	5 USC 2302(b)(9); Appeal Right; Grievance, Complaint; OSC and IG Involvement; Refusal to Obey Unlawful Order ...	3430
a.	WPEA: Exercise of, Testimony or Assistance in, Appeal, Complaint, or Grievance	3436
7.	Discrimination Unrelated to Job Performance; 5 USC 2302(b)(10)	3438
8.	Discrimination Against Veteran; 5 USC 2302(b)(11)	3439
9.	Violation of Merit System Principle; 5 USC 2302(b)(12).....	3440
a.	Failure to Provide Effective Training; 5 USC 2301(b)(7).....	3443
10.	Nondisclosure Agreement; 5 USC 2302(b)(13)	3443
11.	Refusal to Violate Law	3444
III.	INDIVIDUAL RIGHT OF ACTION	3446
A.	STATUTORY AND REGULATORY REQUIREMENTS AND LIMITATIONS	3447
1.	Time for Initiating IRA Appeal With OSC and MSPB	3452
a.	Case That May Be Either Initiated With OSC or Appealed Directly to MSPB.....	3453
b.	Jurisdiction Limitations of an IRA Rather Than an Adverse Action Appeal	3454
c.	Premature Appeal Following Resort to OSC.....	3455
d.	Belated Receipt of OSC Closeout Notice	3455
e.	Calculation of Appeal Period; Late IRA Appeal; Waiver	3457
f.	OSC Reopening	3458
g.	Equitable Tolling	3461
h.	Laches in Filing OSC Complaint.....	3464
B.	JURISDICTIONAL ISSUE	3465
1.	<i>Rusin</i> Model: Nonfrivolous Allegations Establish Jurisdiction	3466
a.	Nonfrivolous Allegations Based on the Written Record	3470
b.	Hearing.....	3472
2.	Jurisdictional Analysis Prior to <i>Rusin</i>	3473
3.	Variations in Order of Proof; Bifurcation; Necessity to Consider Entire Record	3474
4.	Exhaustion of Remedies; Amendment of Appeal	3483
5.	Election and Preclusion of Remedies.....	3487
a.	Grievance or MSPB Appeal.....	3488
b.	Exhaustion of OSC Process; Direct Appeal of Otherwise Appealable Action	3491
c.	EEO Complaint.....	3495
6.	Collateral Jurisdiction Over EEO Claim Presented in IRA Appeal Not Involving Otherwise Appealable Action	3495
7.	Jurisdiction Over Merits Determination, Collateral Prohibited Personnel Practice, Constitutional, Discrimination Claim, and Harmful Error Claim in Otherwise Appealable Action Initiated Through OSC.....	3496
8.	Status of Particular Agencies and Employees.....	3498

a.	Postal Service	3498
b.	Department of Veterans Affairs Title 38 Employee	3499
c.	National Guard Technician	3503
d.	Federal Bureau of Investigation	3507
e.	Judicial Branch Employee.....	3509
f.	Federal Reserve Board	3509
g.	NAF Employee	3510
h.	Independent Counsel	3510
i.	Federal Aviation Administration	3510
j.	Transportation Security Agency	3511
k.	Intelligence, Counterintelligence Agencies; Foreign National.....	3514
l.	Government Corporation	3517
m.	Other Entities	3517
n.	Experts and Consultants; Personnel Appointed Outside Title 5.....	3517
o.	Lawyer	3519
p.	Former Employee	3519
q.	Employee of Agency Other Than the Agency Charged With Reprisal	3520
r.	Inspector General Office	3522
s.	Employee in the Private Sector; Applicant for Employment	3522
t.	Uniformed Service	3523
u.	Administrator of Federal Benefits.....	3525
9.	Retroactivity of 1989 Whistleblower Amendments; Continuing Violation	3525
C.	PLEADING REQUIREMENTS.....	3525
1.	Duty of Judge to Inform Appellant of Jurisdictional Requirements.....	3525
2.	Specificity of Underlying Whistleblower Disclosure; Labeling of Disclosure Not Required.....	3528
3.	Pleading to OSC.....	3531
a.	Classification or Labeling of Disclosure Not Required	3538
b.	Curative Filing With OSC	3540
c.	Proof of Scope of Complaint Made to OSC; Post-Complaint Submission.....	3540
d.	Information First Submitted With PFR	3542
e.	Serial Complaints to OSC.....	3543
f.	OSC Closeout Letter.....	3543
4.	Pleading to MSPB	3544
D.	COVERED AND EXCLUDED PERSONNEL ACTIONS.....	3545
1.	Threatened Personnel Action	3545
a.	Proposed Action; Dispute Arising During Compliance.....	3549
2.	Failure to Take Personnel Action.....	3549
3.	Performance Appraisal; Evaluation of Qualifications or Abilities.....	3552
4.	Awards and Acts Preliminary to Awards.....	3552
5.	Denial of Salary Step Increase	3553
6.	Promotion, Appointment.....	3553
7.	Decision Concerning Leave; Change in Duties; Idling; Overtime; Harassment	3554
a.	Degree of Significance of Change of Duties, Responsibilities, or Working Conditions.....	3555
b.	Hostile Environment.....	3556
8.	Reprimand; Admonition; Counseling; Performance Warning; Performance Improvement Period	3557
9.	Suspension	3560
10.	Probationary Termination	3560
11.	Failure to Renew Appointment; Failure to Reinstate	3561
12.	Reassignment, Transfer, and Detail	3561
13.	Fitness Examination; Investigation	3563
14.	Security Clearance Suspension, Revocation; Other Certification	3564
15.	Training	3568
16.	Defamatory Statement; Tort; Arrest; False Allegation; Blacklisting	3569
17.	Reduction in Force.....	3570
18.	Classification Issue	3571
19.	Constructive Adverse Action	3572
20.	Action Affecting Private Sector Employment Opportunity	3575
21.	Other Action.....	3576
E.	REMEDIES.....	3577
IV.	CASES BROUGHT BY OSC	3578
A.	STATUTORY BASES.....	3579

1.	Corrective Action Petition; Stay	3579
2.	Disciplinary Complaint.....	3581
3.	Board Authority in Disciplinary, Corrective Action Case.....	3581
4.	Hatch Act; FOIA Violation	3582
B.	ORGANIZATION OF OSC.....	3585
1.	Organizational Structure	3585
2.	Disclosure Unit.....	3586
3.	MSPB Referral to OSC.....	3586
4.	Judicial or Administrative Finding of Discrimination by Federal Employee; 5 USC 1216(a)(5)	3586
C.	OSC DISCIPLINARY COMPLAINT	3587
1.	Limits on Prosecutorial Authority.....	3587
a.	Employee Who Takes or Recommends Personnel Action.....	3588
b.	Prior Resort to Agency-Employer for Disciplinary Action	3589
2.	OSC Complaint.....	3589
3.	Rights of Employee, Respondent	3590
4.	OSC Subpoena; Discovery Procedures	3591
5.	Hearing by Administrative Law Judge; MSPB Review.....	3591
6.	Disciplinary Penalty.....	3591
D.	OSC CORRECTIVE ACTION PETITION	3596
1.	Regulatory Provisions	3598
2.	Filing a Complaint With OSC	3599
a.	OSC Deferral Policy on EEO Charge	3600
b.	Proceeding to Compel OSC Action.....	3600
c.	Right to Counsel in OSC Investigation.....	3603
E.	LITIGATION WITH OSC.....	3604
1.	Purpose of MSPB Hearing	3604
a.	Obtaining Records	3605
b.	Evidence From Other Investigation	3605
c.	Dismissal of OSC Action	3605
2.	Settlement of OSC Litigation	3605
3.	Judicial Review of OSC and IRA Cases	3605
a.	Stay Pending Judicial Review.....	3606
V.	BURDEN OF PROOF IN REPRISAL CASE	3606
A.	ANALYSIS UNDER WHISTLEBLOWER PROTECTION ACT	3606
1.	Analysis Required by Judge.....	3607
2.	Statutory, Regulatory Provisions	3607
3.	Contributing Factor Analysis	3608
a.	Order of Proof	3609
b.	<i>Per Se</i> Timing/Knowledge Test	3610
c.	Evidence Other Than Timing.....	3613
d.	Knowledge by Agency Manager of Appellant’s Whistleblowing; Constructive Knowledge; Cat’s Paw.....	3619
e.	Disclosure Follows the Personnel Action.....	3625
f.	Settlement Offer	3627
g.	Reprisal Without Unlawful Motivation: Reprisal by Investigation—the Atypical Case; <i>Marano, Carr</i>	3627
h.	Charge Arising Out of Conduct During Retaliatory Investigation.....	3635
i.	OSC Corrective Action Case	3638
4.	Otherwise Appealable Action	3639
5.	Agency’s Clear and Convincing Evidence; <i>Carr</i> Factors.....	3639
a.	Constructive Adverse Action.....	3656
6.	Evidence of Reprisal	3656
a.	Strength of Agency’s Case; Probationer; Term Employee.....	3658
b.	Strength of Motive to Retaliate	3662
c.	Comparison Employees	3663
d.	Preliminary Reprisal Leading to Personnel Action	3664
e.	Shifting or Belated Explanations for Agency Action.....	3665
B.	ANALYSIS FOR PROHIBITED PRACTICES NOT COVERED BY WPA, WPEA.....	3665
1.	<i>Mt. Healthy</i>	3668
2.	Importance of Untainted Deciding Official	3671
3.	Timing of Action.....	3673
4.	Severity of Charged Misconduct	3674
5.	Discipline Related to Refusal of Reassignment	3675

6.	Reprisal Against Individual Involved in Union Activity	3675
7.	Performance Case	3678
8.	Disciplinary Case Against Individual Charged With Reprisal.....	3678
a.	Analysis by Agency Deciding Official.....	3685
VI.	STAYS OF PERSONNEL ACTIONS	3685
A.	STAY THROUGH INDIVIDUAL APPEAL.....	3685
1.	Basis for Stay	3687
a.	Intervention by OPM.....	3689
2.	Scope of Stay	3689
3.	MSPB Review of Judge's Stay Decision	3689
B.	STAY THROUGH OSC PROCEEDING	3690
1.	Statutory, Regulatory Provisions	3691
2.	Initial Stay.....	3693
a.	Potential for Disruption by Employee's Return to Workplace	3694
b.	Obtaining Clarification of Stay Order	3695
3.	Extension of Stay.....	3695
a.	Indefinite Stay.....	3698
4.	Proof Supporting Stay Application	3699
5.	Nature of Relief.....	3699
a.	Hostile Environment; Protective Order.....	3700
b.	Restraint On Employee Communication With OSC, Congress.....	3703
6.	Termination of the Stay.....	3705
7.	Relation of Stay and Appeal Proceedings	3705
8.	Use of Stay to Protect Other Proceeding.....	3706
a.	EEO Case	3706
b.	Union Rights Under Statute.....	3706
9.	Employees Covered by Stay	3706
a.	SES	3706
b.	Presidential Appointee; Policymaker	3706
c.	At Will Employee	3706
d.	Former Agency Employee.....	3706

CHAPTER 14: RETIREMENT AND RESTORATION RIGHTS3707

I.	RETIREMENT.....	3707
A.	OVERVIEW OF THE PRINCIPAL RETIREMENT SYSTEMS.....	3708
1.	Conversions.....	3709
B.	FEDERAL EMPLOYMENT.....	3710
1.	Effect of Reemployment.....	3712
C.	COVERED AND CREDITABLE SERVICE.....	3712
1.	Service Requirements for CSRS.....	3713
2.	When-Actually-Employed; Seasonal Employee; Leave Without Pay; Part-Time.....	3715
3.	Indefinite Appointment.....	3717
4.	Temporary Employment.....	3717
5.	Personal Service Contract	3717
6.	Nonappropriated Fund.....	3723
7.	Others.....	3724
8.	Effect of Military Service; Deposit for Military Service.....	3724
a.	National Guard, Other Uniformed Service	3736
(i)	Abandonment of Civilian Career for Military Service	3737
9.	Period of Receipt of OWCP Benefits	3742
10.	Sick Leave Credit.....	3744
D.	DISABILITY RETIREMENT.....	3744
1.	Statutory, Regulatory Standards.....	3744
a.	Concept of Disability	3746
b.	Cause of Disability	3748
c.	Medical Condition Postdating Disability Retirement.....	3748
2.	Disability Incurred While in the Federal Service.....	3748
a.	Preexisting Condition	3748
3.	Position Last Occupied.....	3748
a.	Qualifying Position.....	3749
4.	Disability Must Continue at Least One Year.....	3749

a.	Possible Future Disability.....	3751
5.	Situational or Transitory Condition; Hostile Environment.....	3751
a.	Workplace Stressor May Be Sufficient.....	3752
b.	Workplace Stressor May Be Insufficient	3753
c.	Alcoholism or Drug Addiction; Inability to Control Condition.....	3754
6.	Partial Disability Does Not Qualify	3754
7.	Reassignment in Lieu of Disability Retirement	3754
a.	Adequacy of Position Offered Through Reassignment	3755
b.	Permanent Light Duty Position	3756
c.	Postal Service: Different Craft.....	3760
d.	Failure to Accept a Suitable Position	3762
8.	Effect of Disability Accommodation on Annuity Entitlement.....	3763
a.	Conflicting Agency Evidence Concerning Accommodation	3765
9.	Necessity for Cessation of Pay or Separation From the Federal Service.....	3765
10.	One Year for Disability Retirement Application.....	3766
a.	New Condition Raised With Judge or in PFR; Condition That Should Have Been Considered by OPM.....	3768
b.	Evidence of Progression of Disease Presented in PFR.....	3769
c.	Technical Constructions Concerning Filing Date: Method of Filing; Filing With Former Agency.....	3769
d.	Waiver; Separation for Medical Reason: Notice Required.....	3772
e.	Mental Incompetence; Related Delay Excused.....	3773
11.	Agency-Initiated Disability Retirement Application.....	3777
12.	Application Cannot Be Filed After the Employee's Death	3780
13.	Bar to Concurrent Receipt of Disability Retirement and Workers Compensation Benefit.....	3780
14.	Withdrawal of Disability Annuity Application	3780
15.	Rescission of Disability Retirement Grant	3782
16.	Evidence of Disability.....	3782
a.	Significance of Position Description, Qualification Requirements	3783
b.	Scope of Board Review; <i>Chavez</i>	3784
c.	Objective Medical Evidence	3787
d.	Content of Medical Report.....	3788
e.	Lack of Evidence of Precise Medical Causation Not Determinative	3788
f.	<i>Mullins-Howard</i> : Disability Established Without Unduly Detailed Medical Causation Analysis	3792
g.	Subjective Evidence.....	3796
h.	Testimony of Supervisor; Performance Appraisal.....	3797
i.	Hearsay.....	3797
j.	Absence; Use of Leave	3797
k.	Possible Improvement Through Future Surgery	3798
l.	Post-Separation Medical Evidence.....	3798
m.	Medical Condition Not Presented to OPM	3800
n.	Removal for Physical Inability to Perform; <i>Bruner</i>	3800
o.	Loss of Military Status	3805
p.	OWCP Determination	3806
q.	Social Security Administration Determination	3806
r.	VA Disability Rating.....	3807
s.	Security Clearance Determination	3807
t.	Agency Medical Disqualification	3808
u.	Removal for Misconduct.....	3808
17.	Refusal to Undergo Diagnostic or Other Procedure.....	3809
18.	Specific Conditions.....	3810
19.	Earnings Recovery	3811
a.	Current Rate of Pay	3812
b.	Basic Pay; Cost of Living Adjustment	3813
c.	Bonus	3813
d.	Miscellaneous Income	3814
e.	Business Expense.....	3814
f.	Pension Contribution.....	3815
20.	Decline of Recovered Earnings.....	3815
21.	Discontinued Service Annuity Upon Recovery of Earning Capacity	3815
22.	Conversion From Disability to Optional Retirement	3816
23.	Conversion From Optional to Disability Retirement	3816
24.	Recovery From Disability: Burden of Proof	3816

25. Restoration of Annuity	3817
26. Calculation of Annuity.....	3818
E. LUMP SUM DEATH BENEFITS.....	3819
1. Submission of Designation.....	3826
2. Child Who Qualifies to Receive Lump Sum Payment	3828
3. Other Distributions.....	3829
a. Slayer Statute	3830
4. Time for Application.....	3830
F. SURVIVOR ANNUITIES	3830
1. Eligibility of Employee for Retirement as Condition to Survivor Annuity	3832
2. Application for Survivor Annuity.....	3833
3. Time, Method of Election	3833
a. Notice to Annuitant of Necessity to Notify OPM of Remarriage to Secure Survivor Annuity.....	3835
b. Delay in Notice to OPM of Survivor Annuity Election	3835
c. Lack of Proper Notice From OPM Concerning Survivor Annuity Election	3837
d. Incorrect Information From Employing Agency Concerning Survivor Annuity Election	3846
e. Survivor Annuity Election Form; Signature.....	3849
f. Effect of Mental Incompetence on Timeliness of Election	3851
g. Authority to Act on Behalf of Incompetent Employee to Create Survivor Annuity	3852
h. Employee Mentally Incompetent to Make Adverse Election	3853
i. Community Property Interests	3854
4. State Law Defines Marital Status; Common Law Marriage; Qualifying Widow.....	3855
a. Current Spouse; Duration of Marriage; Widow: Issue of Marriage.....	3856
b. Accidental Death	3857
c. Putative Spouse	3857
5. Effect of Remarriage After Retirement	3859
6. Calculation.....	3859
a. Survivor Annuity Based on Disability Annuity.....	3860
b. Health Benefits	3861
c. Social Security Benefit Offset—CSRS	3862
d. Social Security Benefit—FERS.....	3863
7. Consent of Spouse to Waiver of Survivor Annuity	3864
a. Consent by Current Spouse to Discontinue Survivor Annuity.....	3871
b. Consent by Current Spouse for Former Spouse Annuity	3871
8. Marriage of at Least Nine Months; Parent of Issue by Marriage; Exceptions	3872
9. Attempt to Modify Amount of Spousal Survivor Annuity.....	3872
10. Survivor Annuity for Child Incapable of Self-Support	3873
a. Children in School.....	3879
G. DISCONTINUED SERVICE ANNUITY	3880
H. LAW ENFORCEMENT RETIREMENT	3889
1. Process of Determining and Appealing LEO Status.....	3889
2. Agency Head Determination; Timeliness of Request for LEO Status.....	3891
3. Substantive Criteria for LEO Determination	3900
a. Customs and Border Patrol Officers.....	3910
b. Cases Prior to 2000.....	3913
4. Evidence Considered	3917
5. Supervisory Credit	3920
6. Effect of Disability Retirement.....	3923
I. FIREFIGHTER RETIREMENT	3924
J. AIR TRAFFIC CONTROLLER RETIREMENT.....	3933
K. OTHER ANNUITY INTERESTS	3933
1. Deferred Annuity.....	3933
2. FERS Minimum Retirement Age Annuity.....	3934
3. Supplemental, Redetermined Annuity	3934
4. Alternative Form of Annuity.....	3937
5. Voluntary Early Retirement Authority.....	3940
L. APPORTIONMENT OF ANNUITY BY COURT ORDER.....	3941
1. Lifetime Annuity	3941
2. Former Spouse Survivor Annuity	3942
a. Intent to Create Former Spouse Survivor Annuity or Other Benefit.....	3943
b. Reduction in Lifetime Annuity.....	3945

c.	Wording of the Decree	3946
d.	Ambiguous Provision in Divorce Decree; Extrinsic Evidence; Rules of Construction	3948
3.	Challenge to Court Order Affecting Annuity Interest	3952
a.	Qualifying Court Order	3953
b.	Amendment to Court Order Affecting Former Spouse Annuity; Construction of Annuity Interest Following Ineffective Amendment	3963
c.	Bifurcated Decree	3975
d.	Spouse Equity Act of 1984 as Amended	3978
M.	ANNUITY CALCULATION ISSUES.....	3980
1.	Estoppel as Basis to Create, Continue, or Adjust Benefit or Overpayment	3980
2.	Refund.....	3982
3.	Redeposit	3989
a.	Personal Service Agreement	3990
4.	High Three Salary Calculation: Basic Pay; Lump Sum Back Pay Settlement.....	3991
5.	Onset of Disability Annuity Payment.....	3994
6.	VA Medical Professional; VA Benefit Reduction.....	3996
7.	Law Enforcement Enhanced Annuity Rate	3997
8.	Minimum, Maximum Annuity	3997
9.	Annuity Allotment.....	3997
10.	Impact of Receipt of Medicare Benefits, Social Security on CSRS, FERS.....	3997
11.	Deposit for Post-1956 Military Service	4000
12.	Deposit for Creditable Service; Annuity Supplement.....	4000
13.	Interest.....	4001
14.	Taxes.....	4001
15.	Cost of Living Adjustment for Reinstated Annuity	4001
16.	Diversion of Annuity Payment.....	4003
17.	Reemployed Annuitant.....	4003
18.	Individual Retirement Record.....	4003
19.	Reconstructing Employment Record.....	4005
N.	OVERPAYMENTS.....	4006
1.	Proving the Debt; Evidence Supporting Waiver; OPM Records	4006
2.	Basis for Waiver	4007
a.	Annuitant Without Fault and Recovery Against Equity and Good Conscience	4009
b.	Knowledge of Overpayment; Set-Aside Rule	4010
c.	OPM Fault in Creating Overpayment	4012
d.	Unconscionability of Recovery; Recovery Delay	4013
e.	Financial Hardship.....	4015
f.	Adjustment of Repayment Schedule; Length of Recovery	4016
g.	Ordinary and Necessary Living Expenses; Future Events.....	4017
h.	Assets Available to Satisfy Overpayment; Income/Expense Margin.....	4018
i.	Detrimental Reliance.....	4019
j.	Age of Debt.....	4022
k.	Calculation of Overpayment; Interest	4023
l.	Recovery Schedule Adjustment When There Is No Annuity Entitlement	4023
m.	Collection From Survivor for Debt of Original Annuitant	4023
n.	Insurance Issue Related to Overpayment.....	4027
O.	OFFSETS; DEBT COLLECTION FROM ANNUITY	4028
II.	RESTORATION RIGHTS UPON RECOVERY FROM OCCUPATIONAL INJURY OR ILLNESS.....	4033
A.	SEPARATION OR FURLOUGH MUST RESULT FROM COMPENSABLE INJURY	4036
1.	Separation for Reason Other Than Result of Injury or Illness.....	4039
a.	Factual Determination on Cause of Separation	4045
b.	Termination When OWCP Determination Supports Employee's Refusal to Return to Work.....	4047
c.	AWOL Covered by Period of Compensation.....	4049
d.	Effect of Resignation	4050
e.	Separation by Settlement Agreement.....	4050
B.	SIGNIFICANCE OF OWCP DETERMINATION; RECEIPT OF COMPENSATION	4051
1.	Requirement of Medical Examination	4054
C.	MEANING OF "RECOVERY"	4055
1.	Fully Recovered Within a Year	4056
2.	Fully Recovered After a Year	4059
a.	Priority Consideration: Necessity For Position to Be Filled by Another Person.....	4061

b.	Geographic Extent of Consideration	4063
c.	Method, Duration of Priority Consideration	4064
3.	Partially Recovered	4064
a.	Geographic Extent of Consideration: Local Commuting Area	4069
b.	Arbitrary or Capricious Restoration Effort	4072
c.	Accommodation Requirement	4074
d.	Postal Service National Reassessment Process; Realignment of Employees; <i>Latham</i>	4076
e.	Other Postal Service Limited Duty Restoration Decisions	4087
f.	Discontinuation of Modified Assignment	4089
4.	Physically Disqualified Employee	4089
a.	Geographic Extent of Consideration	4090
D.	PARTICULAR GROUPS OF EMPLOYEES	4091
1.	Probationer	4091
2.	Reemployed Annuitant	4091
3.	Postal Service	4092
4.	Nonappropriated Fund	4095
E.	WHEN RESTORATION IS TO OCCUR	4096
1.	Light Duty	4097
2.	Effect of Disability Retirement	4097
F.	TIME TO APPLY FOR RESTORATION	4099
1.	Form of Restoration Request	4100
G.	REMEDY	4101
1.	Same or Equivalent Position	4102
a.	Return to <i>Status Quo</i>	4102
b.	Interim Promotion	4103
2.	Regraded Position	4103
3.	Seniority Inapplicable	4103
4.	Priority Placement Program	4104
5.	Benefits Upon Restoration	4105
H.	MSPB APPEAL RIGHTS	4111
1.	Time for Appeal	4111
a.	Lack of Notice of Appeal Right	4112
b.	Settlement	4113
2.	Burden of Proof; Jurisdictional Allegations	4113

CHAPTER 15: ATTORNEY FEES.....4115

I.	ENTITLEMENT STANDARDS	4115
A.	STATUTORY AND REGULATORY BASIS FOR FEES	4115
1.	Use of Counsel; Licensure	4116
2.	Governing Statutes and Regulation	4118
a.	Civil Rights Statutes	4120
b.	Whistleblower Protection Act	4120
3.	Jurisdiction Over Action Under Appeal	4120
4.	Miscellaneous Appeals	4121
a.	Regulation Review Proceeding	4121
b.	Retirement Case	4121
c.	OSC Case: Prohibited Personnel Practice and Hatch Act Litigation	4121
d.	Sanction	4130
B.	PREVAILING PARTY STATUS	4130
1.	Mitigation	4132
2.	Other Relief	4133
3.	Must Prevail Through MSPB Procedures	4134
a.	Mixed-Motive Determination	4135
4.	Cancellation of Action Appealed	4136
a.	Enforcement Proceeding Mooted by Agency Action	4140
5.	Settlement	4144
a.	Prevailing Party Status Through Settlement	4144
b.	Relief Through Settlement Must Be Related to MSPB Appeal	4146
c.	Interest of Justice Criteria	4146
d.	MSPB Jurisdiction to Accept and Enforce Settlement Providing for Fee or Supporting Fee Motion	4146
C.	INTEREST OF JUSTICE: AN OVERVIEW	4151

1.	<i>Allen</i> Criteria	4151
a.	Financial Hardship.....	4152
2.	Preservation of Claims Supporting Entitlement; Significance of Final Merits Decision	4152
a.	Overlapping Fee Entitlement Standards	4152
3.	Statutory Examples Not Exclusive	4153
D.	BAD FAITH	4153
1.	Malicious Action; Inadequate Inquiry	4154
a.	Disparate Treatment	4154
2.	Mitigation	4154
3.	Unreasonable Litigation Tactics; Failure to Settle.....	4154
a.	Frivolous PFR	4154
4.	Compliance	4155
E.	CLEARLY WITHOUT MERIT OR WHOLLY UNFOUNDED	4155
1.	Failure to Adhere to Legal Precedent.....	4155
2.	Inadequate Initial Inquiry Into Facts	4156
3.	Lack of Legitimate Basis for Agency Action	4156
a.	Development of Dispositive Information During MSPB Appeal.....	4156
4.	Mitigation	4157
5.	Factual Dispute	4157
6.	Performance Case	4158
7.	Retirement Case.....	4159
a.	Legal Error by OPM	4162
b.	Incorrect Advice From OPM	4163
c.	Issue of Mental Incompetence	4163
F.	KNEW OR SHOULD HAVE KNOWN	4165
1.	Lack of Reasonable Inquiry	4165
2.	Disregard of Legal Precedent	4167
3.	Regulatory Error.....	4167
4.	Reduction in Force.....	4167
5.	Performance Case	4167
6.	Mitigation	4167
a.	Not All Charges Sustained	4171
7.	Negligent Presentation of Case	4172
8.	Decision of Another Tribunal	4172
9.	Retirement Case	4172
a.	Failure of OPM to Evaluate Evidence Available During Reconsideration Process	4172
b.	Legal Error by OPM	4175
10.	Settlement	4175
G.	GROSS PROCEDURAL ERROR.....	4175
1.	Denial of Advance Notice or Appeal Right	4177
a.	Involuntary or Constructive Adverse Action	4179
b.	Enforced Leave	4179
c.	Indefinite or Emergency Suspension	4180
2.	Mitigation.....	4180
3.	Performance Case	4180
4.	Reduction in Force.....	4181
H.	SUBSTANTIALLY INNOCENT.....	4181
1.	<i>Yorkshire</i>	4183
2.	MSPB Treatment of <i>Yorkshire</i>	4184
3.	Appellant Who Ensnares the Agency	4186
4.	Mitigation: <i>Boese, VanFossen</i>	4186
a.	Factually Close Case.....	4189
b.	Prior Law	4190
5.	Performance Case	4190
6.	Other Legal Error	4191
I.	OTHER AUTHORITY FOR FEE AWARDS	4191
1.	Back Pay Act	4191
a.	Postal Service Employee	4191
2.	Equal Access to Justice Act	4193
a.	Administrative Law Judge Case	4195
b.	Basis for Compensating Court Time	4197

c.	Prevailing Party	4197
d.	Substantial Justification	4200
e.	Basis for Awarding MSPB Time	4202
f.	Rate Under EAJA; <i>Pro Bono</i> or Contingent Representation; COLA; Expenses	4203
g.	Procedure Under EAJA; Time for Filing; Application	4205
h.	Effect of EAJA on MSPB Litigation	4206
3.	Civil Rights Case	4207
a.	Result Achieved	4209
4.	Prohibited Personnel Practice Case	4210
5.	USERRA; VEOA	4211
6.	Miscellaneous Claims; Equitable Assessment of Fee.....	4213
II.	PROCEDURES FOR OBTAINING FEES	4213
A.	HOW FEES ARE INCURRED	4213
1.	Attorney-Client Relationship; Fee Payment	4213
a.	Law Clerk, Paraprofessional; <i>Pro Se</i> Appellant.....	4213
2.	Union Counsel	4214
a.	Demise of the Cost-Plus Formula.....	4214
b.	History of the Cost-Plus Rule	4217
c.	Repayment of Fees to Union Required	4218
3.	Federally Employed Attorney	4218
4.	Public Interest Organization	4218
B.	COMPENSABLE SERVICES	4218
1.	Service Prior to Final Adverse Action or Other Decision	4218
2.	Research	4221
3.	Discovery	4221
4.	Settlement, Mediation.....	4221
5.	PFR	4221
a.	OPM Reconsideration Petition	4222
6.	Time in Court	4223
a.	Appropriate Charge for Court Time	4226
b.	Practice Notes	4226
7.	Preparation of Fee Motion	4226
8.	Defense of Fee Motion	4227
9.	Enforcement Proceeding.....	4227
10.	Related Proceeding	4232
a.	MSPB	4233
b.	Grievance	4234
c.	Privacy Act	4234
d.	Unemployment Compensation	4234
e.	Criminal Case	4235
f.	EEO Complaint.....	4235
g.	Media Contact; Congressional Activity.....	4237
11.	Anticipated Time; Supplemental Petition	4237
12.	Unsuccessful Claim, Issue, or Defense	4237
a.	<i>Hensley</i>	4237
b.	Mitigation.....	4244
c.	Tangentially Related Issue	4245
d.	Clearly Separate Claim	4245
e.	Unsuccessful EEO Claim	4246
f.	Unsuccessful Whistleblower Claim	4247
C.	REASONABLENESS OF FEES.....	4248
1.	Hourly Rate.....	4249
a.	Evidence of Reasonableness; Fee Agreement; Result Achieved	4250
b.	Initial Decision in Another Appeal; Decision of Another Tribunal	4256
c.	Settlement	4256
d.	Out-Of-Town Counsel	4257
e.	Travel Time	4257
2.	Contingency Arrangement, Enhancement; <i>City of Burlington</i>	4258
a.	Early Treatment by MSPB of Contingent Fee	4260
b.	Enhancement for Payment Delay; Interest	4261
c.	Enhancement for Quality Work	4262

d.	Enhancement for Wear and Tear	4265
e.	Traditional Contingency Agreement; Fee Cap	4265
3.	<i>Laffey</i> Matrix	4266
4.	Below Market Rate	4271
5.	Reasonableness of Time Invested	4274
a.	Responsibility of Judge	4275
b.	Articulated Analysis Required	4277
c.	Notice to Counsel of Defect in Fee Motion	4278
d.	Expertise and Diligence of Counsel; Likely Outcome	4279
e.	Time at Hearing	4279
f.	PFR	4279
g.	<i>Amicus</i> Brief	4280
h.	Time Preparing Counsel Fee Motion	4280
i.	Consolidated Cases	4281
j.	Multiple Counsel; Duplicative Work.....	4281
k.	Clerical, Secretarial Work	4283
6.	Examples of Fee Awards	4284
a.	Rates	4284
b.	Amounts	4284
D.	COSTS AND EXPENSES.....	4285
1.	Transcript.....	4286
2.	Photocopy; Electronic Production	4287
3.	Travel	4287
4.	Secretarial Expense.....	4287
5.	Postage; Courier	4287
6.	Fee for Expert, Consultant	4287
7.	Investigator	4287
8.	Accounting Expense	4288
9.	Telephone or Facsimile	4288
10.	Electronic Research	4288
11.	Taxes	4289
12.	EEO, Whistleblower Protection Act, USERRA, and VEOA Cases; Broader Coverage.....	4289
13.	Direct Recovery of Costs by Appellants	4290
E.	FEE MOTION	4292
1.	Who May File	4293
2.	Time and Place of Filing	4293
a.	Premature Fee Motion.....	4294
b.	Timing of Agency Response	4294
c.	Late Fee Motion	4294
3.	Fee Motion Must Be Complete When Filed	4298
a.	Incomplete Fee Motion	4298
4.	Developing Evidence to Support Fee Motion	4299
a.	Hearing Concerning Fee Entitlement in Settled Appeal	4299
b.	Hearing and Discovery Concerning Reasonableness	4300
5.	Format of Motion	4300
a.	What to Include.....	4301
b.	Fee Agreement	4302
c.	Itemization of Time	4302
d.	Retrospective Reconstruction of Time	4303
6.	Supplemental or Corrected Fee Motion	4303
7.	Unopposed, Moot, or Settled Fee Motion.....	4304
8.	Service of Fee Motion	4304
9.	Opposition to Fee Motion	4304
10.	Initial Decision on Fee Motion.....	4305
a.	Obligation of Judge to Ensure Due Process	4305
b.	Requirements of Addendum Initial Decision	4305
c.	Initial Decision Controls Basis for Fee Determination	4306
d.	Change in Judge	4307
e.	Hourly Rate Analysis.....	4307
11.	Waiver of Fee Through Settlement Agreement	4307
a.	Effect of Settlement on Claims of Multiple Counsel	4308

12. Settlement of Fee Motion	4309
13. Payment of Fee to Counsel and Client	4310
a. Payment to Counsel	4310
b. Repayment of Fee by Counsel to Client	4311
14. PFR of Fee Decision	4311
a. Interim Fee	4312
b. Time Spent on PFR	4312

CHAPTER 16: SETTLEMENT, REMEDIES, AND ENFORCEMENT4313

I. SETTLEMENT.....	4313
A. ELEMENTS OF SETTLEMENTS	4313
1. Settlement Resources; Mediation Appeals Program.....	4315
2. Minimum Requirements	4315
a. Hatch Act Case.....	4316
3. Settlement After Issuance of Initial Decision	4316
4. Regulatory Process	4317
5. Filing, Acceptance of Settlement for Purpose of Enforcement	4317
a. Intent That Agreement Be Subject to MSPB Enforcement Authority	4318
b. Unfiled Settlement	4320
c. Oral Advice of Settlement	4321
d. Specific Oral Settlement Agreement Entered Into the Record	4323
e. Distinguishing Oral Agreement and Ongoing or Incomplete Negotiation	4327
f. Oral Agreement to Be Followed by Written Agreement	4330
g. Appellant’s Understanding of Agreement	4332
6. Jurisdictional to Acceptance of Settlement: <i>Delorme</i>	4333
a. Prior Law	4334
b. Settlement Arising From Disputed Last Chance Agreement.....	4337
7. Flexibility, Scope of Settlement	4339
a. Incomplete Settlement; Omitted Terms	4339
8. Conditional Settlement; Lapsed Offer; Implied Term	4340
9. Settlement Requiring Specific Action by the Judge.....	4343
10. Integration or “Zipper” Clause	4344
11. Modification or Amendment of Agreement	4347
12. Waiver of Statutory Right; Release	4348
a. Unemployment Compensation	4349
b. Workers’ Compensation	4350
c. Older Workers’ Benefit Protection Act	4350
d. RIF Entitlement	4358
e. Limitation on the Right to Seek Future Federal Employment	4359
13. Retirement Benefit.....	4359
14. Settlement Provision Affecting Other Agencies	4360
15. OSC Case	4360
B. SETTING ASIDE A SETTLEMENT	4361
1. Agreement Challenged as Invalid; Use of PFR	4362
2. Timing of PFR.....	4364
3. Bases for Setting Aside a Settlement	4365
a. Threat of Unwarranted Action; Duress	4366
b. Hardship.....	4368
c. Disappointment; Confusion	4369
d. Lack of Understanding	4369
e. Mental Incapacity; Stress	4370
f. Time Pressure	4373
g. Coercion or Bias by Judge	4373
h. Coercion by Counsel or Union Representative; Lack of Signature by Counsel	4378
i. Error or Lack of Authority of Appellant’s Counsel or Union Representative—Agreement Sustained	4380
j. Error or Lack of Authority of Appellant’s Counsel or Union Representative— <i>Bona Fide</i> Challenge to Agreement	4383
k. Error or Lack of Authority of Government Counsel.....	4387
l. Fraud; Misrepresentation; Bad Faith; Merit of the Underlying Action	4388
m. Mutual, Unilateral Mistake	4394
n. Lack of Mutual Assent.....	4401

o.	Lack of Consideration	4403
p.	Incorrect Information From the Agency Concerning Retirement Eligibility	4404
q.	Provision Unlawful or Contrary to Public Policy or Labor Contract	4404
r.	Change in Law	4409
4.	Unfiled Settlement Agreement; Preappeal Settlement	4410
5.	Collateral Attack on Settlement Through New Appeal	4412
6.	Breach of Settlement: Election Between Rescission or Enforcement.....	4413
a.	Agency May Rescind	4414
b.	Restoration of Consideration Received; "Tender Back"	4414
c.	Use of Enforcement Petition to Rescind Settlement	4417
II.	APPELLATE REMEDIES	4417
A.	REMEDIAL ORDERS AND RIGHTS	4418
1.	Impact of OPM Regulation	4418
2.	Statutory Basis for Remedial Authority	4418
3.	Collateral Result of Restoration Order; Action Related to Case Under Appeal	4418
a.	TSP Loan.....	4423
b.	Effect on Remedial Order of Decision of Another Tribunal	4423
c.	Reversal of Criminal Conviction	4424
4.	Back Pay Remedies	4424
a.	Necessary Findings	4425
b.	Pay Entitlement: Ready, Willing, and Able to Work	4425
c.	Maximum Recovery Period	4431
d.	Liability for Event Preceding Adverse Action	4431
e.	Method of Payment	4431
f.	Method of Calculation	4431
g.	Reinstatement With No or Limited Pay; Time-Served or Other Suspension; After-Acquired Evidence; Shortened Notice Period	4432
h.	Effect of Loss of Security Clearance	4433
i.	Bonus and Award; Differential; Relocation Expense	4434
j.	Premium, Overtime, Holiday Pay	4436
k.	Overtime for Postal Service Employee	4440
l.	Interest—Back Pay Act	4441
m.	Interest—Postal Service Employee	4445
n.	Insurance Benefit.....	4446
o.	Retirement, TSP Contribution	4446
p.	Leave Account; FMLA; Military Leave	4451
q.	Restoration of Leave for Participation in MSPB or Related Proceedings; Compensatory Time; Official Time	4454
r.	Interim Promotion; WIGI; Pay Increase.....	4456
s.	Applicant for Employment	4460
t.	Federal Aviation Administration Employee	4460
5.	Duty to Mitigate Damages Through Interim Employment	4460
a.	Employee Other Than Postal Service.....	4460
b.	Postal Service Employee	4461
6.	Deductions From Back Pay	4463
a.	Retirement, TSP Contribution	4463
b.	Debt to Retirement Fund.....	4465
c.	Annuity Entitlement or Adjustment	4465
d.	Union Dues; Insurance; Medicare	4465
e.	Taxes; Increased Taxes.....	4470
f.	Unemployment, OWCP, Workers' Compensation.....	4472
g.	Interim Earnings; Job Search, Relocation Cost; Replacement Earnings; Retirement Income; Fraudulent Earnings Information	4475
h.	Other Deductions	4478
7.	Retraining	4479
8.	Reemployment Right.....	4479
9.	Purging of Records; Modification of Documentation, Performance Appraisal	4480
a.	Coding of Personnel Document.....	4483
b.	Adjustment to AWOL Charge	4483
10.	Damages; Regulation Governing Recovery.....	4484
a.	Availability of Compensatory Damages	4487
b.	Awards of Compensatory Damages—Civil Rights Acts	4491

c.	Effect of Receipt of FECA and Insurance Benefits on Recovery of Compensatory Damages	4500
d.	Consequential Damages and Costs—Whistleblower Case	4502
e.	Compensatory Damages—Whistleblower Case	4511
f.	Damages Under Veterans Employment Opportunities Act of 1998; USERRA	4514
g.	Monetary Relief for Prohibited Personnel Practices Not Covered by the WPA or EEO Law	4515
h.	Punitive Damages	4517
i.	Taxation of Damages, Attorney Fees	4517
11.	Nontraditional Remedies	4518
a.	Waiver of Debt	4518
b.	Apology; Evidence Destruction	4518
c.	Protection Against Intervening Event	4518
d.	Protection Against Future Event	4519
e.	Front Pay	4519
f.	Equitable Relief; Other Remedies	4519
III.	ENFORCEMENT	4521
A.	ENFORCEMENT OF MSPB DECISION	4521
1.	Authority to Order Compliance; Sanctions	4522
2.	Limitation on Enforcement Authority to Award Back Pay or Monetary Remedy	4523
a.	Mootness	4525
b.	Burden of Proof; Proof of Compliance	4526
3.	Enforcement Procedure	4527
a.	Enforcement Petition Regulation, Guidance	4528
b.	Duty to Supply Information; Accounting	4530
c.	Evidence Supplied After Decision of Judge	4532
d.	Time for Initiating Enforcement	4532
e.	Agency Request for Extension of Time	4536
f.	Unclear or Impossible Compliance	4536
g.	Evidence of Compliance; Statement of Intent; Representative’s Statement; Hearing	4536
h.	Discovery	4538
i.	Referral to Comptroller General	4539
j.	Sanction Against Agency	4539
k.	Multiple Enforcement Petitions; <i>Res Judicata</i>	4540
l.	Analysis by Judge	4542
m.	MSPB Review of Compliance Initial Decision	4542
4.	Allegation of Reprisal, Bad Faith, Discrimination, or Harassment	4544
a.	Discipline Related to Agency Noncompliance	4545
b.	Performance Appraisal Dispute	4545
5.	Back Pay Dispute	4546
a.	Delay in Payment	4548
b.	Damages	4548
6.	Reinstatement to the Same Position; <i>Status Quo Ante</i> Remedy	4548
a.	Compelling Reason for Reassignment; Detail; Different Duties	4552
b.	Medical Limitation	4559
c.	Administrative Leave	4560
d.	Effect Of Retirement	4561
e.	Reason Related to Original Action	4561
f.	Obligation Under Collective Bargaining Agreement	4563
g.	Other Post-Reinstatement Action; Medical Certification Requirement	4563
h.	Postal Service Reorganization	4564
i.	Security Clearance Problem	4566
j.	Demotion	4568
k.	Term or Temporary Appointment	4575
l.	Seniority Adjustment	4576
m.	Pay System Change	4577
n.	Insurance	4577
o.	Other Working Conditions	4577
7.	Reinstatement With Accommodation for Disability	4578
8.	Lack of Authority to Enforce Compliance	4582
9.	Sovereign Immunity Issue	4582
B.	ENFORCEMENT AND INTERPRETATION OF SETTLEMENT AGREEMENTS	4583
1.	Scope of Enforcement Authority	4585

a.	Only Filed Settlement May Be Enforced	4585
b.	Allegation of Discrimination; Whistleblowing Reprisal	4586
c.	Damages.....	4588
2.	Agency Enforcement Initiative	4588
a.	Appellant’s Agreement to Resign or to Take Other Action; Agency Self Help	4589
b.	Agreement Not to Reapply for Employment With Agency	4590
c.	Agreement to Withdraw EEOC Case or Other Litigation	4591
3.	Agreement That Appellant First Notify Agency of Noncompliance Allegation	4591
a.	Agreement That the Parties Attempt to Adjust Disputes Under the Settlement.....	4592
4.	Election Between Enforcement and Rescission; Pleading in the Alternative	4593
a.	Modification of Settlement Provision	4594
5.	Role of MSPB Regional or Field Office	4595
a.	Treatment of Enforcement Issue, Evidence on PFR	4595
6.	Time for Initiating Enforcement.....	4595
a.	Reasonableness of Timing of Enforcement; Laches Defense	4600
7.	Burden of Proof	4603
a.	Evidence Required	4606
b.	Mutual Breach; “Clean Hands”	4607
8.	Interpretation and Application of Settlement: Legal Principles	4608
a.	Materiality of Breach	4609
b.	Good Faith Required; Harassment; Bad Faith.....	4614
c.	Foreclosure of Future Discipline or Other Agency Action for Past Conduct.....	4618
d.	Time for Compliance if No Time Set in Settlement Agreement	4621
9.	Interpretation of Agreement: External Law; Extrinsic or Parol Evidence; Ambiguous Term; History of Performance; Hearing	4623
a.	Back Pay Obligation; Omitted Term	4628
b.	Amendment to Agreement; Counterproposal	4630
10.	Specific Settlement Provisions	4630
a.	Term of Art	4631
b.	Obligation to Reinstate or Restore to Duty; Precondition to Restoration.....	4631
c.	Agreement to Reassign, Demote, Suspend; Light Duty Position	4632
d.	Agreement That Employee May Be Terminated or Will Resign or Retire Upon Specified Condition; Agreement Not to Reapply	4634
e.	Promotion, Placement Consideration; Priority Consideration	4636
f.	Agreement to Provide Affirmative, Neutral, or Controlled Reference	4640
g.	“Clean Record” or “Clean Paper”; Expungement or Withdrawal of Record; Implied Requirement	4648
h.	Nondisclosure or Confidentiality Clause.....	4663
i.	“Need to Know” Exception to Confidentiality Clause.....	4670
j.	Whistleblower Protection Enhancement Act Provision.....	4675
k.	Waiver of Protection of Confidentiality or Affirmative Reference Provision	4675
l.	Damages Unavailable for Breach of Clause Requiring Affirmative Reference, Other Violations	4676
m.	Adjustment of Performance Appraisal, Documentation.....	4677
n.	Agreement to Provide Assistance to Employee	4679
o.	Agreement to “Cancel” Action; Back Pay, Interest, Damages, or Other Entitlement; Bonus or Award; Lump Sum Provision	4679
p.	Retirement Entitlement	4684
q.	Unemployment Compensation	4690
11.	Debt Recoupment	4690
12.	Allegation of Reprisal or Harassment.....	4690
13.	Settlement Reached in Another Tribunal	4693
14.	Settlement Involving Action of Third Party	4693
15.	Privacy Act Issue	4694
16.	Provision That Violates Collective Bargaining Agreement	4694
17.	Unlawful Provision	4694
C.	INTERVENING ABOLITION OF POSITION; SUBSEQUENT ADVERSE ACTION DURING ENFORCEMENT PROCEEDING ...	4696

CHAPTER 17: JUDICIAL REVIEW.....4699

I.	OVERVIEW OF THE APPELLATE PROCESS	4699
A.	NATURE OF THE DECISION UNDER REVIEW	4699
1.	Final Decision.....	4699
a.	Denial of Request for Reopening.....	4700

2.	Statutory Basis for Review; CSRA and Whistleblower Protection Enhancement Act of 2012	4703
a.	Collateral MSPB Order.....	4704
b.	Decision Remanding Case to Judge; Final Order Rule	4704
c.	Counsel Fee Award, Application	4706
3.	Proper Parties in Court; Standing; Mootness	4707
a.	Proper Respondent in Court	4707
b.	OSC Disciplinary Case	4711
c.	Arbitration Award	4712
4.	Authorization to Appeal	4713
5.	<i>Amicus</i> Submission	4713
6.	Counsel Authorized to Appear in Appeal; Federal Circuit Admission.....	4713
7.	Government Appellate Review Request; Cross-Appeal.....	4713
a.	Review Request by OPM	4713
b.	Discrimination Issue	4715
8.	Court of Appeals for the Federal Circuit.....	4715
a.	Nonprecedential Decision.....	4716
b.	Summary Affirmation	4718
c.	Court Practice	4718
d.	<i>Pro Se</i> Appeal	4721
e.	Stay Pending Court Review.....	4722
9.	Record Below	4722
a.	Appendix	4724
b.	New and Material Evidence	4724
B.	SCOPE OF REVIEW	4724
1.	Arbitrary and Capricious.....	4725
2.	Issues of Law, Jurisdiction; Contract Interpretation.....	4725
a.	Decisional Rationale Omitted by MSPB; Departure From Precedent	4727
3.	Procedural Error by MSPB.....	4728
a.	Ruling on Witnesses and Evidence	4728
b.	Ruling on Discovery	4729
c.	Timeliness of MSPB Filing.....	4730
4.	Substantial Evidence; Factual Dispute.....	4731
a.	Credibility.....	4734
b.	Nexus	4738
5.	Agency Rule of Conduct.....	4739
6.	Penalty Determination	4739
a.	Performance Action.....	4743
7.	Reduction in Force	4743
8.	Whistleblower Reprisal: Circuits Other Than the Federal Circuit	4743
C.	DEFERENCE; INTERPRETATION OF STATUTES, REGULATIONS, LABOR AND OTHER CONTRACTS	4744
1.	Agency Statutory Interpretation	4744
a.	Regulation Applying Statute; Agency Interpretation of Regulation	4746
2.	Agency Handbook, Instruction	4750
3.	MSPB Decision	4752
4.	Principles of Statutory and Regulatory Interpretation	4752
a.	Language Controls.....	4753
b.	Consideration of the Statutory Scheme	4755
c.	Avoidance of Absurd Consequences	4755
d.	Statements of Legislators	4756
e.	Amendment; Failure to Amend.....	4756
f.	Retroactivity	4756
g.	Change in Law	4760
5.	Interpretation of Collective Bargaining Agreement.....	4760
6.	Settlement; Last Chance Agreement	4761
D.	RETIREMENT AND ANNUITY APPEALS	4763
1.	Disability Retirement	4763
2.	Optional Retirement	4768
E.	DISCRIMINATION ISSUES	4768
1.	Reprisal.....	4771
2.	Procedural Problem.....	4772
3.	Jurisdictional Matter; Constructive Adverse Action	4772

4.	Timeliness Issue	4778
5.	Review of Board Cases That Include EEO Defenses or Both EEO and Whistleblower Reprisal Defenses.....	4784
6.	Transfer To and From District Courts.....	4786
7.	District Court Review	4787
	a. Exhaustion of Administrative Remedies	4787
	b. Summary Adjudication of EEO Issues; Disposition of Civil Service Issues	4788
	c. Scope of Review	4789
	d. Compliance With District Court Decision	4790
8.	Discharge of Probationer	4790
F.	REVIEW OF ARBITRATION AWARDS.....	4792
	1. Exclusivity of Review	4793
	a. Mixed Case.....	4794
	2. Time for Seeking Review	4799
	3. Decisional Standards for Arbitrator	4800
	a. Arbitrability	4803
	b. Bargaining History	4804
	c. Past Practice.....	4804
	4. Review Sought by OPM	4805
	5. Award Involving Department of Veterans Affairs Title 38 Employee	4806
	6. Award Involving Nonappropriated Fund Instrumentality Employee.....	4807
	7. Award Reviewed by Federal Labor Relations Authority.....	4808
G.	VEOA, USERRA CLAIMS.....	4808
II.	PREREQUISITES FOR JUDICIAL REVIEW	4809
	A. TIME FOR INITIATING JUDICIAL REVIEW.....	4809
	1. Equitable Tolling	4813
	B. EXHAUSTION OF MSPB ADMINISTRATIVE REMEDIES	4816
	1. Issue Must Be Raised With the MSPB	4816
	a. Exception to Exhaustion Requirement	4817
	b. Mandamus.....	4818
	2. Necessity for PFR to MSPB.....	4819
	a. Challenge to Settlement.....	4821
	3. Ripeness for Judicial Review	4821
III.	JUDICIAL REMEDIAL AUTHORITY	4822
	A. AUTHORITY TO REMAND	4822
	1. Remand to Effect Settlement	4824
	2. Judicial Control of MSPB Procedures	4824
	B. AUTHORITY TO TRANSFER	4824
	C. SANCTIONS	4825
	1. Examples of Sanctionable Conduct	4827
IV.	JUDICIAL RELIEF OUTSIDE THE REFORM ACT	4829
	A. PARTIES TO THE SUIT	4830
	1. Sovereign Immunity.....	4830
	2. Absolute Immunity.....	4831
	3. Qualified Immunity.....	4831
	a. Action Against Union	4831
	B. SUITS BASED ON STATUTE AND CONSTITUTION	4831
	1. Administrative Procedure Act	4831
	a. Use of the APA	4832
	b. Scope of Review; Preclusive Effect of the Reform Act	4832
	c. Scope of Relief	4836
	2. Privacy Act; FOIA	4836
	a. Scope of the Act	4837
	b. Enforcement of the Act	4837
	c. Use of the Privacy Act	4837
	d. Position Classification	4838
	3. Mandamus Act	4839
	a. Position Classification	4839
	4. Tucker Act	4842
	a. Position Classification	4847
	b. Overtime Pay Claim	4848
	c. Environmental Differential, Hazard Pay.....	4849

d.	Claims Concerning Tenure, Contract Employment, Promotion, and Bonuses	4850
e.	Whistleblower Reprisal Claim	4854
f.	EEO Settlement	4855
g.	MSPB Settlement	4857
5.	Back Pay Act	4860
a.	Implied Preclusion Under the CSRA	4863
b.	Promotion Claim	4863
6.	Family Medical Leave Act	4864
7.	Overtime, Pay Statutes	4864
8.	Unfair Labor Practice	4866
9.	Constitution	4867
a.	Property Interest	4868
b.	Liberty Interest; Name Clearing Hearing	4869
(i)	Termination of Probationer, Others	4870
c.	First Amendment	4872
10.	Injunction Action	4873
C.	ACTIONS FOR DAMAGES AGAINST INDIVIDUALS AND GOVERNMENT; <i>BIVENS</i>	4880
1.	Preclusion in the Circuits	4884
a.	D.C. Circuit	4884
b.	First Circuit	4887
c.	Second Circuit	4887
d.	Third Circuit	4887
e.	Fourth Circuit	4888
f.	Fifth Circuit	4888
g.	Sixth Circuit	4889
h.	Seventh Circuit	4889
i.	Eighth Circuit	4890
j.	Ninth Circuit	4890
k.	Tenth Circuit	4892
l.	Eleventh Circuit	4892
2.	Claims Based Upon State Law; Westfall Act; Federal Tort Claims Act; Defamation; Tort Action Arising From Assault	4893

CHAPTER 18: RESEARCH, REFERENCE MATERIALS, AND FORMS.....4901

I.	RESEARCH AND REFERENCES	4901
II.	FORMS	4902

BIBLIOGRAPHY4923

TABLE OF CASES4931

INDEX5081