

# 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 Nonprecedential Final Orders.....	20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 MITIGATION .....2089

I.	CONCEPT OF NEXUS .....	2089
A.	<i>MERRITT</i> 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: DISCRIMINATION .....3039

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 RIGHTS .....3707

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 ENFORCEMENT .....4313

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

**BIBLIOGRAPHY .....4923**

**TABLE OF CASES .....4931**

**INDEX .....5081**