

SUMMARY TABLE OF CONTENTS

VOLUME I

PREFACE	i
GLOSSARY	iii
CHAPTER 1: MSPB STRUCTURE AND JURISDICTION.....	1
CHAPTER 2: APPEAL AND DISCOVERY	809
CHAPTER 3: HEARING.....	1225
CHAPTER 4: EVIDENCE.....	1363
CHAPTER 5: INITIAL DECISION AND PETITION FOR REVIEW.....	1511
CHAPTER 6: ADVERSE ACTIONS	1765
CHAPTER 7: NEXUS AND MITIGATION	2157
CHAPTER 8: SUBSTANTIVE OFFENSES.....	2295

VOLUME II

CHAPTER 9: PERFORMANCE CASES	2717
CHAPTER 10: REDUCTIONS IN FORCE.....	2833
CHAPTER 11: HARMFUL ERROR.....	2975
CHAPTER 12: DISCRIMINATION	3143
CHAPTER 13: PROHIBITED PERSONNEL PRACTICES	3397
CHAPTER 14: RETIREMENT AND RESTORATION RIGHTS.....	3843
CHAPTER 15: ATTORNEY FEES.....	4269
CHAPTER 16: SETTLEMENT, REMEDIES, AND ENFORCEMENT	4473
CHAPTER 17: JUDICIAL REVIEW.....	4867
CHAPTER 18: RESEARCH, REFERENCE MATERIALS, AND FORMS.....	5099
BIBLIOGRAPHY	5121
TABLE OF CASES	5129
INDEX	5283

TABLE OF CONTENTS

VOLUME I

PREFACE	i
GLOSSARY	iii
CHAPTER 1: MSPB STRUCTURE AND JURISDICTION.....	1
I. REFORM ACT.....	1
A. CAPSULE HISTORY	1
B. OFFICE OF SPECIAL COUNSEL	4
II. MSPB ORGANIZATION AND ADMINISTRATIVE OPERATION.....	5
A. IMPARTIAL ADJUDICATION.....	6
1. <i>De Novo</i> Review of Agency Actions	7
a. Deference to OPM Regulations	8
b. Consideration of Agency Regulations	8
2. Prohibition Against Advisory Opinion; Internal Guidance; Request for Advisory Opinion.....	9
B. ORGANIZATION	10
1. Clerk.....	11
2. Office of Appeals Counsel.....	12
C. ADMINISTRATIVE JUDGES	14
1. Delegations of Authority.....	15
a. Administrative Law Judges Adjudicating Specialized Cases.....	16
2. <i>Judges' Handbook</i> ; Internal Guidance.....	16
3. Qualifications, Performance Standards for Administrative Judge.....	16
a. Judges' Position Description, Performance Standards	16
b. Regional Director (Chief Administrative Judge) Position Description and SES Performance Plan.....	18
4. Regulatory Responsibilities of Judge.....	19
a. Waiver of Procedural Regulations	19
5. Quality Review	20
D. BOARD DECISIONS; PRECEDENTIAL SIGNIFICANCE.....	20
1. Nonprecedential Final Orders.....	21
2. Arbitration Award.....	22
3. Sensitive, Public Interest Appeal	22
4. Referral to OPM, OSC	22
E. MSPB RECORDS	22
1. Gaining Access; Review Procedure	26
2. Precluding Access	26
a. Sealing of Record or Files.....	26
b. Attempt to Preclude Publication of Decision.....	29
c. Expungement of Record.....	29
d. Redaction of Initial Decision.....	29
e. Classified Information.....	30
F. RULEMAKING PETITIONS.....	31
G. RESPONSIBILITY OF PARTIES IN MSPB CASES.....	31
III. JURISDICTIONAL OVERVIEW.....	31
A. SOURCES OF JURISDICTION	33
1. Original Jurisdiction Cases.....	34
2. Appealable Actions	34
a. Adverse Action	35
b. Performance-Based Action.....	35
c. Demonstration Project.....	36
3. Jurisdiction Through Agency Regulation.....	37
B. PRELIMINARY APPELLATE JURISDICTIONAL ANALYSIS	37
1. Lack of Jurisdiction; Failure to State a Claim	38
IV. EMPLOYEES WHO MAY APPEAL; APPEALABLE ISSUES	39
A. NATURE OF CIVIL SERVICE APPOINTMENTS	40
B. CONCEPTS COMMON TO DEFINITION OF "EMPLOYEE" FOR COMPETITIVE AND EXCEPTED SERVICE.....	41

1.	Current Continuous Service	42
a.	Break in Service	43
b.	Effect of Grievance or Other Settlement; Collective Bargaining Contract.....	47
c.	Service During Detail or in Acting Position.....	47
d.	Period of Non-Pay Status	47
2.	Not Serving a Probationary or Trial Period Under an Initial Appointment.....	48
3.	Counting Service Time in a Prior Position or Appointment; <i>McCormick</i>	49
a.	Time in Nonpermanent Appointment as a Component of Current Continuous Service.....	55
C.	COMPETITIVE SERVICE EMPLOYEES	60
1.	Other Than a Temporary Appointment Limited to One Year or Less.....	62
D.	EXCEPTED SERVICE EMPLOYEES	64
1.	1990 Civil Service Due Process Amendments; Nonpreference Eligible Employees.....	65
a.	Excepted Service Employees Excluded From Due Process Amendments; Statutory Appointment Discretion.....	65
2.	Preference Eligible Status.....	71
a.	Documentation.....	76
b.	Disabled Veteran.....	77
c.	Derivative Preference Eligible Status.....	78
3.	Same or Similar Position	80
a.	Factual Dispute Concerning Similarity of Positions	87
b.	In an Executive Agency	89
4.	Appointment Pending Conversion to Competitive Service	92
E.	DETERMINATION OF PROBATION	96
1.	Probationary Classification Issues.....	96
a.	Appointment From Register.....	96
b.	Transfer.....	98
c.	Temporary Appointment Pending Establishment of a Register (TAPER).....	99
d.	Career Reinstatement	99
2.	Calculating Year of Service.....	102
a.	Incorrect Determination of Duration of Probation	103
b.	Effective Time and Date of Inexplicit Termination Notice.....	107
c.	Significance of SF-50; Unclear Appointment Date	107
d.	WAE Appointment	109
e.	Military Service	109
3.	Tacking of Prior Service: Competitive Service Probation.....	110
a.	Same Agency	116
b.	Same Line of Work.....	117
4.	Agreement to Serve Probationary Period; Waiver of Preexisting Appeal Right	119
5.	Imposition of Probation Following Break in Service	122
6.	Representation by Agency That Probation Is Not Required; Equitable Estoppel	122
a.	Lack of Notice of Probationary Period	124
b.	Creation of Probationary Period Not Required by Statute or Regulation	124
F.	APPEAL RIGHTS OF PROBATIONER.....	125
1.	Appeal of Probationary Termination.....	126
a.	Actions Other Than Termination.....	128
2.	Classification of Probationers and Their Appeals	128
a.	Competitive Service Term Appointee; Trial Period	128
b.	Probationary Supervisor	129
3.	Jurisdictional Issue; Right to Hearing.....	134
a.	Effect of Collective Bargaining Contract; Agency Regulation	136
b.	Other Contract.....	136
c.	Harmful Error Analysis; <i>Stephen</i>	136
d.	Relation to Suitability Determination	138
4.	Preappointment Conditions	142
a.	Harmful Error Analysis: Lack of Proper Advance Notice, Other Procedural Error	142
b.	Entitlement to Hearing.....	147
c.	Measure of Substantive Review	148
5.	Postappointment Reasons.....	148
a.	Pre- and Postappointment Distinctions.....	148
6.	Defective or Untimely Termination Notice	154
a.	Termination by Unauthorized Official.....	155
7.	Discrimination and Partisan Politics.....	156

a.	Nonfrivolous Allegations	157
b.	Partisan Political Reason	158
c.	Marital Status	160
d.	Other Discrimination.....	167
8.	Constitutional Claim	167
9.	Involuntary Resignation.....	169
G.	LOSS OF APPEAL RIGHTS BY CHANGE IN POSITION.....	169
1.	Movement Between Positions in Same Agency; Lack of Notice of Requirement of Probation.....	169
a.	Movement to Position Through Settlement Agreement	177
2.	Movement From One Agency to Another; Transfer; Lack of Notice of Requirement of Probation	177
H.	TEMPORARY AND TERM APPOINTMENTS	180
1.	Competitive Service Temporary, Term Appointees.....	183
2.	Excepted Service Preference Eligible Temporary Appointees	189
3.	Excepted Service Nonpreference Eligible Temporary Appointees.....	189
4.	Particular Temporary or Irregular Schedule Appointments.....	189
a.	TAPER	189
b.	Seasonal; On-Call	190
c.	Intermittent	193
d.	Full-Time/Part-Time.....	195
e.	Postal Service Light Duty.....	195
f.	Indefinite Appointment	195
5.	Jurisdictional Effect of Lapse of Term or Temporary Appointment	195
6.	Appeal Right if Termination Occurs Before End of Expiration of Limited Appointment.....	197
I.	PARTICULAR APPOINTMENTS.....	198
1.	Nonappropriated Fund	198
2.	Veterans Readjustment Act	199
3.	Reemployed Annuitant.....	204
a.	Exceptions.....	206
4.	Senior Executive Service.....	207
5.	Administrative Law Judge.....	208
6.	Disabled Employee.....	208
7.	Employees in Confidential, Policy-Making, Policy-Determining Positions; Presidential Appointee.....	211
a.	White House, Executive Office of the President Employees	214
b.	Schedule F Positions.....	215
8.	Alien; Noncitizen	217
9.	Students.....	217
a.	Federal Career Intern Program	218
b.	Student Temporary Employment Program; Recent Graduates Program; Student Career Experience Program.....	223
10.	Judicial Branch	226
11.	Government Corporation.....	227
12.	Postal Service.....	228
a.	One Year of Qualifying Service; Current Continuous Service in Same or Similar Position	232
b.	Postal Supervisors, Managers	237
c.	Postal Personnel Officials, Confidential Employees	243
d.	Postal Service Employees Who Lack Preference Eligibility, Have No Negotiated Grievance Procedures, and Who Are Neither Managers Nor Personnelists	247
13.	Contractors	249
14.	Others.....	250
J.	AGENCIES WITH SPECIALIZED PERSONNEL SYSTEMS: MSPB JURISDICTIONAL EXCLUSIONS AND MODIFICATIONS.....	251
1.	Department of Homeland Security	251
a.	Human Resources Management System's Rise and Demise	251
b.	Transportation Security Agency: Screeners; Other Employees	251
(i)	Probationer	254
(ii)	Other TSA Employees.....	255
c.	RIF.....	259
2.	Federal Aviation Administration.....	259
a.	2012 Legislation Restoring Back Pay Authority as a Component of MSPB Jurisdiction	261
b.	2000 Legislation Restoring MSPB Jurisdiction; Back Pay Issues	262
c.	1996 Legislation Removing MSPB Jurisdiction.....	269
3.	Department of Defense National Security Personnel System	270
4.	District of Columbia	270

5.	Central Intelligence Agency; Defense Department Intelligence; Other Intelligence or Security Agencies.....	270
6.	Federal Bureau of Investigation	272
7.	Canal Zone.....	272
8.	National Archives	272
9.	National Guard Technicians.....	272
10.	Tennessee Valley Authority Employees.....	276
11.	Library of Congress; GAO; Congressional Employees.....	276
a.	Ramspeck Act	276
12.	Smithsonian Institution	277
13.	Bureau of Indian Affairs.....	277
14.	MSPB Employees	277
15.	Department of Veterans Affairs.....	277
a.	USERRA Coverage.....	287
b.	Actions Against Healthcare Professionals Not Involving Professional Conduct or Competence.....	288
(i)	Involuntary Retirement, Resignation.....	289
c.	Veterans Canteen Service	291
16.	Agriculture: Stabilization and Conservation Service; Cooperative Extension Services	293
17.	Department of Defense Education Activity.....	294
18.	Office of Independent Counsel.....	295
19.	Foreign Service.....	295
20.	World Bank	295
K.	NATURE OF PERSONNEL ACTION APPEALED.....	296
1.	Possible Adverse Action; Proposal	296
2.	Suspension	296
a.	Paper Suspension	297
b.	Consolidation of Short Suspensions.....	297
c.	Calculating Duration of Suspension.....	298
d.	Erroneous Imposition of Suspension Exceeding 14 Days.....	299
e.	Indefinite Suspension	300
3.	Position Change; Nonselection.....	300
a.	Rank Reduction	301
b.	Nonselection.....	302
c.	Loss of Promotion or Earnings Opportunities; Change in Work Schedule	304
d.	Disciplinary Reassignment; Unified Penalties	306
4.	Pay and Benefits; Classification; Debt; Leave	307
a.	Classification	307
b.	Pay System Conversion; Grade Reduction.....	309
c.	Correction of Pay, Grade	313
d.	Reduction in Pay; Locality Pay Issue; Failure to Obtain Pay Increase	319
e.	Misrepresentation Concerning Pay Rates.....	323
f.	Termination of Premium Pay; Bonus; LEAPA; Seniority, Overtime Adjustments	324
g.	Retirement Credit, Contributions, and Incentives; Individual Retirement Record.....	330
h.	Debt Collection, Recoupment, Retirement Funds: Agency, OPM Involvement.....	331
i.	Leave Dispute; Administrative Leave; Notice, Investigation Leave	334
j.	Pay and Compensation Claims: Role of OPM	338
5.	Severance Pay.....	338
6.	Promotion Claim.....	338
a.	Termination of Temporary Promotion	339
b.	Lower Graded Position Through Return Right—Overseas Employee.....	341
7.	Back Pay Dispute	341
a.	Retirement Payment.....	341
8.	Resignation.....	341
a.	Abandonment of Position	342
9.	Mandatory Retirement.....	343
10.	OWCP Benefits	344
11.	Insurance Programs.....	345
12.	Requests for Reinstatement: Non-Military Personnel.....	351
a.	Failure to Rehire	351
b.	Reinstatement Rights—Occupational Illness or Injury; Others.....	351
13.	Performance Standard; Rating; PIP.....	352
14.	Prohibited Personnel Practices; Allegations of Discrimination	352

15. Merit System Principles Violations	355
16. Constitutional Violation	356
17. Miscellaneous Issues	360
L. EFFECT OF COLLECTIVE BARGAINING CONTRACT GRIEVANCE OR RELATED PROCEDURES; 5 USC 7121	361
1. Postal Service Employees	365
a. Effect of EEO Allegation or EEO Complaint	366
2. Administrative Grievance System	366
3. Statutory Grievance System; Foreign Service Grievance Board	367
4. Employee Choice: Adverse Action; Performance Case	367
5. Collective Bargaining Contract Exclusivity	367
a. Appeal Right With EEO Allegation	369
b. USERRA Claim	372
c. RIF	375
d. Acceptable Level of Competence Determination; Within-Grade Increase	377
6. Problems Arising From Choice of Collective Bargaining Contract Procedure	377
a. Incorrect or Inadequate Advice From Agency	377
b. Dispute Over Bargaining Unit Status or Arbitrability; Ineffective Elections; Cross-Filing; Withdrawal of Grievance	379
c. Defunct Union	381
d. Union Action on Behalf of Employee	383
e. What Constitutes Filing of Grievance	386
f. Premature Elections	386
g. Belated Grievance	387
h. Failure to Obtain Arbitration Hearing	388
7. Indefinite Suspension	390
8. Appeal Right With Arbitration Award; Employees of Agencies Other Than Postal Service	391
9. Unfair Labor Practice Charge	392
M. GRADE AND PAY RETENTION	394
1. <i>Atwell</i>	396
a. Restoration Action	398
2. Absence of Retention; Benefits Declined	398
3. Appeal of RIF; Classification	399
4. Termination of Pay Retention	401
V. APPEAL RIGHTS BASED ON MILITARY SERVICE AND VETERANS PREFERENCE	401
A. REGULATIONS GOVERNING USERRA, VEOA CLAIMS	406
B. JUDGE'S RESPONSIBILITY	408
C. HEARING ENTITLEMENT; BOARD DISPOSITION	409
D. EXCLUSIVITY OF VEOA OR USERRA APPEAL; JOINDER OF CLAIMS	413
E. UNIFORMED SERVICE EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT	413
1. USERRA Statutory Structure	418
a. Related EEO Violation; Prohibited Personnel Practice Allegation	423
b. Affirmative Defense	426
2. Time for USERRA Appeal	426
a. Laches	428
b. Waiver of Right to Appeal	429
3. Permissive Exhaustion of Labor Department Remedy	430
a. Referral to Office of Special Counsel	433
4. Liberal Pleading Standard	434
a. Nonfrivolous Jurisdictional Allegations	439
b. Summary Disposition of Claim	440
5. Burden of Proof	441
a. Analysis of Alleged Discrimination or Reprisal Based on Military Service	445
b. Reprisal Against the Exercise of USERRA Rights	449
c. Circumstantial Evidence; Statistics	451
d. Discrimination Motivated by Lower-Level Supervisor; Cat's Paw	454
e. Disability Incurred While in Military Service	456
f. Disparate Impact Theory Inapplicable	457
6. Recovery Period	459
a. Nonretroactive Substantive Application	461
b. Vietnam Era Veterans' Readjustment Assistance Act of 1974	464
7. Covered Personnel; Agencies	465

a.	Contractor Employee	470
b.	Relatives of Service Members	472
8.	Military Restoration Rights	472
a.	National Guard USERRA Discrimination and Restoration Claims.....	475
b.	Length of Service Before Loss of Restoration Right	480
c.	Conditions of Discharge From Military Service	481
d.	Effect of Release From Service for Disability.....	481
e.	Delay in Requesting Restoration Following Military Service.....	485
f.	Elimination of Position Through RIF	485
9.	Other Personnel Action, Benefits	487
a.	Dismissal From Employment; Demotion; Abandonment of Civilian Career.....	487
b.	Constructive Adverse Action.....	493
c.	Suspension.....	494
d.	Failure to Appoint.....	494
e.	Failure to Consider Employee for Vacant Positions; Nonpromotion; Manipulation or Abolition of Positions.....	499
f.	Denial of Priority Consideration.....	503
g.	Performance Appraisal	503
h.	Noncompetitive Promotion; Bid Assignment; Escalator Principle; Interim Promotion.....	504
i.	Reassignment	511
j.	Retirement Benefits	511
k.	Education Benefits	512
l.	Military Leave; <i>Butterbaugh</i>	512
m.	Charge to Leave	521
n.	Harassment; Hostile Working Environment.....	521
o.	Change in Employment Status; Reemployment; Benefits Following Restoration to Duty.....	525
p.	Ready Reserve Status	533
F.	VETERANS EMPLOYMENT OPPORTUNITIES ACT	533
1.	Statutory Structure	536
a.	Definition of Agency	537
b.	Burden of Proof	539
c.	Related EEO Violation, Prohibited Personnel Practice, Other Challenges.....	539
2.	Covered Personnel.....	540
a.	Training Status.....	543
b.	Disabled Veteran.....	545
3.	Student, Intern Recruitment Programs	545
a.	Federal Career Intern Program	545
b.	Outstanding Scholar Program	553
c.	Pathways, Recent Graduates Program	560
4.	Particular Agencies; Positions.....	565
a.	Postal Service	565
b.	Foreign Service.....	567
c.	Nonappropriated Fund	568
d.	Public Health Service.....	570
e.	Statutory Exclusions	570
f.	VA Medical Professionals	570
g.	FAA, TSA Employees	571
h.	National Guard Technicians	573
i.	Title 10 Intelligence Position	573
5.	Time for VEOA Appeal	574
6.	Mandatory Exhaustion of DOL Remedy; Time for Complaint.....	575
a.	Specificity Required for DOL Complaint	579
b.	Equitable Tolling of DOL Time Limit; Waiver of Administrative Exhaustion Requirement.....	580
c.	Effect of Settlement Reached by DOL.....	591
d.	Termination of Proceedings to Pursue Case in Court.....	591
7.	Liberal Pleading Standard.....	592
8.	Basis for Veterans Preference	594
a.	Excepted Service Position; "Positive Factor"; Attorneys.....	596
9.	Application of Veterans Preference to Appointment Process.....	610
a.	Necessity for Application.....	611
b.	Appointment Through Reinstatement.....	612
c.	Impact of Collective Bargaining Contract	612

d.	Background Investigation	614
e.	Failure to Provide Proper Veterans Preference	614
f.	Use of Improper Appointment Authority	616
g.	Manipulation of Appointments; Cancellation of Vacancy	617
h.	Geographic Extent of Competition	626
i.	Category Rating System	626
j.	Rule of Three	629
10.	Qualifications for Position; Exclusion From Consideration; Consideration of Experience	631
a.	Education	641
b.	Time-In-Grade	642
c.	Medical Fitness	644
d.	Age Limit on Appointment	644
e.	Consideration for Position but Nonselection; Limitation on Consideration Imposed by the Applicant	649
f.	Improper Assessment of Qualifications	651
11.	Appointment and Promotion Processes Challenges	653
a.	Competitive Appointment Procedures; Exceptions to Competitive Requirements	653
b.	Merit Promotion With Internal Candidates Only; Reassignment; Reinstatement	658
c.	Merit Promotion, Open to External Candidates; Canceled Announcement; "Right to Compete" Claim	660
d.	Position Announced Under Both Open Competition and Merit Promotion Procedures	669
e.	Veterans Readjustment Act Appointment	674
12.	Remedial Structure; Reconstruction of Selection Process; Removal of Selectee	676
a.	Passover	688
b.	Mootness; Review of Agency-Initiated Reconstruction Effort	693
13.	Damages, Performance Award	694
14.	Disciplinary Case	699
15.	Reassignment; Transfer	699
16.	Retirement Benefit	700
17.	Other Benefits	700
VI.	SUITABILITY DETERMINATION	701
A.	APPELLATE PROCEDURES	706
B.	APPLICATION TO COMPETITIVE SERVICE APPOINTEES	707
1.	Employees Serving in Probationary or Trial Periods	707
C.	SUITABILITY DETERMINATIONS BY AGENCIES OPERATING UNDER AUTHORITY DELEGATED BY OPM	708
1.	Evidence of Material, Intentional False Statement, or Deception or Fraud	710
2.	Constructive Suitability Determination	712
3.	Nonselection for Position; Constructive Suitability Determination Under Delegated Authority	714
a.	Decisions Under OPM Regulations Predating 2008	721
4.	Impact of 2008 OPM Suitability Regulations	727
D.	ADJUDICATION STANDARDS	728
1.	Mitigation; EEO Defenses	731
2.	Disparate Treatment	732
3.	Rehabilitation	732
E.	EVIDENCE	732
1.	Collateral Estoppel; <i>Res Judicata</i>	734
F.	BASES FOR SUITABILITY DETERMINATIONS	735
1.	Falsification of Employment Document	735
2.	Drug Involvement	736
3.	Post-Appointment Conduct	737
4.	Criminal or Dishonest Conduct	740
5.	Other Problems	740
G.	REMEDIES	741
1.	Mootness	743
H.	RELATION OF SUITABILITY AND PASSOVER DETERMINATIONS	743
I.	RELATION OF OPM-DIRECTED SUITABILITY REMOVAL AND ADVERSE ACTION APPEAL RIGHTS, MITIGATION ANALYSIS; <i>AGUZIE</i>	745
VII.	OPM REGULATION REVIEW; CHALLENGES TO AGENCY IMPLEMENTATION OF OPM REGULATIONS; CHALLENGES TO OPM EMPLOYMENT PRACTICES	754
A.	REGULATION AND REGULATION IMPLEMENTATION REVIEW PROCEDURES	754
1.	General Criteria for Regulation Review and Regulation Implementation Review	755
a.	Distinction Between Regulation Review, Implementation Review	759
2.	Pleading Requirements; Scope of Review	760

a.	Discretionary Review; Likelihood of Success.....	761
b.	Likelihood of Harm	761
c.	Likelihood Issues Will Be Addressed in a Different MSPB Appeal or a Different Forum.....	761
d.	Standing; “Interested Person”	763
e.	Covered Personnel Action.....	764
3.	Examples of Regulation Review.....	764
a.	Administrative Law Judge Examination Authority.....	764
b.	SES Reassignment, Work Schedule	764
c.	Administration of Leave	766
d.	OPM Qualification Standards	766
e.	Scope of Administrative Grievance Procedure	767
f.	Other Issues	767
4.	Examples of Regulation Implementation Review	769
a.	SES Performance Appraisal Dispute	770
B.	EMPLOYMENT PRACTICE CHALLENGES	771
1.	Time and Place for Filing Appeal	776
2.	Agency Misapplication of Valid OPM Requirement; Agency Employment Practices; Nonselections	777
3.	Standing to Raise Challenge	781
4.	General Characteristics of Tests Rather Than Individual Examination Results	783
5.	Failure to Hire.....	784
6.	Scope of Competition.....	785
7.	Position Qualification Standard; Educational Requirement	785
8.	Medical and Physical Qualification Requirements	791
9.	OPM Involvement in Agency Selection.....	792
10.	Selection and Examination Practices for Administrative Law Judges.....	795
a.	Rule of Three.....	801
11.	Passover Determination	803
12.	Time-In-Grade Restriction.....	804
13.	Eligibility Rating and Suitability Determination	806
14.	Failure to Promote	806
15.	Remedy.....	806
VIII.	CHALLENGES TO ADVERSE PERSONNEL RECORDS NOTATIONS.....	807

CHAPTER 2: APPEAL AND DISCOVERY 809

I.	INITIATING AN APPEAL.....	809
A.	RULES AND PRACTICES OF GENERAL APPLICATION GOVERNING APPEALS	809
1.	Dates of Filing.....	809
2.	Service of Pleadings	809
3.	Filing Regulation; Electronic Filing; Technical Difficulties.....	810
4.	MSPB Processing of Appeal	815
B.	TIME FOR FILING APPEAL	816
1.	Treatment of Timeliness Issues.....	817
2.	Jurisdiction or Timeliness as Alternate Bases for Dismissal of Appeal	818
3.	Time to Appeal; Regulatory Provisions; Computation of Time.....	820
a.	Allegations of Discrimination—Mixed Case	821
b.	Effect of Collective Bargaining Contract Grievance Procedure	821
c.	Computation of Time	822
d.	Technical Constructions.....	822
e.	Request for Extension of Time to Appeal.....	823
4.	Suspension Appeal.....	824
a.	Indefinite Suspension; Enforced Leave.....	824
5.	Individual Right of Action Appeal.....	827
6.	USERRA Appeal	828
7.	Negative OPM Reconsideration Decision Appeal	828
a.	Failure to Seek Timely Reconsideration; Requests to Extend Time to Request Reconsideration	831
b.	Belated Receipt of Reconsideration Decision	837
c.	Relation Between Scope of Reconsideration Request and Appeal.....	837
d.	Failure of OPM to Act on Reconsideration Request; Failure of OPM to Advise of Reconsideration Right.....	838
e.	Overpayment Determinations.....	843
8.	Law Enforcement Officer Retirement Credit Appeal.....	843
C.	METHOD AND PLACE OF FILING	845

1.	Method of Filing	845
a.	Mail	845
b.	Significance of Postmark: Presumptive Filing Date.....	846
c.	Significance of Actual Mailing Date; Mailstream Rule: Actual Filing Date	846
d.	Commercial Delivery	846
e.	Facsimile	847
f.	Personal Delivery	847
g.	Electronic Filing.....	847
2.	Irregular and Misdirected Filings.....	848
a.	Appeal To or From Congressional Office.....	848
b.	Misfiled Mixed Case Appeal.....	848
c.	Non-Mixed Appeal Filed With Employing Agency	850
d.	Appeal Misdirected Within MSPB, to OPM, or to OSC	851
e.	Incomplete Appeal	852
D.	PREMATURE APPEALS	852
1.	Abeyance Arrangement.....	853
2.	Premature Appeal That Ripens Into Appealable Action During Regional Adjudication or During PFR.....	854
3.	Retirement Appeal.....	855
4.	Mixed and Whistleblowing Cases; Actions Initiated in Court	857
E.	TIMELINESS OF APPEALS	858
1.	Judge's Responsibility to Provide Notice Concerning a Timeliness Issue	859
a.	Mental or Physical Illness; <i>Lacy</i> Notice	861
b.	Duty of Appellant to Produce Evidence Concerning Timeliness.....	863
c.	Duty of Agency and Judge to Produce and Develop Evidence Concerning Timeliness	863
2.	Waiver; <i>Alonzo</i>	866
a.	Prejudice to Respondent; <i>Laches</i>	867
b.	Current Law on Waiver; Multifactor Analysis.....	868
c.	Historical Position on Waiver.....	873
d.	Retirement Appeals	875
3.	Application for Waiver	876
a.	Hearing Entitlement on a Timeliness Issue	877
b.	Due Diligence	880
4.	Collective Bargaining Contract Stay Provision; Postal Service Employee; Agency-Initiated Stay.....	880
F.	JUSTIFICATION FOR LATE FILING.....	882
1.	Sickness or Hospitalization	882
a.	Supporting Evidence.....	882
b.	Mental Impairment.....	883
c.	Effect of Continuing Mental Disorder on Filing Deadline.....	885
2.	Substitute Employment, Travel, or Other Activities.....	887
3.	Military Service.....	888
4.	Incarceration; Criminal Proceeding	890
5.	Need to Obtain Documentation.....	891
6.	Need to Obtain Counsel	891
7.	Unfamiliarity With MSPB Procedures and Law; Ambiguous Agency Communications	892
a.	Language Difficulties	893
b.	Miscalculation of Time for Appeal.....	893
8.	Obligation to Provide Notice of Appeal Rights	894
a.	Failure to Provide Notice.....	895
b.	Belated Receipt of Adverse Action Decision.....	900
c.	Constructive Receipt of Decision Notice.....	901
d.	Proof Concerning Delivery of Notice of Appeal Right.....	903
e.	Notice of Appeal Right to Appellant's Representative.....	903
f.	Appellant's Responsibility When Decision Notice or Information About Appeal Rights Is Not Received	904
g.	Constructive Adverse Action; Notice if Agency Learns of Employee's Protest.....	905
h.	Constructive Adverse Action Without Notice of Employee's Protest to Agency	908
(i)	<i>Jones, Krizman and Beyond</i>	914
i.	Agency on Notice but Fails to Provide Appeal Rights; Secondary Information Concerning Appeal Rights	918
j.	Adverse Action or Performance-Based Appeal Arising From Last Chance or Other Settlement Agreement	919
k.	Lack of Notice Concerning Restoration and Reemployment Appeal Rights.....	922
l.	Enforced Leave	925
m.	Prior or Subsequent Notice of Filing Deadline	926

n.	Agency Misrepresentation.....	927
o.	Threats by Agency Personnel.....	928
p.	Mixed Case Notice Problems.....	928
q.	Problem With or Delayed Receipt of Domestic, Certified, or International Mail, or Commercial Delivery; Address Change.....	930
9.	Appeal Lost in the Mail.....	937
10.	Facsimile Problems.....	938
11.	Electronic Filing Problem.....	939
12.	Problem Caused by Adjudicators; Misdirected Appeal.....	939
a.	MSPB.....	939
b.	EEOC; Agency EEO Processes.....	939
c.	OPM.....	940
13.	Uncertainty as to Outcome of a Related Case; Pending Settlement Negotiations or Investigation; Case Taken to Court.....	941
a.	Grievances.....	942
14.	Inadequate Representation.....	942
a.	Delay Not Excused.....	943
b.	Delay Excused; Counsel's Delay Balanced Against Appellant's Best Efforts; Retirement Cases.....	944
c.	Delay Excused; Obstruction or Misrepresentation by Counsel.....	946
d.	Delay Excused; Inconsequential Delay by Representative.....	950
15.	Other Problems.....	951
G.	TIME FOR RAISING NEW APPELLATE ISSUES AND CLAIMS.....	951
1.	Issues and Defenses.....	951
a.	Liberal Construction of Pleadings; Issues Raised at Hearing.....	952
b.	EEO Affirmative Defenses.....	952
2.	Additional Appealable Action.....	952
H.	MOOT, WITHDRAWN, AND WAIVED APPEALS.....	953
1.	Mootness of Appeal.....	953
a.	Cancellation of Action Appealed.....	954
b.	Restoration of <i>Status Quo Ante</i>	955
c.	Initiation of New Action Based on Events Leading to Canceled Action.....	963
d.	Procedure Followed if Action Not Completely Rescinded.....	963
e.	Procedure Following Remand to Judge.....	964
f.	Settlement Independent of MSPB Appeal.....	964
g.	Complete Relief Through Other Means; Stay of Pending Litigation.....	974
h.	Collateral Issues Following Rescission of Action; Claims for Attorney Fees or General Damages; Interest.....	975
i.	EEO Allegation; Claim for Compensatory Damages.....	975
j.	Whistleblower Protection Act: Claims for Damages, Other Relief.....	978
k.	Uniformed Services Employment and Reemployment Rights Act.....	984
l.	Criminal Conviction.....	986
m.	Consecutive Adverse Actions.....	986
n.	OPM Rescinds Reconsideration or Final Decision; Overpayment Recovery; Withdrawal of or Additional Retirement Application.....	986
o.	Administrative Law Judge Complaint.....	993
p.	Other Problems.....	993
2.	Effect of Retirement on Appealable Action.....	993
a.	Effect of Cleansing Personnel File When Removal Is Accompanied by Retirement; Effect of Claim for Damages.....	1000
b.	Resignation or Retirement Before Termination.....	1004
c.	Reduction in Force Appeal.....	1004
d.	Prior Law; Disability Retirement.....	1006
3.	Withdrawal of Appeal.....	1007
a.	Withdrawal to Pursue EEO Complaint; Withdrawal of EEO Claim.....	1009
b.	Withdrawal to Pursue a Collective Bargaining Contract Grievance Procedure.....	1011
c.	Confusion Between Necessity for Withdrawal of Appeal, Continuance, and Withdrawal of Appeal Without Prejudice to Refile.....	1012
d.	Unauthorized Act of Representative.....	1013
e.	Duress; Misrepresentation; Incompetence.....	1016
f.	Mistake.....	1019
g.	Misleading or Incomplete Information From Judge.....	1019
h.	Attempts to Refile, Reinstate, or Reopen Withdrawn Appeals.....	1022

4.	Dismissal Without Prejudice to Refile (“DWOP”).....	1026
a.	Reasons for DWOP	1030
b.	Pending Criminal Proceeding; Indefinite Suspension.....	1031
c.	Procedures for Obtaining Dismissal; Refiling	1033
d.	Refiling Date.....	1033
e.	Effect of PFR.....	1036
f.	Agency-Initiated Request; Prior Practice.....	1036
g.	Dismissal Initiated by Judge or MSPB	1037
5.	Delay in Refiling After DWOP.....	1038
a.	Retirement Appeals.....	1043
b.	Imperfect Attempt to Refile; Confusion Caused by Judge.....	1043
c.	Late Refiling; Independent Right of Appeal	1044
6.	Waiver of Appeal Through Last Chance or Other Preappeal Agreement	1044
a.	Jurisdictional Analysis.....	1047
b.	Public Policy; Appeal Preclusion; Consideration; Conflict With Regulation	1055
c.	Ambiguous Term; Failure to Waive Future Appeal Right.....	1057
d.	Due Process Considerations; Notice	1061
e.	Last Chance Agreement Superseded by Independent Adverse Action	1062
f.	Lack of Authority of Representative to Enter Agreement.....	1064
g.	Agreement to Accept Demotion, Suspension	1064
h.	Bad Faith, Coercion, Lack of Mental Capacity.....	1065
i.	Illegal or Punitive Term	1071
j.	Jurisdictional Prerequisite: LCA Compliance or Breach	1071
k.	Burden of Proof	1073
l.	Hearing Entitlement	1075
m.	Condition Unrelated to Underlying Action; Ambiguous Condition; Condition Described in Notice of LCA Violation	1078
n.	Discrimination, Reprisal	1084
o.	Claim Collateral to Breach of Agreement.....	1085
p.	Duration of Agreement	1085
7.	Personnel Action Resulting From Settlement Not Constituting Last Chance Agreement	1086
8.	Settlement Reached During Board Appeal	1087
II.	FORMAT AND PRELIMINARY PROCESSING OF APPEAL	1088
A.	ESSENTIAL INFORMATION.....	1088
B.	FORMAT.....	1089
1.	Interpretation of Appeal.....	1089
2.	Signature	1091
3.	Appeal Filed Through Representative	1091
4.	“John Doe” Appeal: Protecting Appellant’s Privacy.....	1091
5.	Agency-Initiated Retirement Appeal	1094
6.	Class Action, Consolidated Appeals, and Joinder; Bifurcated Appeals.....	1094
a.	Consolidation.....	1094
b.	Joinder; Compulsory Joinder	1097
c.	Class Action	1099
d.	Bifurcated Appeals.....	1100
7.	Substitution; Survival of Claim	1101
a.	IRA Case.....	1102
C.	INTERVENTION	1103
1.	Intervention of Right: OPM, OSC	1103
a.	OPM	1104
b.	OSC	1105
2.	Permissive Intervention	1105
3.	Rights of Intervenor.....	1108
4.	<i>Amicus Curiae</i>	1108
D.	STEPS TAKEN AFTER APPEAL IS FILED	1108
1.	Acknowledgment of Appeal.....	1110
a.	Philippines Retirement Appeal.....	1111
2.	Amendment of Appeal.....	1111
3.	Service of Pleadings	1112
4.	Deficient Appeal.....	1112
5.	Affirmative Defense Order; Requirement of Specific Allegations.....	1113

E.	AGENCY RESPONSE TO APPEAL.....	1115
1.	Narrative Response to Appeal.....	1116
2.	Motion to Dismiss Appeal.....	1116
3.	Delay in Appeal Response.....	1116
4.	Designation of Agency Representative.....	1117
F.	JURISDICTIONAL ISSUES.....	1117
1.	Nonfrivolous Jurisdictional Allegation.....	1120
2.	Judge Must Ensure Jurisdictional Issues Are Identified; <i>Burgess</i> Notice.....	1122
3.	Agency Representative’s Responsibilities.....	1125
4.	Hearing on Jurisdictional Issue.....	1126
G.	REPRESENTATIVES.....	1127
1.	Right to Representation.....	1127
a.	Inadequate Representation.....	1129
b.	Service on Representative.....	1130
2.	Disqualification of Representative; State Disciplinary Rules.....	1130
a.	Conflicts.....	1132
b.	Representative as Witness.....	1135
H.	<i>PRO SE</i> AND INADEQUATELY REPRESENTED PARTIES.....	1135
1.	<i>Pro Se</i> Appellant.....	1135
2.	Assistance to Mentally Incompetent Appellant; <i>French</i> Procedure.....	1136
I.	<i>EX PARTE</i> COMMUNICATIONS.....	1140
1.	What They Are.....	1141
2.	How <i>Ex Parte</i> Communications Are Treated.....	1143
III.	INTERLOCUTORY APPEALS.....	1144
A.	INTERLOCUTORY APPEAL PROCEDURE.....	1144
1.	Regulation.....	1144
2.	Application of Regulation.....	1146
a.	Rulings on Bias and Intervention.....	1148
b.	Direct Appeal to MSPB.....	1148
3.	Stay of Proceeding.....	1148
IV.	DISCOVERY.....	1149
A.	OVERVIEW.....	1150
1.	Regulatory Structure.....	1150
2.	Preliminary Steps.....	1153
a.	Initial Disclosures.....	1154
3.	Limitations.....	1155
a.	Jurisdictional or Timeliness Issue.....	1155
4.	Motion to Compel.....	1156
5.	Federal Rules.....	1158
a.	Federal Rules of General Application.....	1158
6.	Interrogatories.....	1160
7.	Deposition.....	1161
8.	Other Discovery Devices.....	1163
a.	Document Request.....	1164
b.	Request for Admission.....	1165
c.	Medical, Psychiatric Examinations.....	1165
d.	Motion for More Definite Statement of Appeal.....	1167
9.	Discovery From Nonparties.....	1167
B.	STRATEGIC CONSIDERATIONS.....	1168
1.	Burden.....	1168
a.	Effect of EEO, Reprisal Allegations.....	1169
b.	Discovery During Pendency of Criminal Proceedings.....	1169
2.	Privileged Information.....	1170
a.	<i>In Camera</i> Inspection.....	1170
b.	Law Enforcement Privilege.....	1171
c.	OSC File; Executive and Investigative Privileges.....	1172
d.	OPM Suitability File.....	1173
e.	Agency Investigative File.....	1173
f.	Attorney-Client Privilege.....	1174
g.	Attorney Work Product Privilege.....	1179
h.	Agency Deliberative Process Privilege.....	1182

i. Statutory Confidentiality Limitations	1183
3. Privacy Act	1184
4. Failure to Use Discovery	1186
5. Informal Discovery; Control by Agencies of Employees' Time	1187
6. Protective Order	1188
C. ENTRY OF DISCOVERY MATERIAL INTO RECORD	1189
D. SUBPOENAS	1190
1. When a Subpoena Is Used	1190
2. Obtaining, Serving Subpoena	1190
a. Witnesses Outside the United States	1192
3. Challenge; Enforcement	1192
4. Witness Fees; Travel Allowances	1193
E. REVIEW OF DISCOVERY RULINGS	1194
1. Rulings on Disputes	1194
a. Synopsis of Testimony	1194
b. Relevance, Overbroad Request	1194
c. Mitigation; Disparate Treatment	1195
d. Deposition of Agency Head	1196
e. Electronic Records	1196
f. Inspection Rather Than Production of Documents	1196
g. OSC Case	1197
2. Effect of Denial of Discovery	1198
a. Due Process Considerations	1200
b. Preservation of Issue	1202
V. SANCTIONS	1203
A. FAILURE TO RESPOND TO APPEAL	1205
1. Default Judgment	1205
B. FAILURE TO PROSECUTE APPEAL	1206
1. Dismissal Warranted	1207
a. Failure to Provide Basis for Appeal	1208
b. Failure to Designate Representative	1208
c. Failure to Comply With Judge's Order	1209
2. Dismissal Unwarranted	1211
a. Failure to Attend Hearing	1212
b. Inadvertent or Isolated Failure to Obey Judge's Orders	1212
c. Late Appeal	1215
C. FAILURE TO COOPERATE IN DISCOVERY	1215
1. Sanction Against Agency	1215
a. Material in Control of Third Party	1218
2. Sanction Against Appellant	1218
D. FAILURE TO FOLLOW PREHEARING OR HEARING PROCEDURES	1221
1. Sanction Against Appellant; Prejudice to Agency	1221
2. Sanction Against Agency	1223

CHAPTER 3: HEARING..... 1225

I. HEARING	1225
A. RIGHT TO HEARING	1225
1. <i>De Novo</i> Hearing	1226
a. Role of Intervenor	1227
2. Jurisdictional Hearing; Documentary Evidence	1227
a. Timeliness Issue	1230
b. No Material Disputed Facts	1230
3. Counsel	1233
4. Control by Judge	1233
5. Official Time; Resources Available to Appellant	1235
B. WAIVER OF HEARING	1236
1. Inability to Travel to Hearing Site	1238
2. Failure to Request Hearing	1239
a. Remands; New Law	1241
3. Untimely Hearing Request	1241
a. Effect of Amendment of Appeal	1242

4.	Withdrawal of Hearing Request	1242
a.	Failure to Receive Hearing Notice.....	1242
b.	Postponement Denied	1244
c.	Events Beyond Appellant’s Control.....	1244
5.	Strategic Considerations—Intentional Waiver	1244
6.	Adjudication After Waiver, Failure to Attend Hearing.....	1245
7.	Adjudication Without Hearing; Responses to Evidentiary Submissions	1245
C.	POSTPONEMENT OF HEARING	1249
1.	Timing of Hearing	1249
2.	Policy on Continuances.....	1250
a.	Dismissal Without Prejudice to Refile.....	1251
b.	Case Suspension	1251
3.	Continuance Procedure	1252
a.	Request; Form of Sworn Statement.....	1253
b.	Failure to Make Request.....	1253
c.	Status of Pending Motion.....	1253
d.	Proceeding After Denial of Motion	1253
4.	Good Cause Requirement.....	1254
a.	Need to Prepare	1254
b.	Awaiting Outcome of Another Case.....	1254
c.	Unavailability of Representative; New Representative	1254
(i)	Case Proceeds to Hearing	1257
d.	Medical Condition of Appellant.....	1257
e.	Pending Criminal Proceeding; Indefinite Suspension.....	1258
f.	Incarceration	1261
g.	Military Service.....	1262
h.	Missing or Unavailable Witness.....	1262
i.	Change in Hearing Location.....	1262
5.	Continuance Denial—Review Standard	1262
D.	VENUE OF HEARING.....	1264
1.	Change of Venue	1264
a.	Cost to Appellant.....	1265
2.	Requesting a Change of Venue	1266
3.	Venue Determination Review Standard	1266
E.	HEARING FUNDAMENTALS.....	1266
1.	Change, Resignation, or Death of Judge	1266
2.	Interaction With Judge.....	1267
3.	Prehearing Submission	1267
4.	Prehearing Conference	1268
a.	Stipulations.....	1271
b.	Waiver or Withdrawal of Affirmative Defense	1271
c.	Dismissal of Charge	1271
5.	Memorandum or Order Summarizing Conference.....	1272
a.	Preservation of Objection; Incomplete Summary	1273
b.	Treatment of EEO and Other Affirmative Defenses; Summary Judgment.....	1275
F.	CONDUCT OF HEARING; RESPONSIBILITIES OF JUDGE	1277
1.	Hearing Error: Measure of Damage	1277
a.	Timing of Submission of Pleadings.....	1278
b.	Timing of Initial Decision.....	1278
2.	Control and Exclusion of Representative or Participant.....	1279
3.	Maintaining Order.....	1280
a.	Exclusion From Hearing Room of an Individual Whose Presence May Intimidate a Witness	1281
b.	Security Arrangement	1281
4.	Witness Control; Sequestration.....	1282
5.	Conduct of Questioning	1284
a.	Multiple Representatives.....	1285
6.	Permitting Record Development	1285
a.	Videoconference, Telephone Hearing.....	1286
b.	Bifurcated Hearing.....	1290
c.	Hearing Subpoena.....	1292
7.	Ensuring Record Development; <i>Pro Se</i> Appellant; EEO File	1292

a.	Annuity Appeal	1294
b.	Duty of Judge to Inform an Appellant of Governing Law; <i>Pro Se</i> Appellant; Liberal Construction of Pleadings	1295
c.	Raising Issue <i>Sua Sponte</i>	1297
d.	Preserving Review Right Through Objection	1299
8.	Media Coverage.....	1299
9.	Public Hearing; Closing the Hearing	1300
10.	Timing of Hearing	1301
11.	Hearing Accommodation for Disabled Appellant; Interpreter	1301
12.	Allocation of Burden of Proof	1303
13.	Opening Statement.....	1303
14.	Closing Argument, Brief.....	1303
G.	PREVENTION OF INTERFERENCE WITH MSPB PROCEEDINGS	1304
1.	Protective Order.....	1304
2.	Protective Order for Appellant	1305
3.	Interference With Witness, Representative, Appellant	1306
a.	Agency Restriction on Appearance of Employee as Witness	1310
H.	POSTHEARING ACTIVITIES	1311
1.	Closing Record	1311
a.	Ensuring Notice of Record Closing.....	1312
b.	Clarifying Scope of Record; Off-The-Record Discussions	1312
c.	Timing of Evidentiary Submissions, Responses.....	1313
d.	Effect of Closing Record	1314
2.	Regional Authority After Initial Decision	1314
a.	Judge's Request to Reopen Record to Correct Error	1315
II.	HEARING RECORD	1315
A.	RIGHT TO AND NECESSITY FOR A RECORD OR TRANSCRIPT	1315
1.	Current MSPB Practice.....	1316
2.	Past Treatment of Transcript.....	1317
3.	Past Internal MSPB Guidance on Transcript.....	1317
4.	Federal Circuit Commentary on Transcript	1318
a.	Arbitration Hearing.....	1318
5.	Use of Recording	1319
B.	PROBLEMS CONCERNING TRANSCRIPT AND RECORD	1319
1.	Off-The-Record Discussion	1319
2.	Hearing Recording Omission; Transcript Error.....	1320
3.	Correction of Transcript	1321
4.	Unofficial Transcript.....	1321
III.	MOTION PRACTICE.....	1322
A.	USE OF MOTIONS.....	1322
1.	Dispositive Motion.....	1324
a.	Motion to Dismiss Filed Before Hearing.....	1324
b.	Motion to Dismiss Filed During Hearing.....	1325
c.	Summary Judgment.....	1326
B.	FORM AND TIMING OF MOTIONS.....	1331
IV.	WITNESSES	1331
A.	WITNESS REQUEST	1331
1.	Obligation to Permit Relevant Testimony	1332
a.	Competence to Testify	1332
b.	Appellant.....	1332
c.	Decisionmaker.....	1333
d.	Agency Head.....	1333
2.	Obligation to Request Witness.....	1333
a.	Witness List	1334
b.	Rebuttal Witness	1335
3.	Repetitious Testimony	1336
4.	Offer of Proof	1336
5.	Compelling Witness Attendance	1337
a.	Appellant.....	1337
b.	Others; Former Employee; Subpoena.....	1337
6.	Duty Status of Federal Employee Witness; Pay, Travel, Per Diem	1338
a.	Official Time.....	1338

7.	Protecting Record; Missing Witness	1339
a.	Preservation of Objection.....	1339
8.	Judge May Call Witness.....	1340
9.	Obtaining Testimony by Alternate Means.....	1340
10.	Right of Witness to Representation	1340
a.	Self-Incrimination.....	1340
11.	Witness Denial—Review Standard	1341
B.	EXAMINATION OF WITNESSES.....	1343
1.	Control of Questioning	1343
a.	Questioning by Judge.....	1343
b.	Leading Questions	1344
c.	Production of Witness Statement, Document Relied on During Testimony.....	1345
d.	Taking Witness Out of Order.....	1346
V.	DISQUALIFICATION OF JUDGE.....	1346
A.	PRESUMPTION OF HONESTY AND IMPARTIALITY.....	1346
1.	Competence of Judge	1348
B.	TREATMENT OF BIAS ALLEGATIONS.....	1348
1.	Procedure; Documenting Record.....	1350
2.	Extrajudicial Source of Bias.....	1352
3.	Treatment of Bias Allegation by Judge, Board.....	1353
4.	Specific Bias Allegations	1353
a.	Relationship With Party or Witness	1353
b.	Relationship With Counsel	1353
c.	Improper Communication	1354
d.	Examination of Witness.....	1355
e.	Remarks About Counsel, Party, Merits, Settlement; <i>Ex Parte</i> Communication.....	1355
f.	Prior Ruling Against Party.....	1359
g.	Erroneous Ruling	1360
h.	Incorrect Factual Conclusion.....	1360
i.	Hasty or Late Decision	1360
j.	Change in Judge Without Finding of Bias	1360
CHAPTER 4: EVIDENCE.....		1363
I.	FUNDAMENTALS.....	1363
A.	RELEVANCE, MATERIALITY, AND FAIRNESS	1363
1.	Informal Adjudication.....	1363
2.	Relevance and Materiality.....	1363
a.	<i>De Novo</i> Review.....	1364
b.	Conditional Admission of Evidence.....	1364
3.	Record.....	1364
a.	Offer of Proof.....	1364
4.	Fairness in Development of Evidence.....	1364
a.	Erroneous Exclusion of Evidence	1364
b.	Erroneous Admission of Evidence.....	1365
c.	Manipulation or Redaction of Evidence.....	1365
B.	NATURE OF CHARGES	1366
1.	Evidentiary Value of Charge	1366
a.	Response to Charge.....	1367
C.	HEARSAY.....	1368
1.	<i>Borninkhof</i>	1369
2.	Judicial Interpretations	1371
3.	5 USC 2302(b)(2): Investigative Statement	1372
II.	EVALUATION OF EVIDENCE.....	1372
A.	DOCUMENTS.....	1373
1.	Response to Appeal	1373
2.	Medical Report, Records.....	1373
3.	Notes of Witness; Memorandum of Conversation	1374
4.	Time and Attendance Record	1374
5.	Business Record	1375
6.	Regulation; Law	1375
7.	Evidence From Other MSPB Hearing; Other Judicial Proceeding.....	1375

8.	Procedure for Introducing Document; Demonstrative Evidence	1375
9.	Authentication Requirement	1377
	a. Handwriting	1377
	b. Significance of Signature	1377
	c. Copy; Photograph	1377
B.	PHYSICAL EVIDENCE.....	1377
1.	Custody and Control	1378
2.	Use at Hearing	1378
C.	ADMISSIONS	1378
1.	Probative Value	1379
	a. Repudiated or Recanted Admission	1379
2.	Settlement Offer	1381
D.	CIRCUMSTANTIAL AND SECONDARY EVIDENCE	1381
1.	Common Possession/Multiple Causation.....	1383
2.	Contemporaneous Statement.....	1383
3.	Flight or Evasion	1384
4.	Statistics.....	1384
E.	OPINION AND IMPEACHMENT EVIDENCE	1384
1.	Physical Condition	1384
2.	Character.....	1384
	a. Past Misconduct.....	1386
	b. Arrest, Conviction.....	1387
	c. Reputation	1387
	d. Habit.....	1388
3.	Evidence in Disability Annuity Appeal; <i>Chavez</i> ; Post-Separation Evidence	1388
F.	RECURRENT EVIDENTIARY PROBLEMS.....	1394
1.	Polygraph	1394
2.	Unsworn Written Statements.....	1395
	a. No Hearing.....	1397
	b. Hearing Held	1397
	c. Sworn Written Statement; Form of Attestation	1398
	d. Deposition.....	1400
3.	Investigation Reports.....	1401
4.	Recordings.....	1403
	a. Video	1403
	b. Audio.....	1403
5.	Transcript of Prior Testimony	1403
6.	Expert Witness; Medical Evidence.....	1403
	a. Medical Expert Opinion	1406
	b. Other Experts.....	1408
7.	Statements of Representative, Party.....	1408
	a. Hearing Deportment Or Demeanor	1409
8.	Testimony of Child	1409
9.	Interpretation of Collective Bargaining Contract	1409
10.	Newspaper Article	1410
11.	Drug Test	1410
III.	SUBSTITUTES FOR DIRECT EVIDENCE	1414
A.	OFFICIAL NOTICE	1414
1.	Regulations.....	1415
	a. Federal Personnel Manual; Agency Handbook, Publication.....	1415
2.	Related Board Case Records.....	1415
B.	ADVERSE INFERENCES AND PRESUMPTIONS	1416
1.	Silence	1416
2.	Negative Inferences.....	1417
	a. Destruction or Loss of Evidence; Spoliation	1418
	b. Negative Evidence.....	1421
3.	Presumption.....	1421
	a. Delivery of Mail, Other Documents.....	1422
C.	STIPULATIONS	1426
1.	Issues of Fact and Law	1427
2.	Stipulations Directed by Judge	1427

D.	RES JUDICATA, COLLATERAL ESTOPPEL, AND LAW OF THE CASE—THE DOCTRINES	1428
1.	Res Judicata.....	1429
a.	Identity of Prior Cause of Action and Issues	1433
b.	Identity of Parties; Privity.....	1434
c.	Complete Relief Available	1435
d.	Jurisdictional Issue.....	1435
e.	Settlement	1438
f.	Withdrawal of Appeal	1439
g.	Res Judicata Raised Sua Sponte by MSPB; Waiver of Defense.....	1439
2.	Collateral Estoppel.....	1441
a.	Error in Law; Change in Law	1444
b.	Proof of a Prior Adjudication	1445
c.	Privity; Appellant as a Party to Prior Case	1445
d.	Privity of Agencies.....	1445
e.	Identity of Prior Issue.....	1446
f.	Jurisdictional, Timeliness Issues	1447
g.	Decision of Another Tribunal	1449
h.	Collateral Estoppel Raised Sua Sponte by MSPB.....	1451
3.	Judicial Estoppel.....	1451
4.	Law of the Case; Mandate Rule	1454
5.	Stare Decisis	1457
E.	RES JUDICATA AND COLLATERAL ESTOPPEL—THE DOCTRINES APPLIED	1458
1.	Criminal Conviction.....	1458
2.	Pleas to Criminal Charges.....	1461
a.	Guilty Plea	1461
b.	Nolo Contendere and Alford Pleas	1463
c.	Pretrial Diversion	1466
d.	Conviction, Misconduct Distinguished	1467
3.	Acquittal; Reversal of Criminal Conviction.....	1467
4.	Successive MSPB Cases	1468
a.	Dismissal for Adjudicatory Efficiency	1469
b.	WIGI/Removal	1469
c.	Successive RIFs	1469
d.	Whistleblowing Prohibited Personnel Practice Complaint or Appeal.....	1470
e.	USERRA Claims	1476
f.	Suitability Determination	1477
g.	Regulation Review	1478
h.	Prior Action Reversed for Lack of Due Process.....	1478
5.	Other Proceedings.....	1478
a.	Credentialing Committee	1478
b.	Union Trial Board	1479
c.	Labor Arbitration Awards	1479
d.	OPM Annuity Determination.....	1482
e.	Unemployment Compensation Award	1484
f.	OWCP Finding; Social Security Determination	1486
g.	EEOC Decision.....	1487
h.	Comptroller General or GAO Decision.....	1487
i.	Judicial Determination	1489
6.	Potential Exceptions to Application of Collateral Estoppel, Res Judicata.....	1490
a.	Pendency of an Appeal; District Court Case	1490
b.	Fairness of Adjudication; New Evidence	1490
c.	Fraud; Misrepresentation.....	1491
d.	Change in Law	1492
IV.	EXCLUSION OF EVIDENCE	1492
A.	PROCEDURES.....	1492
1.	Objection, Motions to Strike or in Limine	1492
2.	Witness Exclusion.....	1493
a.	Proposing Official.....	1493
B.	CONSTITUTIONAL AND STATUTORY CHALLENGES	1494
1.	Search.....	1494
a.	Wiretap.....	1498

b.	Recording	1499
c.	Drug Testing	1499
2.	Interrogation.....	1504
a.	Misconduct of Investigator	1504
b.	Compelled Testimony; <i>Kalkines</i> Warning.....	1504
c.	Right to Silence, Counsel	1506
d.	Denial of Union Representation.....	1508
C.	OTHER BASES FOR EXCLUSION OF EVIDENCE	1509
1.	Claims of Privilege.....	1509
a.	Alcoholism Treatment Records.....	1509
b.	Other Medical Records	1509
c.	Privacy; Attorney-Client Communication.....	1509
2.	Conference With Union Representative.....	1509
3.	Failure to Follow MSPB Procedure	1510

CHAPTER 5: INITIAL DECISION AND PETITION FOR REVIEW..... 1511

I.	INITIAL DECISION.....	1511
A.	INITIAL DECISION FORMAT	1511
1.	Minimum Requirements.....	1511
a.	Bench Decision.....	1513
b.	Notice of Right to Review	1514
2.	Appeal Dismissed by Consent; Mootness of Initial Decision.....	1515
B.	REQUIRED ANALYSIS	1515
1.	Incomplete Analysis	1516
a.	Incorrect Adjudication Standard.....	1518
b.	Issue Not Raised in Appeal.....	1518
2.	Timeliness and Jurisdictional Issues.....	1518
3.	Adverse Action, Performance Case.....	1519
4.	Annuity Appeal	1519
5.	EEO, Prohibited Personnel Practice Issue	1520
a.	Nondispositive EEO, Prohibited Personnel Practice Issue.....	1521
6.	Consolidated Appeals.....	1523
7.	Attorney Fees Decision	1523
C.	CREDIBILITY FINDINGS	1523
1.	Necessary Findings	1523
a.	Weight of Evidence Equally Balanced.....	1524
2.	Factors Considered; <i>Hillen</i>	1524
a.	Some Testimony Discredited.....	1527
b.	Alibi Defense	1527
c.	Inconsistencies; Denials; Memory Lapse; Failure to Provide Statement.....	1527
d.	Contemporaneous Notation, Statement; <i>Post Hoc</i> Explanation.....	1528
e.	Self-Serving Testimony; Bias; Criminal Conviction; Past Misconduct	1529
f.	Uncontradicted Testimony.....	1530
g.	Implausible, Inherently Improbable, Imprecise Testimony	1530
3.	Telephonic Hearing	1530
4.	Determination Made Without Hearing	1531
II.	PETITION FOR REVIEW; RECONSIDERATION	1531
A.	PFR PROCESS	1531
1.	Statutory and Regulatory Structure	1532
a.	Internal Board Guidance	1534
2.	Board Treatment of PFR, Reopening Request.....	1535
a.	Enforcement Issue.....	1537
3.	Reply to PFR Response	1537
4.	Cross-PFR.....	1537
a.	Conditional Cross-PFR	1538
5.	Effect of Judicial Review on PFR.....	1538
6.	Effect of EEOC Review on PFR.....	1539
7.	Who May Obtain Review	1539
a.	OPM.....	1539
b.	OSC	1540
c.	Others; Intervenors	1540

8.	Grounds for PFR.....	1540
	a. Evidentiary Disputes.....	1541
	b. Ineffective Counsel	1542
	c. Frivolous PFR; Sanction	1543
	d. Challenges to Settlement	1543
9.	Time for Filing.....	1543
10.	Service.....	1544
11.	MSPB Processing	1545
	a. Tied Vote; Lack of Quorum	1547
	b. Decision Effective Upon Issuance by Clerk	1547
	c. Joinder.....	1547
12.	Failure to Prosecute; Failure to Respond.....	1548
	a. Withdrawal of PFR	1548
	b. Dismissal Without Prejudice	1548
13.	PFR Settlement Program	1549
14.	Entry of Settlement Agreement Into Record.....	1549
15.	MSPB Final Decision	1550
	a. Short Form Order.....	1550
16.	Authority to Reopen and Reconsider	1551
	a. Jurisdictional Issue.....	1554
	b. Due Diligence	1555
	c. Reversal of Criminal Conviction	1559
	d. Change in Law	1560
	e. Fraud	1561
	f. Retirement Appeal.....	1563
	g. Effect of Judicial Review on Petition to Reopen.....	1564
	h. Reopening in Lieu of Excusing Untimely or Defective PFR	1565
	i. Clear Legal Error; Manifest Injustice.....	1566
	j. Discovery of Additional Legal Argument.....	1566
	k. Correction of Case Processing Error.....	1566
B.	INTERIM RELIEF	1567
1.	Effective Date of Interim Relief.....	1570
2.	Effect of Remand or Supplemental Initial Decision on Interim Relief.....	1570
3.	Obligation to Return Employee to Work and Pay; Undue Disruption.....	1571
	a. Undue Disruption Determination	1573
	b. Undue Disruption Notice.....	1574
	c. Implicit Disruption Determination; Strong Overriding Interest	1576
	d. Removal From Workplace or Adverse Action During Interim Relief Period	1580
	e. Return to Work With Changed Duties	1581
	f. Restoration Followed by Appellant’s Inability to Work	1581
	g. Pay Entitlement; Overtime; Allowances	1581
	h. Deductibility of Interim Earnings or Severance Pay.....	1584
	i. Prior “Bad Faith” Implementation Standard	1584
4.	Dismissal of PFR for Failure to Provide Interim Relief.....	1585
	a. Remedy for Inadequate Interim Relief.....	1586
	b. Motion to Dismiss PFR for Lack of Proper Interim Relief	1587
	c. Discriminatory Application of Interim Relief	1588
	d. Effect of Jurisdictional Issue	1588
5.	PFR Not Mooted by Overbroad Interim Relief	1588
6.	Certification and Proof of Interim Relief	1589
	a. Evidence of Interim Relief.....	1590
	b. Technical Error; Supplemental Evidence of Interim Relief.....	1593
	c. Delay in Payment Following Certification or <i>Prima Facie</i> Evidence of Interim Relief.....	1594
	d. Withdrawal of Interim Relief.....	1595
7.	Factors Limiting or Warranting Denial of Interim Relief.....	1595
	a. OWCP Benefits.....	1596
	b. Retirement	1596
	c. Restriction on Extension of Appointment.....	1597
	d. Waiver, Settlement of Interim Relief; Employment Status Change	1598
8.	Special Situations	1599
	a. Retirement Appeals	1599

b.	Within-Grade Increase Appeal.....	1600
c.	Suitability Appeal	1600
d.	VEOA Appeal	1600
e.	Mitigation of Removal to Demotion.....	1601
f.	Mitigation of Removal to Suspension.....	1601
g.	Mitigation of Demotion to Suspension.....	1601
h.	Mitigation or Cancellation of Suspension	1602
i.	Enforced Leave Concluded by the Date of the Initial Decision.....	1602
j.	Unified Penalty Involving Reassignment	1602
C.	REVIEW OF FACTUAL AND CREDIBILITY FINDINGS	1602
1.	Factual Findings; "Special Deference"	1603
a.	Decision Based on Affidavits, Documents.....	1608
b.	Telephonic, Videoconference Hearing.....	1608
2.	Omitted Findings	1608
3.	Unnecessary Findings.....	1609
4.	Issue of Mental Competence During Appeal Adjudication	1610
D.	REVIEW OF NEW EVIDENCE	1610
1.	What Constitutes Evidence.....	1613
2.	What Evidence Is New	1613
a.	Previously Available.....	1614
b.	Issue First Raised by Judge.....	1615
c.	Claim of Surprise.....	1615
d.	Due Diligence	1615
e.	Issue of Timeliness of Appeal or Other Submission	1618
f.	Issue of Jurisdiction; Exhaustion of Remedies	1620
g.	Evidence From Another MSPB Case.....	1622
3.	Materiality of New Evidence.....	1622
a.	Impeachment, Rebuttal Evidence	1623
b.	Corroborative Evidence.....	1626
c.	Disparate Treatment	1627
d.	OPM, SSA, OWCP, VA Determination; Evidence of Medical, Mental Condition	1627
e.	Adjudication of Past Discipline.....	1628
f.	Reversal of Criminal Conviction	1629
E.	REVIEW OF NEW LAW	1629
F.	REVIEW OF NEW ISSUES OR ISSUES NOT RAISED WITH JUDGE.....	1631
1.	General Rule.....	1631
a.	Jurisdictional Issue	1632
b.	Order Directing Payment in Violation of Federal Statute.....	1633
2.	Determining if Issue or Argument Was Raised Below.....	1633
a.	Annuity.....	1633
b.	Penalty.....	1633
c.	Statutory, Constitutional Interpretation.....	1633
d.	Timeliness of Appeal	1634
e.	Discrimination	1634
f.	Waiver of Issue.....	1634
G.	TIMELINESS OF PFR.....	1635
1.	Request for Extension of Time	1635
2.	Date and Place of Filing	1636
a.	Deficient but Timely PFR.....	1636
3.	Filing by Facsimile	1637
a.	Misguided Facsimile	1637
4.	Filing by Commercial Delivery.....	1638
5.	Filing by Hand.....	1638
6.	Filing by Mail.....	1638
a.	Proof of Mailing; Postmark; Letterbox Rule.....	1640
b.	PFR Lost in the Mail.....	1643
7.	Electronic Filing.....	1644
8.	Procedure on Late Submission.....	1646
a.	Affidavit or Sworn Statement Required.....	1647
b.	Strict Application	1648
c.	Retirement Appeal.....	1649

9.	Justification for Late Filing	1650
a.	Electronic Filing Problem.....	1651
b.	Mailroom Delay in Posting PFR	1653
c.	Foreign Mail Problem.....	1654
d.	Office Equipment, Technology, Related Problems	1654
e.	Merits	1654
f.	Physical or Mental Condition of Appellant or Counsel.....	1654
g.	Ignorance of Law; Late Discovery of Legal Defense; Subsequent MSPB Decision in Another Case.....	1661
h.	Problem With Settlement	1663
i.	Misinterpretation, Ignorance of MSPB Regulation, Instruction.....	1665
j.	Incorrect Information From MSPB, Others	1666
k.	Incomplete Notice of Right to File PFR.....	1667
l.	Delayed Receipt, Misrouting of Initial Decision, PFR; Constructive Receipt	1668
m.	Failure to Receive Initial Decision; E-Filer.....	1670
(i)	Responsibility to Notify Board of Physical or Email Address Change	1673
n.	Effect of Judge's Remand to Agency for Redetermination.....	1675
o.	Withdrawal, Absence of Representative	1675
p.	Inability to Obtain Representation.....	1676
q.	Unexcused Delay or Neglect of Representative.....	1676
r.	Excused Neglect of Representative; Diligence of Appellant.....	1679
s.	Attempt to Obtain Congressional Assistance	1682
t.	Pending Review by Another Adjudicator	1682
u.	Awaiting Transcript, Other Document.....	1683
v.	Delay in Internal Decisionmaking	1684
w.	Military Service.....	1684
x.	Fear of Prosecution; Agency Misrepresentation	1685
y.	Language Difficulties	1685
z.	Other Problems.....	1685
10.	Filing PFR With Wrong Agency or MSPB Office	1688
a.	Mixed Case Appeals.....	1688
b.	Other Misdirected Filings	1689
11.	Case or PFR Misfiled in Court	1690
H.	FORMAT AND SUBSTANCE OF PFR; REPLY; RESPONSE TO REPLY	1691
1.	Allowable Submissions; Length, Format.....	1691
a.	Erroneous Designation of Pleading.....	1693
b.	Error in Formal Requirements	1693
c.	<i>Pro Se</i> Form PFR.....	1693
2.	Signature, Designation of Representative Required	1695
3.	Specific and Supported Objection.....	1695
a.	Factual Error.....	1696
b.	Adjudicatory Error	1696
4.	Response to PFR	1696
5.	Reply to Response.....	1697
6.	Supplemental Authority	1697
7.	Lack of Transcript.....	1698
I.	MOOTNESS OF PFR.....	1698
1.	Cancelation of Adverse Action; Agency Compliance With Initial Decision	1698
a.	Effect of Appellant's PFR; No Agency PFR Filed	1699
2.	Settlement; Vacatur of Initial Decision	1699
3.	Regulation Review Proceeding	1700
4.	Retirement Appeal.....	1700
5.	Disqualification of Representative	1700
J.	PROCEDURE ON REMAND.....	1700
1.	Determining Whether a Remand Is Necessary	1700
a.	Board Obtains Evidence During PFR	1700
2.	Evidence, Findings From First Hearing.....	1701
a.	Effect of MSPB Order Vacating Initial Decision	1701
3.	Remand for Further Discovery	1702
4.	Remand for More Evidence	1702
a.	Subsequent PFR.....	1702
b.	Entry of Interlocutory or Interim Relief on Remand.....	1702

5.	Remand for Compliance	1702
K.	OPM RECONSIDERATION REQUESTS	1703
1.	Governing Statute and Regulation	1703
2.	Substantial Impact on Law	1705
a.	Decisions Before 1990.....	1707
3.	Limited to Facts, Issues of Record.....	1707
4.	Timing of Request; Arbitration Award	1707
5.	Mootness.....	1708
6.	EEO Discrimination Decision.....	1708
L.	STAY REQUESTS	1708
1.	Requested by OPM	1709
a.	Request for Supreme Court Review.....	1712
2.	Requested by Agency.....	1712
a.	Stay of Enforcement Proceeding	1714
3.	Requested By or For Individual	1714
a.	Special Counsel Disciplinary Case	1716
b.	Other OSC Litigation	1718
M.	REVIEW OF ARBITRATION AWARDS.....	1718
1.	Award Subject to Review.....	1723
a.	Governing Statute and Regulation; Time for Review	1724
b.	EEO Allegation.....	1726
c.	Remand for Resolution of EEO Issue.....	1731
d.	Attorney Fees Claim.....	1731
2.	MSPB Review Procedure	1732
a.	Time to Seek Review.....	1734
3.	Proper Appellant Before MSPB.....	1736
4.	Method, Scope of MSPB Review	1736
a.	Issue Preclusion.....	1739
b.	Collective Bargaining Contract Exclusivity.....	1740
c.	Allegation of Bias, Unfair Hearing.....	1740
d.	Enforcement of Award Reviewed by MSPB.....	1741
5.	Standard of Review.....	1741
a.	Penalty, Time-Served Suspension; Remedy	1745
b.	Procedures; Timeliness of Grievance	1752
c.	EEO Issue.....	1756
6.	Postal Service Employees.....	1757
a.	Effect of Arbitration Award on Board Appeal.....	1759

CHAPTER 6: ADVERSE ACTIONS 1765

I.	ADVERSE ACTIONS DEFINED	1765
A.	CANCELATION OF APPOINTMENT, PROMOTION.....	1765
1.	Appointment	1766
a.	Entry on Duty; Action by Appointing Authority; Reliance	1770
b.	Citizenship.....	1770
c.	Nepotism	1772
d.	Selective Service Registration.....	1772
e.	Political Influence	1774
f.	Withdrawal of Offer to Extend Term Appointment.....	1775
2.	Promotion, Pay Increase	1775
B.	TERMINATION BY ADVERSE ACTION OF APPOINTMENT SECURED BY FRAUD; OPM SUITABILITY ACTION.....	1788
C.	CONSTRUCTIVE ADVERSE ACTION	1789
1.	Jurisdictional Showing	1792
a.	Specific Allegations Control.....	1801
b.	Totality of Circumstances.....	1803
c.	Judge to Inform Appellant of Jurisdictional Requirements.....	1806
d.	Jurisdictional Analysis in Untimely Appeal	1806
e.	Collateral Attack on Settlement Agreement, Waiver of Appeal Right.....	1806
f.	Allegation of Discrimination.....	1808
2.	Overview of Constructive Adverse Action Appeals.....	1811
a.	Timing of Events	1812
3.	Involuntary Downgrading	1814

a.	Hearing.....	1814
b.	Deceit; Misrepresentation	1815
c.	Action Threatened Without Good Cause	1822
d.	Time Pressure	1823
e.	Improper Reassignment	1824
f.	Withdrawal of Request for Downgrading.....	1824
g.	Unauthentic Request for Downgrading.....	1825
h.	Discrimination; Intolerable Working Conditions.....	1825
i.	External Problems	1828
j.	Correction of Administrative Error	1829
4.	Involuntary Resignation.....	1830
a.	Hearing.....	1834
b.	Deceit; Misrepresentation	1835
c.	Action Threatened Without Good Cause	1840
d.	Time Pressure	1843
e.	Improper Reassignment	1846
f.	Withdrawal of Request to Resign.....	1846
g.	Irrevocable Resignation; VSIP.....	1849
h.	Unauthentic, Ambiguous or Conditional Resignation.....	1850
i.	Ineffective Resignation.....	1850
j.	Mental Disability.....	1851
k.	Intolerable Working Conditions	1852
l.	Whistleblowing Reprisal	1860
m.	Discriminatory Working Conditions	1862
n.	Failure to Accommodate Disability.....	1865
o.	Denial of Leave	1868
p.	External Problems	1869
q.	Probationer.....	1869
r.	Technical Error	1869
5.	Involuntary Retirement.....	1869
a.	Hearing.....	1871
b.	Deceit; Misrepresentation	1872
(i)	Correction of Benefit; Placement in Wrong Retirement System.....	1884
c.	Action Threatened Without Good Cause	1885
d.	Time Pressure	1887
e.	Involuntary Reassignment	1888
f.	Withdrawal of Request to Retire	1891
g.	Irrevocable Retirement; VSIP	1892
h.	Intolerable Working Conditions	1896
i.	Whistleblowing Reprisal	1903
j.	Discriminatory Working Conditions	1908
k.	Failure to Accommodate Disability.....	1912
l.	Discriminatory Conduct Causes Disability	1924
m.	Denial of Leave	1924
n.	Mental Disability.....	1925
o.	Agency-Initiated Retirement.....	1925
p.	Discontinued Service Retirement.....	1926
q.	Mandatory Retirement	1928
r.	Employing Agency as Party to Appeal Against OPM.....	1928
6.	Constructive Demotion Through Reassignment; <i>Russell</i>	1928
a.	Planned Management Action.....	1932
b.	Position Must Be Upgraded	1934
c.	Identity of Duties.....	1937
d.	Qualification for Higher-Graded Position	1937
e.	Jurisdictional Analysis; Hearing.....	1938
f.	Evidence of Classification Error	1938
g.	EEO Allegation.....	1938
h.	Timeliness of Appeal	1938
7.	Involuntary Transfer.....	1939
D.	ENFORCED LEAVE; CONSTRUCTIVE SUSPENSION.....	1940
1.	Jurisdictional Analysis; Burden of Proof.....	1943

a.	Hearing.....	1945
b.	EEO Allegation.....	1947
c.	Effect of Receipt of OWCP Benefit.....	1947
d.	Disputed Restoration Right.....	1948
2.	Requirement for Adverse Action Procedure.....	1949
a.	Leave Status Voluntarily Assumed; Failure to Provide Medical Documentation, Perform Available Work.....	1952
b.	Process Due to Employee.....	1956
c.	Evaluation of Leave Enforced Following Notice to Employee.....	1956
d.	Disability Accommodation.....	1956
3.	Employee AWOL.....	1960
4.	Employee Blocked From Working Because of Employer's Concern About Fitness.....	1962
a.	Employee on LWOP.....	1968
5.	Light and Limited Duty; Medical Restriction.....	1968
a.	Historical Development of Light Duty Analysis.....	1973
b.	Collective Bargaining Contract.....	1978
c.	Disability Accommodation.....	1981
d.	EEO Settlement.....	1986
e.	Termination of Light Duty.....	1986
f.	Postal Service National and Other Collective Bargaining Contracts.....	1988
g.	Furlough.....	1989
6.	Work Release.....	1990
7.	Bar Order Preventing Entry to Workplace.....	1990
8.	Temporary Absence Resulting From Intolerable Working Conditions.....	1992
E.	INDEFINITE SUSPENSION.....	1995
1.	Use.....	1995
2.	Procedure; Duration.....	1999
a.	Due Process.....	2005
b.	Regulatory Error.....	2007
3.	Criminal Activity.....	2008
a.	Indictment; Filing of Information; Referral for Prosecution.....	2010
b.	Investigation Accompanied by Other Circumstances.....	2011
c.	Arrest.....	2014
4.	Nexus.....	2020
5.	Security Clearance or Other Investigation.....	2023
a.	Due Process: Separation of Officials Denying Access and Deciding Suspension; Change in Basis for Clearance Suspension.....	2029
b.	Indefinite Prolongation of Suspension.....	2044
c.	Alternatives to Suspension.....	2046
d.	Discrimination; Accommodation for Disability; Medical Issues; Whistleblowing.....	2052
6.	Inquiry Into Other Issues.....	2053
7.	Remedy.....	2058
a.	Action Following Termination of Criminal Proceeding.....	2063
II.	SERVICE EFFICIENCY.....	2063
A.	BURDEN OF PROOF.....	2065
1.	Charges.....	2066
2.	Affirmative Defenses.....	2066
3.	Preponderance of Evidence.....	2067
a.	Uniformity of Standard.....	2068
b.	Violation of Criminal Statute.....	2068
c.	Intent.....	2068
d.	Suspicion; Belief.....	2069
4.	<i>Prima Facie</i> Case.....	2069
5.	Presumption.....	2069
B.	PERSONAL FAULT.....	2070
1.	Adverse Action to Address Action Involving Another Employee.....	2070
a.	EEO Complaint.....	2070
b.	Merit Promotion Grievance.....	2070
2.	Action Directed by Arbitrator.....	2070
3.	Correction of Administrative Error.....	2071
4.	<i>Respondeat Superior</i>	2071
C.	ADVERSE ACTION RELATED TO DISABILITY.....	2073

1. Medical Standard	2074
2. Medical Impairment.....	2075
3. Agency-Initiated Retirement.....	2076
a. Assistance in Securing Counsel.....	2079
b. Prior Law: Reasonable Cause to Believe	2080
4. Evaluation of Physical Impairment	2081
a. Evidence of Recovery Between Date of Removal and MSPB Decision.....	2084
5. Effect of Removal for Inability to Work on OPM Disability Annuity Determination.....	2086
a. Rebuttable Presumption of Annuity Entitlement.....	2086
6. Effect of Grant of Disability Retirement Application on Action Based on Inability to Perform Duties	2094
7. Allegation of Disability Discrimination; Lack of Reasonable Accommodation	2096
III. SPECIAL CLASSES OF EMPLOYEES.....	2097
A. SENIOR EXECUTIVE SERVICE	2098
1. Mitigation of Disciplinary Action.....	2104
2. Performance Case	2104
a. Informal Hearing.....	2105
3. Department of Veterans Affairs.....	2106
a. 2014 Legislation	2107
B. ADMINISTRATIVE LAW JUDGES.....	2112
1. Scope of MSPB Review	2116
a. Good Cause	2116
b. Penalty Determination	2120
c. Affirmative Defenses	2121
2. Cause for Discipline	2122
a. Insubordination	2124
b. Performance.....	2125
c. Failure to Follow Performance-Related Directive	2129
d. Remarks to Litigant; Comments in Decision; Conduct of Hearing.....	2131
e. Prolonged Absence; Irregular Attendance	2133
f. Other Misconduct	2134
3. Constructive Action Against Judge: <i>Tunik</i>	2136
a. Forced Retirement.....	2144
b. Enforced Leave	2145
c. Pre- <i>Tunik</i> Decisions; Judicial Independence.....	2145
4. Furlough; RIF.....	2153
5. Settlement of Complaint.....	2156
6. Voluntary Dismissal of Complaint.....	2156

CHAPTER 7: NEXUS AND MITIGATION2157

I. CONCEPT OF NEXUS.....	2157
A. <i>MERRITT</i> AND PRESUMPTIONS OF NEXUS; OFF-DUTY CONDUCT	2157
1. General Approach Toward Proof.....	2160
a. Actual or Potential Publicity, Notoriety	2161
b. Potential for Future Harm	2162
c. Investigative Exertion	2162
B. SPECIFIC NEXUS DETERMINATIONS.....	2162
1. Arrest	2163
2. Violent Off-Duty Misconduct	2163
a. Shooting; Killing.....	2163
b. Assault; Threat.....	2165
3. Violent Conduct on Agency Premises	2166
4. Off-Duty Drug Offense	2166
a. Drug Activity Involving Agency Time or Facilities	2170
5. Off-Duty Alcohol-Related Offense	2170
a. Off-Duty Activity Involving Agency Premises	2171
6. Sexual Misconduct.....	2171
7. Fraud and Theft; Other Integrity Offenses	2183
a. Off-Duty Offense.....	2183
b. Preemployment Offense.....	2185
c. On-Duty or Job-Related Offense.....	2185
8. Gambling.....	2186

9.	Failure to Pay Debt.....	2186
10.	Grievance Meeting	2189
11.	Conduct Contrary to Agency Mission.....	2189
	a. Real Estate Activity—DHUD	2189
	b. Employee’s Tax Problem—IRS, Other Agencies; Responsibility for Errors of Others.....	2189
	c. Law Enforcement Officer; <i>Giglio</i> Impairment	2194
	d. Driver.....	2199
	e. Strike-Related Conduct	2199
12.	AWOL Removal After Criminal Conviction.....	2199
II.	MITIGATION OR AGGRAVATION OF PENALTIES.....	2199
A.	GENERAL CONSIDERATIONS	2200
	1. <i>Douglas</i> Standards; Decision to Reflect Mitigating Factors or MSPB Imposes Maximum Reasonable Penalty	2202
	a. Consideration of Mitigating Factors	2204
	b. Proposal to List Aggravating Factors; Treatment of Warnings; Due Process Considerations.....	2204
	c. Exemplary Penalty.....	2206
	d. Exaggeration of Charge	2207
	2. Articulation of Relevant Factors.....	2207
	a. By Agency; Decision Notice	2207
	b. By MSPB	2209
	3. Not All Charges Sustained; Maximum Reasonable Penalty.....	2209
	a. Remand to Agency for Redetermination of Penalty.....	2214
	4. All Charges but Not All Specifications Sustained; Partial Specification Sustained.....	2216
	5. Charge Sustained That Was Not Brought	2217
	6. Factors Not Considered Mitigating.....	2217
	a. Disability Discrimination; Impairment.....	2218
	b. Discriminatory Environment	2218
	c. Prohibited Personnel Practice.....	2218
	d. Offer of Settlement	2218
	7. When Mitigation Must Be Raised	2219
	8. Special Counsel Disciplinary Case.....	2219
	9. Impact of Mitigation by Demotion on Labor Agreement Requirement.....	2219
B.	SPECIFIC MITIGATING OR AGGRAVATING FACTORS	2220
	1. Potential for Rehabilitation.....	2220
	a. Deference to Higher Level Management Assessment.....	2220
	b. Forward-Looking Analysis.....	2221
	c. Performance Action.....	2221
	d. Notice of Rule or Policy.....	2222
	e. Temporary Condition; Stress; Alcoholism.....	2223
	f. Long Service.....	2223
	g. Intervening Good Performance; Misconduct Subsequent to Charge Leading to Adverse Action.....	2224
	h. Post-Removal Conduct or Evidence of Rehabilitation	2225
	i. Contrition or Remorse; Admission of Misconduct.....	2226
	j. Denial of Misconduct; Vigorous Defense.....	2228
	k. Repeated Misconduct; Last Chance Agreement.....	2229
	2. Psychological Problem; Illness or Treatment; Stress.....	2229
	3. Performance, Evaluations.....	2235
	4. Intent	2236
	5. Notoriety	2236
	6. Position of Trust; Fiduciary Duty; Loss of Trust.....	2236
	7. Progressive Discipline.....	2239
	8. Table of Penalties; Classification of Offense.....	2241
	9. Disparate; Comparable Penalties	2244
	a. Duty of Agency to Inquire Into Comparable Offenses and Penalties.....	2248
	b. Degree of Consistency Required	2249
	c. Substantial Similarity of Offenses; Totality of Circumstances.....	2249
	d. Proximity in Time	2254
	e. Same Work Unit; Evolving Case Law: <i>Woebcke</i> ; <i>Lewis</i>	2255
	f. Positions of Similar Levels of Trust and Responsibility.....	2263
	g. Selective Prosecution.....	2265
	h. Settlement	2265
	i. Comparable Arbitration Awards; Other MSPB Decisions.....	2268

j.	Effect of Criminal Sentence.....	2270
k.	Assertion of Discrimination	2270
l.	Post-Removal Comparability Analysis	2270
10.	Mandatory Penalty	2271
11.	Staleness of Charge	2274
12.	Agency Bad Faith, Provocation, Manipulation; Improper Pressure on Appellant; Entrapment.....	2275
13.	Condonation.....	2275
14.	Favorable Attitude of Coworker; Supervisor	2276
15.	Severity of Misconduct.....	2276
a.	Sequential Disciplinary Proposals	2276
b.	Multiplicity and Merger of Charges	2276
c.	Zero Tolerance Policy	2277
16.	Employee Job Level.....	2279
a.	Ineffectiveness as Supervisor; Demotion	2279
b.	Reassignment	2280
C.	AGENCY CONSIDERATION OF PAST DISCIPLINE	2281
1.	Notice Requirement	2283
a.	Failure to Include Past Discipline in Proposal: Due Process	2284
2.	Proof, Rebuttal of Past Discipline.....	2285
a.	Availability of Challenge to Past Discipline.....	2285
b.	Clearly Erroneous.....	2285
c.	Reprisal.....	2286
d.	Pending Challenge to Past Discipline	2287
e.	Past Discipline Reversed After Initial Decision.....	2289
f.	Discipline Imposed After the Appealed Adverse Action.....	2289
g.	Past Discipline Time-Barred	2289
h.	Dissimilar Offense.....	2290
i.	Nondisciplinary Sanction	2291
D.	JUDICIAL REVIEW OF PENALTY, ADMINISTRATIVE RECONSIDERATION	2292
1.	General Rule.....	2292
2.	Agency Table of Penalties	2292
3.	Application of Relevant <i>Douglas</i> Factors.....	2292
4.	Effect of OPM Reconsideration Request.....	2293

CHAPTER 8: SUBSTANTIVE OFFENSES.....2295

I.	STATUS.....	2295
A.	ABSENCE.....	2295
1.	Impact on Service Efficiency	2295
a.	Assigned Post of Duty; Travel Requirement.....	2297
2.	Approved and Disapproved Absence.....	2297
a.	Abuse of Leave	2299
b.	Loafing; Wasting Time.....	2299
c.	Excessive Leave, LWOP, Absences Beyond Employee's Control; Failure to Maintain a Regular Work Schedule; OWCP Coverage.....	2299
(i)	Historical Application of <i>Cook</i> and Related Decisions.....	2303
d.	Unscheduled but Approved Absence Following Failure to Follow Procedure to Request Leave	2310
e.	Disability	2313
3.	Tardiness.....	2314
4.	Leave-Requesting, Leave-Reporting Requirement.....	2314
a.	Leave Restriction Notice	2318
b.	Justification for Leave; Medical Certification Requirement.....	2319
c.	Other Certification or Documentation Requirement	2320
d.	Disability Accommodation	2320
5.	Proof of AWOL; Telework Status; Leave Request.....	2320
6.	Evidence of Illness First Submitted to MSPB	2322
a.	FMLA	2324
7.	LWOP; Other Leave Arrangement; Compensable Injury; Disability Accommodation	2324
a.	Executive Order 5396; Disabled Veteran	2328
b.	Advanced Sick Leave	2328
c.	Donated Leave.....	2328
8.	Family Leave.....	2329

a.	FMLA Request, Agency Compliance; Medical Documentation	2334
b.	Constructive Request	2342
c.	Belated Submission of Request, Documentation	2345
d.	Abuse of Family Leave	2347
9.	Worker's Compensation Issue.....	2347
a.	Determining Whether Removal Is Based on Reason Unrelated to OWCP Entitlement.....	2349
b.	Leave-Reporting Requirement	2350
c.	No Foreseeable End to Absence; Absence When Compensation Ends	2351
10.	Leave Status Pending Disability Retirement	2353
11.	Incarceration; Work-Release Program.....	2353
12.	Cancellation or Conversion of Approved Leave.....	2355
13.	Absence Caused by Fear for Safety.....	2355
14.	Military Leave.....	2355
15.	Religious Leave	2356
16.	Problem Following Reinstatement Through MSPB Order	2356
17.	Agency Abuse of Discretion	2356
a.	Ambiguous Leave Policy or Directive.....	2357
b.	Condonation of AWOL.....	2357
c.	Leave Status Caused by Agency's Wrongful Action	2357
d.	Jury Duty.....	2358
18.	Aggravating Factors	2358
a.	Prolonged AWOL	2358
b.	Frequent AWOL	2358
c.	Unreliable Attendance.....	2358
19.	Mitigating Factors	2359
a.	Short, Infrequent AWOL	2360
b.	Longer AWOL	2361
B.	REFUSAL TO ACCEPT REASSIGNMENT	2362
1.	General Rule	2363
a.	SES Employee.....	2369
2.	Inconvenience or Health Problem	2370
3.	Agency Burden of Proof; Legitimate Reason for Reassignment	2371
a.	Mobility Agreement; Condition of Employment	2374
b.	Return From Overseas Assignment	2375
4.	Misconduct Following Improper Reassignment.....	2375
5.	Application of RIF Procedures; Procedural Errors	2375
C.	FAILURE TO MAINTAIN OR OBTAIN CONDITION OF POSITION.....	2375
1.	License, Certification	2375
a.	Lawyer	2376
b.	Driver.....	2376
c.	Others	2377
d.	Medical Certification or Standard.....	2377
e.	Certification by Military Authority.....	2377
2.	Loss of Credential.....	2378
3.	Failure to Complete Training Course; Validity of Examination.....	2378
a.	Air Traffic Controller	2379
b.	Other Positions.....	2381
4.	Lack of or Loss of Minimum Qualification; Position Requirement	2383
a.	Indian Child Protection and Family Violence Prevention Act.....	2384
b.	Lautenberg Amendment.....	2387
c.	Removal From Reserve Status.....	2389
d.	Access to Agency Computer, Network	2393
5.	Security Clearance Revocation; Sensitive Position.....	2394
a.	Clearance Process.....	2394
b.	Agency Clearance Proceeding.....	2395
c.	Review of Agency Determination; <i>Egan</i> ; Constitutional Due Process.....	2399
d.	Decision to Require a Clearance; Whether Clearance Required as Employment Condition.....	2406
e.	Reassignment to Nonsensitive Position; Mitigation	2410
f.	EEO Issue; Whistleblower Reprisal; Disparate Treatment; USERRA	2412
g.	Regulatory Infraction During Revocation Process.....	2415
h.	Suspension, Removal Under 5 USC 7532.....	2421

i.	Suitability Determination, Security Clearance Distinguished	2422
j.	Sensitive Duties Not Requiring a Clearance: <i>Conyers</i>	2422
k.	Decisions Postdating <i>Conyers</i>	2443
l.	Requirement Similar to Security Clearance; Public Trust Position	2446
m.	TSA Sensitive Security Information.....	2448
n.	Retirement Issue Related to Removal for Loss of Clearance	2449
6.	Lack of Suitability for Continued Employment	2450
D.	CONFLICTS OF INTEREST; APPARENT CONFLICTS.....	2451
1.	Conflicts; Improper Business Dealings	2452
2.	Apparent Conflicts.....	2453
3.	Use of Government Office for Private Gain.....	2454
4.	Agency Internal Information.....	2455
a.	Nondisclosure Agreements	2456
5.	Transaction With Another; Gift; Bribe; Honorarium; Loan	2456
a.	Transaction With Patron, Vendor, Inmate.....	2457
b.	Transaction With Supervisor.....	2458
c.	Compensation for Government Service From Another Source.....	2458
6.	Acting as Agent or Attorney Against Government.....	2458
E.	OUTSIDE EMPLOYMENT	2458
1.	Personal Work on Government Time	2459
a.	Reporting, Approval Requirements.....	2459
b.	Employment in Violation of Agency Restriction; Outside Practice of Law	2459
F.	SPECIAL CATEGORIES OF EMPLOYEES	2459
1.	Guard, Correctional Officer, Police, Investigator, Security Official	2460
2.	Immigration Officer	2460
3.	Ship Employee.....	2461
4.	Supervisor.....	2461
G.	STRIKES.....	2461
1.	Charge of Striking	2461
2.	Basis for Removal	2462
3.	Proof of Participation	2462
4.	Refuting Participation.....	2462
5.	Fear for Personal Safety.....	2462
a.	Insufficient Threat.....	2463
b.	Duress, Coercion Established	2463
6.	Association With Strikers	2463
7.	Influence of Political Leader	2463
8.	Penalty.....	2463
9.	Other Issues.....	2464
II.	RELATIONSHIPS	2464
A.	INSUBORDINATION AND SIMILAR MISCONDUCT	2464
1.	Refusal or Failure to Perform Work.....	2465
a.	Proof of Intent.....	2466
2.	Failure to Follow Instruction.....	2467
3.	Failure to Follow Policy, Regulation.....	2468
4.	Disruptiveness; Lack of Cooperation.....	2469
5.	Recording of Conversation	2470
6.	Cumulative Insubordination	2470
7.	Dispute Over Position Responsibilities.....	2470
a.	Difficulty Following Reinstatement	2471
b.	Breach of Settlement Agreement.....	2472
8.	Insolence, Abusive Language	2472
a.	Abuse of Coworker, Subordinate	2472
b.	Abuse of Supervisor; Disrespectful or Coarse Language	2473
c.	Disagreement Over Instruction, Program	2475
9.	Misuse of Dispute Resolution Procedure.....	2475
a.	EEO Process.....	2475
b.	Congressional Communication.....	2476
c.	Grievance Proceeding.....	2476
d.	Supervisor	2478
e.	Interference With Employee Grievance.....	2478

10. Refusal to Take Fitness Examination.....	2478
a. Properly Ordered	2479
b. Improperly Ordered.....	2480
11. Failure to Provide Medical Information; Position Requirement	2483
12. Refusal to Submit to Search or Drug Test	2485
13. Problems During Investigations: Lack of Cooperation; Interference; Self-Incrimination.....	2488
14. Administrative Law Judge; Judicial Independence	2497
15. Defenses	2497
a. Inability to Comply.....	2498
b. Unclear Order; Unknown Policy	2498
c. Constitutional, Similar Challenge	2498
d. Improper Directive; Command Influence.....	2499
e. Federal Labor Law Policy; Collective Bargaining Contract	2503
f. Fear for Safety or Other Harm	2504
16. Mitigating Factors	2506
B. SEXUAL MISCONDUCT.....	2508
1. Sexual Harassment; Inappropriate Behavior	2509
a. Past Significance of Psychological Harm.....	2515
b. Charge Based on Agency Regulation or Standard of Conduct Not Tied to Title VII	2521
c. Physical Contact.....	2526
d. Offensive Remarks; Photos.....	2529
e. Consensual Conduct Affecting Workplace.....	2533
f. Homosexual Conduct	2534
2. Misconduct Toward Agency Client, Affiliate.....	2535
3. Misconduct Toward Child.....	2535
4. Penalties for Sexual Misconduct.....	2535
a. Demotion, Suspension	2535
b. Removal	2536
5. Defenses	2536
C. CONDUCT HARMING OTHERS; CRIMINAL VIOLATIONS	2537
1. Threat; Inappropriate Conduct.....	2538
a. Metz Test	2539
b. Reaction of Others to Threat	2542
c. Threat Through Another; Rumor.....	2544
d. Conditional Threat.....	2545
e. Statement to Therapist; EAP Counselor.....	2547
f. Statement to Union Representative	2550
g. Threat Against a Coworker.....	2551
h. Threat Against a Supervisor.....	2552
i. Threat Against Others	2552
j. Thought of Violence	2552
k. Inappropriate or Disruptive Statement Not Charged as Threat	2553
l. Mitigation.....	2556
2. Assault.....	2556
a. Against Coworker	2557
b. Against Supervisor	2557
c. Against Subordinate.....	2557
d. Against Others.....	2557
e. Defenses	2558
f. Mitigation; Aggravation	2559
3. Fighting; Self Defense.....	2561
4. Gambling.....	2561
5. Threat of Legal Action, Whistleblowing, or Publicity	2562
6. Lawsuit	2563
7. Discourtesy; Related Problems.....	2564
a. Profanity.....	2565
8. Improper Conduct Toward Patient, Ward, Others	2565
9. Invidious Discrimination; Offensive Remark or Conduct; Preferential Treatment; Reprisal	2567
a. Nepotism; Hiring of Friend.....	2571
D. ACTION AGAINST SUPERVISOR FOR WHISTLEBLOWING REPRISAL, OTHER PROHIBITED PRACTICES	2574
E. CRITICAL STATEMENTS	2578

1.	Constitutional Framework Applied in Federal Sector	2585
a.	Private Speech	2587
2.	Criticism of Agency or Its Personnel.....	2588
a.	Constitutional Analysis.....	2588
b.	Prohibited Personnel Practice Analysis	2590
c.	Defamation; Related Conduct	2593
d.	Congressional Communication.....	2594
e.	Political Activity and Speech	2595
f.	Concept of Loyalty	2597
3.	Internal Criticism	2597
a.	Constitutional Analysis.....	2597
b.	Managerial Disagreement.....	2598
c.	Administrative Law Judge; Judicial Independence.....	2599
d.	Criticism, False Statement About Coworker, Subordinate, Supervisor	2599
III.	INTEGRITY.....	2602
A.	FALSIFICATION AND MISREPRESENTATION	2602
1.	Proof of Fraud; Falsification	2605
a.	Neglect or Mistake	2609
b.	Perjury.....	2611
c.	Failure to Correct Report of Another.....	2612
d.	Reliance on Advice of Counsel or Other Individual	2612
e.	Cumulative False Statements.....	2613
2.	Employment Application; Security Questionnaire; Lack of Candor.....	2613
a.	Criminal Record.....	2617
b.	Education; Experience	2618
c.	Pre-Employment Medical Inquiry.....	2620
3.	Compensation Claim; Voucher.....	2622
a.	Overtime	2622
b.	Travel Voucher, Related Documentation.....	2623
c.	OWCP Claim.....	2625
d.	Unemployment Compensation	2626
e.	Disability or Leave Claim.....	2626
f.	Pay and Allowances Claim.....	2626
4.	Records of Time, Attendance, Work, and Pay; Negligence	2627
5.	Medical Certificate	2630
6.	Alteration, Failure to Preserve Documentation and Evidence.....	2630
7.	Investigative Misrepresentation; "Exculpatory No"	2630
8.	Lack of Candor.....	2632
9.	Failure to Report Misconduct	2636
10.	Disclosure Statement.....	2637
11.	Mitigating Factors	2637
a.	Time, Attendance, Travel Record.....	2639
b.	Medical Certificate	2640
c.	Employment Application.....	2640
B.	REMOVAL, MISUSE OF PROPERTY	2641
1.	Service Efficiency.....	2641
2.	Burden of Proof.....	2642
a.	Conversion	2642
b.	Unauthorized Possession or Removal of Property; Theft.....	2643
c.	Unauthorized Use.....	2644
d.	Common Possession	2644
e.	Evidence of Intent: Theft and Unauthorized Possession	2645
3.	Petty Theft.....	2646
a.	Shoplifting	2647
b.	Significance of Custody and Control of Property.....	2648
4.	Government Vehicle.....	2650
a.	Deviation From Assigned Route; Minor Personal Use; Public Service Exception	2655
b.	Nonstatutory Vehicle Misuse Charge; Impaired Driver.....	2655
5.	Unauthorized Use, Theft, or Destruction of Specific Property.....	2656
a.	Computer; Internet.....	2656
b.	Photocopier; Facsimile.....	2658

c.	Telephone.....	2658
d.	Government Credit Card.....	2658
e.	Government Services or Funds	2659
f.	Government Records; Official Information; Privacy Act.....	2660
g.	Black Marketing; Diversion of Property.....	2675
h.	Obstruction, Theft, or Mistreatment of Mail	2675
i.	Misuse of Official Mail, Delivery Service.....	2676
j.	Concealment of Theft	2676
k.	Mitigating Factors	2677
IV.	DRUGS AND ALCOHOL.....	2678
A.	DRUG AND ALCOHOL OFFENSES	2678
1.	Drug Possession, Use, Distribution	2679
a.	Possession or Use	2679
b.	Sale or Distribution	2682
c.	Safe Harbor Provision.....	2682
2.	Alcohol.....	2684
3.	Mitigation.....	2685
V.	PERFORMANCE.....	2688
A.	POOR PERFORMANCE REQUIRES CORRECTION.....	2688
1.	Performance Evaluations.....	2689
2.	Performance Standards	2689
a.	<i>Ad Hoc</i> Measure.....	2689
b.	Assigned Standard.....	2691
c.	Measurement of Work Error.....	2692
3.	Responsibility for Work Error.....	2693
4.	Medical Inability to Perform.....	2693
a.	Specific Medical or Physical Standard.....	2702
b.	Penalty Analysis.....	2702
c.	Disability Accommodation Analysis	2702
d.	Recovery From Disability	2703
5.	Mitigating Factors; Choice of Penalty	2705
a.	Comparative Performance	2706
b.	New Duties.....	2707
c.	Detail, Special Assignment.....	2708
d.	Progressive Discipline	2709
e.	Lack of Training	2709
f.	Lack of Improvement Period	2709
g.	Demotion or Reassignment.....	2710
h.	Suspension.....	2711
B.	NEGLIGENCE	2711
1.	Endangerment of Employee	2713
2.	Public Safety Risk.....	2713
3.	Destruction or Loss of Property	2714
4.	Medical Error.....	2714
5.	Mishandling or Improper Possession of Weapon.....	2714
6.	Inattention to Duty; Sleeping on Job.....	2715
7.	Failure to Follow Procedure	2715
8.	Excessive Expenditure; Waste	2715

VOLUME II

CHAPTER 9: PERFORMANCE CASES2717

I.	UNACCEPTABLE PERFORMANCE CASES	2717
A.	STATUTORY AND REGULATORY PROVISIONS: EMPLOYEE AND AGENCY COVERAGE	2719
1.	OPM Regulations.....	2720
B.	OVERVIEW OF PERFORMANCE ACTIONS	2722
1.	Merit Pay Employee.....	2723
C.	OPM APPROVAL OF APPRAISAL SYSTEM.....	2724
1.	Change in Appraisal System.....	2725
2.	Flexibility Permitted by Appraisal System; Skeletal Plans	2729

3.	Extent of OPM Review; Subordinate Organization Within Agency.....	2729
4.	Change Directed by OPM.....	2730
D.	PERFORMANCE STANDARD CRITERIA	2731
1.	Substantive Right.....	2732
2.	Scope of Review.....	2732
a.	Deference to Agency Management.....	2733
3.	Objectivity	2735
a.	Timeliness of Work	2737
b.	Draft; Intermediate Work Product	2738
c.	Personal Characteristic: Initiative, Reliability.....	2738
4.	Standards Development; Employee Involvement	2738
5.	<i>Wilson and Jackson</i> ; Negative or “Backwards” Standard.....	2739
6.	Communication of Standard.....	2742
7.	Change in Standard.....	2743
8.	Augmentation of Standard.....	2744
9.	PIP to Establish, Refine Standard.....	2746
10.	Specific Occupations.....	2749
a.	Clerical Employee, Secretary	2749
b.	Voucher Examiner	2751
c.	Inspector.....	2751
d.	Social Security Claims Representative	2751
e.	Employee Relations, Human Relations Specialist.....	2751
f.	Trade Analyst.....	2752
g.	Medical Technologist; Nurse.....	2752
h.	Scientist.....	2752
i.	Tradesperson.....	2753
j.	IT Specialist	2753
k.	Supervisory Supply Technician.....	2753
l.	Engineer.....	2753
m.	Lawyer	2754
n.	Paralegal	2754
o.	Management Analyst.....	2754
p.	Realty Specialist	2754
q.	Others	2754
11.	Numeric Standard.....	2755
12.	Multiple Components.....	2756
13.	Classification, Significance of Error	2759
14.	Relation of Standards in Element	2759
15.	Absolute Standard; <i>Guillebeau</i>	2760
a.	Law Before <i>Guillebeau</i>	2764
b.	Standard to Be Viewed as a Whole	2765
c.	Modification of Absolute Standard.....	2765
d.	Standard That Enumerates Tasks	2765
e.	Level of Performance That May Be Exceeded.....	2766
16.	Unreasonable Standard	2767
17.	Levels of Performance	2768
a.	Five-Tier Appraisal System; Marginal, Minimally Successful, or “Needs Improvement” Level of Performance.....	2768
b.	Multiple Appraisal Levels Derived From Ratings for Critical Elements	2772
c.	Two-Level; Pass/Fail Appraisal System	2774
E.	OPPORTUNITY TO IMPROVE.....	2775
1.	Prerequisite of Unacceptable Performance.....	2776
2.	Opportunity Period Requirements	2777
a.	Order, Burden of Proof.....	2778
b.	Control Over Work.....	2778
c.	Assistance to Employee.....	2778
d.	Necessity for Specific Warning.....	2780
e.	Statement of Expectations; Job Responsibilities Not Described in PIP	2780
f.	Impossibility of Improvement; Unreasonable Expectations.....	2781
g.	Harmful Error Rule.....	2782
3.	Time Allowed for Improvement.....	2783
a.	One-Year Maximum for Evaluation; Pre-PIP Performance	2785

b.	Post-PIP Performance; Roller Coaster Employees	2786
c.	PIP Extension.....	2790
d.	Performance During Detail.....	2790
F.	PROCEDURE	2791
1.	Chapter 43 and 75 Actions Distinguished.....	2791
a.	Executive Order 13,839; Executive Order 14,003	2791
2.	Department of Veterans Affairs.....	2792
3.	Failure to Use Chapter 43	2794
a.	<i>Lovshin</i> ; Combined Action Under Chapters 75 and 43	2794
b.	Conversion of Action.....	2796
4.	Limitations on Use of Chapter 43.....	2800
5.	Proposal, Decision Letter.....	2800
a.	Requirement of Concurrence.....	2800
b.	Unstated Charge.....	2800
c.	Necessity for Specific Instances.....	2800
d.	Notice Period.....	2802
G.	NECESSARY PROOF: SUBSTANTIAL EVIDENCE.....	2802
1.	Test Defined; Scope of Review	2802
2.	Weight, Quality of Substantial Evidence.....	2803
a.	Charges, Work Papers.....	2804
b.	Effect of Prior Performance Evaluation; Rating Issued in Error	2805
c.	Statistics; Sampling Method.....	2806
d.	Other Documentation; Testimony.....	2807
H.	DEFENSES.....	2808
1.	Propriety and Comparison of Performance Standards.....	2808
2.	Comparison of Employees' Performance.....	2808
3.	Adequacy of PIP; Lack of Control of Work; Agency Bad Faith	2809
4.	Training	2810
5.	Discrimination; Disparate Treatment	2812
6.	Reprisal.....	2815
7.	Collective Bargaining Contract	2816
I.	PRECLUSION OF MITIGATION	2816
II.	WITHIN-GRADE INCREASE DENIALS	2817
A.	BASIS FOR APPEAL	2819
B.	WHEN JURISDICTION ATTACHES.....	2819
1.	Effect of Collective Bargaining Contract.....	2825
C.	BURDEN OF PROOF	2825
1.	Proof of Poor Performance	2826
a.	Role of Performance Standards.....	2826
2.	Substantial Evidence Controls.....	2826
a.	What Constitutes Evidence.....	2827
D.	DEFENSES.....	2827
1.	Error in ALOC Procedure	2827
a.	Linkage of ALOC and Appraisal System	2827
b.	Waiting Period	2829
c.	Lack of ALOC Determination.....	2829
d.	Vague ALOC Determination	2829
2.	Reconsideration Errors.....	2829
a.	Employee Denied Information	2830
b.	Reconsideration Summary Lacking	2830
c.	Reconsideration Decision Level	2830
d.	Late Reconsideration Decision	2830
3.	Circumstances of Employee	2830
a.	Unfair Work Burden.....	2830
b.	Illness or Disability	2830
c.	Comparative Work Production	2830
d.	Lack of Training	2831

CHAPTER 10: REDUCTIONS IN FORCE.....2833

I.	RIF PROCESS	2833
A.	NATURE OF RIF	2833

1.	Statutory Provisions	2834
2.	OPM Regulations, Guidance.....	2835
a.	Validity of RIF Statute, Regulations	2837
3.	Furlough	2837
a.	Exemptions.....	2849
b.	Emergency Furlough.....	2851
c.	Part-Time, Light Duty Status; Intermittent Appointment; Work Schedule Adjustment.....	2851
d.	Discovery in Furlough Appeal.....	2852
B.	ACTIONS APPEALABLE AS RIF; MSPB JURISDICTION	2854
1.	Regulatory Structure.....	2854
2.	Jurisdictional Effect of Collective Bargaining Contract	2855
3.	Types of Appointees.....	2855
a.	Temporary	2855
b.	Probationer.....	2856
c.	Demonstration Project	2856
d.	Postal Service Non-Preference Eligible	2859
e.	Part-Time.....	2860
f.	Senior Executive Service	2860
g.	Agencies With Independent Statutory Personnel Authority	2863
4.	Possible RIF	2864
5.	Action to Avoid RIF	2864
a.	Transfer to Another Agency.....	2865
b.	Resignation.....	2865
c.	Retirement	2865
d.	Detail.....	2865
e.	Reassignment Without Regard to RIF	2866
(i)	Representative Rate	2867
f.	Reassignment During or Following RIF	2868
g.	Reassignment With Pay Reduction in Anticipation of RIF.....	2869
(i)	Postal Reorganizations: 1990s.....	2869
(ii)	Postal Reorganizations: 2000 Onward.....	2877
(iii)	Other Agencies	2882
6.	Grade and Pay Retention; Pay Rate Change; Demotion.....	2885
7.	Classification Issue	2885
a.	Erosion of Duties.....	2887
b.	Intentional Changes in Duties	2889
8.	Transfer of Function.....	2889
a.	Identification of Positions for Transfer	2891
b.	Employee Who Declines to Move	2894
C.	COMPETITIVE AREA.....	2894
1.	Defined	2894
2.	Criteria.....	2895
3.	Assignment Across Competitive Area	2895
4.	Challenge to Competitive Area.....	2895
a.	Burden of Proof	2895
b.	Organizational Structure; One-Person RIF.....	2895
c.	Geographical Structure; Local Commuting Area	2898
D.	COMPETITIVE LEVEL	2899
1.	Defined	2899
2.	Challenge to Competitive Level.....	2901
a.	Primacy of Position Description	2902
b.	Testimony Concerning Duties.....	2904
c.	Loss of Productivity; Undue Interruption	2905
d.	Collective Bargaining Contract.....	2906
e.	Challenge to Performance Appraisal.....	2907
3.	Particular Groups of Employees.....	2908
a.	Developmental/Trainee	2908
b.	Temporary	2909
c.	Part-Time.....	2909
d.	VA Health Care Professional.....	2909
e.	Bureau of Indian Affairs; Indian Health Service	2912

4.	Scope of MSPB Review	2912
a.	Impact of Error.....	2912
b.	Right to Hearing.....	2913
c.	Substantive Review.....	2913
II.	ASSIGNMENT AND RELATED RIGHTS	2913
A.	REGULATORY AND OPERATIONAL BASIS.....	2914
1.	Veteran, Other Preferences.....	2916
2.	Appointment Qualifying for Assignment Right	2918
a.	Excepted Service.....	2918
b.	Detail	2918
c.	Intergovernmental Personnel Act	2918
d.	Part-Time/Full-Time.....	2918
3.	Position Subject to Displacement.....	2918
a.	Supervisory.....	2918
b.	Temporary.....	2918
4.	Filling of Vacancies.....	2918
5.	Assessment of Qualifications	2921
a.	Updating Qualifications	2924
b.	Qualifications of Displacing Employee.....	2924
c.	Merit Promotion Issue.....	2924
d.	Undue Interruption.....	2925
6.	Representative Rate	2926
7.	Amendment of RIF Notice; Change in Position Offer.....	2927
B.	BUMPING.....	2928
C.	RETREAT	2930
1.	Prior Rule	2931
2.	Method of Analysis	2931
3.	Burden of Proof.....	2933
D.	REEMPLOYMENT RIGHTS	2933
1.	Reemployment Priority List Right Before RIF Effective Date	2945
2.	Remedy in Reemployment Priority List Appeal	2947
3.	Transitional Assistance	2947
III.	RIF CHALLENGES.....	2948
A.	BURDEN OF PROOF.....	2948
1.	Agency Responsibility	2948
2.	Agency's <i>Prima Facie</i> Case.....	2949
3.	Qualifications; Assignment Right	2949
4.	Classification Dispute	2949
B.	<i>BONA FIDE</i> RIF: <i>LOSURE</i>	2950
1.	Substantive Rights, Harmful Error	2951
2.	RIF as Adverse Action.....	2953
3.	Challenge to Reorganization	2957
a.	Reorganization Defined; Single Position RIF	2957
b.	Managerial Discretion.....	2957
c.	Funding Decision.....	2958
d.	Redistribution of Duties.....	2960
e.	Planning for Future Events.....	2960
f.	Comparative Qualifications as a Factor in Selection of Positions for RIF.....	2961
g.	Contribution to Agency Mission; Funding of Individual Position.....	2961
h.	Contracting Out Challenge.....	2962
i.	Sham, Paperwork Reorganization: Old, New Position Identical; Delayed Reorganization	2962
j.	Merit Promotion, Hiring, Placement During RIF.....	2965
k.	Events Preceding, Subsequent to RIF.....	2965
C.	DISCRIMINATION DEFENSES	2966
1.	Age	2971
2.	Religion.....	2972
D.	PROCEDURAL ISSUES.....	2972
1.	Internal Procedures	2972
2.	Timing of Job Offer; Timing of Release of Employees.....	2972
3.	Correction of Retention Standing Error	2972
4.	Adequacy of RIF Notice.....	2973

CHAPTER 11: HARMFUL ERROR.....2975

I.	STATUTORY STANDARD	2975
A.	HARMFUL ERROR DEFINED.....	2975
1.	<i>Parker</i>	2976
2.	Might Have/Would Have Analysis.....	2977
B.	HARMFUL ERROR APPLIED	2978
1.	Mixing Harmful Error and Other Doctrines.....	2978
a.	Mitigation of Penalty.....	2978
b.	Prohibited Personnel Practice.....	2978
2.	Statutory, Regulatory Violation; Action Not in Accordance With Law	2978
a.	Unfair Labor Practice	2980
b.	Privacy Act; Disclosure of Confidential Information	2982
c.	Constitution.....	2983
d.	Invalid Regulation	2983
3.	Collective Bargaining Contract Violation.....	2984
a.	Disputed Coverage	2986
b.	Impact of Arbitration Award.....	2986
c.	Employment Contract	2987
4.	Problem With Representation	2987
a.	Cautionary Notes to Counsel	2987
5.	Treatment of Affirmative Defense if Action Is Set Aside as Erroneous.....	2988
II.	ERROR IN PRELIMINARY PROCEDURES.....	2988
A.	AGENCY INVESTIGATION	2988
1.	Due Process	2989
2.	Right to Counsel; Union Representative.....	2989
3.	Entrapment	2991
4.	Agency Predecisional Hearing	2992
5.	Security Clearance Investigation	2992
B.	STALE CHARGES; LACHES	2993
1.	General Rule	2993
2.	Agency Regulation; Collective Bargaining Contract	2995
3.	Performance Case	2995
C.	ESTOPPEL; DOUBLE JEOPARDY	2995
1.	Estoppel.....	2995
2.	Double Jeopardy	2996
a.	Reinitiation of a Proposal After an Adverse Action Is Canceled.....	3003
b.	Action Initiated After Earlier Action Invalidated for Procedural Reason.....	3004
c.	Consecutive Adverse Actions.....	3005
d.	Action Following Acquittal	3005
III.	ERRORS IN PROPOSAL NOTICE AND REPLY PROCESS.....	3005
A.	BASIC RIGHTS	3006
1.	Predecision Proposal Not Mandated in Some Cases When Due Process Is Provided Following Decision	3008
2.	Right to Counsel	3011
B.	PROPOSAL NOTICE.....	3011
1.	Purpose, Sufficiency of Notice; Due Process	3011
a.	Supporting Evidence.....	3013
b.	Technical Deficiencies.....	3014
c.	Failure to Provide Notice of Appeal or Statutory Right.....	3014
d.	Error in Date.....	3014
e.	Other Minor Error	3015
f.	Assessing Sufficiency of Charge.....	3016
2.	Specific Charge; Only Conduct Described	3020
a.	Conduct Postdating Proposal	3025
b.	Amendment	3025
3.	Framing of Charge	3025
a.	General Charge; Charge Label; Detailed Narrative; <i>Otero</i> and <i>Cross</i>	3025
b.	Variation Between Stated Charge and Supporting Narrative or Specification; <i>Nazelrod</i> and <i>Lachance</i>	3029
c.	Splitting of Charge.....	3035
d.	Independent Elements of Single Charge.....	3037
e.	Multiple Specifications Supporting a Single Charge.....	3041
f.	Lesser Included Offense	3044

4.	Past Discipline; Performance Record; Aggravating Factors	3044
5.	Citation of Standards of Conduct.....	3044
6.	Charge Tied to Penalty Table Classification	3045
7.	Criminal Charge	3045
8.	Mixing Chapters 43 and 75.....	3046
9.	Cumulative Charges; Merger of Charges.....	3046
10.	Charge of Unbecoming or Improper Conduct.....	3048
C.	INADEQUATE REPLY AND NOTICE PERIOD	3050
1.	Calculation.....	3050
2.	Not Less Than Seven Days for Reply.....	3050
3.	30-Day Advance Notice of Action	3053
4.	Service of Notice.....	3054
D.	SHORTENED NOTICE PERIOD; CRIME PROVISION	3056
1.	Procedure to Invoke Shortened Notice.....	3057
2.	Reasonable Belief of Crime.....	3058
a.	Arrest, Warrant.....	3060
b.	Conduct Caused by Mental Impairment.....	3060
3.	Emergency Suspension for Reason Other Than Reasonable Belief of Crime	3060
4.	Indefinite Suspension.....	3061
E.	FAILURE TO PROVIDE EVIDENCE FILE, OTHER INFORMATION.....	3061
1.	Loss or Destruction of Evidence	3064
F.	ORAL AND WRITTEN REPLIES.....	3064
1.	Proof of Harm; Failure to Consider a Reply; Due Process.....	3066
a.	Investigation of Information Provided by the Employee.....	3071
b.	Criminal Proceeding Pending	3072
2.	Waiver of Reply Right.....	3072
a.	Extension Request.....	3073
3.	Decisionmaker, Reply Officer	3076
4.	Right to Confrontation.....	3076
5.	Right to Information.....	3077
6.	Inadequate Representation.....	3077
G.	AGENCY DECISIONAL PROCEDURES; <i>EX PARTE</i> COMMUNICATIONS.....	3077
1.	Early Law From Courts.....	3077
2.	<i>Sullivan</i> ; Regulatory Prohibitions; Adverse External Influences	3080
3.	<i>Stone</i> ; Current, Broadened Due Process Test.....	3083
a.	Reinitiation of Action Following Due Process Reversal	3089
4.	Early Law From MSPB.....	3089
5.	Deciding Official Consults Witness, Advisor; Information Not Disclosed to Employee	3092
a.	Information From Witness.....	3092
b.	Impact of 5 USC 2302(b)(2).....	3094
c.	Report, Investigation.....	3094
d.	Advisor.....	3094
e.	Past Discipline as Rebuttal to Mitigation	3094
f.	Multiple Charges.....	3095
6.	Proposing and Deciding Official Confer; Same Proposing and Deciding Official.....	3096
7.	Information Pertaining to Aggravation or Mitigation of Penalty; <i>Ward</i>	3097
a.	Potential Publicity, Notoriety, Other Harm.....	3116
b.	Information or Documents in the Evidence File Not Referenced in the Proposal	3119
c.	Information Provided to the Deciding Official Before the Reply Process Begins	3120
d.	Evaluation of Information Presented During Reply	3121
e.	Penalty Table, Standards of Conduct.....	3121
f.	Performance Cases.....	3124
g.	Harmful Error Analysis Before <i>Ward</i>	3126
8.	Predisposition to Take Adverse Action; Offer to Permit Resignation; Uninformed Deciding Official.....	3127
a.	Biased Proposing Official.....	3131
b.	Malicious Initiation of Action	3132
9.	Deciding Official Who Is Biased or Whose Decision Is Directed	3132
a.	Lack of Discretion	3134
10.	Involvement of OSC.....	3134
11.	Changes in Proposing, Deciding Official	3134
12.	Lack of Authority	3138

a. Deciding Official	3138
b. Proposing Official	3139
13. Pending Retirement Application	3140
14. Specificity of Decision Letter	3140
a. No Decision Letter	3140
b. Retroactive Decision Letter	3140
c. Notice of Appeal Rights	3140
15. Delayed Decision	3141

CHAPTER 12: DISCRIMINATION3143

I. DISCRIMINATION ISSUES	3143
A. PROCEDURES IN MIXED CASES	3143
1. Multiple Agency Review Processes	3145
2. Multiple Filing Options; Pleading Requirements; Timing of MSPB Appeal	3147
a. Withdrawal or Abandonment of EEO Allegation	3148
b. Authority of Judge to Strike Frivolous EEO Allegation; Summary Judgment	3148
3. Jurisdictional Problems With EEO Complaints	3151
a. Filing Dates	3152
b. Timeliness of EEO Complaint	3153
c. EEO Class Action	3156
d. EEO Complaint Withdrawn	3158
e. What Constitutes a Complaint	3158
f. Coextensive Issues; Scope of Complaint	3159
g. Premature Appeal	3160
4. Duty to Resolve Issues and Inform Appellant of Elements of Proof	3160
5. Jurisdiction Over Appealable Action; Constructive Adverse Action	3161
a. Probationer	3163
b. Restoration Appeal Involving Employee Partially Recovered From Compensable Injury	3163
6. Election of Remedies	3163
a. Election Through Collective Bargaining Contract Grievance	3163
b. Election Between EEO and Direct MSPB Appeal; Treatment of EEO Complaint	3164
c. Effect of Subject Matter of Preexisting Complaint on Subsequent Appeal; Complaint Involving Proposed Action	3166
7. MSPB Remand; EEOC Remand	3167
8. Strategic Considerations	3170
B. BURDEN OF PROOF	3170
1. <i>Prima Facie</i> Case	3170
2. Analysis Following the <i>Prima Facie</i> Case	3174
a. Analysis of Motivation, Pretext	3176
b. Mixed Motives; Proof That Action Would Have Been Taken Without Discriminatory Motive	3178
c. Element of Intent; Employer Error	3185
d. Significance of Agency's Proof of Charges	3186
e. Significance of Agency's Failure to Prove Charge	3187
f. Comparable Employees; Disparate Treatment	3188
C. EVIDENCE	3195
1. Direct Evidence; Evidence Considered as a Whole; Comparators; Taint of Agency Official; Cat's Paw	3195
2. Circumstantial Evidence; Pretext; Presumption	3199
3. Disparate Impact	3201
4. Statistics	3202
5. Supervisory Practices; Remarks	3203
D. FORMS OF DISCRIMINATION	3204
1. Race	3204
2. Age	3205
3. Religion	3210
4. Marital Status	3212
5. Pregnancy	3212
6. Sex; Sexual Orientation; Equal Pay Act	3212
7. Retirement Cases: Application by OPM of Statutory Requirements	3212
E. REPRISAL	3213
1. Convincing Mosaic; Evidence Considered as a Whole; Comparators	3224
2. Collateral Personnel Action of Evidentiary Weight in an EEO Affirmative Defense	3228

3.	Taint of Reprisal by Lower Level Official; Cat's Paw	3228
II.	REHABILITATION ACT: DISABLING CONDITIONS	3230
A.	REGULATORY STRUCTURE.....	3231
B.	PRIMA FACIE CASE; ACCOMMODATION REQUIREMENTS	3235
1.	Individual Regarded or Perceived as Disabled	3238
2.	Individual Associated With Disabled Person	3244
3.	Substantial Limitation of Major Life Activity	3245
a.	Life Activity of Working	3247
4.	Order and Burden of Proof.....	3251
a.	Disparate Treatment	3259
b.	Mixed Motive Analysis	3260
5.	Causal Connection.....	3263
6.	Transitory or Temporary Disability	3265
a.	Corrected or Mitigated Condition	3267
7.	Limitation on General Employability	3267
a.	Allergy.....	3269
b.	Stress Disorder.....	3271
c.	Other Mental Disability; Proof of Disability.....	3276
8.	Conditions Not Protected by Rehabilitation Act	3277
a.	Gambling Compulsion	3277
b.	Sexual Disorder	3277
c.	Pregnancy	3278
9.	Qualified Disabled Employee.....	3278
a.	Dangerousness; Risk Assessment; Direct Threat	3280
b.	Lack of Medical Release.....	3285
10.	Knowledge of Disability.....	3285
a.	When Disability Claim or Defense Must Be Raised.....	3286
11.	Suggesting Nonapparent Accommodation; Duty of Reasonable Inquiry	3288
a.	Interactive Process	3290
C.	ACCOMMODATION THROUGH JOB RESTRUCTURING, ASSISTANCE	3293
1.	Light Duty and Job Modification.....	3293
a.	Lifting Requirements.....	3297
b.	Postal Service Collective Bargaining Contracts.....	3299
c.	Inappropriate Job Modification; Increased Job Burden	3300
2.	Provision of, Modification to, Job Equipment.....	3300
3.	Alteration of Work Schedule, Worksite; Telework	3303
4.	Alteration of Training Requirement.....	3313
D.	ACCOMMODATION THROUGH REASSIGNMENT	3314
1.	<i>Ignacio</i>	3316
2.	Evaluation of Reassignment Effort.....	3318
a.	Reassignments Across Organizational Lines	3324
3.	Collective Bargaining Contract	3330
4.	Agency Regulation	3330
5.	Restoration From Compensable Injury	3331
6.	Demotion; Promotion.....	3331
E.	ACCOMMODATION THROUGH MEANS OTHER THAN JOB MODIFICATION OR REASSIGNMENT.....	3333
1.	Modification of Agency Policy, Facility	3333
2.	Job Training; Change in Supervision.....	3333
3.	Referral for Counseling.....	3336
F.	AGENCY DEFENSES	3337
1.	Disqualifying Misconduct	3337
2.	Undue Hardship.....	3337
a.	Unreasonable Accommodation	3340
b.	Restrictions in Collective Bargaining Contract	3342
3.	Lack of Qualification for Position.....	3344
a.	Failure to Provide Evidence of Fitness for Position With Medical Standard	3344
4.	Receipt of Disability Annuity.....	3345
5.	Rebuttal	3346
6.	Restriction on Remedy	3346
G.	ALCOHOLISM AND SUBSTANCE ABUSE.....	3346
1.	Necessity for Accommodation: <i>Ruzek</i>	3348

a. Suitability.....	3349
b. Postal Service Employee	3350
2. Notice of Disability.....	3350
a. Agency Request for Information.....	3351
3. Proof of Disease	3351
4. Causal Connection: Misconduct Caused by Disease.....	3352
a. Alcohol or Drug Use on the Job	3356
b. Revocation of Driver's License	3356
c. Possession of Drugs.....	3357
d. Misappropriation or Theft of Drugs.....	3357
e. Misappropriation of Funds.....	3357
5. Qualified Disabled Employee; <i>Hougens</i> and Disqualifying Conduct.....	3358
a. Current Substance Abuser	3361
b. Disqualifying Misconduct: Removal Appropriate.....	3363
c. Less Serious Conduct: Concurrent Rehabilitation, Discipline.....	3368
6. Firm Choice, Last Chance Agreement.....	3370
a. Requirement of Collective Bargaining Contract, Agency Regulation	3373
b. Failed Rehabilitation Attempt.....	3374
7. Undue Hardship.....	3377
III. AVENUES OF FURTHER REVIEW OF EEO DEFENSES	3378
A. EEOC.....	3378
B. SPECIAL PANEL.....	3379
C. COURT.....	3386
1. Scope of District Court Review.....	3389
a. Effect of District Court Review	3390
b. Time for District Court Review; Tolling or Estoppel; Exhaustion of Remedies.....	3393
2. Effect of Waiver of EEO Claim.....	3396

CHAPTER 13: PROHIBITED PERSONNEL PRACTICES3397

I. OVERVIEW.....	3397
A. SIGNIFICANCE OF DISCOVERY.....	3399
II. TYPES OF PROHIBITED PERSONNEL PRACTICES	3400
A. WHISTLEBLOWING REPRISAL.....	3402
1. Whistleblower Protection Enhancement Act of 2012; Retroactivity	3403
2. Statutory Definitions Control.....	3405
a. "Gross" Waste or Mismanagement	3406
b. Violation of Law, Rule, or Regulation.....	3414
c. Abuse of Authority.....	3422
d. Threat to Public Health and Safety.....	3426
e. Disclosure of Censorship Related to Research, Analysis, or Technical Information.....	3453
3. Dispute Over Form of Whistleblowing	3453
a. Disclosure of Potential Harm or Wrongdoing	3453
b. Complaint to Wrongdoer.....	3454
c. Disclosure to Someone Who Cannot Directly Remedy the Problem.....	3457
d. Minor Personal Grievance	3459
e. Internal, Policy Disagreement.....	3459
f. Disclosure Made During Normal Course of Duties.....	3465
g. Required Report Under Office of Government Ethics Rules, E.O. 12675	3477
h. Communication Indirectly Involving the Government; Private Wrongdoing	3477
i. Communication to News Media; Congress.....	3480
j. Disclosure in Court.....	3481
k. Complaint to the Inspector General	3481
l. Disclosure of Information Already Known or Public.....	3482
m. Sequential Allegations.....	3485
4. Whistleblowing No Shield Against Misconduct.....	3485
a. Abusive Whistleblower; Robust Language; Chain of Command.....	3486
b. Threatened Disclosure.....	3489
5. Personnel Treated as Whistleblowers.....	3491
a. Individual Perceived as Whistleblower	3491
b. Whistleblower's Aide, Associate.....	3495
c. Individual Serving as Conduit of Information; Internal Disclosure	3496

d. Former Employee	3497
e. Contractor Employee	3497
6. Protected Disclosure: Reasonableness	3498
a. "Reasonably Believes"; False Statement	3498
b. Motivation of Whistleblower	3504
c. Information Developed After Disclosure	3505
d. Belief Shared by Other Employees; Disinterested Observer	3505
e. Response of Agency to Disclosure	3506
f. Expertise of Whistleblower	3506
g. Specificity of Disclosure	3508
h. Presumed Agency Good Faith; "Irrefragable Proof" Standard	3510
7. Unprotected Disclosure; Dispute Concerning Coverage of Disclosure Under 2302(b)(8) or 2302(b)(9)	3513
a. Disclosure Prohibited by Law; Regulation Incorporating Statutory Provision; E.O. 13,526	3516
b. EEO Complaint	3526
c. Other Appeals, Charges, FECA Claims, Grievances, and Complaints	3530
8. Disclosures in Multiple Forums	3534
B. PROHIBITED PRACTICES OTHER THAN WHISTLEBLOWING REPRISAL	3536
1. Discrimination Proscribed by Civil Rights Laws; 5 USC 2302(b)(1)(A)	3537
a. Sexual Harassment	3537
2. Improper Personnel Recommendation; 5 USC 2302(b)(2)	3537
3. Obstruction of Competition; 5 USC 2302(b)(4)	3538
4. Influencing Employment Decision; 5 USC 2302(b)(5)	3538
5. Improper Preference, Promotion; 5 USC 2302(b)(6)	3539
6. 5 USC 2302(b)(9); Appeal Right; Grievance, Complaint; OSC and IG Involvement; Refusal to Obey Unlawful Order	3541
a. WPEA: Exercise of, Testimony or Assistance in, Appeal, Complaint, or Grievance	3547
7. Discrimination Unrelated to Job Performance; 5 USC 2302(b)(10)	3549
8. Discrimination Against Veteran; 5 USC 2302(b)(11)	3551
9. Violation of Merit System Principle; 5 USC 2302(b)(12)	3551
a. Failure to Provide Effective Training; 5 USC 2301(b)(7); Training for Government Personnel on Whistleblowing Protections	3554
10. Nondisclosure Agreement; Gag Order; 5 USC 2302(b)(13)	3555
11. Refusal to Violate Law, Regulation, or Rule	3556
III. INDIVIDUAL RIGHT OF ACTION	3558
A. STATUTORY AND REGULATORY REQUIREMENTS AND LIMITATIONS	3559
1. Filing a Complaint With OSC	3566
a. OSC Deferral Policy on EEO Charge	3567
b. Proceeding to Compel OSC Action	3568
c. IRA Appeal Against OSC	3571
2. Time for Initiating IRA Appeal With OSC and MSPB	3571
a. Laches in Filing OSC Complaint	3572
b. Case That May Be Either Initiated With OSC or Appealed Directly to MSPB	3574
c. Jurisdiction Limitations of an IRA Rather Than an Adverse Action Appeal	3574
d. Premature Appeal Following Resort to OSC	3575
e. Belated Receipt of OSC Closeout Notice	3575
f. Calculation of Appeal Period; Late IRA Appeal; Waiver	3577
g. Equitable Tolling	3578
h. OSC Reopening	3582
B. JURISDICTIONAL ISSUE	3584
1. <i>Rusin</i> Model: Nonfrivolous Allegations Establish Jurisdiction; <i>Hessami</i>	3585
a. Nonfrivolous Allegations Based on the Written Record	3591
2. Jurisdictional Analysis Before <i>Rusin</i>	3593
3. Hearing	3594
4. Variations in Order of Proof; Necessity to Develop Evidence, Consider Entire Record; <i>Whitmore</i>	3594
5. Exhaustion of Remedies; Amendment of Appeal	3604
6. Election and Preclusion of Remedies	3607
a. Grievance or MSPB Appeal	3609
b. IRA Appeal, Direct Appeal of Otherwise Appealable Action Distinguished; Issue Preclusion	3612
c. EEO Complaint	3616
7. Collateral Jurisdiction Over EEO Claim Presented in IRA Appeal Not Involving Otherwise Appealable Action	3616
8. Limited Jurisdiction Over Merits Determination, Collateral Prohibited Personnel Practice, Constitutional, Discrimination, and Harmful Error Claims in Otherwise Appealable Action Initiated Through OSC as IRA	3617

9.	Status of Particular Agencies and Employees.....	3619
a.	Postal Service	3619
b.	Department of Veterans Affairs Title 38 Employee	3621
c.	National Guard Technician	3625
d.	Federal Bureau of Investigation	3628
e.	Judicial Branch.....	3631
f.	Federal Reserve Board	3631
g.	NAF Employee	3632
h.	Independent Counsel	3632
i.	Office of Special Counsel	3632
j.	Federal Aviation Administration	3632
k.	Transportation Security Agency	3633
l.	Intelligence, Counterintelligence Agencies; Foreign National.....	3636
m.	Government Corporation	3639
n.	Other Entities	3639
o.	Experts and Consultants; Personnel Appointed Outside Title 5.....	3640
p.	Lawyer	3642
q.	Former Employee	3642
r.	Inspector General Office	3643
s.	Employee of Agency Other Than the Agency Charged With Reprisal	3643
t.	Private Sector Employee; Applicant for Employment	3644
u.	Uniformed Service	3645
v.	Administrator of Federal Benefits.....	3647
w.	Schedule F Employees; Policy Positions.....	3647
10.	Retroactivity of 1989 Whistleblower Amendments; Continuing Violation	3648
C.	PLEADING REQUIREMENTS.....	3648
1.	Duty of Judge to Inform Appellant of Jurisdictional Requirements.....	3648
2.	Specificity of Underlying Disclosure; Labeling of Disclosure Not Required	3651
3.	Pleading to OSC.....	3654
a.	Classification or Labeling of Disclosure Not Required	3662
b.	Curative Filing With OSC	3666
c.	Proof of Scope of Complaint Made to OSC; Post-Complaint Submission.....	3666
d.	Information First Submitted With PFR	3670
e.	Serial Complaints to OSC.....	3670
f.	OSC Closeout Letter.....	3671
4.	Pleading to MSPB.....	3671
D.	COVERED AND EXCLUDED PERSONNEL ACTIONS.....	3673
1.	Threatened Personnel Action	3673
a.	Proposed Action; Dispute Arising During Compliance.....	3676
2.	Failure to Take Personnel Action.....	3677
3.	Performance Appraisal; Evaluation of Qualifications or Abilities.....	3679
4.	Awards and Acts Preliminary to Awards.....	3680
5.	Denial of Within-Grade Increase	3681
6.	Promotion, Appointment.....	3681
7.	Decision Concerning Leave; Change in Duties; Idling; Overtime; Harassment	3682
a.	Degree of Significance of Change of Duties, Responsibilities, or Working Conditions.....	3683
b.	Hostile Environment.....	3684
8.	Reprimand; Admonition; Counseling; Performance Warning; Performance Improvement Period	3685
9.	Suspension	3688
10.	Probationary Termination	3688
11.	Failure to Renew Appointment; Failure to Reinstatement.....	3689
12.	Reassignment, Transfer, and Detail	3689
13.	Fitness Examination; Investigation	3691
14.	Security Clearance Suspension, Revocation; Other Certification	3693
15.	Training	3698
16.	Defamatory Statement; Tort; Arrest; False Allegation; Blacklisting	3698
17.	Reduction in Force.....	3700
18.	Classification Issue	3701
19.	Constructive Adverse Action	3701
20.	Action Affecting Private Sector Employment Opportunity.....	3705
21.	Other Action.....	3705

E.	REMEDIES	3706
1.	Transfer	3708
IV.	CASES BROUGHT BY OSC	3708
A.	STATUTORY BASES	3709
1.	Corrective Action Petition; Stay	3709
2.	Disciplinary Complaint	3711
3.	Board Authority in Disciplinary, Corrective Action Case	3711
4.	Judicial or Administrative Finding of Discrimination by Federal Employee; 5 USC 1216(a)(5)	3711
5.	Hatch Act; FOIA Violation	3711
B.	SPECIAL COUNSEL OPERATIONS	3715
1.	Organizational Structure	3715
2.	Disclosure Unit	3715
3.	MSPB Referral to OSC	3716
C.	RIGHT TO COUNSEL IN OSC INVESTIGATION	3716
D.	OSC DISCIPLINARY ACTION	3717
1.	Limits on Prosecutorial Authority	3718
a.	Employee Who Takes or Recommends Personnel Action	3719
b.	Prior Resort to Agency-Employer for Disciplinary Action	3719
2.	OSC Complaint	3720
3.	Rights of Employee, Respondent	3721
4.	OSC Subpoena; Discovery Procedures	3721
5.	Hearing by Administrative Law Judge; MSPB Review	3722
6.	Disciplinary Penalty	3722
E.	OSC CORRECTIVE ACTION PETITION	3727
1.	Regulatory Provisions	3729
F.	LITIGATION WITH OSC	3730
1.	Purpose of MSPB Hearing	3730
a.	Obtaining Records	3730
b.	Evidence From Other Investigation	3730
c.	Dismissal of OSC Action	3730
2.	Settlement	3730
3.	Judicial Review in OSC and IRA Cases	3731
a.	Stay Pending Judicial Review	3731
V.	BURDEN OF PROOF IN REPRISAL CASE	3731
A.	ANALYSIS UNDER WHISTLEBLOWER PROTECTION ACT	3732
1.	Analysis Required by Judge	3732
2.	Statutory, Regulatory Provisions	3732
3.	Contributing Factor Analysis	3733
a.	Order of Proof	3734
b.	<i>Per Se</i> Timing/Knowledge Test	3736
c.	Evidence Other Than Timing	3738
d.	Knowledge by Agency Manager of Appellant's Whistleblowing; Constructive Knowledge; Cat's Paw	3744
e.	Disclosure After the Personnel Action	3751
f.	Settlement Offer	3753
g.	Reprisal Without Unlawful Motivation: Reprisal by Investigation—the Atypical Case; <i>Marano</i>	3753
h.	Charge Arising Out of Conduct During Retaliatory Investigation	3761
i.	OSC Corrective Action Case	3764
j.	Otherwise Appealable Action	3765
4.	Agency's Clear and Convincing Evidence; <i>Carr</i> Factors	3765
a.	Constructive Adverse Action	3784
5.	Evidence of Reprisal	3784
a.	Strength of Agency's Case; Probationer; Term Employee	3786
b.	Strength of Motive to Retaliate	3790
c.	Comparison Employees	3791
d.	Preliminary Reprisal Leading to Personnel Action	3794
e.	Shifting or Belated Explanations for Agency Action	3794
B.	ANALYSIS FOR PROHIBITED PRACTICES NOT COVERED BY WPA, WPEA; VIOLATIONS OF 5 USC 2302(B)(9)	3795
1.	<i>Mt. Healthy</i>	3798
2.	Importance of Untainted Deciding Official	3800
3.	Timing of Action	3802
4.	Severity of Charged Misconduct	3803

5.	Discipline Related to Refusal of Reassignment	3804
6.	Reprisal Against Individual Involved in Union Activity	3804
7.	Performance Case	3810
8.	OSC and Agency Disciplinary Case Against Individual Charged With Reprisal	3810
	a. Analysis by Agency Deciding Official.....	3817
C.	DEPARTMENT OF VETERANS AFFAIRS	3817
VI.	STAYS OF PERSONNEL ACTIONS	3818
A.	STAY THROUGH INDIVIDUAL APPEAL.....	3818
1.	Basis for Stay Sought by Appellant.....	3820
	a. Intervention by OPM.....	3822
2.	Scope of Stay	3822
3.	MSPB Review of Judge's Stay Decision.....	3822
B.	STAY THROUGH OSC PROCEEDING	3822
1.	Statutory, Regulatory Provisions	3824
2.	Initial Stay.....	3826
	a. Potential for Disruption by Employee's Return to Workplace	3828
	b. Obtaining Clarification of Stay Order	3828
3.	Extension of Stay	3829
	a. Indefinite Stay.....	3832
4.	Proof Supporting Stay Application.....	3833
5.	Nature of Relief.....	3833
	a. Hostile Environment; Protective Order.....	3834
	b. Restraint on Employee Communication With OSC, Congress.....	3837
6.	Termination of Stay.....	3839
7.	Relation of Stay and Appeal Proceedings	3839
8.	Use of Stay to Protect Other Proceeding.....	3840
	a. EEO Case	3840
	b. Union Rights Under Statute.....	3840
9.	Effect of Prior Settlement Agreement.....	3840
10.	Employees Covered by Stay	3840
	a. SES.....	3840
	b. Presidential Appointee; Policymaker	3840
	c. At Will Employee	3840
	d. Former Agency Employee	3840
C.	DEPARTMENT OF VETERANS AFFAIRS	3841

CHAPTER 14: RETIREMENT AND RESTORATION RIGHTS3843

I.	RETIREMENT.....	3843
A.	OVERVIEW OF THE PRINCIPAL RETIREMENT SYSTEMS	3844
1.	Conversions.....	3845
B.	FEDERAL EMPLOYMENT.....	3846
1.	Effect of Reemployment	3848
C.	COVERED AND CREDITABLE SERVICE.....	3848
1.	Service Requirements for CSRS	3850
2.	When-Actually-Employed; Seasonal Employee; Leave Without Pay; Part-Time	3852
3.	Indefinite Appointment.....	3853
4.	Temporary Employment.....	3854
5.	Personal Service Contract	3854
6.	Nonappropriated Fund	3860
7.	Others.....	3861
8.	Effect of Military Service; Deposit for Military Service	3861
	a. National Guard, Other Uniformed Service	3875
	(i) Abandonment of Civilian Career for Military Service	3877
9.	Period of Receipt of OWCP Benefits	3882
10.	Sick Leave Credit.....	3884
D.	DISABILITY RETIREMENT.....	3884
1.	Statutory, Regulatory Standards.....	3884
	a. Concept of Disability	3886
	b. Cause of Disability	3887
	c. Medical Condition Postdating Disability Retirement	3888
2.	Disability Incurred While in the Federal Service.....	3888

a. Preexisting Condition	3888
3. Position Last Occupied.....	3888
a. Qualifying Position.....	3889
4. Disability Must Continue at Least One Year	3889
a. Possible Future Disability.....	3891
5. Situational or Transitory Condition; Hostile Environment.....	3891
a. Workplace Stressor May Be Sufficient.....	3893
b. Workplace Stressor May Be Insufficient	3893
c. Alcoholism or Drug Addiction; Inability to Control Condition.....	3894
6. Partial Disability Does Not Qualify	3895
7. New Condition Raised With Judge or in PFR; Condition That Should Have Been Considered by OPM.....	3895
a. Evidence of Progression of Disease Presented in PFR.....	3896
8. Reassignment in Lieu of Disability Retirement	3896
a. Adequacy of Position Offered Through Reassignment	3896
b. Permanent Light Duty Position	3899
c. Postal Service: Different Craft.....	3902
d. OWCP Position Suitability Determination	3905
9. Effect of Disability Accommodation on Annuity Entitlement.....	3906
a. Conflicting Agency Evidence Concerning Accommodation	3906
10. Necessity for Cessation of Pay or Separation From the Federal Service.....	3906
11. One Year for Disability Retirement Application.....	3907
a. Waiver; Separation for Medical Reason: Notice Not Provided.....	3909
b. Waiver; Mental Incompetence.....	3912
c. Technical Constructions Concerning Filing Date: Method of Filing; Filing With Former Agency.....	3916
12. Agency-Initiated Disability Retirement Application.....	3918
a. Service Credit Requirement.....	3921
13. Application After Employee's Death.....	3921
14. Bar to Concurrent Receipt of Disability Retirement, OWCP Benefit.....	3921
15. Withdrawal of Disability Retirement Application	3921
16. Evidence of Disability.....	3922
a. Scope of Board Review; <i>Chavez</i>	3923
b. Significance of Position Description, Qualification Requirements	3927
c. Objective Medical Evidence	3928
d. Content of Medical Report.....	3928
e. Lack of Evidence of Precise Medical Causation Not Determinative	3929
f. <i>Mullins-Howard</i> : Disability Established Without Unduly Detailed Medical Causation Analysis	3932
g. Subjective Evidence.....	3937
h. Testimony of Supervisor; Performance Appraisal.....	3937
i. Hearsay.....	3937
j. Absence; Use of Leave	3937
k. Post-Separation Medical Evidence.....	3938
l. Medical Condition Not Presented to OPM	3940
m. Removal for Physical Inability to Perform; <i>Bruner</i> ; Settlement.....	3940
n. Loss of Military Status	3945
o. OWCP Determination	3946
p. Social Security Administration Determination	3946
q. VA Disability Rating.....	3948
r. Security Clearance Determination	3949
s. Agency Medical Disqualification	3950
t. Removal for Misconduct.....	3950
17. Refusal to Undergo Diagnostic or Other Procedure.....	3951
a. Possible Improvement Through Future Surgery	3952
18. Specific Conditions.....	3952
19. Earnings Recovery.....	3953
a. Current Rate of Pay	3955
b. Basic Pay; Cost of Living Adjustment	3955
c. Bonus	3956
d. Miscellaneous Income	3957
e. Business Expense.....	3957
f. Pension Contribution.....	3957
20. Decline of Earnings.....	3957

a.	Discontinued Service Annuity Upon Recovery of Earning Capacity	3958
21.	Conversion From Disability to Optional Retirement	3958
22.	Conversion From Optional to Disability Retirement	3959
23.	Rescission of Disability Retirement Grant	3959
24.	Recovery From Disability: Burden of Proof	3959
a.	Restoration of Annuity.....	3961
25.	Calculation of Annuity.....	3961
26.	Loss of Annuity for Certain Offenses.....	3962
E.	LUMP SUM DEATH BENEFITS.....	3964
1.	Submission of Designation.....	3970
2.	Child Who Qualifies to Receive Lump Sum Payment	3973
3.	Other Distributions.....	3974
a.	Slayer Statute	3974
4.	Time for Application.....	3975
F.	SURVIVOR ANNUITIES	3975
1.	Eligibility of Employee for Retirement as Condition to Annuity	3977
2.	Application for Annuity.....	3978
3.	Time, Method of Election	3978
a.	Effect of Remarriage After Retirement.....	3980
b.	Notice to Annuitant of Necessity to Notify OPM of Remarriage to Secure Annuity	3980
c.	Delay in Notice to OPM of Annuity Election	3981
d.	Lack of Proper Notice From OPM Concerning Annuity Election	3982
e.	Incorrect Information From Employing Agency Concerning Annuity Election.....	3993
f.	Annuity Election Form; Signature; Submission	3996
g.	Effect of Mental Incompetence on Timeliness of Election	3997
h.	Authority to Act on Behalf of Incompetent Employee to Create Annuity	3998
i.	Employee Mentally Incompetent to Make Adverse Election	3999
j.	Community Property Interests	4000
4.	State Law Defines Marital Status; Common Law Marriage; Qualifying Widow.....	4001
a.	Current Spouse; Duration of Marriage; Widow: Issue of Marriage; Children	4003
b.	Accidental Death	4004
c.	Putative Spouse	4004
5.	Calculation.....	4005
a.	Survivor Annuity Based on Disability Annuity.....	4006
b.	Health Benefits	4008
c.	Social Security Benefit Offset—CSRS	4008
d.	Social Security Benefit—FERS.....	4009
6.	Consent of Spouse to Waiver of Survivor Annuity	4010
a.	Consent by Current Spouse to Discontinue Survivor Annuity.....	4016
b.	Attempt to Modify Amount of Spousal Survivor Annuity	4018
c.	Consent by Current Spouse for Former Spouse Annuity	4019
7.	Marriage of at Least Nine Months; Parent of Issue by Marriage; Exceptions	4019
8.	Survivor Annuity for Child Incapable of Self-Support	4020
a.	Children in School.....	4026
G.	DISCONTINUED SERVICE ANNUITY	4027
H.	LAW ENFORCEMENT RETIREMENT	4036
1.	Process of Determining and Appealing LEO Status.....	4036
2.	Agency Head Determination; Timeliness of Request for LEO Status.....	4038
3.	Substantive Criteria for LEO Determination	4048
a.	Customs and Border Patrol Officers.....	4058
b.	Decisions Before 2000.....	4060
4.	Evidence Considered	4065
5.	Supervisory Credit	4068
6.	Effect of Disability Retirement.....	4070
I.	FIREFIGHTER RETIREMENT	4071
J.	AIR TRAFFIC CONTROLLER RETIREMENT.....	4080
K.	OTHER ANNUITY INTERESTS	4080
1.	Deferred Annuity.....	4080
2.	FERS Minimum Retirement Age Annuity.....	4081
3.	Supplemental, Redetermined Annuity	4082
4.	Alternative Form of Annuity.....	4085

5.	Voluntary Early Retirement Authority.....	4088
L.	APPORTIONMENT OF ANNUITY BY COURT ORDER.....	4090
1.	Lifetime Annuity.....	4090
2.	Former Spouse Survivor Annuity	4091
a.	Intent to Create Former Spouse Survivor Annuity or Other Benefit.....	4092
b.	Reduction in Lifetime Annuity.....	4095
c.	Wording of Decree	4096
d.	Ambiguous Provision in Divorce Decree; Extrinsic Evidence; Rules of Construction	4098
3.	Challenge to Court Order Affecting Annuity Interest.....	4101
a.	Qualifying Court Order.....	4103
b.	Amendment to Court Order Affecting Former Spouse Annuity; Construction of Annuity Interest Following Ineffective Amendment	4113
c.	Bifurcated Decree.....	4125
d.	Spouse Equity Act of 1984 as Amended	4128
M.	ANNUITY CALCULATION ISSUES.....	4130
1.	Estoppel as Basis to Create, Continue, or Adjust Benefit or Overpayment	4130
2.	Refund.....	4132
3.	Redeposit	4139
a.	Personal Service Agreement	4140
4.	High Three Salary Calculation: Basic Pay; Lump Sum Back Pay Settlement.....	4141
5.	Onset of Disability Annuity Payment.....	4144
6.	VA Medical Professional; VA Benefit Reduction.....	4147
7.	Annuity Reduction for VA Employees Removed for Certain Performance or Misconduct.....	4147
8.	Law Enforcement Enhanced Annuity Rate	4148
9.	Minimum, Maximum Annuity	4148
10.	Annuity Allotment.....	4148
11.	Impact of Receipt of Medicare Benefits, Social Security on CSRS, FERS.....	4148
12.	Deposit for Post-1956 Military Service	4151
13.	Deposit for Creditable Service; Annuity Supplement.....	4151
14.	Interest.....	4152
15.	Taxes.....	4152
16.	Cost of Living Adjustment for Reinstated Annuity	4153
17.	Diversion of Annuity Payment.....	4154
18.	Reemployed Annuitant.....	4154
19.	Individual Retirement Record.....	4154
20.	Reconstructing Employment Record.....	4157
N.	OVERPAYMENTS.....	4157
1.	Proving the Debt; Evidence Supporting Waiver; OPM Records.....	4157
2.	Basis for Waiver	4159
a.	Annuitant Without Fault and Recovery Against Equity and Good Conscience	4161
b.	Knowledge of Overpayment; Set-Aside Rule	4162
c.	OPM Fault in Creating Overpayment	4164
d.	Unconscionability of Recovery; Recovery Delay	4165
e.	Financial Hardship.....	4169
f.	Ordinary and Necessary Living Expenses; Future Events.....	4170
g.	Assets Available to Satisfy Overpayment; Income/Expense Margin.....	4171
h.	Detrimental Reliance.....	4172
i.	Adjustment of Repayment Schedule; Length of Recovery	4176
j.	Age of Debt.....	4177
k.	Calculation of Overpayment; Interest	4177
l.	Recovery Schedule Adjustment When There Is No Annuity Entitlement	4177
m.	Collection From Survivor for Debt of Original Annuitant	4178
n.	Insurance Issue Related to Overpayment.....	4181
O.	OFFSETS; DEBT COLLECTION FROM ANNUITY	4182
II.	RESTORATION RIGHTS UPON RECOVERY FROM OCCUPATIONAL INJURY OR ILLNESS.....	4187
A.	SEPARATION OR FURLOUGH MUST RESULT FROM COMPENSABLE INJURY	4190
1.	Separation for Reason Other Than Result of Injury or Illness.....	4193
a.	Factual Determination on Cause of Separation	4199
b.	Termination When OWCP Determination Supports Employee's Refusal to Return to Work.....	4201
c.	AWOL Covered by Period of Compensation.....	4203
d.	Effect of Resignation	4204

e. Separation by Settlement Agreement.....	4204
B. SIGNIFICANCE OF OWCP DETERMINATION; RECEIPT OF COMPENSATION.....	4205
1. Requirement of Medical Examination.....	4208
C. MEANING OF "RECOVERY".....	4209
1. Fully Recovered Within a Year.....	4211
2. Fully Recovered After a Year.....	4213
a. Priority Consideration: Necessity for Position to Be Filled by Another Person.....	4215
b. Geographic Extent of Consideration.....	4217
c. Method, Duration of Priority Consideration.....	4218
3. Partially Recovered.....	4218
a. Geographic Extent of Consideration: Local Commuting Area.....	4223
b. Arbitrary or Capricious Restoration Effort.....	4226
c. Accommodation Requirement.....	4228
d. Postal Service National Reassessment Process; Realignment of Employees; <i>Latham</i>	4230
e. Other Postal Service Limited Duty Restoration Decisions.....	4241
f. Discontinuation of Modified Assignment.....	4243
4. Physically Disqualified Employee.....	4243
a. Geographic Extent of Consideration.....	4244
D. PARTICULAR GROUPS OF EMPLOYEES.....	4245
1. Probationer.....	4245
2. Reemployed Annuitant.....	4245
3. Postal Service.....	4246
4. Nonappropriated Fund.....	4249
E. WHEN RESTORATION IS TO OCCUR.....	4250
1. Light Duty.....	4251
2. Effect of Disability Retirement.....	4252
F. TIME TO APPLY FOR RESTORATION.....	4254
1. Form of Restoration Request.....	4255
G. REMEDY.....	4255
1. Same or Equivalent Position.....	4256
a. Return to <i>Status Quo</i>	4256
b. Interim Promotion.....	4257
2. Regraded Position.....	4258
3. Seniority Inapplicable.....	4258
4. Priority Placement Program.....	4258
5. Benefits Upon Restoration.....	4260
H. MSPB APPEAL RIGHTS.....	4266
1. Time for Appeal.....	4266
a. Lack of Notice of Appeal Right.....	4266
b. Settlement.....	4267
2. Burden of Proof; Jurisdictional Allegations.....	4267

CHAPTER 15: ATTORNEY FEES.....4269

I. ENTITLEMENT STANDARDS.....	4269
A. STATUTORY AND REGULATORY BASIS FOR FEES.....	4269
1. Use of Counsel; Licensure.....	4270
2. Governing Statutes and Regulation.....	4273
a. Civil Rights Statutes.....	4274
b. Whistleblower Protection Act.....	4274
3. Jurisdiction Over Action Under Appeal.....	4275
4. Miscellaneous Appeals.....	4275
a. Regulation Review Proceeding.....	4275
b. Retirement Appeal.....	4275
c. OSC Case: Prohibited Personnel Practice and Hatch Act Litigation.....	4276
d. Sanction.....	4284
B. PREVAILING PARTY STATUS.....	4284
1. Mitigation.....	4286
2. Other Relief.....	4287
3. Must Prevail Through MSPB Procedures.....	4288
a. Mixed-Motive Determination.....	4289
4. Cancellation of Action Appealed.....	4290

a.	Enforcement Proceeding Mooted by Agency Action.....	4296
5.	Settlement	4299
a.	Prevailing Party Status Through Settlement.....	4299
b.	Relief Through Settlement Must Be Related to MSPB Appeal.....	4301
c.	Interest of Justice Criteria	4301
d.	Jurisdiction to Accept and Enforce Settlement Providing for Fees or Supporting Fee Motion	4302
C.	INTEREST OF JUSTICE: AN OVERVIEW	4306
1.	<i>Allen</i> Criteria	4306
a.	Financial Hardship.....	4307
2.	Preservation of Claims Supporting Entitlement; Significance of Final Merits Decision	4307
a.	Overlapping Fee Entitlement Standards.....	4308
3.	Statutory Examples Not Exclusive.....	4308
D.	BAD FAITH.....	4308
1.	Malicious Action; Inadequate Inquiry.....	4309
2.	Disparate Treatment.....	4309
3.	Action Reversed but Some Charges Sustained	4309
4.	Unreasonable Litigation Tactics; Failure to Settle.....	4309
a.	Frivolous PFR.....	4309
5.	Enforcement.....	4310
E.	CLEARLY WITHOUT MERIT OR WHOLLY UNFOUNDED	4310
1.	Failure to Adhere to Legal Precedent.....	4311
2.	Inadequate Initial Inquiry Into Facts	4311
3.	Lack of Legitimate Basis for Agency Action.....	4312
a.	Development of Dispositive Information During Appeal.....	4312
4.	Mitigation.....	4312
5.	Factual Dispute	4312
6.	Performance Appeal	4314
7.	Retirement Appeal.....	4314
a.	Legal Error by OPM	4318
b.	Incorrect Advice From OPM.....	4318
c.	Issue of Mental Incompetence	4318
F.	KNEW OR SHOULD HAVE KNOWN	4321
1.	Lack of Reasonable Inquiry.....	4321
2.	Disregard of Legal Precedent.....	4322
3.	Regulatory Error.....	4322
4.	Reduction in Force.....	4323
5.	Performance-Based Action.....	4323
6.	Mitigation.....	4323
a.	Not All Charges Sustained.....	4326
7.	Negligent Presentation of Case.....	4327
8.	Decision of Another Tribunal	4327
9.	Retirement Appeal.....	4327
a.	Failure of OPM to Evaluate Evidence Available During Reconsideration Process.....	4327
b.	Legal Error by OPM	4330
10.	Settlement	4330
G.	GROSS PROCEDURAL ERROR.....	4331
1.	Denial of Advance Notice or Appeal Right	4333
a.	Involuntary or Constructive Adverse Action	4334
b.	Enforced Leave	4334
c.	Indefinite or Emergency Suspension	4336
2.	Mitigation.....	4336
3.	Performance-Based Action.....	4336
4.	Reduction in Force.....	4336
H.	SUBSTANTIALLY INNOCENT.....	4337
1.	<i>Yorkshire</i>	4339
2.	MSPB Treatment of <i>Yorkshire</i>	4339
3.	Appellant Who Ensnares the Agency.....	4341
4.	Mitigation: <i>Boese, VanFossen</i>	4341
a.	Factually Close Case.....	4345
b.	Prior Law	4345
5.	Performance-Based Appeal.....	4346

6. Other Legal Error	4346
I. OTHER AUTHORITY FOR FEE AWARDS	4346
1. Back Pay Act	4346
a. Postal Service Employee	4347
2. Equal Access to Justice Act	4348
a. Administrative Law Judge Case	4351
b. Basis for Compensating Court Time	4352
c. Prevailing Party	4352
d. Substantial Justification	4357
e. Basis for Awarding MSPB Time.....	4360
f. Hourly Rate; <i>Pro Bono</i> or Contingent Representation; COLA; Expenses	4361
g. Procedure; Time for Filing; Application.....	4363
h. Application to MSPB Cases	4364
3. Civil Rights Case.....	4365
a. Result Achieved.....	4367
4. Prohibited Personnel Practice Case	4368
5. USERRA; VEOA	4369
6. Other Bases for Fee Claims; Equitable Assessment of Fee	4371
II. PROCEDURES FOR OBTAINING FEES	4371
A. HOW FEES ARE INCURRED	4371
1. Attorney-Client Relationship; Fee Payment.....	4371
a. Law Clerk, Paraprofessional; <i>Pro Se</i> Appellant.....	4371
2. Union Counsel.....	4372
a. Demise of the Cost-Plus Formula.....	4372
b. History of the Cost-Plus Rule	4375
c. Repayment of Fees to Union Required.....	4376
3. Federally Employed Attorney	4376
4. Public Interest Organization.....	4376
B. COMPENSABLE SERVICES.....	4376
1. Work Performed Before Final Adverse Action or Other Decision	4377
2. Research	4379
3. Discovery.....	4379
4. Settlement, Mediation.....	4379
5. PFR.....	4379
6. OPM Reconsideration Petition	4380
7. Time in Court	4381
a. Appropriate Charge for Court Time	4384
b. Practice Notes	4384
8. Preparation of Fee Motion	4385
9. Defense of Fee Motion	4385
10. Enforcement Proceeding.....	4385
11. Related Proceeding	4390
a. MSPB	4392
b. Grievance.....	4392
c. Privacy Act.....	4392
d. Unemployment Compensation	4393
e. Criminal Case	4393
f. EEO Complaint.....	4394
g. Media Contact; Congressional Activity.....	4395
12. Anticipated Time; Supplemental Petition	4395
13. Unsuccessful Claim, Issue, or Defense	4395
a. <i>Hensley</i>	4396
b. Mitigation.....	4402
c. Tangentially Related Issue.....	4404
d. Clearly Separate Claim.....	4404
e. Unsuccessful EEO Claim	4404
f. Unsuccessful Whistleblower Claim	4406
C. REASONABLENESS OF FEES.....	4406
1. Hourly Rate.....	4407
a. Evidence of Reasonableness; Fee Agreement; Result Achieved	4408
b. Initial Decision in Another Appeal; Decision of Another Tribunal	4415

c.	Settlement	4416
d.	Out-Of-Town Counsel	4416
e.	Travel Time	4416
2.	Contingency Arrangement, Enhancement; <i>City of Burlington</i>	4417
a.	Early Treatment by MSPB of Contingent Adjustments	4419
b.	Enhancement for Payment Delay; Interest.....	4420
c.	Enhancement for Quality Work	4422
d.	Enhancement for Wear and Tear	4424
e.	Traditional Contingency Agreement; Fee Cap.....	4424
3.	<i>Laffey Matrix</i>	4425
4.	Below Market Rate	4430
5.	Reasonableness of Time Invested	4433
a.	Responsibility of Judge	4434
b.	Articulated Analysis Required.....	4436
c.	Notice to Counsel of Defect in Fee Motion	4437
d.	Expertise and Diligence of Counsel; Likely Outcome.....	4438
e.	Time at Hearing	4438
f.	PFR	4438
g.	<i>Amicus Brief</i>	4439
h.	Time Preparing Attorney Fees Motion.....	4440
i.	Consolidated Appeals.....	4440
j.	Multiple Counsel; Duplicative Work.....	4440
k.	Clerical, Secretarial Work.....	4442
6.	Examples of Fee Awards	4443
a.	Rates.....	4443
b.	Amounts	4443
D.	COSTS AND EXPENSES.....	4444
1.	Transcript.....	4445
2.	Photocopy; Electronic Production	4446
3.	Travel.....	4446
4.	Secretarial Expense.....	4446
5.	Postage; Courier.....	4446
6.	Fee for Expert, Consultant.....	4446
7.	Investigator	4446
8.	Accounting Expense	4447
9.	Telephone or Facsimile.....	4447
10.	Electronic Research	4447
11.	Taxes.....	4448
12.	EEO, Whistleblower Protection Act, USERRA, and VEOA Cases; Broader Coverage.....	4448
13.	Direct Recovery of Costs by Appellants	4449
E.	FEE MOTION	4451
1.	Who May File.....	4452
2.	Time and Place of Filing	4452
a.	Premature Motion	4453
b.	Timing of Agency Response	4453
c.	Late Motion.....	4453
3.	Motion Must Be Complete When Filed.....	4458
a.	Incomplete Motion	4458
4.	Developing Evidence to Support Motion	4458
a.	Hearing Concerning Fee Entitlement in Settled Appeal.....	4458
b.	Hearing and Discovery Concerning Reasonableness.....	4459
5.	Format of Motion	4459
a.	What to Include	4460
b.	Fee Agreement.....	4461
c.	Itemization of Time	4461
d.	Retrospective Reconstruction of Time.....	4462
6.	Supplemental or Corrected Motion	4463
7.	Unopposed, Moot, or Settled Motion.....	4464
8.	Service of Motion	4464
9.	Opposition to Motion.....	4464
10.	Initial Decision on Motion.....	4464

a.	Obligation of Judge to Ensure Due Process.....	4464
b.	Requirements of Addendum Initial Decision.....	4465
c.	Initial Decision Controls Basis for Fee Determination.....	4465
d.	Change in Judge.....	4466
e.	Hourly Rate Analysis.....	4467
11.	Waiver of Fee Through Settlement Agreement.....	4467
a.	Effect of Settlement on Claims of Multiple Counsel.....	4468
12.	Settlement of Fee Claim.....	4469
13.	Payment of Fee to Counsel and Client.....	4470
a.	Payment to Counsel.....	4470
b.	Repayment of Fee by Counsel to Client.....	4470
14.	PFR of Fee Decision.....	4471
a.	Interim Fee.....	4471
b.	Time Spent on PFR.....	4471

CHAPTER 16: SETTLEMENT, REMEDIES, AND ENFORCEMENT4473

I.	SETTLEMENT.....	4473
A.	ELEMENTS OF SETTLEMENTS.....	4473
1.	Settlement Resources; Mediation Appeals Program.....	4475
2.	Minimum Requirements.....	4475
a.	Hatch Act Case.....	4476
3.	Settlement After Initial Decision.....	4476
4.	Regulatory Process.....	4477
5.	Filing, Acceptance of Settlement for Enforcement.....	4477
a.	Intent That Agreement Be Subject to MSPB Enforcement Authority.....	4478
b.	Unfiled Settlement.....	4480
c.	Oral Advice of Settlement.....	4481
d.	Specific Oral Settlement Agreement Entered Into the Record.....	4483
e.	Distinguishing Oral Agreement and Ongoing or Incomplete Negotiation.....	4487
f.	Oral Agreement to Be Followed by Written Agreement.....	4491
g.	Appellant's Understanding of Agreement.....	4492
6.	Jurisdiction to Accept Settlement: <i>Delorme</i>	4493
a.	Prior Law.....	4494
b.	Settlement Arising From Disputed Last Chance Agreement.....	4498
7.	Flexibility, Scope of Settlement.....	4499
a.	Incomplete Settlement; Omitted Terms.....	4499
b.	Regulatory Limitations.....	4501
8.	Conditional Settlement; Lapsed Offer; Implied Term.....	4501
9.	Settlement Requiring Specific Action by Judge.....	4504
10.	Integration or "Zipper" Clause.....	4505
11.	Modification, Amendment of Agreement.....	4508
12.	Waiver of Statutory Right; Release.....	4509
a.	Unemployment Compensation.....	4510
b.	Workers' Compensation.....	4511
c.	Older Workers' Benefit Protection Act.....	4511
d.	RIF Benefit.....	4520
e.	Limitation on the Right to Seek Future Federal Employment.....	4520
13.	Retirement Benefit.....	4521
14.	Settlement Provision Affecting Other Agencies.....	4521
15.	OSC Case.....	4522
B.	SETTING ASIDE A SETTLEMENT.....	4523
1.	Agreement Challenged as Invalid; Use of PFR.....	4523
2.	Timing of PFR.....	4525
3.	Bases for Setting Aside a Settlement.....	4527
a.	Threat of Unwarranted Action; Duress.....	4528
b.	Hardship.....	4530
c.	Disappointment; Confusion.....	4530
d.	Lack of Understanding.....	4531
e.	Mental Incapacity; Stress.....	4532
f.	Time Pressure.....	4535
g.	Coercion or Bias by Judge.....	4535

h.	Coercion by Counsel or Union Representative; Lack of Signature by Counsel	4539
i.	Error or Lack of Authority of Appellant’s Counsel or Union Representative—Agreement Sustained.....	4542
j.	Error or Lack of Authority of Appellant’s Counsel or Union Representative— <i>Bona Fide</i> Challenge to Agreement.....	4545
k.	Error or Lack of Authority of Government Counsel.....	4549
l.	Fraud; Misrepresentation; Bad Faith; Merit of the Underlying Action.....	4550
m.	Mutual, Unilateral Mistake	4555
n.	Lack of Mutual Assent.....	4562
o.	Lack of Consideration	4565
p.	Incorrect Information From the Agency Concerning Retirement Eligibility.....	4565
q.	Provision Unlawful or Contrary to Public Policy.....	4566
r.	Change in Law	4571
4.	Unfiled Settlement Agreement; Preappeal Settlement	4571
5.	Collateral Attack on Settlement Through New Appeal	4574
6.	Breach of Settlement: Election Between Rescission or Enforcement.....	4574
a.	Agency May Rescind	4575
b.	Restoration of Consideration Received; “Tender Back”.....	4576
c.	Enforcement Petition to Rescind Settlement.....	4578
II.	APPELLATE REMEDIES	4579
A.	REMEDIAL AUTHORITY	4579
1.	Statutory Basis for Remedial Authority	4579
2.	OPM Regulation.....	4579
3.	Collateral Result of Restoration Order; Action Related to Case Under Appeal	4580
a.	Effect on Remedial Order of Decision of Another Tribunal	4584
b.	Reversal of Criminal Conviction	4585
B.	BACK PAY AND RELATED REMEDIES.....	4586
1.	Necessary Findings.....	4586
2.	Pay Entitlement: Ready, Willing, and Able to Work	4586
3.	Maximum Recovery Period.....	4592
a.	Liability for Event Preceding Adverse Action	4592
4.	Method of Payment.....	4593
5.	Method of Calculation.....	4593
6.	Reinstatement With No or Limited Pay; Time-Served or Other Suspension; Shortened Notice Period	4593
a.	After Acquired Evidence	4595
7.	Loss of Security Clearance.....	4595
8.	Bonus or Award; Differential; Relocation Expense	4596
9.	Premium, Overtime, Holiday Pay.....	4597
a.	Overtime for Postal Service Employee.....	4602
10.	Interest—Back Pay Act	4603
a.	Interest—Postal Service Employee	4606
11.	Insurance Benefit.....	4607
12.	Retirement, TSP Contribution or Loan.....	4608
13.	Leave Account; FMLA; Military Leave.....	4613
14.	Leave Restoration for MSPB, Related Proceedings; Compensatory Time; Official Time	4616
15.	Interim Promotion; WIGI; Pay Increase	4618
16.	Applicant for Employment	4622
17.	Federal Aviation Administration Employee.....	4623
C.	DUTY TO MITIGATE BACK PAY THROUGH INTERIM EMPLOYMENT	4623
1.	Employee Other Than Postal Service	4623
2.	Postal Service Employee.....	4623
D.	DEDUCTIONS FROM BACK PAY	4625
1.	Retirement, TSP Contribution	4626
2.	Debt to Retirement Fund	4627
3.	Annuity Entitlement or Adjustment.....	4628
4.	Union Dues; Insurance; Medicare.....	4628
5.	Taxes; Increased Taxes	4633
6.	Unemployment, OWCP, Workers’ Compensation	4634
7.	Interim Earnings; Job Search, Relocation Cost; Replacement Earnings; Retirement Income; Fraudulent Earnings Information	4638
8.	Other Deductions	4641
E.	RETRAINING	4641

F.	REEMPLOYMENT RIGHT.....	4641
G.	PURGING OF RECORDS; MODIFICATION OF DOCUMENTATION, PERFORMANCE APPRAISAL.....	4642
	1. Coding of Personnel Document.....	4645
	2. Adjustment to AWOL Charge.....	4645
H.	DAMAGES; REGULATION GOVERNING RECOVERY.....	4647
	1. Availability of Compensatory Damages.....	4649
	2. Awards of Compensatory Damages—Civil Rights Acts.....	4654
	a. Effect of Receipt of FECA and Insurance Benefits on Recovery of Compensatory Damages.....	4663
	3. Consequential Damages and Costs—Whistleblower Case.....	4664
	4. Compensatory Damages—Whistleblower Case.....	4674
	5. Damages Under VEOA, USERRA.....	4678
	6. Monetary Relief for Prohibited Personnel Practices Not Covered by the WPA or EEO Law.....	4679
	7. Punitive Damages.....	4682
	8. Taxation of Damages, Attorney Fees.....	4683
I.	NONTRADITIONAL REMEDIES.....	4684
	1. Waiver of Debt.....	4684
	2. Apology; Evidence Destruction.....	4684
	3. Protection Against Intervening Event.....	4684
	a. Protection Against Future Event.....	4684
	4. Front Pay.....	4684
	5. Equitable Relief; Other Remedies.....	4685
III.	ENFORCEMENT.....	4686
A.	ENFORCEMENT OF MSPB DECISION.....	4686
	1. Authority to Order Compliance; Sanctions.....	4688
	a. Sanction Against Agency.....	4688
	2. Limitation on Enforcement Authority to Award Back Pay or Monetary Remedy.....	4689
	a. Mootness.....	4692
	b. Burden of Proof; Proof of Compliance.....	4692
	3. Enforcement Procedure.....	4693
	a. Enforcement Petition Regulation, Guidance.....	4694
	b. Time for Initiating Enforcement.....	4696
	c. Agency Request for Extension of Time.....	4700
	d. Duty to Supply Information; Accounting.....	4700
	e. Unclear or Impossible Compliance.....	4702
	f. Evidence of Compliance; Statement of Intent; Representative’s Statement.....	4702
	g. Hearing.....	4703
	h. Discovery.....	4704
	i. Referral to Comptroller General.....	4705
	j. Multiple Enforcement Petitions; <i>Res Judicata</i>	4705
	k. Analysis by Judge.....	4707
	l. Evidence Supplied After Decision of Judge.....	4707
	m. MSPB Review of Initial Decision on Enforcement Petition.....	4708
	4. Allegation of Reprisal, Bad Faith, Discrimination, or Harassment.....	4710
	a. Discipline Related to Agency Noncompliance.....	4711
	b. Performance Appraisal Dispute.....	4711
	5. Back Pay Dispute.....	4712
	a. Delay in Payment.....	4713
	b. Damages.....	4714
	6. Reinstatement to the Same Position; <i>Status Quo Ante</i> Remedy.....	4714
	a. Medical Limitation.....	4718
	b. Administrative Leave.....	4719
	c. Effect of Retirement.....	4720
	d. Obligation Under Collective Bargaining Contract.....	4720
	e. Other Post-Reinstatement Action; Medical Certification Requirement.....	4720
	f. Postal Service Reorganization.....	4721
	g. Security Clearance Problem.....	4723
	h. Demotion.....	4725
	i. Term or Temporary Appointment.....	4732
	j. Seniority Adjustment.....	4733
	k. Pay System Change.....	4734
	l. Insurance.....	4734

m. Other Working Conditions	4734
7. Compelling Reason for Reassignment; Detail; Different Duties.....	4735
a. Replacement Employee	4736
b. Placement on Administrative Leave Pending Subsequent Removal Attempt.....	4736
c. Detail or Other Variation of Permanent Position.....	4736
d. Reasons Related to Original Action.....	4737
e. Overriding Interest.....	4737
8. Reinstatement With Accommodation for Disability.....	4744
9. Lack of Authority to Enforce Compliance.....	4748
10. Sovereign Immunity Issue.....	4748
B. ENFORCEMENT AND INTERPRETATION OF SETTLEMENT AGREEMENTS	4749
1. Scope of Enforcement Authority.....	4751
a. Only Filed Settlement May Be Enforced.....	4751
b. Allegation of Discrimination; Whistleblowing Reprisal	4753
c. Damages.....	4754
2. Agency Enforcement Initiative.....	4754
a. Appellant's Agreement to Resign or to Take Other Action; Agency Self Help	4756
b. Agreement Not to Reapply for Employment With Agency	4756
c. Agreement to Withdraw EEOC Case or Other Litigation.....	4757
3. Agreement That Appellant First Notify Agency of Noncompliance Allegation.....	4758
a. Agreement That the Parties Attempt to Adjust Disputes Under the Settlement.....	4758
4. Election Between Enforcement and Rescission; Pleading in the Alternative.....	4759
a. Modification of Settlement Provision	4760
5. Role of MSPB Regional or Field Office.....	4761
a. Treatment of Enforcement Issue; Evidence on PFR.....	4761
6. Time for Initiating Enforcement.....	4762
a. Reasonableness of Timing of Enforcement; Laches Defense	4767
7. Burden of Proof.....	4769
a. Evidence Required	4773
b. Mutual Breach; "Clean Hands".....	4773
8. Interpretation and Application of Settlement: Legal Principles.....	4775
a. Materiality of Breach	4775
b. Good Faith Required; Bad Faith.....	4781
9. Reprisal or Harassment	4785
a. Foreclosure of Future Discipline or Other Agency Action for Past Conduct.....	4788
b. Time for Compliance if None Set in Settlement Agreement	4791
10. Interpretation of Agreement: External Law; Extrinsic or Parol Evidence; Ambiguous Term; History of Performance; Hearing.....	4792
a. Back Pay, Other Obligation; Omitted Term.....	4798
b. Amendment to Agreement; Counterproposal	4800
11. Specific Settlement Provisions	4800
a. Term of Art	4800
b. Obligation to Reinstatement or Restore to Duty; Precondition to Restoration.....	4801
c. Agreement to Reassign; Work Schedule Change; Light Duty Position; Duration of Agency's Commitment	4802
d. Employee May Be Terminated or Will Resign or Retire on Specified Condition; Agreement Not to Reapply.....	4805
e. Promotion, Placement Consideration; Priority Consideration	4807
f. Agreement to Provide Affirmative, Neutral, or Controlled Reference.....	4810
g. "Clean Record" or "Clean Paper"; Expungement or Withdrawal of Record; Implied Requirement; NDAA; Executive Order 13,839.....	4819
h. Nondisclosure or Confidentiality Clause.....	4834
i. "Need to Know" Exception to Confidentiality Clause.....	4842
j. Whistleblower Protection Enhancement Act Provision.....	4846
k. Waiver of Protection of Confidentiality or Affirmative Reference Provision	4846
l. Damages Unavailable for Breach of Clause Requiring Affirmative Reference, Other Violations	4847
m. Adjustment of Performance Appraisal, Documentation.....	4849
n. Agreement to Provide Assistance to Employee	4850
o. Agreement to "Cancel" Action; Back Pay, Interest, Damages, or Other Entitlement; Bonus or Award; Lump Sum Provision.....	4851
p. Annuity Issues.....	4856
q. Unemployment Compensation	4861
12. Debt Recoupment	4861

13. Settlement Reached in Another Tribunal	4862
14. Settlement Involving Action of Third Party	4862
15. Privacy Act Issue	4862
16. Provision That Violates Collective Bargaining Contract.....	4863
17. Unlawful Provision.....	4863
C. INTERVENING ABOLITION OF POSITION; SUBSEQUENT ADVERSE ACTION DURING ENFORCEMENT PROCEEDING	4864

CHAPTER 17: JUDICIAL REVIEW.....4867

I. OVERVIEW OF THE APPELLATE PROCESS	4867
A. NATURE OF THE DECISION UNDER REVIEW	4867
1. Final Decision.....	4867
a. Denial of Request for Reopening.....	4869
b. Collateral MSPB Order.....	4872
c. Decision Remanding Case to Judge	4873
2. Statutory Basis for Review; CSRA and Whistleblower Protection Enhancement Act of 2012	4875
3. Proper Parties in Court; Standing; Mootness	4876
a. Proper Respondent in Court.....	4877
b. OSC Disciplinary Case	4881
c. Arbitration Award.....	4882
4. Authorization to Appeal	4882
5. <i>Amicus</i> Submission	4882
6. Government Appellate Review Request; Cross-Appeal	4882
a. Review Request by OPM	4882
b. Discrimination Issue	4884
7. Court of Appeals for the Federal Circuit.....	4885
a. Nonprecedential Decision.....	4886
b. Summary Affirmation	4887
c. Court Practice	4888
d. Counsel Authorized to Appear in Appeal; Federal Circuit Admission.....	4891
e. <i>Pro Se</i> Appeal.....	4891
f. Appointment of Counsel	4892
g. Stay Pending Court Review.....	4892
8. Record and Issues Below	4892
a. Appendix	4894
b. New and Material Evidence	4894
B. SCOPE OF REVIEW	4895
1. Arbitrary and Capricious.....	4896
2. Issues of Law, Jurisdiction; Contract Interpretation; Constitutional Issues	4896
a. Decisional Rationale Omitted by MSPB; Departure From Precedent	4897
3. Procedural Error by MSPB.....	4899
a. Ruling on Witnesses and Evidence.....	4900
b. Ruling on Discovery.....	4901
c. Timeliness of MSPB Filing	4902
4. Substantial Evidence; Factual Dispute.....	4903
a. Credibility	4907
b. Nexus	4911
5. Agency Rule of Conduct	4912
6. Penalty Determination	4912
a. Performance Action.....	4916
7. Reduction in Force.....	4916
8. Retirement Appeals.....	4916
a. Disability Retirement.....	4918
b. Optional Retirement.....	4923
9. Whistleblower Reprisal: Circuits Other Than the Federal Circuit	4923
C. DEFERENCE; INTERPRETATION OF STATUTES, REGULATIONS, LABOR AND OTHER CONTRACTS	4923
1. Agency Statutory Interpretation	4923
a. Regulation Applying Statute; Agency Interpretation of Regulation	4926
2. Agency Handbook, Instruction	4930
3. MSPB Decision.....	4932
4. Principles of Statutory and Regulatory Interpretation	4932
a. Language Controls.....	4933

b.	Consideration of the Statutory Scheme.....	4936
c.	Avoidance of Absurd Consequences.....	4937
d.	Statements of Legislators	4937
e.	Amendment; Failure to Amend.....	4937
f.	Retroactivity	4938
g.	Change in Law	4941
5.	Interpretation of Collective Bargaining Contract.....	4942
6.	Settlement; Last Chance Agreement	4944
D.	DISCRIMINATION ISSUES	4946
1.	Reprisal.....	4949
a.	Individual Right of Action.....	4950
2.	Jurisdictional Issue; Constructive Adverse Action; <i>Perry</i>	4951
3.	Timeliness, Procedural Issue; <i>Kloeckner</i>	4958
4.	Review of Board Decisions That Include EEO Defenses or Both EEO and Whistleblower Reprisal Defenses.....	4964
5.	Attorney Fees Award, Application.....	4966
6.	Transfer To and From District Courts.....	4967
7.	District Court Review	4969
a.	Exhaustion of Administrative Remedies	4969
b.	Summary Adjudication of EEO Issues; Disposition of Civil Service Issues	4970
c.	Scope of Review.....	4971
d.	Compliance With District Court Decision	4972
8.	Discharge of Probationer	4972
E.	REVIEW OF ARBITRATION AWARDS.....	4974
1.	Mixed Case.....	4976
2.	Time for Seeking Review	4982
3.	Decisional Standards for Arbitrator	4983
a.	Arbitrability.....	4987
b.	Bargaining History	4988
c.	Past Practice.....	4988
d.	<i>Functus Officio</i> ; Interim Award	4990
4.	Attorney Fees Award.....	4991
5.	Review Sought by OPM.....	4992
6.	Award Involving Department of Veterans Affairs Title 38 Employee	4992
7.	Award Involving Nonappropriated Fund Instrumentality Employee.....	4994
8.	Award Reviewed by Federal Labor Relations Authority.....	4994
F.	VEOA, USERRA CLAIMS.....	4995
II.	PREREQUISITES FOR JUDICIAL REVIEW	4996
A.	TIME FOR INITIATING JUDICIAL REVIEW.....	4996
1.	Equitable Tolling.....	5000
B.	EXHAUSTION OF MSPB ADMINISTRATIVE REMEDIES	5004
1.	Issue Must Be Raised With the MSPB.....	5004
a.	Exception to Exhaustion Requirement	5006
2.	Necessity for PFR to MSPB.....	5007
a.	Challenge to Settlement.....	5009
3.	Ripeness for Judicial Review	5009
4.	Mandamus.....	5011
III.	JUDICIAL REMEDIAL AUTHORITY	5012
A.	AUTHORITY TO REMAND	5012
1.	Remand to Effect Settlement.....	5013
2.	Judicial Control of MSPB Procedures	5013
B.	AUTHORITY TO TRANSFER.....	5013
C.	SANCTIONS	5014
1.	Examples of Sanctionable Conduct	5016
IV.	JUDICIAL RELIEF OUTSIDE THE REFORM ACT	5018
A.	PARTIES TO THE SUIT	5023
1.	Sovereign Immunity.....	5023
2.	Absolute Immunity.....	5023
3.	Qualified Immunity.....	5023
a.	Action Against Union.....	5023
B.	SUITS BASED ON STATUTE AND CONSTITUTION.....	5023
1.	Administrative Procedure Act.....	5023

a.	Use of the APA	5024
b.	Scope of Review; Preclusive Effect of the Reform Act.....	5025
c.	Scope of Relief	5028
2.	Privacy Act; FOIA.....	5028
a.	Scope of the Act.....	5029
b.	Enforcement of the Act	5030
c.	Use of the Privacy Act	5030
d.	Position Classification	5031
3.	Mandamus Act	5031
a.	Position Classification	5032
4.	Tucker Act	5035
a.	Position Classification	5040
b.	Overtime Pay Claim	5040
c.	Environmental Differential, Hazard Pay, Travel Pay	5041
d.	Claims Concerning Tenure, Contract Employment, Promotion, and Bonuses.....	5044
e.	Whistleblower Reprisal Claim	5048
f.	Claims Based on Constitution	5050
g.	EEO Settlement	5051
h.	MSPB Settlement.....	5054
5.	Federal Tort Claims Act.....	5057
6.	Back Pay Act	5058
a.	Implied Preclusion Under the CSRA	5061
b.	Promotion Claim.....	5062
7.	Family Medical Leave Act.....	5062
8.	Overtime, Pay Statutes	5063
9.	Unfair Labor Practice.....	5065
10.	Constitution	5065
a.	Property Interest.....	5066
b.	Liberty Interest; Name Clearing Hearing	5067
(i)	Termination of Probationer.....	5069
c.	First Amendment.....	5070
11.	Injunction Action.....	5072
C.	ACTIONS FOR DAMAGES AGAINST INDIVIDUALS AND GOVERNMENT; <i>BIVENS</i>	5078
1.	Preclusion in the Circuits	5083
a.	D.C. Circuit.....	5083
b.	First Circuit	5085
c.	Second Circuit.....	5085
d.	Third Circuit	5086
e.	Fourth Circuit	5086
f.	Fifth Circuit.....	5086
g.	Sixth Circuit.....	5087
h.	Seventh Circuit	5088
i.	Eighth Circuit.....	5088
j.	Ninth Circuit	5089
k.	Tenth Circuit	5090
l.	Eleventh Circuit	5091
2.	Claims Based on State Law; Westfall Act; Federal Tort Claims Act; Defamation; Tort Action Arising From Assault; No FEAR Act.....	5091

CHAPTER 18: RESEARCH, REFERENCE MATERIALS, AND FORMS.....5099

I.	RESEARCH AND REFERENCES.....	5099
II.	FORMS.....	5100

BIBLIOGRAPHY5121

TABLE OF CASES5129

INDEX5283