

SUMMARY TABLE OF CONTENTS

VOLUME I

PREFACE	i
GLOSSARY	iii
CHAPTER 1: MSPB STRUCTURE AND JURISDICTION.....	1
CHAPTER 2: APPEAL AND DISCOVERY.....	819
CHAPTER 3: HEARING.....	1239
CHAPTER 4: EVIDENCE.....	1377
CHAPTER 5: INITIAL DECISION AND PETITION FOR REVIEW.....	1527

VOLUME II

CHAPTER 6: ADVERSE ACTIONS	1783
CHAPTER 7: NEXUS AND MITIGATION	2177
CHAPTER 8: SUBSTANTIVE OFFENSES.....	2315
CHAPTER 9: PERFORMANCE CASES	2741
CHAPTER 10: REDUCTIONS IN FORCE.....	2857
CHAPTER 11: HARMFUL ERROR.....	2999
CHAPTER 12: DISCRIMINATION	3167

VOLUME III

CHAPTER 13: PROHIBITED PERSONNEL PRACTICES.....	3423
CHAPTER 14: RETIREMENT AND RESTORATION RIGHTS.....	3875
CHAPTER 15: ATTORNEY FEES.....	4309
CHAPTER 16: SETTLEMENT, REMEDIES, AND ENFORCEMENT	4517
CHAPTER 17: JUDICIAL REVIEW.....	4913
CHAPTER 18: RESEARCH, REFERENCE MATERIALS, AND FORMS.....	5155
BIBLIOGRAPHY	5177
TABLE OF CASES	5185
INDEX	5339

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	7
b. Consideration of Agency Regulations	8
2. Prohibition Against Advisory Opinion; Internal Guidance; Request for Advisory Opinion	8
B. ORGANIZATION	9
1. Clerk	11
2. Office of Appeals Counsel	11
C. ADMINISTRATIVE JUDGES	14
1. Delegations of Authority	15
a. Administrative Law Judges Adjudicating Specialized Cases	15
2. <i>Judges' Handbook</i> ; Internal Guidance	15
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.....	17
4. Regulatory Responsibilities of Judge.....	18
a. Waiver of Procedural Regulations	19
5. Quality Review	19
D. BOARD DECISIONS; PRECEDENTIAL SIGNIFICANCE	20
1. Nonprecedential Final Orders.....	21
2. Arbitration Award.....	21
3. Sensitive, Public Interest Appeal	21
4. Referral to OPM, OSC	22
E. MSPB RECORDS	22
1. Gaining Access; Review Procedure	25
2. Precluding Access	25
a. Sealing of Record or Files	25
b. Attempt to Preclude Publication of Decision.....	28
c. Expungement of Record	29
d. Redaction of Initial Decision	29
e. Classified Information	29
F. RULEMAKING PETITIONS.....	30
G. RESPONSIBILITY OF PARTIES IN MSPB CASES	30
III. JURISDICTIONAL OVERVIEW	31
A. SOURCES OF JURISDICTION	33
1. Original Jurisdiction Cases.....	33
2. Appealable Actions	34
a. Adverse Action	35
b. Performance-Based Action.....	35
c. Demonstration Project	35
3. Jurisdiction Through Agency Regulation	36
B. PRELIMINARY APPELLATE JURISDICTIONAL ANALYSIS	37
1. Lack of Jurisdiction; Failure to State a Claim	38
IV. EMPLOYEES WHO MAY APPEAL; APPEALABLE ISSUES	38
A. NATURE OF CIVIL SERVICE APPOINTMENTS	40

B.	CONCEPTS COMMON TO DEFINITION OF “EMPLOYEE” FOR COMPETITIVE AND EXCEPTED SERVICE	41
1.	Current Continuous Service	41
a.	Break in Service	42
b.	Effect of Grievance or Other Settlement; Collective Bargaining Contract.....	46
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.....	47
3.	Counting Service Time in a Prior Position or Appointment; <i>McCormick</i>	48
a.	Time in Nonpermanent Appointment as a Component of Current Continuous Service.....	54
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.....	64
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.....	77
3.	Same or Similar Position	79
a.	Factual Dispute Concerning Similarity of Positions	87
b.	In an Executive Agency	88
4.	Appointment Pending Conversion to Competitive Service	92
E.	PROBATION OR TRIAL PERIOD.....	95
1.	Probationary Classification Issues.....	96
a.	Appointment From Register	96
b.	Transfer	97
c.	Temporary Appointment Pending Establishment of a Register (TAPER).....	98
d.	Career Reinstatement	98
2.	Calculating Year of Service.....	101
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	108
e.	Military Service.....	108
3.	Tacking of Prior Service: Competitive Service Probation.....	109
a.	Same Agency	115
b.	Same Line of Work.....	116
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	123
b.	Creation of Probationary Period Not Required by Statute or Regulation	123
F.	APPEAL RIGHTS OF PROBATIONER.....	125
1.	Appeal of Probationary Termination.....	126
a.	Actions Other Than Termination.....	127
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.....	133
a.	Effect of Collective Bargaining Contract; Agency Regulation	135
b.	Other Contract.....	136
c.	Harmful Error Analysis; <i>Stephen</i>	136
d.	Relation to Suitability Determination	138
4.	Preappointment Conditions	141
a.	Harmful Error Analysis: Lack of Proper Advance Notice, Other Procedural Error	142
b.	Entitlement to Hearing.....	147
c.	Measure of Substantive Review	147
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	156
b.	Partisan Political Reason	158
c.	Marital Status	160
d.	Other Discrimination	166
8.	Constitutional Claim	167
9.	Involuntary Resignation.....	168
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	188
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.....	203
a.	Exceptions.....	206
4.	Senior Executive Service.....	208
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	219
b.	Student Temporary Employment Program; Recent Graduates Program; Student Career Experience Program.....	224
10.	Judicial Branch	227
11.	Government Corporation.....	228
12.	Postal Service	229
a.	One Year of Qualifying Service; Current Continuous Service in Same or Similar Position	233
b.	Postal Supervisors, Managers	238
c.	Postal Personnel Officials, Confidential Employees	244
d.	Postal Service Employees Who Lack Preference Eligibility, Have No Negotiated Grievance Procedures, and Who Are Neither Managers Nor Personnelists	248
13.	Contractors.....	250
14.	Others.....	251
J.	AGENCIES WITH SPECIALIZED PERSONNEL SYSTEMS: MSPB JURISDICTIONAL EXCLUSIONS AND MODIFICATIONS	252
1.	Department of Homeland Security	252
a.	Human Resources Management System's Rise and Demise	252
b.	Transportation Security Agency: Screeners; Other Employees	252
(i)	Probationer	255
(ii)	Other TSA Employees.....	256
c.	RIF.....	260
2.	Federal Aviation Administration.....	260
a.	2012 Legislation Restoring Back Pay Authority as a Component of MSPB Jurisdiction	263
b.	2000 Legislation Restoring MSPB Jurisdiction; Back Pay Issues	264
c.	1996 Legislation Removing MSPB Jurisdiction.....	271
3.	Department of Defense National Security Personnel System	272
4.	District of Columbia	272
5.	Central Intelligence Agency; Defense Department Intelligence; Other Intelligence or Security Agencies.....	273

6.	Federal Bureau of Investigation	274
7.	Canal Zone.....	274
8.	National Archives	274
9.	National Guard Technicians.....	274
10.	Tennessee Valley Authority Employees.....	278
11.	Library of Congress; GAO; Congressional Employees	278
a.	Ramspeck Act	279
12.	Smithsonian Institution	279
13.	Bureau of Indian Affairs.....	279
14.	MSPB Employees	279
15.	Department of Veterans Affairs.....	279
a.	USERRA Coverage.....	292
b.	Actions Against Healthcare Professionals Not Involving Professional Conduct or Competence.....	293
(i)	Involuntary Retirement, Resignation.....	294
c.	Veterans Canteen Service	296
16.	Agriculture: Stabilization and Conservation Service; Cooperative Extension Services	298
17.	Department of Defense Education Activity.....	299
18.	Office of Independent Counsel.....	300
19.	Foreign Service.....	300
20.	World Bank	300
K.	NATURE OF PERSONNEL ACTION APPEALED.....	301
1.	Possible Adverse Action; Proposal	301
2.	Suspension	301
a.	Paper Suspension	302
b.	Consolidation of Short Suspensions.....	302
c.	Calculating Duration of Suspension	304
d.	Erroneous Imposition of Suspension Exceeding 14 Days	304
e.	Indefinite Suspension	305
3.	Position Change; Nonselection.....	305
a.	Rank Reduction	307
b.	Nonselection.....	307
c.	Loss of Promotion or Earnings Opportunities; Change in Work Schedule	309
d.	Disciplinary Reassignment; Unified Penalties	311
4.	Pay and Benefits; Classification; Debt; Leave	312
a.	Classification	312
b.	Pay System Conversion; Grade Reduction	314
c.	Correction of Pay, Grade	319
d.	Reduction in Pay; Locality Pay Issue; Failure to Obtain Pay Increase	324
e.	Misrepresentation Concerning Pay Rates	329
f.	Termination of Premium Pay; Bonus; LEAPA; Seniority, Overtime Adjustments	329
g.	Retirement Credit, Contributions, and Incentives; Individual Retirement Record.....	335
h.	Debt Collection, Recoupment, Retirement Funds: Agency, OPM Involvement.....	336
i.	Leave Dispute; Administrative Leave; Notice, Investigation Leave	339
j.	Pay and Compensation Claims: Role of OPM	343
5.	Severance Pay.....	344
6.	Promotion Claim	344
a.	Termination of Temporary Promotion	344
b.	Lower Graded Position Through Return Right—Overseas Employee	346
7.	Back Pay Dispute	346
a.	Retirement Payment	347
8.	Resignation.....	347
a.	Abandonment of Position	347
9.	Mandatory Retirement	348
10.	OWCP Benefits	349
11.	Insurance Programs.....	350
12.	Requests for Reinstatement: Non-Military Personnel	356
a.	Failure to Rehire	356
b.	Reinstatement Rights—Occupational Illness or Injury; Others.....	357
13.	Performance Standard; Rating; PIP	357
14.	Prohibited Personnel Practices; Allegations of Discrimination	358
15.	Merit System Principles Violations	361
16.	Constitutional Violation	362

17. Miscellaneous Issues	366
L. EFFECT OF COLLECTIVE BARGAINING CONTRACT GRIEVANCE OR RELATED PROCEDURES; 5 USC 7121	367
1. Postal Service Employees	370
a. Effect of EEO Allegation or EEO Complaint	371
2. Administrative Grievance System	372
3. Statutory Grievance System; Foreign Service Grievance Board	372
4. Employee Choice: Adverse Action; Performance Case	372
5. Collective Bargaining Contract Exclusivity	373
a. Appeal Right With EEO Allegation	374
b. USERRA Claim	377
c. RIF	381
d. Acceptable Level of Competence Determination; Within-Grade Increase	383
6. Problems Arising From Choice of Collective Bargaining Contract Procedure	383
a. Incorrect or Inadequate Advice From Agency	383
b. Dispute Over Bargaining Unit Status or Arbitrability; Ineffective Elections; Cross-Filing; Withdrawal of Grievance	384
c. Defunct Union	387
d. Union Action on Behalf of Employee	389
e. What Constitutes Filing of Grievance	391
f. Premature Elections	392
g. Belated Grievance	393
h. Failure to Obtain Arbitration Hearing	393
7. Indefinite Suspension	396
8. Appeal Right With Arbitration Award; Employees of Agencies Other Than Postal Service	397
9. Unfair Labor Practice Charge	398
M. GRADE AND PAY RETENTION	400
1. <i>Atwell</i>	402
a. Restoration Action	404
2. Absence of Retention; Benefits Declined	404
3. Appeal of RIF; Classification	405
4. Termination of Pay Retention	407
V. APPEAL RIGHTS BASED ON MILITARY SERVICE AND VETERANS PREFERENCE	407
A. REGULATIONS GOVERNING USERRA, VEOA CLAIMS	412
B. JUDGE'S RESPONSIBILITY	414
C. HEARING ENTITLEMENT; BOARD DISPOSITION	415
D. EXCLUSIVITY OF VEOA OR USERRA APPEAL; JOINDER OF CLAIMS	419
E. UNIFORMED SERVICE EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT	419
1. USERRA Statutory Structure	424
a. Related EEO Violation; Prohibited Personnel Practice Allegation	429
b. Affirmative Defense	432
2. Time for USERRA Appeal	432
a. Laches	434
b. Waiver of Right to Appeal	435
3. Permissive Exhaustion of Labor Department Remedy	437
a. Referral to Office of Special Counsel	439
4. Liberal Pleading Standard	440
a. Nonfrivolous Jurisdictional Allegations	445
b. Summary Disposition of Claim	446
5. Burden of Proof	447
a. Analysis of Alleged Discrimination or Reprisal Based on Military Service	451
b. Reprisal Against the Exercise of USERRA Rights	455
c. Circumstantial Evidence; Statistics	457
d. Preselection	460
e. Discrimination Motivated by Lower-Level Supervisor; Cat's Paw	461
f. Disability Incurred While in Military Service	463
g. Disparate Impact Theory Inapplicable	464
6. Recovery Period	466
a. Nonretroactive Substantive Application	468
b. Vietnam Era Veterans' Readjustment Assistance Act of 1974	471
7. Covered Personnel; Agencies	472
a. Contractor Employee	477
b. Relatives of Service Members	479

8.	Military Restoration Rights	479
a.	National Guard USERRA Discrimination and Restoration Claims.....	483
b.	Length of Service Before Loss of Restoration Right	487
c.	Conditions of Discharge From Military Service	488
d.	Effect of Release From Service for Disability.....	488
e.	Delay in Requesting Restoration Following Military Service.....	492
f.	Elimination of Position Through RIF	492
9.	Other Personnel Action, Benefits	494
a.	Dismissal From Employment; Demotion; Abandonment of Civilian Career.....	494
b.	Constructive Adverse Action	500
c.	Suspension	501
d.	Failure to Appoint.....	501
e.	Failure to Consider Employee for Vacant Positions; Nonpromotion; Manipulation or Abolition of Positions.....	507
f.	Denial of Priority Consideration.....	511
g.	Performance Appraisal	511
h.	Noncompetitive Promotion; Bid Assignment; Escalator Principle; Interim Promotion.....	512
i.	Reassignment	518
j.	Retirement Benefits	519
k.	Education Benefits	520
l.	Military Leave; <i>Butterbaugh</i>	520
m.	Charge to Leave	528
n.	Differential Pay	529
o.	Harassment; Hostile Working Environment.....	530
p.	Change in Employment Status; Reemployment; Benefits Following Restoration to Duty.....	534
q.	Ready Reserve Status	542
F.	VETERANS EMPLOYMENT OPPORTUNITIES ACT	542
1.	Statutory Structure	545
a.	Definition of Agency	546
b.	Burden of Proof	548
c.	Related EEO Violation, Prohibited Personnel Practice, Other Challenges.....	548
2.	Covered Personnel.....	549
a.	Training Status.....	552
b.	Disabled Veteran.....	554
3.	Student, Intern Recruitment Programs	554
a.	Federal Career Intern Program	554
b.	Outstanding Scholar Program	562
c.	Pathways, Recent Graduates Program	569
4.	Particular Agencies; Positions.....	574
a.	Postal Service	574
b.	Foreign Service	576
c.	Nonappropriated Fund	578
d.	Public Health Service.....	579
e.	Statutory Exclusions	579
f.	VA Medical Professionals	579
g.	FAA, TSA Employees	580
h.	National Guard Technicians	582
i.	Title 10 Intelligence Position	582
5.	Time for VEOA Appeal	583
6.	Mandatory Exhaustion of DOL Remedy; Time for Complaint	584
a.	Specificity Required for DOL Complaint	588
b.	Equitable Tolling of DOL Time Limit; Waiver of Administrative Exhaustion Requirement.....	589
c.	Effect of Settlement Reached by DOL.....	600
d.	Termination of Proceedings to Pursue Case in Court.....	600
7.	Liberal Pleading Standard.....	601
8.	Basis for Veterans Preference	603
a.	Excepted Service Position; "Positive Factor"; Attorneys.....	605
9.	Application of Veterans Preference to Appointment Process.....	619
a.	Necessity for Application.....	620
b.	Appointment Through Reinstatement	621
c.	Impact of Collective Bargaining Contract	622
d.	Background Investigation	623

e.	Failure to Provide Proper Veterans Preference.....	623
f.	Use of Improper Appointment Authority.....	625
g.	Manipulation of Appointments; Cancellation of Vacancy.....	626
h.	Geographic Extent of Competition.....	635
i.	Category Rating System.....	635
j.	Rule of Three.....	639
10.	Qualifications for Position; Exclusion From Consideration; Consideration of Experience.....	640
a.	Education.....	650
b.	Time-In-Grade.....	651
c.	Medical Fitness.....	653
d.	Age Limit on Appointment.....	653
e.	Consideration for Position but Nonselection; Limitation on Consideration Imposed by the Applicant.....	659
f.	Improper Assessment of Qualifications.....	660
11.	Appointment and Promotion Processes Challenges.....	662
a.	Competitive Appointment Procedures; Exceptions to Competitive Requirements.....	663
b.	Merit Promotion With Internal Candidates Only; Reassignment; Reinstatement.....	667
c.	Merit Promotion, Open to External Candidates; Canceled Announcement; "Right to Compete" Claim.....	669
d.	Position Announced Under Both Open Competition and Merit Promotion Procedures.....	678
e.	Veterans Readjustment Act Appointment.....	683
12.	Remedial Structure; Reconstruction of Selection Process; Removal of Selectee.....	685
a.	Passover.....	697
b.	Mootness; Review of Agency-Initiated Reconstruction Effort.....	702
13.	Damages, Performance Award.....	703
14.	Disciplinary Case.....	708
15.	Reassignment; Transfer.....	708
16.	Retirement Benefit.....	710
17.	Other Benefits.....	710
VI.	SUITABILITY DETERMINATION.....	710
A.	APPELLATE PROCEDURES.....	716
B.	APPLICATION TO COMPETITIVE SERVICE APPOINTEES.....	717
1.	Employees Serving in Probationary or Trial Periods.....	717
C.	SUITABILITY DETERMINATIONS BY AGENCIES OPERATING UNDER AUTHORITY DELEGATED BY OPM.....	717
1.	Evidence of Material, Intentional False Statement, or Deception or Fraud.....	720
2.	Constructive Suitability Determination.....	722
3.	Nonselection for Position; Constructive Suitability Determination Under Delegated Authority.....	723
a.	Decisions Under OPM Regulations Predating 2008.....	731
4.	Impact of 2008 OPM Suitability Regulations.....	737
D.	ADJUDICATION STANDARDS.....	738
1.	Mitigation; EEO Defenses.....	741
2.	Disparate Treatment.....	742
3.	Rehabilitation.....	742
E.	EVIDENCE.....	742
1.	Collateral Estoppel; <i>Res Judicata</i>	744
F.	BASES FOR SUITABILITY DETERMINATIONS.....	745
1.	Falsification of Employment Document.....	745
2.	Drug Involvement.....	746
3.	Criminal or Dishonest Conduct.....	747
4.	Other Problems.....	747
G.	REMEDIES.....	747
1.	Mootness.....	749
H.	RELATION OF SUITABILITY AND PASSOVER DETERMINATIONS.....	750
I.	RELATION OF OPM-DIRECTED SUITABILITY REMOVAL AND ADVERSE ACTION APPEAL RIGHTS, MITIGATION ANALYSIS; <i>AGUZIE</i>	752
VII.	OPM REGULATION REVIEW; CHALLENGES TO AGENCY IMPLEMENTATION OF OPM REGULATIONS; CHALLENGES TO OPM EMPLOYMENT PRACTICES.....	764
A.	REGULATION AND REGULATION IMPLEMENTATION REVIEW PROCEDURES.....	764
1.	General Criteria for Regulation Review and Regulation Implementation Review.....	765
a.	Distinction Between Regulation Review, Implementation Review.....	769
2.	Pleading Requirements; Scope of Review.....	769
a.	Discretionary Review; Likelihood of Success.....	771
b.	Likelihood of Harm.....	771

c.	Likelihood Issues Will Be Addressed in a Different MSPB Appeal or a Different Forum.....	771
d.	Standing; “Interested Person”	773
e.	Covered Personnel Action.....	774
3.	Examples of Regulation Review	774
a.	Administrative Law Judge Examination Authority	774
b.	SES Reassignment, Work Schedule	774
c.	Administration of Leave	775
d.	OPM Qualification Standards.....	775
e.	Scope of Administrative Grievance Procedure	777
f.	Other Issues	777
4.	Examples of Regulation Implementation Review.....	779
a.	SES Performance Appraisal Dispute	780
B.	EMPLOYMENT PRACTICE CHALLENGES	781
1.	Time and Place for Filing Appeal	786
2.	Agency Misapplication of Valid OPM Requirement; Agency Employment Practices; Nonselections	787
3.	Standing to Raise Challenge	791
4.	General Characteristics of Tests Rather Than Individual Examination Results.....	793
5.	Failure to Hire.....	793
6.	Scope of Competition.....	795
7.	Position Qualification Standard; Educational Requirement	795
8.	Medical and Physical Qualification Requirements.....	801
9.	OPM Involvement in Agency Selection	802
10.	Selection and Examination Practices for Administrative Law Judges.....	804
a.	Rule of Three.....	811
11.	Passover Determination	813
12.	Time-In-Grade Restriction.....	814
13.	Eligibility Rating and Suitability Determination	816
14.	Failure to Promote	816
15.	Remedy	816
VIII.	CHALLENGES TO ADVERSE PERSONNEL RECORDS NOTATIONS.....	817

CHAPTER 2: APPEAL AND DISCOVERY 819

I.	INITIATING AN APPEAL.....	819
A.	RULES AND PRACTICES OF GENERAL APPLICATION GOVERNING APPEALS	819
1.	Dates of Filing	819
2.	Service of Pleadings	819
3.	Filing Regulation; Electronic Filing; Technical Difficulties.....	820
4.	MSPB Processing of Appeal	826
B.	TIME FOR FILING APPEAL	827
1.	Treatment of Timeliness Issues	828
2.	Jurisdiction or Timeliness as Alternate Bases for Dismissal of Appeal	829
3.	Time to Appeal; Regulatory Provisions; Computation of Time.....	831
a.	Allegations of Discrimination—Mixed Case.....	832
b.	Effect of Collective Bargaining Contract Grievance Procedure	832
c.	Computation of Time	833
d.	Technical Constructions.....	833
e.	Request for Extension of Time to Appeal	834
4.	Suspension Appeal.....	834
a.	Indefinite Suspension; Enforced Leave.....	835
5.	Individual Right of Action Appeal.....	838
6.	USERRA Appeal.....	839
7.	Negative OPM Reconsideration Decision Appeal	839
a.	Failure to Seek Timely Reconsideration; Requests to Extend Time to Request Reconsideration	843
b.	Belated Receipt of Reconsideration Decision	848
c.	Relation Between Scope of Reconsideration Request and Appeal.....	849
d.	Failure of OPM to Act on Reconsideration Request; Failure of OPM to Advise of Reconsideration Right	849
e.	Overpayment Determinations	854
8.	Law Enforcement Officer Retirement Credit Appeal.....	855
C.	METHOD AND PLACE OF FILING	856
1.	Method of Filing	857
a.	Mail.....	857

b.	Significance of Postmark: Presumptive Filing Date.....	857
c.	Significance of Actual Mailing Date; Mailstream Rule: Actual Filing Date	857
d.	Commercial Delivery	858
e.	Facsimile	858
f.	Personal Delivery	858
g.	Electronic Filing.....	858
2.	Irregular and Misdirected Filings.....	859
a.	Appeal To or From Congressional Office.....	859
b.	Misfiled Mixed Case Appeal	860
c.	Non-Mixed Appeal Filed With Employing Agency	862
d.	Appeal Misdirected Within MSPB, to OPM, or to OSC	863
e.	Incomplete Appeal	864
D.	PREMATURE APPEALS	864
1.	Abeyance Arrangement.....	865
2.	Premature Appeal That Ripens Into Appealable Action During Regional Adjudication or During PFR	866
3.	Retirement Appeal.....	867
4.	Mixed and Whistleblowing Cases; Actions Initiated in Court	869
E.	TIMELINESS OF APPEALS	870
1.	Judge’s Responsibility to Provide Notice Concerning a Timeliness Issue	870
a.	Mental or Physical Illness; <i>Lacy</i> Notice	873
b.	Duty of Appellant to Produce Evidence Concerning Timeliness	875
c.	Duty of Agency and Judge to Produce and Develop Evidence Concerning Timeliness	875
2.	Waiver of Time Limit for Appeal; <i>Alonzo</i>	878
a.	Prejudice to Respondent; <i>Laches</i>	879
b.	Current Law on Waiver; Multifactor Analysis.....	880
c.	Historical Position on Waiver.....	885
d.	Retirement Appeals	887
3.	Application for Waiver	888
a.	Hearing Entitlement on a Timeliness Issue	889
b.	Due Diligence	892
4.	Collective Bargaining Contract Stay Provision; Postal Service Employee; Agency-Initiated Stay.....	892
F.	JUSTIFICATION FOR LATE FILING	894
1.	Sickness or Hospitalization.....	894
a.	Supporting Evidence.....	895
b.	Mental Impairment.....	896
c.	Effect of Continuing Mental Disorder on Filing Deadline.....	897
2.	Substitute Employment, Travel, or Other Activities.....	900
3.	Military Service.....	900
4.	Incarceration; Criminal Proceeding	902
5.	Need to Obtain Documentation.....	903
6.	Need to Obtain Counsel	903
7.	Unfamiliarity With MSPB Procedures and Law; Ambiguous Agency Communications	904
a.	Language Difficulties	905
b.	Miscalculation of Time for Appeal	905
8.	Lack of Notice of Appeal Rights.....	906
a.	Failure to Provide Notice.....	907
b.	Belated Receipt of Adverse Action Decision.....	912
c.	Constructive Receipt of Decision Notice.....	913
d.	Proof Concerning Delivery of Notice of Appeal Right	915
e.	Notice of Appeal Right to Appellant’s Representative.....	916
f.	Appellant’s Responsibility When Decision Notice or Information About Appeal Rights Is Not Received	916
g.	Constructive Adverse Action; Notice if Agency Learns of Employee’s Protest.....	917
h.	Constructive Adverse Action Without Notice of Employee’s Protest to Agency	919
(i)	<i>Jones, Krizman</i> and Beyond.....	926
i.	Agency on Notice but Fails to Provide Appeal Rights; Secondary Information Concerning Appeal Rights	930
j.	Adverse Action or Performance-Based Appeal Arising From Last Chance or Other Settlement Agreement	931
k.	Lack of Notice Concerning Restoration and Reemployment Appeal Rights	934
l.	Enforced Leave	937
m.	Prior or Subsequent Notice of Filing Deadline	938
n.	Agency Misrepresentation.....	939
o.	Threats by Agency Personnel.....	940

p.	Mixed Case Notice Problems.....	940
q.	Problem With or Delayed Receipt of Domestic, Certified, or International Mail, or Commercial Delivery; Address Change.....	942
9.	Appeal Lost in the Mail.....	949
10.	Facsimile Problems.....	950
11.	Electronic Filing Problem.....	951
12.	Problem Caused by Adjudicators; Misdirected Appeal.....	951
a.	MSPB.....	951
b.	EEOC; Agency EEO Processes.....	951
c.	OPM.....	952
13.	Uncertainty as to Outcome of a Related Case; Pending Settlement Negotiations or Investigation; Case Taken to Court.....	953
a.	Grievances.....	954
14.	Inadequate Representation.....	954
a.	Delay Not Excused.....	955
b.	Delay Excused; Counsel's Delay Balanced Against Appellant's Best Efforts; Retirement Cases.....	956
c.	Delay Excused; Obstruction or Misrepresentation by Counsel.....	958
d.	Delay Excused; Inconsequential Delay by Representative.....	962
15.	Other Problems.....	963
G.	TIME FOR RAISING NEW APPELLATE ISSUES AND CLAIMS.....	963
1.	Issues and Defenses.....	963
a.	Liberal Construction of Pleadings; Issues Raised at Hearing.....	964
b.	EEO Affirmative Defenses.....	964
2.	Additional Appealable Action.....	964
H.	MOOT, WITHDRAWN, AND WAIVED APPEALS.....	965
1.	Mootness of Appeal.....	965
a.	Cancellation of Action Appealed.....	966
b.	Restoration of <i>Status Quo Ante</i>	967
c.	Initiation of New Action Based on Events Leading to Canceled Action.....	975
d.	Procedure Followed if Action Not Completely Rescinded.....	975
e.	Procedure Following Remand to Judge.....	976
f.	Settlement Independent of MSPB Appeal.....	977
g.	Complete Relief Through Other Means; Stay of Pending Litigation.....	986
h.	Collateral Issues Following Rescission of Action; Claims for Attorney Fees or General Damages; Interest.....	987
i.	EEO Allegation; Claim for Compensatory Damages.....	988
j.	Whistleblower Protection Act: Claims for Damages, Other Relief.....	990
k.	Uniformed Services Employment and Reemployment Rights Act.....	996
l.	Criminal Conviction.....	998
m.	Consecutive Adverse Actions.....	998
n.	OPM Rescinds Reconsideration or Final Decision; Overpayment Recovery; Withdrawal of or Additional Retirement Application.....	998
o.	Administrative Law Judge Complaint.....	1005
p.	Other Problems.....	1005
2.	Effect of Retirement on Appealable Action.....	1005
a.	Effect of Cleansing Personnel File When Removal Is Accompanied by Retirement; Effect of Claim for Damages.....	1013
b.	Resignation or Retirement Before Termination.....	1016
c.	Reduction in Force Appeal.....	1017
d.	Prior Law; Disability Retirement.....	1018
3.	Withdrawal of Appeal.....	1019
a.	Withdrawal to Pursue EEO Complaint; Withdrawal of EEO Claim.....	1022
b.	Withdrawal to Pursue a Collective Bargaining Contract Grievance Procedure.....	1024
c.	Confusion Between Necessity for Withdrawal of Appeal, Continuance, and Withdrawal of Appeal Without Prejudice to Refile.....	1024
d.	Unauthorized Act of Representative.....	1025
e.	Duress; Misrepresentation; Incompetence.....	1029
f.	Mistake.....	1031
g.	Misleading or Incomplete Information From Judge.....	1031
h.	Attempts to Refile, Reinstate, or Reopen Withdrawn Appeals.....	1034
4.	Dismissal Without Prejudice to Refile ("DWOP").....	1038
a.	Reasons for DWOP.....	1043
b.	Pending Criminal Proceeding; Indefinite Suspension.....	1043

c.	Procedures for Obtaining Dismissal; Refiling	1045
d.	Refiling Date	1045
e.	Effect of PFR	1048
f.	Agency-Initiated Request; Prior Practice.....	1048
g.	Dismissal Initiated by Judge or MSPB	1049
5.	Delay in Refiling After DWOP.....	1050
a.	Retirement Appeals	1055
b.	Imperfect Attempt to Refile; Confusion Caused by Judge	1055
c.	Late Refiling; Independent Right of Appeal	1056
6.	Waiver of Appeal Through Last Chance or Other Preappeal Agreement	1056
a.	Jurisdictional Analysis.....	1059
b.	Public Policy; Appeal Preclusion; Consideration; Conflict With Regulation	1068
c.	Ambiguous Term; Failure to Waive Future Appeal Right.....	1070
d.	Due Process Considerations; Notice	1074
e.	Last Chance Agreement Superseded by Independent Adverse Action	1075
f.	Lack of Authority of Representative to Enter Agreement.....	1077
g.	Agreement to Accept Demotion, Suspension	1077
h.	Bad Faith, Coercion, Lack of Mental Capacity.....	1078
i.	Illegal or Punitive Term	1083
j.	Jurisdictional Prerequisite: LCA Compliance or Breach	1084
k.	Burden of Proof	1086
l.	Hearing Entitlement	1088
m.	Condition Unrelated to Underlying Action; Ambiguous Condition; Condition Described in Notice of LCA Violation	1091
n.	Discrimination, Reprisal	1097
o.	Claim Collateral to Breach of Agreement.....	1098
p.	Duration of Agreement	1098
7.	Personnel Action Resulting From Settlement Not Constituting Last Chance Agreement	1098
8.	Settlement Reached During Board Appeal	1100
II.	FORMAT AND PRELIMINARY PROCESSING OF APPEAL	1101
A.	ESSENTIAL INFORMATION.....	1101
B.	FORMAT.....	1102
1.	Interpretation of Appeal.....	1102
2.	Signature	1103
3.	Appeal Filed Through Representative	1104
4.	“John Doe” Appeal: Protecting Appellant’s Privacy.....	1104
5.	Agency-Initiated Retirement Appeal	1107
6.	Class Action, Consolidated Appeals, and Joinder; Bifurcated Appeals.....	1107
a.	Consolidation	1108
b.	Joinder; Compulsory Joinder	1110
c.	Class Action	1112
d.	Bifurcated Appeals.....	1113
7.	Substitution; Survival of Claim	1114
a.	IRA Case.....	1115
C.	INTERVENTION.....	1116
1.	Intervention of Right: OPM, OSC	1117
a.	OPM	1117
b.	OSC	1118
2.	Permissive Intervention	1118
3.	Rights of Intervenor.....	1121
4.	<i>Amicus Curiae</i>	1121
D.	STEPS TAKEN AFTER APPEAL IS FILED	1121
1.	Acknowledgment of Appeal.....	1123
a.	Philippines Retirement Appeal	1124
2.	Amendment of Appeal.....	1124
3.	Service of Pleadings	1125
4.	Deficient Appeal.....	1125
5.	Affirmative Defense Order; Requirement of Specific Allegations.....	1126
E.	AGENCY RESPONSE TO APPEAL.....	1128
1.	Narrative Response to Appeal	1129
2.	Motion to Dismiss Appeal.....	1129

3.	Delay in Appeal Response.....	1129
4.	Designation of Agency Representative.....	1130
F.	JURISDICTIONAL ISSUES.....	1130
1.	Nonfrivolous Jurisdictional Allegation	1133
2.	Judge Must Ensure Jurisdictional Issues Are Identified; <i>Burgess</i> Notice	1135
3.	Agency Representative’s Responsibilities	1138
4.	Hearing on Jurisdictional Issue	1139
G.	REPRESENTATIVES.....	1140
1.	Right to Representation.....	1140
a.	Inadequate Representation	1142
b.	Service on Representative.....	1143
2.	Disqualification of Representative; State Disciplinary Rules	1144
a.	Conflicts	1145
b.	Representative as Witness.....	1148
H.	<i>PRO SE</i> AND INADEQUATELY REPRESENTED PARTIES	1148
1.	<i>Pro Se</i> Appellant	1148
2.	Assistance to Mentally Incompetent Appellant; <i>French</i> Procedure	1149
I.	<i>EX PARTE</i> COMMUNICATIONS	1153
1.	What They Are	1154
2.	How <i>Ex Parte</i> Communications Are Treated	1157
III.	INTERLOCUTORY APPEALS	1157
A.	INTERLOCUTORY APPEAL PROCEDURE.....	1157
1.	Regulation.....	1157
2.	Application of Regulation	1159
a.	Rulings on Bias and Intervention.....	1161
b.	Direct Appeal to MSPB.....	1161
3.	Stay of Proceeding.....	1161
IV.	DISCOVERY	1162
A.	OVERVIEW	1163
1.	Regulatory Structure.....	1163
2.	Preliminary Steps.....	1166
a.	Initial Disclosures.....	1167
3.	Limitations	1168
a.	Jurisdictional or Timeliness Issue	1168
4.	Motion to Compel.....	1169
5.	Federal Rules	1171
a.	Federal Rules of General Application	1172
6.	Interrogatories.....	1173
7.	Deposition	1174
8.	Other Discovery Devices	1177
a.	Document Request	1177
b.	Request for Admission.....	1178
c.	Medical, Psychiatric Examinations	1179
d.	Motion for More Definite Statement of Appeal	1180
9.	Discovery From Nonparties	1180
B.	STRATEGIC CONSIDERATIONS	1181
1.	Burden	1181
a.	Effect of EEO, Reprisal Allegations.....	1182
b.	Discovery During Pendency of Criminal Proceedings	1182
2.	Privileged Information	1183
a.	<i>In Camera</i> Inspection	1183
b.	Law Enforcement Privilege	1184
c.	OSC File; Executive and Investigative Privileges	1185
d.	OPM Suitability File.....	1186
e.	Agency Investigative File	1186
f.	Attorney-Client Privilege	1187
g.	Attorney Work Product Privilege	1192
h.	Agency Deliberative Process Privilege.....	1195
i.	Statutory Confidentiality Limitations.....	1196
3.	Privacy Act	1197
4.	Failure to Use Discovery.....	1199

5. Informal Discovery; Control by Agencies of Employees' Time	1200
6. Protective Order	1201
C. ENTRY OF DISCOVERY MATERIAL INTO RECORD	1202
D. SUBPOENAS	1203
1. When a Subpoena Is Used	1203
2. Obtaining, Serving Subpoena	1203
a. Witnesses Outside the United States	1205
3. Challenge; Enforcement	1205
4. Witness Fees; Travel Allowances	1206
E. REVIEW OF DISCOVERY RULINGS	1207
1. Rulings on Disputes.....	1207
a. Synopsis of Testimony	1207
b. Relevance, Overbread Request	1207
c. Mitigation; Disparate Treatment	1209
d. Deposition of Agency Head.....	1209
e. Electronic Records.....	1209
f. Inspection Rather Than Production of Documents.....	1210
g. OSC Case.....	1211
2. Effect of Denial of Discovery	1211
a. Due Process Considerations	1213
b. Preservation of Issue	1215
V. SANCTIONS	1216
A. FAILURE TO RESPOND TO APPEAL	1218
1. Default Judgment.....	1219
B. FAILURE TO PROSECUTE APPEAL	1219
1. Dismissal Warranted	1220
a. Failure to Provide Basis for Appeal	1222
b. Failure to Designate Representative.....	1222
c. Failure to Comply With Judge's Order.....	1222
2. Dismissal Unwarranted	1224
a. Failure to Attend Hearing	1225
b. Inadvertent or Isolated Failure to Obey Judge's Orders	1225
c. Late Appeal.....	1228
C. FAILURE TO COOPERATE IN DISCOVERY	1228
1. Sanction Against Agency	1229
a. Material in Control of Third Party.....	1231
2. Sanction Against Appellant.....	1232
D. FAILURE TO FOLLOW PREHEARING OR HEARING PROCEDURES	1234
1. Sanction Against Appellant; Prejudice to Agency.....	1234
2. Sanction Against Agency	1236

CHAPTER 3: HEARING..... 1239

I. HEARING.....	1239
A. RIGHT TO HEARING	1239
1. <i>De Novo</i> Hearing.....	1240
a. Role of Intervenor	1241
2. Jurisdictional Hearing; Documentary Evidence.....	1241
a. Timeliness Issue	1244
b. No Material Disputed Facts	1244
3. Counsel	1247
4. Control by Judge	1247
5. Official Time; Resources Available to Appellant	1249
B. WAIVER OF HEARING	1250
1. Inability to Travel to Hearing Site	1252
2. Failure to Request Hearing	1253
a. Remands; New Law.....	1255
3. Untimely Hearing Request.....	1255
a. Effect of Amendment of Appeal	1256
4. Failure to Receive Hearing Notice	1256
5. Withdrawal of Hearing Request.....	1257
a. Postponement Denied	1258

b. Events Beyond Appellant’s Control.....	1258
6. Strategic Considerations—Intentional Waiver	1258
7. Adjudication After Waiver, Failure to Attend Hearing.....	1259
8. Adjudication Without Hearing; Responses to Evidentiary Submissions	1259
C. POSTPONEMENT OF HEARING	1263
1. Timing of Hearing	1264
2. Policy on Continuances	1264
a. Dismissal Without Prejudice to Refile	1265
b. Case Suspension	1265
3. Continuance Procedure	1266
a. Request; Form of Sworn Statement	1267
b. Failure to Make Request.....	1267
c. Status of Pending Motion.....	1267
d. Proceeding After Denial of Motion	1267
4. Good Cause Requirement.....	1268
a. Need to Prepare	1268
b. Awaiting Outcome of Another Case.....	1268
c. Unavailability of Representative; New Representative	1268
(i) Case Proceeds to Hearing	1271
d. Medical Condition of Appellant.....	1271
e. Pending Criminal Proceeding; Indefinite Suspension.....	1272
f. Incarceration	1275
g. Military Service	1276
h. Missing or Unavailable Witness	1276
i. Change in Hearing Location.....	1276
5. Continuance Denial—Review Standard	1276
D. VENUE OF HEARING.....	1278
1. Change of Venue	1278
a. Cost to Appellant	1280
2. Requesting a Change of Venue.....	1280
3. Venue Determination Review Standard	1280
E. HEARING FUNDAMENTALS	1280
1. Change, Resignation, or Death of Judge	1280
2. Interaction With Judge.....	1281
3. Prehearing Submission	1281
4. Prehearing Conference	1282
a. Stipulations.....	1285
b. Waiver or Withdrawal of Affirmative Defense	1285
c. Dismissal of Charge	1285
5. Memorandum or Order Summarizing Conference.....	1286
a. Preservation of Objection; Incomplete Summary.....	1287
b. Treatment of EEO and Other Affirmative Defenses; Summary Judgment.....	1289
F. CONDUCT OF HEARING; RESPONSIBILITIES OF JUDGE	1291
1. Hearing Error: Measure of Damage	1291
a. Timing of Submission of Pleadings	1292
b. Timing of Initial Decision	1293
2. Control and Exclusion of Representative or Participant.....	1293
3. Maintaining Order.....	1294
a. Exclusion From Hearing Room of an Individual Whose Presence May Intimidate a Witness	1295
b. Security Arrangement	1295
4. Witness Control; Sequestration.....	1296
5. Conduct of Questioning	1298
a. Multiple Representatives.....	1299
6. Permitting Record Development	1299
a. Videoconference, Telephone Hearing.....	1300
b. Bifurcated Hearing	1304
c. Hearing Subpoena.....	1306
7. Ensuring Record Development; <i>Pro Se</i> Appellant; EEO File	1306
a. Annuity Appeal	1308
b. Duty of Judge to Inform an Appellant of Governing Law; <i>Pro Se</i> Appellant; Liberal Construction of Pleadings....	1309
c. Raising Issue <i>Sua Sponte</i>	1311

d.	Preserving Review Right Through Objection	1313
8.	Media Coverage.....	1313
9.	Public Hearing; Closing the Hearing	1314
10.	Timing of Hearing	1315
11.	Hearing Accommodation for Disabled Appellant; Interpreter	1315
12.	Allocation of Burden of Proof	1317
13.	Opening Statement.....	1317
14.	Closing Argument, Brief.....	1317
G.	PREVENTION OF INTERFERENCE WITH MSPB PROCEEDINGS	1318
1.	Protective Order.....	1318
2.	Protective Order for Appellant	1319
3.	Interference With Witness, Representative, Appellant	1320
a.	Agency Restriction on Appearance of Employee as Witness	1324
H.	POSTHEARING ACTIVITIES	1325
1.	Closing Record	1325
a.	Ensuring Notice of Record Closing	1326
b.	Clarifying Scope of Record; Off-The-Record Discussions	1327
c.	Timing of Evidentiary Submissions, Responses.....	1327
d.	Effect of Closing Record	1328
2.	Regional Authority After Initial Decision	1328
a.	Judge’s Request to Reopen Record to Correct Error	1329
II.	HEARING RECORD	1329
A.	RIGHT TO AND NECESSITY FOR A RECORD OR TRANSCRIPT	1329
1.	Current MSPB Practice.....	1330
2.	Past Treatment of Transcript.....	1331
3.	Past Internal MSPB Guidance on Transcript.....	1331
4.	Federal Circuit Commentary on Transcript	1332
a.	Arbitration Hearing	1333
5.	Use of Recording	1333
B.	PROBLEMS CONCERNING TRANSCRIPT AND RECORD.....	1333
1.	Off-The-Record Discussion	1334
2.	Hearing Recording Omission; Transcript Error.....	1334
3.	Correction of Transcript	1335
4.	Unofficial Transcript.....	1335
III.	MOTION PRACTICE	1336
A.	USE OF MOTIONS.....	1336
1.	Dispositive Motion	1338
a.	Motion to Dismiss Filed Before Hearing.....	1338
b.	Motion to Dismiss Filed During Hearing.....	1339
c.	Summary Judgment.....	1340
B.	FORM AND TIMING OF MOTIONS.....	1345
IV.	WITNESSES	1346
A.	WITNESS REQUEST	1346
1.	Obligation to Permit Relevant Testimony	1346
a.	Competence to Testify	1346
b.	Appellant	1347
c.	Decisionmaker.....	1347
d.	Agency Head	1347
2.	Obligation to Request Witness	1347
a.	Witness List	1348
b.	Rebuttal Witness.....	1350
3.	Repetitious Testimony.....	1350
4.	Offer of Proof	1350
5.	Compelling Witness Attendance	1351
a.	Appellant.....	1351
b.	Others; Former Employee; Subpoena.....	1352
6.	Duty Status of Federal Employee Witness; Pay, Travel, Per Diem	1352
a.	Official Time	1352
7.	Protecting Record; Missing Witness	1353
a.	Preservation of Objection.....	1354
8.	Judge May Call Witness.....	1354

9.	Obtaining Testimony by Alternate Means.....	1354
10.	Right of Witness to Representation	1355
a.	Self-Incrimination	1355
11.	Witness Denial—Review Standard	1355
B.	EXAMINATION OF WITNESSES	1357
1.	Control of Questioning	1357
a.	Questioning by Judge.....	1358
b.	Leading Questions	1358
c.	Production of Witness Statement, Document Relied on During Testimony	1359
d.	Taking Witness Out of Order	1360
V.	DISQUALIFICATION OF JUDGE	1360
A.	PRESUMPTION OF HONESTY AND IMPARTIALITY	1361
1.	Competence of Judge	1362
B.	TREATMENT OF BIAS ALLEGATIONS.....	1362
1.	Procedure; Documenting Record.....	1365
2.	Extrajudicial Source of Bias.....	1367
3.	Treatment of Bias Allegation by Judge, Board.....	1367
4.	Specific Bias Allegations	1368
a.	Relationship With Party or Witness	1368
b.	Relationship With Counsel	1368
c.	Improper Communication	1368
d.	Examination of Witness.....	1369
e.	Remarks About Counsel, Party, Merits, Settlement; <i>Ex Parte</i> Communication.....	1369
f.	Prior Ruling Against Party.....	1373
g.	Erroneous Ruling	1374
h.	Incorrect Factual Conclusion.....	1374
i.	Hasty or Late Decision	1374
j.	Change in Judge Without Finding of Bias	1375

CHAPTER 4: EVIDENCE..... 1377

I.	FUNDAMENTALS	1377
A.	RELEVANCE, MATERIALITY, AND FAIRNESS	1377
1.	Informal Adjudication	1377
2.	Relevance and Materiality	1377
a.	<i>De Novo</i> Review	1378
b.	Conditional Admission of Evidence.....	1378
3.	Record.....	1378
a.	Offer of Proof.....	1378
4.	Fairness in Development of Evidence.....	1378
a.	Erroneous Exclusion of Evidence	1378
b.	Erroneous Admission of Evidence.....	1379
c.	Manipulation or Redaction of Evidence.....	1379
B.	NATURE OF CHARGES	1380
1.	Evidentiary Value of Charge	1380
a.	Response to Charge	1381
C.	HEARSAY	1382
1.	<i>Borninkhof</i>	1383
2.	Judicial Interpretations	1385
3.	5 USC 2302(b)(2): Investigative Statement	1386
II.	EVALUATION OF EVIDENCE	1386
A.	DOCUMENTS	1387
1.	Response to Appeal	1387
2.	Medical Report, Records.....	1387
3.	Notes of Witness; Memorandum of Conversation	1388
4.	Time and Attendance Record	1388
5.	Business Record	1389
6.	Regulation; Law	1389
7.	Evidence From Other MSPB Hearing; Other Judicial Proceeding.....	1389
8.	Procedure for Introducing Document; Demonstrative Evidence	1389
9.	Authentication Requirement	1391
a.	Handwriting	1391

b. Significance of Signature	1391
c. Copy; Photograph	1391
B. PHYSICAL EVIDENCE.....	1392
1. Custody and Control	1392
2. Use at Hearing	1392
C. ADMISSIONS	1392
1. Probative Value	1393
a. Repudiated or Recanted Admission	1393
2. Settlement Offer.....	1395
D. CIRCUMSTANTIAL AND SECONDARY EVIDENCE	1395
1. Common Possession/Multiple Causation.....	1397
2. Contemporaneous Statement.....	1398
3. Flight or Evasion	1398
4. Statistics.....	1398
E. OPINION AND IMPEACHMENT EVIDENCE	1398
1. Physical Condition	1398
2. Character.....	1399
a. Past Misconduct	1400
b. Arrest, Conviction.....	1401
c. Reputation	1401
d. Habit	1402
3. Evidence in Disability Annuity Appeal; <i>Chavez</i> ; Post-Separation Evidence	1402
F. RECURRENT EVIDENTIARY PROBLEMS.....	1408
1. Polygraph.....	1408
2. Unsworn Written Statements.....	1409
a. No Hearing.....	1411
b. Hearing Held	1411
c. Sworn Written Statement; Form of Attestation	1412
d. Deposition	1414
3. Investigation Reports.....	1415
4. Recordings.....	1417
a. Video	1417
b. Audio	1417
5. Transcript of Prior Testimony	1418
6. Expert Witness; Medical Evidence	1418
a. Medical Expert Opinion	1420
b. Other Experts.....	1422
7. Statements of Representative, Party.....	1423
a. Hearing Deportment or Demeanor	1423
8. Testimony of Child	1424
9. Interpretation of Collective Bargaining Contract	1424
10. Newspaper Article	1424
11. Drug Test	1424
III. SUBSTITUTES FOR DIRECT EVIDENCE	1429
A. OFFICIAL NOTICE	1429
1. Regulations.....	1429
a. Federal Personnel Manual; Agency Handbook, Publication	1429
2. Related Board Case Records.....	1430
B. ADVERSE INFERENCES AND PRESUMPTIONS	1430
1. Silence	1430
2. Negative Inferences.....	1432
a. Destruction or Loss of Evidence; Spoliation	1433
b. Negative Evidence	1436
3. Presumption.....	1436
a. Delivery of Mail, Other Documents	1436
C. STIPULATIONS	1440
1. Issues of Fact and Law	1441
2. Stipulations Directed by Judge	1442
D. <i>RES JUDICATA</i> , COLLATERAL ESTOPPEL, AND LAW OF THE CASE—THE DOCTRINES.....	1442
1. <i>Res Judicata</i>	1443
a. Identity of Prior Cause of Action and Issues	1448

b.	Identity of Parties; Privity	1449
c.	Complete Relief Available	1449
d.	Jurisdictional Issue	1450
e.	Settlement	1452
f.	Withdrawal of Appeal	1454
g.	<i>Res Judicata</i> Raised <i>Sua Sponte</i> by MSPB; Waiver of Defense	1454
2.	Collateral Estoppel.....	1455
a.	Error in Law; Change in Law	1459
b.	Proof of a Prior Adjudication	1460
c.	Privity; Appellant as a Party to Prior Case	1460
d.	Privity of Agencies	1460
e.	Identity of Prior Issue	1461
f.	Jurisdictional, Timeliness Issues	1462
g.	Decision of Another Tribunal	1465
h.	Collateral Estoppel Raised <i>Sua Sponte</i> by MSPB	1466
3.	Judicial Estoppel	1467
4.	Law of the Case; Mandate Rule	1469
5.	<i>Stare Decisis</i>	1473
E.	RES JUDICATA AND COLLATERAL ESTOPPEL—THE DOCTRINES APPLIED	1473
1.	Criminal Conviction.....	1474
2.	Pleas to Criminal Charges.....	1476
a.	Guilty Plea	1476
b.	<i>Nolo Contendere</i> and <i>Alford</i> Pleas	1478
c.	Pretrial Diversion	1481
d.	Conviction, Misconduct Distinguished	1482
3.	Acquittal; Reversal of Criminal Conviction.....	1482
4.	Successive MSPB Cases	1483
a.	Dismissal for Adjudicatory Efficiency	1484
b.	WIGI/Removal	1484
c.	Successive RIFs	1485
d.	Whistleblowing Prohibited Personnel Practice Complaint or Appeal.....	1485
e.	USERRA Claims	1492
f.	Suitability Determination	1492
g.	Regulation Review	1493
h.	Prior Action Reversed for Lack of Due Process.....	1493
5.	Other Proceedings.....	1493
a.	Credentialing Committee	1493
b.	Union Trial Board	1494
c.	Labor Arbitration Awards	1494
d.	OPM Annuity Determination	1497
e.	Unemployment Compensation Award	1499
f.	OWCP Finding; Social Security Determination	1501
g.	EEOC Decision.....	1502
h.	Comptroller General or GAO Decision	1503
i.	Judicial Determination	1504
6.	Potential Exceptions to Application of Collateral Estoppel, <i>Res Judicata</i>	1505
a.	Pendency of an Appeal; District Court Case	1505
b.	Fairness of Adjudication; New Evidence	1506
c.	Fraud; Misrepresentation	1506
d.	Change in Law	1507
IV.	EXCLUSION OF EVIDENCE	1507
A.	PROCEDURES	1507
1.	Objection, Motions to Strike or <i>in Limine</i>	1508
2.	Witness Exclusion	1508
a.	Proposing Official	1508
B.	CONSTITUTIONAL AND STATUTORY CHALLENGES	1509
1.	Search.....	1509
a.	Wiretap.....	1513
b.	Recording	1514
c.	Drug Testing	1514
2.	Interrogation.....	1519

a.	Misconduct of Investigator	1519
b.	Compelled Testimony; <i>Kalkines</i> Warning	1519
c.	Right to Silence, Counsel	1521
d.	Denial of Union Representation.....	1523
C.	OTHER BASES FOR EXCLUSION OF EVIDENCE	1524
1.	Claims of Privilege.....	1524
a.	Alcoholism Treatment Records.....	1524
b.	Other Medical Records	1524
c.	Privacy; Attorney-Client Communication	1524
2.	Conference With Union Representative.....	1525
3.	Failure to Follow MSPB Procedure	1525

CHAPTER 5: INITIAL DECISION AND PETITION FOR REVIEW..... 1527

I.	INITIAL DECISION.....	1527
A.	INITIAL DECISION FORMAT	1527
1.	Minimum Requirements.....	1527
a.	Bench Decision	1529
b.	Notice of Right to Review	1530
2.	Appeal Dismissed by Consent; Mootness of Initial Decision.....	1531
B.	REQUIRED ANALYSIS	1531
1.	Incomplete Analysis	1532
a.	Incorrect Adjudication Standard.....	1534
b.	Issue Not Raised in Appeal.....	1534
2.	Timeliness and Jurisdictional Issues	1535
3.	Adverse Action, Performance Case	1535
4.	Annuity Appeal	1536
5.	EEO, Prohibited Personnel Practice Issue	1536
a.	Nondispositive EEO, Prohibited Personnel Practice Issue.....	1538
6.	Consolidated Appeals	1539
7.	Attorney Fees Decision	1540
C.	CREDIBILITY FINDINGS	1540
1.	Necessary Findings	1540
a.	Weight of Evidence Equally Balanced	1541
2.	Factors Considered; <i>Hillen</i>	1541
a.	Some Testimony Discredited	1543
b.	Alibi Defense	1544
c.	Inconsistencies; Denials; Memory Lapse; Failure to Provide Statement	1544
d.	Contemporaneous Notation, Statement; <i>Post Hoc</i> Explanation.....	1545
e.	Self-Serving Testimony; Bias; Criminal Conviction; Past Misconduct	1545
f.	Uncontradicted Testimony.....	1546
g.	Implausible, Inherently Improbable, Imprecise Testimony	1547
3.	Telephonic Hearing	1547
4.	Determination Made Without Hearing	1547
II.	PETITION FOR REVIEW; RECONSIDERATION	1547
A.	PFR PROCESS	1548
1.	Statutory and Regulatory Structure	1549
a.	Internal Board Guidance	1551
2.	Board Treatment of PFR, Reopening Request.....	1552
a.	Enforcement Issue.....	1553
3.	Reply to PFR Response	1554
4.	Cross-PFR.....	1554
a.	Conditional Cross-PFR	1555
5.	Effect of Judicial Review on PFR	1555
6.	Effect of EEOC Review on PFR	1556
7.	Who May Obtain Review	1556
a.	OPM	1556
b.	OSC	1557
c.	Others; Intervenors	1557
8.	Grounds for PFR	1557
a.	Evidentiary Disputes	1558
b.	Ineffective Counsel	1558

c.	Fivolous PFR; Sanction	1560
d.	Challenges to Settlement	1560
9.	Time for Filing.....	1560
10.	Service	1561
11.	MSPB Processing	1561
a.	Tied Vote; Lack of Quorum	1563
b.	Decision Effective Upon Issuance by Clerk	1564
c.	Joinder	1564
12.	Failure to Prosecute; Failure to Respond.....	1564
a.	Withdrawal of PFR.....	1564
b.	Dismissal Without Prejudice	1565
13.	PFR Settlement Program	1565
14.	Entry of Settlement Agreement Into Record.....	1566
15.	MSPB Final Decision	1566
a.	Short Form Order.....	1567
16.	Authority to Reopen and Reconsider	1568
a.	Jurisdictional Issue.....	1571
b.	Due Diligence	1572
c.	Reversal of Criminal Conviction	1576
d.	Change in Law	1577
e.	Fraud	1578
f.	Retirement Appeal	1579
g.	Effect of Judicial Review on Petition to Reopen.....	1581
h.	Reopening in Lieu of Excusing Untimely or Defective PFR	1582
i.	Clear Legal Error; Manifest Injustice.....	1582
j.	Discovery of Additional Legal Argument.....	1583
k.	Correction of Case Processing Error	1583
B.	INTERIM RELIEF	1583
1.	Effective Date of Interim Relief.....	1586
2.	Effect of Remand or Supplemental Initial Decision on Interim Relief.....	1587
3.	Obligation to Return Employee to Work and Pay; Undue Disruption.....	1587
a.	Undue Disruption Determination	1590
b.	Undue Disruption Notice	1591
c.	Implicit Disruption Determination; Strong Overriding Interest	1593
d.	Removal From Workplace or Adverse Action During Interim Relief Period	1597
e.	Return to Work With Changed Duties.....	1598
f.	Restoration Followed by Appellant’s Inability to Work.....	1598
g.	Pay Entitlement; Overtime; Allowances	1598
h.	Deductibility of Interim Earnings or Severance Pay	1601
i.	Prior “Bad Faith” Implementation Standard	1601
4.	Dismissal of PFR for Failure to Provide Interim Relief	1601
a.	Remedy for Inadequate Interim Relief	1603
b.	Motion to Dismiss PFR for Lack of Proper Interim Relief	1603
c.	Discriminatory Application of Interim Relief	1604
d.	Effect of Jurisdictional Issue	1605
5.	PFR Not Mooted by Overbroad Interim Relief.....	1605
6.	Certification and Proof of Interim Relief	1606
a.	Evidence of Interim Relief	1607
b.	Technical Error; Supplemental Evidence of Interim Relief	1610
c.	Delay in Payment Following Certification or <i>Prima Facie</i> Evidence of Interim Relief.....	1611
d.	Withdrawal of Interim Relief	1611
7.	Factors Limiting or Warranting Denial of Interim Relief	1612
a.	OWCP Benefits	1612
b.	Retirement	1613
c.	Restriction on Extension of Appointment	1614
d.	Waiver, Settlement of Interim Relief; Employment Status Change	1614
8.	Special Situations	1616
a.	Retirement Appeals	1616
b.	Within-Grade Increase Appeal	1617
c.	Suitability Appeal	1617
d.	VEOA Appeal.....	1617

e.	Mitigation of Removal to Demotion	1617
f.	Mitigation of Removal to Suspension	1618
g.	Mitigation of Demotion to Suspension	1618
h.	Mitigation or Cancellation of Suspension	1618
i.	Enforced Leave Concluded by the Date of the Initial Decision.....	1619
j.	Unified Penalty Involving Reassignment	1619
C.	REVIEW OF FACTUAL AND CREDIBILITY FINDINGS	1619
1.	Factual Findings; "Special Deference"	1620
a.	Decision Based on Affidavits, Documents	1624
b.	Telephonic, Videoconference Hearing	1625
2.	Omitted Findings	1625
3.	Unnecessary Findings	1626
4.	Issue of Mental Competence During Appeal Adjudication	1627
D.	REVIEW OF NEW EVIDENCE	1627
1.	What Constitutes Evidence	1630
2.	What Evidence Is New	1630
a.	Previously Available	1630
b.	Issue First Raised by Judge	1631
c.	Claim of Surprise	1632
d.	Due Diligence	1632
e.	Issue of Timeliness of Appeal or Other Submission.....	1635
f.	Issue of Jurisdiction; Exhaustion of Remedies	1637
g.	Evidence From Another MSPB Case	1639
3.	Materiality of New Evidence	1639
a.	Impeachment, Rebuttal Evidence	1640
b.	Corroborative Evidence	1643
c.	Disparate Treatment	1644
d.	OPM, SSA, OWCP, VA Determination; Evidence of Medical, Mental Condition	1644
e.	Adjudication of Past Discipline.....	1645
f.	Reversal of Criminal Conviction	1646
E.	REVIEW OF NEW LAW	1646
F.	REVIEW OF NEW ISSUES OR ISSUES NOT RAISED WITH JUDGE	1648
1.	General Rule.....	1648
a.	Jurisdictional Issue	1648
b.	Order Directing Payment in Violation of Federal Statute.....	1649
2.	Determining if Issue or Argument Was Raised Below	1650
a.	Annuity	1650
b.	Penalty	1650
c.	Statutory, Constitutional Interpretation	1650
d.	Timeliness of Appeal	1650
e.	Discrimination	1650
f.	Waiver of Issue	1651
G.	TIMELINESS OF PFR	1651
1.	Request for Extension of Time	1652
2.	Date and Place of Filing	1653
a.	Deficient but Timely PFR.....	1653
3.	Filing by Facsimile	1654
a.	Misguided Facsimile	1654
4.	Filing by Commercial Delivery.....	1655
5.	Filing by Hand.....	1655
6.	Filing by Mail.....	1655
a.	Proof of Mailing; Postmark; Mailbox Rule	1657
b.	PFR Lost in the Mail.....	1660
7.	Electronic Filing.....	1662
8.	Procedure on Late Submission.....	1663
a.	Affidavit or Sworn Statement Required	1664
b.	Strict Application	1665
c.	Retirement Appeal.....	1666
9.	Justification for Late Filing	1667
a.	Electronic Filing Problem.....	1668
b.	Mailroom Delay in Posting PFR	1671

c.	Foreign Mail Problem.....	1671
d.	Office Equipment, Technology, Related Problems	1671
e.	Merits	1672
f.	Physical or Mental Condition of Appellant or Counsel	1672
g.	Ignorance of Law; Late Discovery of Legal Defense; Subsequent MSPB Decision in Another Case.....	1679
h.	Problem With Settlement	1681
i.	Misinterpretation, Ignorance of MSPB Regulation, Instruction.....	1682
j.	Incorrect Information From MSPB, Others	1684
k.	Incomplete Notice of Right to File PFR.....	1684
l.	Delayed Receipt, Misrouting of Initial Decision, PFR; Constructive Receipt	1685
m.	Failure to Receive Initial Decision; E-Filer	1687
(i)	Responsibility to Notify Board of Physical or Email Address Change	1690
n.	Effect of Judge's Remand to Agency for Redetermination	1692
o.	Withdrawal, Absence of Representative	1693
p.	Inability to Obtain Representation	1693
q.	Unexcused Delay or Neglect of Representative.....	1694
r.	Excused Neglect of Representative; Diligence of Appellant	1697
s.	Attempt to Obtain Congressional Assistance	1699
t.	Pending Review by Another Adjudicator	1699
u.	Awaiting Transcript, Other Document.....	1700
v.	Delay in Internal Decisionmaking	1702
w.	Military Service.....	1702
x.	Fear of Prosecution; Agency Misrepresentation	1702
y.	Language Difficulties	1702
z.	Other Problems.....	1703
10.	Filing PFR With Wrong Agency or MSPB Office	1705
a.	Mixed Case Appeals.....	1705
b.	Other Misdirected Filings	1706
11.	Case or PFR Misfiled in Court	1707
H.	FORMAT AND SUBSTANCE OF PFR; REPLY; RESPONSE TO REPLY.....	1708
1.	Allowable Submissions; Length, Format.....	1708
a.	Erroneous Designation of Pleading	1710
b.	Error in Formal Requirements	1710
c.	<i>Pro Se</i> Form PFR.....	1710
2.	Signature, Designation of Representative Required	1711
3.	Specific and Supported Objection	1712
a.	Factual Error	1713
b.	Adjudicatory Error	1713
4.	Response to PFR	1713
5.	Reply to Response.....	1714
6.	Supplemental Authority.....	1714
7.	Lack of Transcript	1714
I.	MOOTNESS OF PFR	1715
1.	Cancelation of Adverse Action; Agency Compliance With Initial Decision	1715
a.	Effect of Appellant's PFR; No Agency PFR Filed	1716
2.	Settlement; Vacatur of Initial Decision	1716
3.	Regulation Review Proceeding	1716
4.	Retirement Appeal.....	1717
5.	Disqualification of Representative	1717
J.	PROCEDURE ON REMAND.....	1717
1.	Determining Whether a Remand Is Necessary.....	1717
a.	Board Obtains Evidence During PFR	1717
2.	Evidence, Findings From First Hearing.....	1718
a.	Effect of MSPB Order Vacating Initial Decision	1718
3.	Remand for Further Discovery	1719
4.	Remand for More Evidence	1719
a.	Subsequent PFR.....	1719
b.	Entry of Interlocutory or Interim Relief on Remand	1719
5.	Remand for Compliance	1719
K.	OPM RECONSIDERATION REQUESTS	1719
1.	Governing Statute and Regulation	1720

2.	Substantial Impact on Law	1722
a.	Decisions Before 1990.....	1724
3.	Limited to Facts, Issues of Record	1724
4.	Timing of Request; Arbitration Award	1724
5.	Mootness	1725
6.	Discrimination Law, Rule, or Regulation	1725
L.	STAY REQUESTS	1726
1.	Requested by OPM	1727
a.	Request for Supreme Court Review	1730
2.	Requested by Agency	1730
a.	Stay of Enforcement Proceeding	1732
3.	Requested By or For Individual	1732
a.	Special Counsel Disciplinary Case	1734
b.	Other OSC Litigation	1736
M.	REVIEW OF ARBITRATION AWARDS	1736
1.	Award Subject to Review	1741
a.	Governing Statute and Regulation; Time for Review	1742
b.	EEO Allegation.....	1744
c.	Remand for Resolution of EEO Issue.....	1748
d.	Attorney Fees Claim	1749
2.	MSPB Review Procedure	1750
a.	Time to Seek Review.....	1752
3.	Proper Appellant Before MSPB	1754
4.	Method, Scope of MSPB Review	1754
a.	Issue Preclusion	1757
b.	Collective Bargaining Contract Exclusivity.....	1758
c.	Allegation of Bias, Unfair Hearing	1758
d.	Enforcement of Award Reviewed by MSPB.....	1759
5.	Standard of Review	1759
a.	Penalty, Time-Served Suspension; Remedy	1762
b.	Procedures; Timeliness of Grievance	1770
c.	EEO Issue	1774
6.	Postal Service Employees.....	1775
a.	Effect of Arbitration Award on Board Appeal.....	1777

VOLUME II

CHAPTER 6: ADVERSE ACTIONS 1783

I.	ADVERSE ACTIONS DEFINED	1783
A.	CANCELATION OF APPOINTMENT, PROMOTION	1783
1.	Appointment	1784
a.	Entry on Duty; Action by Appointing Authority; Reliance	1788
b.	Citizenship.....	1788
c.	Nepotism	1790
d.	Selective Service Registration.....	1790
e.	Political Influence	1792
f.	Withdrawal of Offer to Extend Term Appointment.....	1793
2.	Promotion, Pay Increase	1794
B.	TERMINATION BY ADVERSE ACTION OF APPOINTMENT SECURED BY FRAUD; OPM SUITABILITY ACTION.....	1806
C.	CONSTRUCTIVE ADVERSE ACTION	1807
1.	Jurisdictional Showing	1810
a.	Specific Allegations Control	1819
b.	Totality of Circumstances	1821
c.	Judge to Inform Appellant of Jurisdictional Requirements.....	1824
d.	Jurisdictional Analysis in Untimely Appeal	1824
e.	Collateral Attack on Settlement Agreement, Waiver of Appeal Right.....	1824
f.	Allegation of Discrimination	1826
2.	Overview of Constructive Adverse Action Appeals	1829
a.	Timing of Events	1830
3.	Involuntary Downgrading	1832
a.	Hearing.....	1832

b.	Deceit; Misrepresentation	1833
c.	Action Threatened Without Good Cause	1840
d.	Time Pressure	1841
e.	Improper Reassignment	1842
f.	Withdrawal of Request for Downgrading	1842
g.	Unauthentic Request for Downgrading	1843
h.	Discrimination; Intolerable Working Conditions	1843
i.	External Problems	1846
j.	Correction of Administrative Error	1847
4.	Involuntary Resignation.....	1848
a.	Hearing.....	1852
b.	Deceit; Misrepresentation	1853
c.	Action Threatened Without Good Cause	1858
d.	Time Pressure	1861
e.	Improper Reassignment	1864
f.	Withdrawal of Request to Resign.....	1864
g.	Irrevocable Resignation; VSIP.....	1867
h.	Unauthentic, Ambiguous or Conditional Resignation	1868
i.	Ineffective Resignation	1868
j.	Mental Disability.....	1869
k.	Intolerable Working Conditions	1870
l.	Whistleblowing Reprisal	1879
m.	Discriminatory Working Conditions	1880
n.	Failure to Accommodate Disability	1883
o.	Denial of Leave	1886
p.	External Problems	1887
q.	Probationer	1887
r.	Technical Error	1887
5.	Involuntary Retirement.....	1887
a.	Hearing	1889
b.	Deceit; Misrepresentation	1890
(i)	Correction of Benefit; Placement in Wrong Retirement System	1902
c.	Action Threatened Without Good Cause	1903
d.	Time Pressure	1905
e.	Involuntary Reassignment	1907
f.	Withdrawal of Request to Retire	1909
g.	Irrevocable Retirement; VSIP	1911
h.	Intolerable Working Conditions	1914
i.	Whistleblowing Reprisal	1921
j.	Discriminatory Working Conditions	1926
k.	Failure to Accommodate Disability	1930
l.	Discriminatory Conduct Causes Disability	1942
m.	Denial of Leave	1943
n.	Mental Disability.....	1944
o.	Agency-Initiated Retirement	1944
p.	Discontinued Service Retirement	1944
q.	Mandatory Retirement	1946
r.	Employing Agency as Party to Appeal Against OPM.....	1946
6.	Constructive Demotion Through Reassignment; <i>Russell</i>	1946
a.	Planned Management Action	1950
b.	Position Must Be Upgraded	1953
c.	Identity of Duties.....	1955
d.	Qualification for Higher-Graded Position	1956
e.	Jurisdictional Analysis; Hearing	1956
f.	Evidence of Classification Error	1957
g.	EEO Allegation	1957
h.	Timeliness of Appeal	1957
7.	Involuntary Transfer	1958
D.	ENFORCED LEAVE; CONSTRUCTIVE SUSPENSION	1959
1.	Jurisdictional Analysis; Burden of Proof	1962
a.	Hearing.....	1964

b.	EEO Allegation	1965
c.	Effect of Receipt of OWCP Benefit	1965
d.	Disputed Restoration Right	1967
2.	Requirement for Adverse Action Procedure.....	1968
a.	Leave Status Voluntarily Assumed; Failure to Provide Medical Documentation, Perform Available Work.....	1970
b.	Process Due to Employee	1974
c.	Evaluation of Leave Enforced Following Notice to Employee	1974
d.	Disability Accommodation	1975
3.	Employee AWOL	1979
4.	Employee Blocked From Working Because of Employer's Concern About Fitness.....	1980
a.	Employee on LWOP	1987
5.	Light and Limited Duty; Medical Restriction.....	1987
a.	Historical Development of Light Duty Analysis.....	1991
b.	Collective Bargaining Contract.....	1996
c.	Disability Accommodation	2000
d.	EEO Settlement	2004
e.	Termination of Light Duty.....	2005
f.	Postal Service National and Other Collective Bargaining Contracts.....	2007
g.	Furlough	2008
6.	Work Release.....	2008
7.	Bar Order Preventing Entry to Workplace	2008
8.	Temporary Absence Resulting From Intolerable Working Conditions	2010
E.	INDEFINITE SUSPENSION.....	2013
1.	Use	2014
2.	Procedure; Duration	2017
a.	Due Process	2023
b.	Regulatory Error.....	2026
3.	Criminal Activity	2027
a.	Indictment; Filing of Information; Referral for Prosecution	2028
b.	Investigation Accompanied by Other Circumstances.....	2030
c.	Arrest	2032
4.	Nexus.....	2039
5.	Security Clearance or Other Investigation.....	2041
a.	Due Process: Separation of Officials Denying Access and Deciding Suspension; Change in Basis for Clearance Suspension.....	2047
b.	Indefinite Prolongation of Suspension.....	2062
c.	Alternatives to Suspension	2065
d.	Discrimination; Accommodation for Disability; Medical Issues; Whistleblowing.....	2070
6.	Inquiry Into Other Issues	2071
7.	Remedy	2077
a.	Action Following Termination of Criminal Proceeding.....	2081
II.	SERVICE EFFICIENCY	2082
A.	BURDEN OF PROOF	2084
1.	Charges.....	2084
2.	Affirmative Defenses.....	2085
3.	Preponderance of Evidence	2085
a.	Uniformity of Standard	2086
b.	Violation of Criminal Statute	2086
c.	Intent	2087
d.	Suspicion; Belief.....	2087
4.	<i>Prima Facie</i> Case	2088
5.	Presumption.....	2088
B.	PERSONAL FAULT.....	2088
1.	Adverse Action to Address Action Involving Another Employee	2088
a.	EEO Complaint	2088
b.	Merit Promotion Grievance	2089
2.	Action Directed by Arbitrator.....	2089
3.	Correction of Administrative Error	2089
4.	<i>Respondeat Superior</i>	2089
C.	ADVERSE ACTION RELATED TO DISABILITY	2092
1.	Medical Standard	2093

2.	Medical Impairment	2094
3.	Agency-Initiated Retirement.....	2095
a.	Assistance in Securing Counsel.....	2098
b.	Prior Law: Reasonable Cause to Believe	2098
4.	Evaluation of Physical Impairment	2100
a.	Evidence of Recovery Between Date of Removal and MSPB Decision.....	2103
5.	Effect of Removal for Inability to Work on OPM Disability Annuity Determination	2104
a.	Rebuttable Presumption of Annuity Entitlement.....	2105
6.	Effect of Grant of Disability Retirement Application on Action Based on Inability to Perform Duties	2113
7.	Allegation of Disability Discrimination; Lack of Reasonable Accommodation	2115
III.	SPECIAL CLASSES OF EMPLOYEES.....	2116
A.	SENIOR EXECUTIVE SERVICE	2116
1.	Mitigation of Disciplinary Action	2122
2.	Performance Case	2123
a.	Informal Hearing.....	2123
3.	Department of Veterans Affairs.....	2125
a.	2014 Legislation	2125
B.	ADMINISTRATIVE LAW JUDGES.....	2131
1.	Scope of MSPB Review	2134
a.	Good Cause	2134
b.	Penalty Determination	2139
c.	Affirmative Defenses	2140
2.	Cause for Discipline	2141
a.	Insubordination	2142
b.	Performance	2143
c.	Failure to Follow Performance-Related Directive	2147
d.	Remarks to Litigant; Comments in Decision; Conduct of Hearing.....	2150
e.	Prolonged Absence; Irregular Attendance	2151
f.	Other Misconduct	2152
3.	Constructive Action Against Judge: <i>Tunik</i>	2155
a.	Forced Retirement.....	2162
b.	Enforced Leave	2163
c.	Pre- <i>Tunik</i> Decisions; Judicial Independence.....	2163
4.	Furlough; RIF	2171
5.	Settlement of Complaint	2174
6.	Voluntary Dismissal of Complaint	2175

CHAPTER 7: NEXUS AND MITIGATION2177

I.	CONCEPT OF NEXUS	2177
A.	MERRITT AND PRESUMPTIONS OF NEXUS; OFF-DUTY CONDUCT	2178
1.	General Approach Toward Proof.....	2181
a.	Actual or Potential Publicity, Notoriety	2181
b.	Potential for Future Harm.....	2182
c.	Investigative Exertion	2182
B.	SPECIFIC NEXUS DETERMINATIONS.....	2182
1.	Arrest	2183
2.	Violent Off-Duty Misconduct	2183
a.	Shooting; Killing	2183
b.	Assault; Threat.....	2185
3.	Violent Conduct on Agency Premises	2186
4.	Off-Duty Drug Offense	2187
a.	Drug Activity Involving Agency Time or Facilities	2190
5.	Off-Duty Alcohol-Related Offense	2190
a.	Off-Duty Activity Involving Agency Premises	2191
6.	Sexual Misconduct.....	2192
7.	Fraud and Theft; Other Integrity Offenses	2203
a.	Off-Duty Offense	2203
b.	Preemployment Offense.....	2205
c.	On-Duty or Job-Related Offense	2205
8.	Gambling.....	2206
9.	Failure to Pay Debt	2206

10. Grievance Meeting	2209
11. Conduct Contrary to Agency Mission	2209
a. Real Estate Activity—DHUD	2209
b. Employee's Tax Problem—IRS, Other Agencies; Responsibility for Errors of Others	2209
c. Law Enforcement Officer; <i>Giglio</i> Impairment	2214
d. Driver.....	2219
e. Strike-Related Conduct	2219
12. AWOL Removal After Criminal Conviction.....	2219
II. MITIGATION OR AGGRAVATION OF PENALTIES	2219
A. GENERAL CONSIDERATIONS	2220
1. <i>Douglas</i> Standards; Decision to Reflect Mitigating Factors or MSPB Imposes Maximum Reasonable Penalty	2222
a. Consideration of Mitigating Factors	2224
b. Proposal to List Aggravating Factors; Treatment of Warnings; Due Process Considerations	2224
c. Exemplary Penalty.....	2227
d. Exaggeration of Charge	2227
2. Articulation of Relevant Factors.....	2227
a. By Agency; Decision Notice	2228
b. By MSPB	2229
3. Not All Charges Sustained; Maximum Reasonable Penalty	2230
a. Remand to Agency for Redetermination of Penalty	2235
4. All Charges but Not All Specifications Sustained; Partial Specification Sustained.....	2237
5. Charge Sustained That Was Not Brought	2238
6. Factors Not Considered Mitigating.....	2238
a. Disability Discrimination; Impairment.....	2238
b. Discriminatory Environment	2239
c. Prohibited Personnel Practice.....	2239
d. Offer of Settlement	2239
7. When Mitigation Must Be Raised	2239
8. Special Counsel Disciplinary Case.....	2240
9. Impact of Mitigation by Demotion on Labor Agreement Requirement	2240
B. SPECIFIC MITIGATING OR AGGRAVATING FACTORS	2240
1. Potential for Rehabilitation	2240
a. Deference to Higher Level Management Assessment.....	2241
b. Forward-Looking Analysis.....	2241
c. Performance Action	2241
d. Notice of Rule or Policy	2242
e. Temporary Condition; Stress; Alcoholism	2244
f. Long Service	2244
g. Intervening Good Performance; Misconduct Subsequent to Charge Leading to Adverse Action	2244
h. Post-Removal Conduct or Evidence of Rehabilitation	2246
i. Contrition or Remorse; Admission of Misconduct	2247
j. Denial of Misconduct; Vigorous Defense	2248
k. Repeated Misconduct; Last Chance Agreement.....	2249
2. Psychological Problem; Illness or Treatment; Stress	2250
3. Performance, Evaluations.....	2256
4. Intent	2257
5. Notoriety	2257
6. Position of Trust; Fiduciary Duty; Loss of Trust	2257
7. Progressive Discipline	2260
8. Table of Penalties; Classification of Offense.....	2262
9. Disparate; Comparable Penalties	2265
a. Duty of Agency to Inquire Into Comparable Offenses and Penalties.....	2269
b. Degree of Consistency Required	2270
c. Substantial Similarity of Offenses; Totality of Circumstances	2270
d. Proximity in Time	2275
e. Same Work Unit; Evolving Case Law: <i>Woebcke</i> ; <i>Lewis</i>	2276
f. Positions of Similar Levels of Trust and Responsibility	2284
g. Selective Prosecution.....	2286
h. Settlement	2286
i. Comparable Arbitration Awards; Other MSPB Decisions	2290
j. Effect of Criminal Sentence	2291

k. Assertion of Discrimination	2291
l. Post-Removal Comparability Analysis	2291
10. Mandatory Penalty	2292
11. Staleness of Charge	2295
12. Agency Bad Faith, Provocation, Manipulation; Improper Pressure on Appellant; Entrapment	2296
13. Condonation	2297
14. Favorable Attitude of Coworker; Supervisor	2297
15. Severity of Misconduct	2297
a. Sequential Disciplinary Proposals	2297
b. Multiplicity and Merger of Charges	2297
c. Zero Tolerance Policy	2298
16. Employee Job Level.....	2300
a. Ineffectiveness as Supervisor; Demotion	2300
b. Reassignment	2302
C. AGENCY CONSIDERATION OF PAST DISCIPLINE	2302
1. Notice Requirement	2304
a. Failure to Include Past Discipline in Proposal: Due Process	2305
2. Proof, Rebuttal of Past Discipline	2306
a. Availability of Challenge to Past Discipline.....	2307
b. Clearly Erroneous	2307
c. Reprisal	2307
d. Pending Challenge to Past Discipline	2308
e. Past Discipline Reversed After Initial Decision	2310
f. Discipline Imposed After the Appealed Adverse Action.....	2310
g. Past Discipline Time-Barred	2311
h. Dissimilar Offense.....	2311
i. Nondisciplinary Sanction	2313
D. JUDICIAL REVIEW OF PENALTY, ADMINISTRATIVE RECONSIDERATION	2313
1. General Rule.....	2313
2. Agency Table of Penalties	2314
3. Application of Relevant <i>Douglas</i> Factors	2314
4. Effect of OPM Reconsideration Request	2314

CHAPTER 8: SUBSTANTIVE OFFENSES.....2315

I. STATUS	2315
A. ABSENCE	2315
1. Impact on Service Efficiency	2315
a. Assigned Post of Duty; Travel Requirement.....	2317
2. Approved and Disapproved Absence.....	2317
a. Abuse of Leave	2319
b. Loafing; Wasting Time.....	2319
c. Excessive Leave, LWOP, Absences Beyond Employee's Control; Failure to Maintain a Regular Work Schedule; OWCP Coverage	2319
(i) Historical Application of <i>Cook</i> and Related Decisions.....	2323
d. Unscheduled but Approved Absence Following Failure to Follow Procedure to Request Leave	2330
e. Disability	2333
3. Tardiness.....	2334
4. Leave-Requesting, Leave-Reporting Requirement	2334
a. Leave Restriction Notice	2338
b. Justification for Leave; Medical Certification Requirement	2339
c. Other Certification or Documentation Requirement	2340
d. Disability Accommodation	2340
5. Proof of AWOL; Telework Status; Leave Request.....	2341
6. Evidence of Illness First Submitted to MSPB	2342
a. FMLA	2344
7. LWOP; Other Leave Arrangement; Compensable Injury; Disability Accommodation	2344
a. Executive Order 5396; Disabled Veteran	2348
b. Advanced Sick Leave	2348
c. Donated Leave.....	2349
8. Family Leave.....	2349
a. FMLA Request, Agency Compliance; Medical Documentation	2354

b.	Constructive Request.....	2363
c.	Belated Submission of Request, Documentation.....	2366
d.	Abuse of Family Leave.....	2367
9.	Worker's Compensation Issue.....	2368
a.	Determining Whether Removal Is Based on Reason Unrelated to OWCP Entitlement.....	2369
b.	Leave-Reporting Requirement.....	2371
c.	No Foreseeable End to Absence; Absence When Compensation Ends.....	2371
10.	Leave Status Pending Disability Retirement.....	2374
11.	Incarceration; Work-Release Program.....	2374
12.	Cancellation or Conversion of Approved Leave.....	2375
13.	Absence Caused by Fear for Safety.....	2375
14.	Military Leave.....	2376
15.	Religious Leave.....	2376
16.	Problem Following Reinstatement Through MSPB Order.....	2377
17.	Agency Abuse of Discretion.....	2377
a.	Ambiguous Leave Policy or Directive.....	2378
b.	Condonation of AWOL.....	2378
c.	Leave Status Caused by Agency's Wrongful Action.....	2378
d.	Jury Duty.....	2378
18.	Aggravating Factors.....	2379
a.	Prolonged AWOL.....	2379
b.	Frequent AWOL.....	2379
c.	Unreliable Attendance.....	2379
19.	Mitigating Factors.....	2380
a.	Short, Infrequent AWOL.....	2381
b.	Longer AWOL.....	2381
B.	REFUSAL TO ACCEPT REASSIGNMENT.....	2383
1.	General Rule.....	2384
a.	SES Employee.....	2389
2.	Inconvenience or Health Problem.....	2391
3.	Agency Burden of Proof; Legitimate Reason for Reassignment.....	2391
a.	Mobility Agreement; Condition of Employment.....	2395
b.	Return From Overseas Assignment.....	2396
4.	Misconduct Following Improper Reassignment.....	2396
5.	Application of RIF Procedures; Procedural Errors.....	2396
C.	FAILURE TO MAINTAIN OR OBTAIN CONDITION OF POSITION.....	2396
1.	License, Certification.....	2396
a.	Lawyer.....	2396
b.	Driver.....	2397
c.	Others.....	2398
d.	Medical Certification or Standard.....	2398
e.	Certification by Military Authority.....	2398
2.	Loss of Credential.....	2398
3.	Failure to Complete Training Course; Validity of Examination.....	2399
a.	Air Traffic Controller.....	2399
b.	Other Positions.....	2402
4.	Lack of or Loss of Minimum Qualification; Position Requirement.....	2404
a.	Indian Child Protection and Family Violence Prevention Act.....	2405
b.	Lautenberg Amendment.....	2407
c.	Removal From Reserve Status.....	2410
d.	Access to Agency Computer, Network.....	2414
5.	Security Clearance Revocation; Sensitive Position.....	2415
a.	Clearance Process.....	2415
b.	Agency Clearance Proceeding.....	2416
c.	Review of Agency Determination; <i>Egan</i> ; Constitutional Due Process.....	2420
d.	Decision to Require a Clearance; Whether Clearance Required as Employment Condition.....	2427
e.	Reassignment to Nonsensitive Position; Mitigation.....	2431
f.	EEO Issue; Whistleblower Reprisal; Disparate Treatment; USERRA.....	2433
g.	Regulatory Infraction During Revocation Process.....	2436
h.	Suspension, Removal Under 5 USC 7532.....	2442
i.	Suitability Determination, Security Clearance Distinguished.....	2443

j.	Sensitive Duties Not Requiring a Clearance: <i>Conyers</i>	2443
k.	Decisions Postdating <i>Conyers</i>	2463
l.	Requirement Similar to Security Clearance; Public Trust Position	2467
m.	TSA Sensitive Security Information	2469
n.	Retirement Issue Related to Removal for Loss of Clearance	2470
6.	Lack of Suitability for Continued Employment	2470
D.	CONFLICTS OF INTEREST; APPARENT CONFLICTS	2472
1.	Conflicts; Improper Business Dealings	2473
2.	Apparent Conflicts	2474
3.	Use of Government Office for Private Gain	2475
4.	Agency Internal Information	2476
a.	Nondisclosure Agreements	2477
5.	Transaction With Another; Gift; Bribe; Honorarium; Loan	2477
a.	Transaction With Patron, Vendor, Inmate	2478
b.	Transaction With Supervisor	2479
c.	Compensation for Government Service From Another Source	2479
6.	Acting as Agent or Attorney Against Government	2479
E.	OUTSIDE EMPLOYMENT	2479
1.	Personal Work on Government Time	2480
a.	Reporting, Approval Requirements	2480
b.	Employment in Violation of Agency Restriction; Outside Practice of Law	2480
F.	SPECIAL CATEGORIES OF EMPLOYEES	2480
1.	Guard, Correctional Officer, Police, Investigator, Security Official	2481
2.	Immigration Officer	2482
3.	Ship Employee	2482
4.	Supervisor	2482
G.	STRIKES	2482
1.	Charge of Striking	2482
2.	Basis for Removal	2483
3.	Proof of Participation	2483
4.	Refuting Participation	2483
5.	Fear for Personal Safety	2484
a.	Insufficient Threat	2484
b.	Duress, Coercion Established	2484
6.	Association With Strikers	2484
7.	Influence of Political Leader	2484
8.	Penalty	2484
9.	Other Issues	2485
II.	RELATIONSHIPS	2485
A.	INSUBORDINATION AND SIMILAR MISCONDUCT	2485
1.	Refusal or Failure to Perform Work	2486
a.	Proof of Intent	2487
2.	Failure to Follow Instruction	2488
3.	Failure to Follow Policy, Regulation	2489
4.	Disruptiveness; Lack of Cooperation	2490
5.	Recording of Conversation	2491
6.	Cumulative Insubordination	2491
7.	Dispute Over Position Responsibilities	2492
a.	Difficulty Following Reinstatement	2492
b.	Breach of Settlement Agreement	2493
8.	Insolence, Abusive Language	2493
a.	Abuse of Coworker, Subordinate	2493
b.	Abuse of Supervisor; Disrespectful or Coarse Language	2494
c.	Disagreement Over Instruction, Program	2496
9.	Misuse of Dispute Resolution Procedure	2496
a.	EEO Process	2497
b.	Congressional Communication	2497
c.	Grievance Proceeding	2497
d.	Supervisor	2499
e.	Interference With Employee Grievance	2499
10.	Refusal to Take Fitness Examination	2499

a.	Properly Ordered	2500
b.	Improperly Ordered.....	2501
11.	Failure to Provide Medical Information; Position Requirement	2504
12.	Refusal to Submit to Search or Drug Test	2506
13.	Problems During Investigations: Lack of Cooperation; Interference; Self-Incrimination	2509
14.	Administrative Law Judge; Judicial Independence	2519
15.	Defenses	2519
a.	Inability to Comply	2519
b.	Unclear Order; Unknown Policy.....	2519
c.	Constitutional, Similar Challenge	2520
d.	Improper Directive; Command Influence	2520
e.	Federal Labor Law Policy; Collective Bargaining Contract.....	2524
f.	Fear for Safety or Other Harm	2525
16.	Mitigating Factors.....	2527
B.	SEXUAL MISCONDUCT.....	2529
1.	Sexual Harassment; Inappropriate Behavior	2530
a.	Past Significance of Psychological Harm	2536
b.	Charge Based on Agency Regulation or Standard of Conduct Not Tied to Title VII	2542
c.	Physical Contact	2547
d.	Offensive Remarks; Photos.....	2550
e.	Consensual Conduct Affecting Workplace	2555
f.	Homosexual Conduct	2555
2.	Misconduct Toward Agency Client, Affiliate.....	2556
3.	Misconduct Toward Child.....	2556
4.	Penalties for Sexual Misconduct	2556
a.	Demotion, Suspension	2557
b.	Removal	2557
5.	Defenses	2558
C.	CONDUCT HARMING OTHERS; CRIMINAL VIOLATIONS	2559
1.	Threat; Inappropriate Conduct.....	2559
a.	<i>Metz</i> Test	2560
b.	Reaction of Others to Threat	2563
c.	Threat Through Another; Rumor	2565
d.	Conditional Threat	2566
e.	Statement to Therapist; EAP Counselor.....	2568
f.	Statement to Union Representative	2571
g.	Threat Against a Coworker	2572
h.	Threat Against a Supervisor	2573
i.	Threat Against Others	2574
j.	Thought of Violence	2574
k.	Inappropriate or Disruptive Statement Not Charged as Threat	2574
l.	Mitigation.....	2577
2.	Assault	2578
a.	Against Coworker	2578
b.	Against Supervisor	2578
c.	Against Subordinate	2578
d.	Against Others	2579
e.	Defenses	2579
f.	Mitigation; Aggravation.....	2580
3.	Fighting; Self Defense.....	2582
4.	Gambling.....	2583
5.	Threat of Legal Action, Whistleblowing, or Publicity	2583
6.	Lawsuit	2584
7.	Discourtesy; Related Problems.....	2585
a.	Profanity.....	2586
8.	Improper Conduct Toward Patient, Ward, Others	2586
9.	Invidious Discrimination; Offensive Remark or Conduct; Preferential Treatment; Reprisal	2589
a.	Nepotism; Hiring of Friend	2593
D.	ACTION AGAINST SUPERVISOR FOR WHISTLEBLOWING REPRISAL, OTHER PROHIBITED PRACTICES.....	2595
E.	CRITICAL STATEMENTS	2599
1.	Constitutional Framework Applied in Federal Sector	2606

a. Private Speech	2609
2. Criticism of Agency or Its Personnel	2610
a. Constitutional Analysis	2610
b. Prohibited Personnel Practice Analysis	2612
c. Defamation; Related Conduct	2614
d. Congressional Communication.....	2615
e. Political Activity and Speech	2617
f. Concept of Loyalty	2619
3. Internal Criticism	2619
a. Constitutional Analysis.....	2619
b. Managerial Disagreement	2620
c. Administrative Law Judge; Judicial Independence.....	2620
d. Criticism, False Statement About Coworker, Subordinate, Supervisor	2621
III. INTEGRITY.....	2623
A. FALSIFICATION AND MISREPRESENTATION	2623
1. Proof of Fraud; Falsification	2626
a. Neglect or Mistake	2630
b. Perjury.....	2633
c. Failure to Correct Report of Another	2633
d. Reliance on Advice of Counsel or Other Individual	2633
e. Cumulative False Statements.....	2634
2. Employment Application; Security Questionnaire; Lack of Candor	2635
a. Criminal Record.....	2639
b. Education; Experience	2640
c. Pre-Employment Medical Inquiry.....	2641
3. Compensation Claim; Voucher	2643
a. Overtime	2643
b. Travel Voucher, Related Documentation.....	2644
c. OWCP Claim.....	2646
d. Unemployment Compensation	2648
e. Disability or Leave Claim	2648
f. Pay and Allowances Claim.....	2648
4. Records of Time, Attendance, Work, and Pay; Negligence	2649
5. Medical Certificate	2651
6. Alteration, Failure to Preserve Documentation and Evidence	2652
7. Investigative Misrepresentation; “Exculpatory No”	2652
8. Lack of Candor.....	2654
9. Failure to Report Misconduct	2658
10. Disclosure Statement.....	2658
11. Mitigating Factors	2658
a. Time, Attendance, Travel Record.....	2661
b. Medical Certificate	2661
c. Employment Application	2662
B. REMOVAL, MISUSE OF PROPERTY	2663
1. Service Efficiency	2663
2. Burden of Proof	2663
a. Conversion	2664
b. Unauthorized Possession or Removal of Property; Theft	2664
c. Unauthorized Use.....	2666
d. Common Possession	2666
e. Evidence of Intent: Theft and Unauthorized Possession.....	2666
3. Petty Theft.....	2668
a. Shoplifting	2669
b. Significance of Custody and Control of Property	2669
4. Government Vehicle.....	2672
a. Deviation From Assigned Route; Minor Personal Use; Public Service Exception	2677
b. Nonstatutory Vehicle Misuse Charge; Impaired Driver.....	2677
5. Unauthorized Use, Theft, or Destruction of Specific Property	2677
a. Computer; Internet.....	2678
b. Photocopier; Facsimile.....	2680
c. Telephone.....	2680

d.	Government Credit Card.....	2680
e.	Government Services or Funds	2681
f.	Government Records; Official Information; Privacy Act.....	2682
g.	Black Marketing; Diversion of Property	2697
h.	Obstruction, Theft, or Mistreatment of Mail	2697
i.	Misuse of Official Mail, Delivery Service.....	2698
j.	Concealment of Theft	2699
k.	Mitigating Factors	2699
IV.	DRUGS AND ALCOHOL.....	2701
A.	DRUG AND ALCOHOL OFFENSES	2701
1.	Drug Possession, Use, Distribution	2702
a.	Possession or Use	2702
b.	Sale or Distribution	2704
c.	Safe Harbor Provision	2705
2.	Alcohol.....	2707
3.	Mitigation.....	2707
V.	PERFORMANCE.....	2711
A.	POOR PERFORMANCE REQUIRES CORRECTION	2711
1.	Performance Evaluations.....	2711
2.	Performance Standards	2712
a.	<i>Ad Hoc</i> Measure.....	2713
b.	Assigned Standard.....	2715
c.	Measurement of Work Error.....	2716
3.	Responsibility for Work Error.....	2716
4.	Medical Inability to Perform.....	2716
a.	Specific Medical or Physical Standard.....	2725
b.	Penalty Analysis.....	2725
c.	Disability Accommodation Analysis	2726
d.	Recovery From Disability	2726
5.	Mitigating Factors; Choice of Penalty	2729
a.	Comparative Performance	2730
b.	New Duties	2730
c.	Detail, Special Assignment	2732
d.	Progressive Discipline	2732
e.	Lack of Training	2732
f.	Lack of Improvement Period	2732
g.	Demotion or Reassignment.....	2733
h.	Suspension	2734
B.	NEGLIGENCE	2734
1.	Endangerment of Employees	2736
2.	Public Safety Risk.....	2736
3.	Destruction or Loss of Property	2737
4.	Medical Error	2737
5.	Mishandling or Improper Possession of Weapon	2737
6.	Inattention to Duty; Sleeping on Job	2738
7.	Failure to Follow Procedure	2738
8.	Excessive Expenditure; Waste	2739

CHAPTER 9: PERFORMANCE CASES2741

I.	UNACCEPTABLE PERFORMANCE CASES	2741
A.	STATUTORY AND REGULATORY PROVISIONS: EMPLOYEE AND AGENCY COVERAGE	2743
1.	OPM Regulations.....	2744
B.	OVERVIEW OF PERFORMANCE ACTIONS	2746
1.	Merit Pay Employee	2747
C.	OPM APPROVAL OF APPRAISAL SYSTEM.....	2748
1.	Change in Appraisal System.....	2749
2.	Flexibility Permitted by Appraisal System; Skeletal Plans	2753
3.	Extent of OPM Review; Subordinate Organization Within Agency.....	2753
4.	Change Directed by OPM.....	2754
D.	PERFORMANCE STANDARD CRITERIA	2755
1.	Substantive Right	2756

2.	Scope of Review	2756
a.	Deference to Agency Management	2757
3.	Objectivity	2759
a.	Timeliness of Work	2761
b.	Draft; Intermediate Work Product	2762
c.	Personal Characteristic: Initiative, Reliability	2762
4.	Standards Development; Employee Involvement	2762
5.	<i>Wilson and Jackson</i> ; Negative or “Backwards” Standard.....	2763
6.	Communication of Standard.....	2766
7.	Change in Standard.....	2767
8.	Augmentation of Standard.....	2768
9.	PIP to Establish, Refine Standard	2770
10.	Specific Occupations	2773
a.	Clerical Employee, Secretary	2773
b.	Voucher Examiner	2775
c.	Inspector.....	2775
d.	Social Security Claims Representative	2775
e.	Employee Relations, Human Relations Specialist	2775
f.	Trade Analyst.....	2776
g.	Medical Technologist; Nurse.....	2776
h.	Scientist	2776
i.	Tradesperson	2777
j.	IT Specialist	2777
k.	Supervisory Supply Technician	2777
l.	Engineer	2777
m.	Lawyer	2778
n.	Paralegal	2778
o.	Management Analyst	2778
p.	Realty Specialist	2778
q.	Others	2778
11.	Numeric Standard	2779
12.	Multiple Components.....	2780
13.	Classification, Significance of Error	2783
14.	Relation of Standards in Element	2783
15.	Absolute Standard; <i>Guillebeau</i>	2784
a.	Law Before <i>Guillebeau</i>	2788
b.	Standard to Be Viewed as a Whole.....	2789
c.	Modification of Absolute Standard	2789
d.	Standard That Enumerates Tasks	2789
e.	Level of Performance That May Be Exceeded	2790
16.	Unreasonable Standard	2791
17.	Levels of Performance	2792
a.	Five-Tier Appraisal System; Marginal, Minimally Successful, or “Needs Improvement” Level of Performance	2792
b.	Multiple Appraisal Levels Derived From Ratings for Critical Elements	2796
c.	Two-Level; Pass/Fail Appraisal System	2798
E.	OPPORTUNITY TO IMPROVE	2799
1.	Prerequisite of Unacceptable Performance	2799
2.	Opportunity Period Requirements	2801
a.	Order, Burden of Proof	2802
b.	Control Over Work	2802
c.	Assistance to Employee.....	2802
d.	Necessity for Specific Warning	2804
e.	Statement of Expectations; Job Responsibilities Not Described in PIP	2804
f.	Impossibility of Improvement; Unreasonable Expectations.....	2805
g.	Harmful Error Rule.....	2806
3.	Time Allowed for Improvement.....	2807
a.	One-Year Maximum for Evaluation; Pre-PIP Performance	2809
b.	Post-PIP Performance; Roller Coaster Employees	2810
c.	PIP Extension.....	2814
d.	Performance During Detail	2814
F.	PROCEDURE	2815

1.	Chapter 43 and 75 Actions Distinguished.....	2815
a.	Executive Order 13,839; Executive Order 14,003	2816
2.	Department of Veterans Affairs.....	2816
3.	Failure to Use Chapter 43	2818
a.	<i>Lovshin</i> ; Combined Action Under Chapters 75 and 43	2819
b.	Conversion of Action	2820
4.	Limitations on Use of Chapter 43.....	2824
5.	Proposal, Decision Letter	2824
a.	Requirement of Concurrence.....	2825
b.	Unstated Charge	2825
c.	Necessity for Specific Instances.....	2825
d.	Notice Period	2826
G.	NECESSARY PROOF: SUBSTANTIAL EVIDENCE	2827
1.	Test Defined; Scope of Review	2827
2.	Weight, Quality of Substantial Evidence	2828
a.	Charges, Work Papers.....	2828
b.	Effect of Prior Performance Evaluation; Rating Issued in Error	2829
c.	Statistics; Sampling Method.....	2830
d.	Other Documentation; Testimony.....	2831
H.	DEFENSES	2832
1.	Propriety and Comparison of Performance Standards	2832
2.	Comparison of Employees' Performance.....	2832
3.	Adequacy of PIP; Lack of Control of Work; Agency Bad Faith	2833
4.	Training	2835
5.	Discrimination; Disparate Treatment	2836
6.	Reprisal.....	2839
7.	Collective Bargaining Contract	2840
I.	PRECLUSION OF MITIGATION	2840
II.	WITHIN-GRADE INCREASE DENIALS	2841
A.	BASIS FOR APPEAL	2843
B.	WHEN JURISDICTION ATTACHES.....	2843
1.	Effect of Collective Bargaining Contract	2849
C.	BURDEN OF PROOF	2850
1.	Proof of Poor Performance	2850
a.	Role of Performance Standards.....	2851
2.	Substantial Evidence Controls.....	2851
a.	What Constitutes Evidence.....	2851
D.	DEFENSES	2852
1.	Error in ALOC Procedure	2852
a.	Linkage of ALOC and Appraisal System	2852
b.	Waiting Period	2853
c.	Lack of ALOC Determination.....	2853
d.	Vague ALOC Determination	2854
2.	Reconsideration Errors.....	2854
a.	Employee Denied Information	2854
b.	Reconsideration Summary Lacking	2854
c.	Reconsideration Decision Level	2854
d.	Late Reconsideration Decision	2854
3.	Circumstances of Employee	2854
a.	Unfair Work Burden	2854
b.	Illness or Disability	2855
c.	Comparative Work Production	2855
d.	Lack of Training	2855

CHAPTER 10: REDUCTIONS IN FORCE.....2857

I.	RIF PROCESS	2857
A.	NATURE OF RIF	2857
1.	Statutory Provisions	2858
2.	OPM Regulations, Guidance.....	2859
a.	Validity of RIF Statute, Regulations	2861
3.	Furlough.....	2861

a.	Exemptions.....	2873
b.	Emergency Furlough	2875
c.	Part-Time, Light Duty Status; Intermittent Appointment; Work Schedule Adjustment.....	2875
d.	Discovery in Furlough Appeal.....	2876
B.	ACTIONS APPEALABLE AS RIF; MSPB JURISDICTION.....	2878
1.	Regulatory Structure.....	2878
2.	Jurisdictional Effect of Collective Bargaining Contract	2879
3.	Types of Appointees.....	2879
a.	Temporary	2879
b.	Probationer.....	2880
c.	Demonstration Project	2880
d.	Postal Service Non-Preference Eligible	2883
e.	Part-Time.....	2884
f.	Senior Executive Service	2884
g.	Agencies With Independent Statutory Personnel Authority.....	2887
4.	Possible RIF.....	2888
5.	Action to Avoid RIF	2888
a.	Transfer to Another Agency	2889
b.	Resignation	2889
c.	Retirement	2889
d.	Detail.....	2889
e.	Reassignment Without Regard to RIF	2890
(i)	Representative Rate.....	2891
f.	Reassignment During or Following RIF	2892
g.	Reassignment With Pay Reduction in Anticipation of RIF	2893
(i)	Postal Reorganizations: 1990s.....	2893
(ii)	Postal Reorganizations: 2000 Onward.....	2901
(iii)	Other Agencies.....	2906
6.	Grade and Pay Retention; Pay Rate Change; Demotion	2909
7.	Classification Issue	2909
a.	Erosion of Duties.....	2911
b.	Intentional Changes in Duties	2913
8.	Transfer of Function.....	2913
a.	Identification of Positions for Transfer	2915
b.	Employee Who Declines to Move.....	2918
C.	COMPETITIVE AREA.....	2918
1.	Defined	2918
2.	Criteria	2919
3.	Assignment Across Competitive Area	2919
4.	Challenge to Competitive Area	2919
a.	Burden of Proof	2919
b.	Organizational Structure; One-Person RIF.....	2919
c.	Geographical Structure; Local Commuting Area	2922
D.	COMPETITIVE LEVEL	2923
1.	Defined	2923
2.	Challenge to Competitive Level	2925
a.	Primacy of Position Description	2926
b.	Testimony Concerning Duties	2928
c.	Loss of Productivity; Undue Interruption	2929
d.	Collective Bargaining Contract.....	2930
e.	Challenge to Performance Appraisal	2931
3.	Particular Groups of Employees	2932
a.	Developmental/Trainee	2932
b.	Temporary.....	2933
c.	Part-Time	2933
d.	VA Health Care Professional.....	2933
e.	Bureau of Indian Affairs; Indian Health Service	2936
4.	Challenge to Competitive Level.....	2936
a.	Impact of Error.....	2936
b.	Right to Hearing	2937
c.	Substantive Review.....	2937

II. ASSIGNMENT AND RELATED RIGHTS	2937
A. REGULATORY AND OPERATIONAL BASIS	2938
1. Veteran, Other Preferences.....	2940
2. Appointment Qualifying for Assignment Right	2942
a. Excepted Service.....	2942
b. Detail.....	2942
c. Intergovernmental Personnel Act	2942
d. Part-Time/Full-Time	2942
3. Position Subject to Displacement.....	2942
a. Supervisory	2942
b. Temporary.....	2942
4. Filling of Vacancies.....	2942
5. Assessment of Qualifications	2945
a. Updating Qualifications.....	2948
b. Qualifications of Displacing Employee	2948
c. Merit Promotion Issue.....	2948
d. Undue Interruption	2949
6. Representative Rate	2950
7. Amendment of RIF Notice; Change in Position Offer.....	2951
B. BUMPING.....	2952
C. RETREAT	2954
1. Prior Rule	2955
2. Method of Analysis	2955
3. Burden of Proof	2957
D. REEMPLOYMENT RIGHTS	2957
1. Reemployment Priority List Before RIF Effective Date	2969
2. Remedy in Reemployment Priority List Appeal	2971
3. Transitional Assistance	2971
III. RIF CHALLENGES.....	2972
A. BURDEN OF PROOF.....	2972
1. Agency Responsibility	2972
2. Agency's <i>Prima Facie</i> Case.....	2973
3. Qualifications; Assignment Right	2973
4. Classification Dispute	2973
B. <i>BONA FIDE</i> RIF: <i>LOSURE</i>	2974
1. Substantive Rights, Harmful Error.....	2975
2. RIF as Adverse Action.....	2977
3. Challenge to Reorganization	2981
a. Reorganization Defined; Single Position RIF	2981
b. Managerial Discretion.....	2981
c. Funding Decision	2982
d. Redistribution of Duties	2984
e. Planning for Future Events	2984
f. Comparative Qualifications as a Factor in Selection of Positions for RIF	2985
g. Contribution to Agency Mission; Funding of Individual Position	2985
h. Contracting Out Challenge	2986
i. Sham, Paperwork Reorganization: Old, New Position Identical; Delayed Reorganization	2986
j. Merit Promotion, Hiring, Placement During RIF.....	2989
k. Events Preceding, Subsequent to RIF	2989
C. DISCRIMINATION DEFENSES	2990
1. Age	2995
2. Religion.....	2996
D. PROCEDURAL ISSUES	2996
1. Internal Procedures	2996
2. Timing of Job Offer; Timing of Release of Employees	2996
3. Correction of Retention Standing Error	2996
4. Adequacy of RIF Notice	2997

CHAPTER 11: HARMFUL ERROR.....2999

I. STATUTORY STANDARD	2999
A. HARMFUL ERROR DEFINED.....	2999

1.	<i>Parker</i>	3000
2.	Might Have/Would Have Analysis	3001
B.	HARMFUL ERROR APPLIED	3002
1.	Mixing Harmful Error and Other Doctrines.....	3002
a.	Mitigation of Penalty.....	3002
b.	Prohibited Personnel Practice	3002
2.	Statutory, Regulatory Violation; Action Not in Accordance With Law	3002
a.	Unfair Labor Practice	3004
b.	Privacy Act; Disclosure of Confidential Information	3006
c.	Constitution.....	3007
d.	Invalid Regulation	3007
3.	Collective Bargaining Contract Violation.....	3008
a.	Disputed Coverage	3011
b.	Impact of Arbitration Award	3011
c.	Employment Contract	3011
4.	Problem With Representation	3011
a.	Cautionary Notes to Counsel	3011
5.	Treatment of Affirmative Defense if Action Is Set Aside as Erroneous.....	3012
II.	ERROR IN PRELIMINARY PROCEDURES.....	3012
A.	AGENCY INVESTIGATION	3012
1.	Due Process	3013
2.	Right to Counsel; Union Representative.....	3013
3.	Entrapment	3016
4.	Agency Predecisional Hearing	3016
5.	Security Clearance Investigation	3017
B.	STALE CHARGES; LACHES	3017
1.	General Rule	3017
2.	Agency Regulation; Collective Bargaining Contract	3019
3.	Performance Case	3019
C.	ESTOPPEL; DOUBLE JEOPARDY	3020
1.	Estoppel	3020
2.	Double Jeopardy.....	3020
a.	Reinitiation of a Proposal After an Adverse Action Is Canceled.....	3028
b.	Action Initiated After Earlier Action Invalidated for Procedural Reason.....	3029
c.	Consecutive Adverse Actions.....	3030
d.	Action Following Acquittal	3030
III.	ERRORS IN PROPOSAL NOTICE AND REPLY PROCESS	3030
A.	BASIC RIGHTS	3030
1.	Predecision Proposal Not Mandated in Some Cases When Due Process Is Provided Following Decision	3033
2.	Right to Counsel	3035
B.	PROPOSAL NOTICE.....	3035
1.	Purpose, Sufficiency of Notice; Due Process	3035
a.	Supporting Evidence.....	3037
b.	Technical Deficiencies	3038
c.	Failure to Provide Notice of Appeal or Statutory Right	3039
d.	Error in Date	3039
e.	Other Minor Error	3040
f.	Assessing Sufficiency of Charge.....	3041
2.	Specific Charge; Only Conduct Described	3045
a.	Conduct Postdating Proposal	3049
b.	Amendment	3050
3.	Framing of Charge	3050
a.	General Charge; Charge Label; Detailed Narrative; <i>Otero</i> and <i>Cross</i>	3050
b.	Variation Between Stated Charge and Supporting Narrative or Specification; <i>Nazelrod</i> and <i>Lachance</i>	3053
c.	Splitting of Charge.....	3059
d.	Independent Elements of Single Charge	3062
e.	Multiple Specifications Supporting a Single Charge	3066
f.	Lesser Included Offense.....	3068
4.	Past Discipline; Performance Record; Aggravating Factors	3069
5.	Citation of Standards of Conduct.....	3069
6.	Charge Tied to Penalty Table Classification	3069

7.	Criminal Charge	3070
8.	Mixing Chapters 43 and 75	3070
9.	Cumulative Charges; Merger of Charges	3071
10.	Charge of Unbecoming or Improper Conduct	3073
C.	INADEQUATE REPLY AND NOTICE PERIOD	3075
1.	Calculation	3075
2.	Not Less Than Seven Days for Reply	3075
3.	30-Day Advance Notice of Action	3078
4.	Service of Notice.....	3079
D.	SHORTENED NOTICE PERIOD; CRIME PROVISION	3081
1.	Procedure to Invoke Shortened Notice	3082
2.	Reasonable Belief of Crime.....	3082
a.	Arrest, Warrant	3085
b.	Conduct Caused by Mental Impairment.....	3085
3.	Emergency Suspension for Reason Other Than Reasonable Belief of Crime	3085
4.	Indefinite Suspension.....	3086
E.	FAILURE TO PROVIDE EVIDENCE FILE, OTHER INFORMATION.....	3086
1.	Loss or Destruction of Evidence	3088
F.	ORAL AND WRITTEN REPLIES.....	3089
1.	Proof of Harm; Failure to Consider a Reply; Due Process.....	3091
a.	Investigation of Information Provided by the Employee.....	3096
b.	Criminal Proceeding Pending	3097
2.	Waiver of Reply Right	3097
a.	Extension Request	3097
3.	Decisionmaker, Reply Officer	3101
4.	Right to Confrontation.....	3101
5.	Right to Information.....	3101
6.	Inadequate Representation.....	3102
G.	AGENCY DECISIONAL PROCEDURES; <i>EX PARTE</i> COMMUNICATIONS.....	3102
1.	Early Law From Courts.....	3102
2.	<i>Sullivan</i> ; Regulatory Prohibitions; Adverse External Influences	3105
3.	<i>Stone</i> ; Current, Broadened Due Process Test.....	3108
a.	Reinitiation of Action Following Due Process Reversal	3114
4.	Early Law From MSPB	3114
5.	Deciding Official Consults Witness, Advisor; Information Not Disclosed to Employee	3116
a.	Information From Witness.....	3117
b.	Impact of 5 USC 2302(b)(2).....	3118
c.	Report, Investigation	3118
d.	Advisor.....	3119
e.	Past Discipline as Rebuttal to Mitigation	3119
f.	Multiple Charges.....	3119
6.	Proposing and Deciding Official Confer; Same Proposing and Deciding Official	3121
7.	Information Pertaining to Aggravation or Mitigation of Penalty; <i>Ward</i>	3122
a.	Mitigating Information.....	3141
b.	Potential Publicity, Notoriety, Other Harm.....	3141
c.	Information or Documents in the Evidence File Not Referenced in the Proposal	3143
d.	Information Provided to the Deciding Official Before the Reply Process Begins	3144
e.	Evaluation of Information Presented During Reply	3146
f.	Penalty Table, Standards of Conduct.....	3146
g.	Performance Cases.....	3149
h.	Harmful Error Analysis Before <i>Ward</i>	3151
8.	Predisposition to Take Adverse Action; Offer to Permit Resignation	3152
a.	Biased Proposing Official.....	3156
b.	Malicious Initiation of Action	3157
c.	Deciding Official Who Is Biased, Whose Decision Is Directed, Who Lacks Discretion	3157
9.	Involvement of OSC.....	3159
10.	Changes in Proposing, Deciding Official	3159
11.	Lack of Authority.....	3163
a.	Deciding Official	3163
b.	Proposing Official.....	3165
12.	Pending Retirement Application	3165

13. Specificity of Decision Letter.....	3165
a. No Decision Letter.....	3165
b. Retroactive Decision Letter.....	3166
c. Notice of Appeal Rights.....	3166
14. Delayed Decision.....	3166

CHAPTER 12: DISCRIMINATION3167

I. DISCRIMINATION ISSUES	3167
A. PROCEDURES IN MIXED CASES.....	3167
1. Multiple Agency Review Processes.....	3169
2. Multiple Filing Options; Pleading Requirements; Timing of MSPB Appeal	3171
a. Withdrawal or Abandonment of EEO Allegation	3172
b. Authority of Judge to Strike Frivolous EEO Allegation; Summary Judgment	3172
3. Jurisdictional Problems With EEO Complaints	3175
a. Filing Dates	3176
b. Timeliness of EEO Complaint	3177
c. EEO Class Action	3180
d. EEO Complaint Withdrawn.....	3182
e. What Constitutes a Complaint	3182
f. Coextensive Issues; Scope of Complaint.....	3183
g. Premature Appeal	3184
4. Duty to Resolve Issues and Inform Appellant of Elements of Proof.....	3184
5. Jurisdiction Over Appealable Action; Constructive Adverse Action	3185
a. Probationer.....	3187
b. Restoration Appeal Involving Employee Partially Recovered From Compensable Injury	3187
6. Election of Remedies	3187
a. Election Through Collective Bargaining Contract Grievance	3187
b. Election Between EEO and Direct MSPB Appeal; Treatment of EEO Complaint	3190
c. Effect of Subject Matter of Preexisting Complaint on Subsequent Appeal; Complaint Involving Proposed Action	3192
7. MSPB Remand; EEOC Remand	3193
8. Strategic Considerations	3195
B. BURDEN OF PROOF	3195
1. <i>Prima Facie</i> Case.....	3196
2. Analysis Following the <i>Prima Facie</i> Case	3199
a. Analysis of Motivation, Pretext	3202
b. Mixed Motives; Proof That Action Would Have Been Taken Without Discriminatory Motive	3203
c. Element of Intent; Employer Error	3210
d. Significance of Agency's Proof of Charges	3211
e. Significance of Agency's Failure to Prove Charge	3213
f. Comparable Employees; Disparate Treatment	3214
C. EVIDENCE	3220
1. Direct Evidence; Evidence Considered as a Whole; Comparators; Taint of Agency Official; Cat's Paw.....	3221
2. Circumstantial Evidence; Pretext; Presumption	3224
3. Disparate Impact	3226
4. Statistics	3227
5. Supervisory Practices; Remarks.....	3229
D. FORMS OF DISCRIMINATION	3229
1. Race	3229
2. Age	3231
3. Religion	3236
4. Marital Status.....	3237
5. Pregnancy	3237
6. Sex; Sexual Orientation; Equal Pay Act.....	3238
7. Retirement Cases: Application by OPM of Statutory Requirements	3238
E. REPRISAL.....	3239
1. Convincing Mosaic; Evidence Considered as a Whole; Comparators.....	3250
2. Collateral Personnel Action of Evidentiary Weight in an EEO Affirmative Defense.....	3253
3. Taint of Reprisal by Lower Level Official; Cat's Paw.....	3254
II. REHABILITATION ACT: DISABLING CONDITIONS	3256
A. REGULATORY STRUCTURE.....	3257

B. PRIMA FACIE CASE; ACCOMMODATION REQUIREMENTS	3261
1. Individual Regarded or Perceived as Disabled	3263
2. Individual Associated With Disabled Person	3270
3. Substantial Limitation of Major Life Activity	3270
a. Life Activity of Working	3272
4. Order and Burden of Proof.....	3276
a. Disparate Treatment	3285
b. Mixed Motive Analysis.....	3286
5. Causal Connection.....	3288
6. Transitory or Temporary Disability.....	3291
a. Corrected or Mitigated Condition	3292
7. Limitation on General Employability	3293
a. Allergy.....	3295
b. Stress Disorder	3297
c. Other Mental Disability; Proof of Disability.....	3302
8. Conditions Not Protected by Rehabilitation Act	3303
a. Gambling Compulsion	3303
b. Sexual Disorder	3303
c. Pregnancy	3304
9. Qualified Disabled Employee	3304
a. Dangerousness; Risk Assessment; Direct Threat	3306
b. Lack of Medical Release	3311
10. Knowledge of Disability.....	3311
a. When Disability Claim or Defense Must Be Raised	3312
11. Suggesting Nonapparent Accommodation; Duty of Reasonable Inquiry	3314
a. Interactive Process	3316
C. ACCOMMODATION THROUGH JOB RESTRUCTURING, ASSISTANCE	3319
1. Light Duty and Job Modification.....	3319
a. Lifting Requirements.....	3323
b. Postal Service Collective Bargaining Contracts.....	3325
c. Inappropriate Job Modification; Increased Job Burden	3326
2. Provision of, Modification to, Job Equipment	3326
3. Alteration of Work Schedule, Worksite; Telework	3329
4. Alteration of Training Requirement.....	3339
D. ACCOMMODATION THROUGH REASSIGNMENT	3340
1. <i>Ignacio</i>	3342
2. Evaluation of Reassignment Effort	3344
a. Reassignments Across Organizational Lines	3350
3. Collective Bargaining Contract	3356
4. Agency Regulation	3356
5. Restoration From Compensable Injury	3357
6. Demotion; Promotion.....	3357
E. ACCOMMODATION THROUGH MEANS OTHER THAN JOB MODIFICATION OR REASSIGNMENT.....	3359
1. Modification of Agency Policy, Facility.....	3359
2. Job Training; Change in Supervision	3359
3. Referral for Counseling.....	3362
F. AGENCY DEFENSES	3363
1. Disqualifying Misconduct	3363
2. Undue Hardship.....	3364
a. Unreasonable Accommodation.....	3367
b. Restrictions in Collective Bargaining Contract	3369
3. Lack of Qualification for Position.....	3371
a. Failure to Provide Evidence of Fitness for Position With Medical Standard	3371
4. Receipt of Disability Annuity.....	3372
5. Rebuttal	3373
6. Restriction on Remedy	3373
G. ALCOHOLISM AND SUBSTANCE ABUSE.....	3373
1. Necessity for Accommodation: <i>Ruzek</i>	3375
a. Suitability.....	3376
b. Postal Service Employee	3377
2. Notice of Disability.....	3377

a. Agency Request for Information.....	3378
3. Proof of Disease	3378
4. Causal Connection: Misconduct Caused by Disease	3379
a. Alcohol or Drug Use on the Job	3383
b. Revocation of Driver's License	3383
c. Possession of Drugs.....	3384
d. Misappropriation or Theft of Drugs.....	3384
e. Misappropriation of Funds	3384
5. Qualified Disabled Employee; <i>Hougens</i> and Disqualifying Conduct	3385
a. Current Substance Abuser	3388
b. Disqualifying Misconduct: Removal Appropriate.....	3390
c. Less Serious Conduct: Concurrent Rehabilitation, Discipline.....	3394
6. Firm Choice, Last Chance Agreement.....	3396
a. Requirement of Collective Bargaining Contract, Agency Regulation	3399
7. Failed Rehabilitation Attempt	3400
8. Undue Hardship	3403
III. AVENUES OF FURTHER REVIEW OF EEO DEFENSES	3404
A. EEOC.....	3404
B. SPECIAL PANEL.....	3404
C. COURT.....	3412
1. Scope of District Court Review.....	3415
a. Effect of District Court Review	3416
b. Time for District Court Review; Tolling or Estoppel; Exhaustion of Remedies	3419
2. Effect of Waiver of EEO Claim	3422

VOLUME III

CHAPTER 13: PROHIBITED PERSONNEL PRACTICES3423

I. OVERVIEW.....	3423
A. SIGNIFICANCE OF DISCOVERY.....	3425
II. TYPES OF PROHIBITED PERSONNEL PRACTICES	3426
A. WHISTLEBLOWING REPRISAL.....	3428
1. Whistleblower Protection Enhancement Act of 2012; Retroactivity	3430
2. Statutory Definitions Control	3432
a. "Gross" Waste or Mismanagement	3432
b. Violation of Law, Rule, or Regulation	3440
c. Abuse of Authority	3448
d. Threat to Public Health and Safety.....	3453
e. Disclosure of Censorship Related to Research, Analysis, or Technical Information.....	3480
3. Form of Whistleblowing	3480
a. Disclosure of Potential Harm or Wrongdoing	3480
b. Complaint to Wrongdoer.....	3481
c. Disclosure to Someone Who Cannot Directly Remedy the Problem.....	3483
d. Minor Personal Grievance	3486
e. Internal, Policy Disagreement.....	3486
f. Disclosure Made During Normal Course of Duties.....	3491
g. Required Report Under Office of Government Ethics Rules, E.O. 12675	3504
h. Communication Indirectly Involving the Government; Private Wrongdoing	3504
i. Communication to News Media; Congress.....	3507
j. Disclosure in Court.....	3508
k. Complaint to the Inspector General	3508
l. Disclosure of Information Already Known or Public.....	3509
m. Sequential Allegations	3511
4. Whistleblowing No Shield Against Misconduct.....	3511
a. Abusive Whistleblower; Robust Language; Chain of Command.....	3513
b. Threatened Disclosure.....	3516
5. Personnel Treated as Whistleblowers	3517
a. Individual Perceived as Whistleblower	3517
b. Whistleblower's Aide, Associate.....	3522
c. Individual Serving as Conduit of Information; Internal Disclosure	3523
d. Former Employee	3524

e. Contractor Employee	3524
6. Protected Disclosure: Reasonableness	3525
a. "Reasonably Believes"; False Statement	3525
b. Motivation of Whistleblower	3531
c. Information Developed After Disclosure	3532
d. Belief Shared by Other Employees; Disinterested Observer	3532
e. Response of Agency to Disclosure	3533
f. Expertise of Whistleblower	3533
g. Specificity of Disclosure	3535
h. Presumed Agency Good Faith; "Irrefragable Proof" Standard	3537
7. Unprotected Disclosure; Dispute Concerning Coverage of Disclosure Under 2302(b)(8) or 2302(b)(9)	3540
a. Disclosure Prohibited by Law; Regulation Incorporating Statutory Provision; E.O. 13,526	3543
b. EEO Complaint	3553
c. Other Appeals, Charges, FECA Claims, Grievances, and Complaints	3557
8. Disclosures in Multiple Forums	3561
B. PROHIBITED PRACTICES OTHER THAN WHISTLEBLOWING REPRISAL	3564
1. Discrimination Proscribed by Civil Rights Laws; 5 USC 2302(b)(1)(A)	3564
a. Sexual Harassment	3564
2. Improper Personnel Recommendation; 5 USC 2302(b)(2)	3564
3. Obstruction of Competition; 5 USC 2302(b)(4)	3565
4. Influencing Employment Decision; 5 USC 2302(b)(5)	3565
5. Improper Preference, Promotion; 5 USC 2302(b)(6)	3566
6. 5 USC 2302(b)(9); Appeal Right; Grievance, Complaint; OSC and IG Involvement; Refusal to Obey Unlawful Order	3569
a. WPEA: Exercise of, Testimony or Assistance in, Appeal, Complaint, or Grievance	3575
7. Discrimination Unrelated to Job Performance; 5 USC 2302(b)(10)	3577
8. Discrimination Against Veteran; 5 USC 2302(b)(11)	3579
9. Violation of Merit System Principle; 5 USC 2302(b)(12)	3579
a. Failure to Provide Effective Training; 5 USC 2301(b)(7); Training for Government Personnel on Whistleblowing Protections	3582
10. Nondisclosure Agreement; Gag Order; 5 USC 2302(b)(13)	3583
11. Refusal to Violate Law, Regulation, or Rule	3584
III. INDIVIDUAL RIGHT OF ACTION	3586
A. STATUTORY AND REGULATORY REQUIREMENTS AND LIMITATIONS	3588
1. Filing a Complaint With OSC	3594
a. OSC Deferral Policy on EEO Charge	3596
b. Proceeding to Compel OSC Action	3596
c. IRA Appeal Against OSC	3599
2. Time for Initiating IRA Appeal With OSC and MSPB	3599
a. Laches in Filing OSC Complaint	3601
b. Case That May Be Either Initiated With OSC or Appealed Directly to MSPB	3602
c. Jurisdiction Limitations of an IRA Rather Than an Adverse Action Appeal	3602
d. Premature Appeal Following Resort to OSC	3603
e. Belated Receipt of OSC Closeout Notice	3604
f. Calculation of Appeal Period; Late IRA Appeal; Waiver	3605
g. Equitable Tolling	3607
h. OSC Reopening	3610
B. JURISDICTIONAL ISSUE	3613
1. <i>Rusin</i> Model: Nonfrivolous Allegations Establish Jurisdiction; <i>Hessami</i>	3613
a. Nonfrivolous Allegations Based on the Written Record	3619
2. Jurisdictional Analysis Before <i>Rusin</i>	3621
3. Hearing	3622
4. Variations in Order of Proof; Necessity to Develop Evidence, Consider Entire Record; <i>Whitmore</i>	3623
5. Exhaustion of Remedies; Amendment of Appeal	3632
6. Election and Preclusion of Remedies	3635
a. Grievance or MSPB Appeal	3638
b. IRA Appeal, Direct Appeal of Otherwise Appealable Action Distinguished; Issue Preclusion	3641
c. EEO Complaint	3645
7. Collateral Jurisdiction Over EEO Claim Presented in IRA Appeal Not Involving Otherwise Appealable Action	3645
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	3646
9. Status of Particular Agencies and Employees	3648

a.	Postal Service	3648
b.	Department of Veterans Affairs Title 38 Employee	3649
c.	National Guard Technician	3654
d.	Federal Bureau of Investigation	3657
e.	Judicial Branch.....	3660
f.	Federal Reserve Board	3660
g.	NAF Employee	3660
h.	Independent Counsel	3661
i.	Office of Special Counsel	3661
j.	Federal Aviation Administration	3661
k.	Transportation Security Agency	3662
l.	Intelligence, Counterintelligence Agencies; Foreign National.....	3665
m.	Government Corporation	3668
n.	Other Entities	3668
o.	Experts and Consultants; Personnel Appointed Outside Title 5.....	3668
p.	Lawyer	3670
q.	Former Employee	3671
r.	Inspector General Office	3671
s.	Employee of Agency Other Than the Agency Charged With Reprisal	3672
t.	Private Sector Employee; Applicant for Employment	3673
u.	Uniformed Service	3674
v.	Administrator of Federal Benefits.....	3676
w.	Schedule F Employees; Policy Positions.....	3676
10.	Retroactivity of 1989 Whistleblower Amendments; Continuing Violation	3677
C.	PLEADING REQUIREMENTS.....	3677
1.	Duty of Judge to Inform Appellant of Jurisdictional Requirements.....	3677
2.	Specificity of Underlying Disclosure; Labeling of Disclosure Not Required	3679
3.	Pleading to OSC.....	3683
a.	Classification or Labeling of Disclosure Not Required	3691
b.	Curative Filing With OSC	3694
c.	Proof of Scope of Complaint Made to OSC; Post-Complaint Submission.....	3695
d.	Information First Submitted With PFR	3699
e.	Serial Complaints to OSC.....	3699
f.	OSC Closeout Letter.....	3699
4.	Pleading to MSPB	3700
D.	COVERED AND EXCLUDED PERSONNEL ACTIONS.....	3702
1.	Threatened Personnel Action	3702
a.	Proposed Action; Dispute Arising During Compliance.....	3705
2.	Failure to Take Personnel Action.....	3706
3.	Performance Appraisal; Evaluation of Qualifications or Abilities.....	3708
4.	Awards and Acts Preliminary to Awards.....	3709
5.	Denial of Within-Grade Increase	3710
6.	Promotion, Appointment.....	3710
7.	Decision Concerning Leave; Change in Duties; Idling; Overtime; Harassment	3711
a.	Degree of Significance of Change of Duties, Responsibilities, or Working Conditions.....	3712
b.	Hostile Environment.....	3713
8.	Reprimand; Admonition; Counseling; Performance Warning; Performance Improvement Period	3714
9.	Suspension	3718
10.	Probationary Termination	3718
11.	Failure to Renew Appointment; Failure to Reinstatement	3719
12.	Reassignment, Transfer, and Detail	3719
13.	Fitness Examination; Investigation	3720
14.	Security Clearance Suspension, Revocation; Other Certification	3723
15.	Training	3728
16.	Defamatory Statement; Tort; Arrest; False Allegation; Blacklisting	3729
17.	Reduction in Force.....	3730
18.	Classification Issue	3731
19.	Constructive Adverse Action	3731
20.	Action Affecting Private Sector Employment Opportunity	3735
21.	Other Action.....	3735
E.	REMEDIES.....	3737

1.	Transfer	3738
IV.	CASES BROUGHT BY OSC	3739
A.	STATUTORY BASES	3739
1.	Corrective Action Petition; Stay	3739
2.	Disciplinary Complaint	3741
3.	Board Authority in Disciplinary, Corrective Action Case	3742
4.	Judicial or Administrative Finding of Discrimination by Federal Employee; 5 USC 1216(a)(5)	3742
5.	Hatch Act; FOIA Violation	3742
B.	SPECIAL COUNSEL OPERATIONS	3746
1.	Organizational Structure	3746
2.	Disclosure Unit	3746
3.	MSPB Referral to OSC	3746
C.	RIGHT TO COUNSEL IN OSC INVESTIGATION	3747
D.	OSC DISCIPLINARY ACTION	3748
1.	Limits on Prosecutorial Authority	3748
a.	Employee Who Takes or Recommends Personnel Action	3749
b.	Prior Resort to Agency-Employer for Disciplinary Action	3750
2.	OSC Complaint	3751
3.	Rights of Employee, Respondent	3752
4.	OSC Subpoena; Discovery Procedures	3752
5.	Hearing by Administrative Law Judge; MSPB Review	3752
6.	Disciplinary Penalty	3753
E.	OSC CORRECTIVE ACTION PETITION	3758
1.	Regulatory Provisions	3760
F.	LITIGATION WITH OSC	3760
1.	Purpose of MSPB Hearing	3760
a.	Obtaining Records	3761
b.	Evidence From Other Investigation	3761
c.	Dismissal of OSC Action	3761
2.	Settlement	3761
3.	Judicial Review in OSC and IRA Cases	3761
a.	Stay Pending Judicial Review	3762
V.	BURDEN OF PROOF IN REPRISAL CASE	3762
A.	ANALYSIS UNDER WHISTLEBLOWER PROTECTION ACT	3762
1.	Analysis Required by Judge	3762
2.	Statutory, Regulatory Provisions	3763
3.	Contributing Factor Analysis	3764
a.	Order of Proof	3765
b.	<i>Per Se</i> Timing/Knowledge Test	3766
c.	Evidence Other Than Timing	3772
d.	Knowledge by Agency Manager of Appellant's Whistleblowing; Constructive Knowledge; Cat's Paw	3775
e.	Disclosure After the Personnel Action	3782
f.	Settlement Offer	3784
g.	Reprisal Without Unlawful Motivation: Reprisal by Investigation—the Atypical Case; <i>Marano</i>	3784
h.	Charge Arising Out of Conduct During Retaliatory Investigation	3792
i.	OSC Corrective Action Case	3795
j.	Otherwise Appealable Action	3796
4.	Agency's Clear and Convincing Evidence; <i>Carr</i> Factors	3796
a.	Evolution of the "Clear and Convincing" Evidentiary Standard Before the Whistleblower Protection Act	3815
b.	Constructive Adverse Action	3816
5.	Evidence of Reprisal	3816
a.	Strength of Agency's Case; Probationer; Term Employee	3818
b.	Strength of Motive to Retaliate	3822
c.	Comparison Employees	3823
d.	Preliminary Reprisal Leading to Personnel Action	3827
e.	Shifting or Belated Explanations for Agency Action	3828
B.	ANALYSIS FOR PROHIBITED PRACTICES NOT COVERED BY WPA, WPEA; VIOLATIONS OF 5 USC 2302(B)(9)	3828
1.	<i>Mt. Healthy</i>	3831
2.	Importance of Untainted Deciding Official	3833
3.	Timing of Action	3836
4.	Severity of Charged Misconduct	3836

5.	Discipline Related to Refusal of Reassignment	3837
6.	Reprisal Against Individual Involved in Union Activity	3838
7.	Performance Case	3843
8.	OSC and Agency Disciplinary Case Against Individual Charged With Reprisal	3843
	a. Analysis by Agency Deciding Official.....	3850
C.	DEPARTMENT OF VETERANS AFFAIRS	3850
VI.	STAYS OF PERSONNEL ACTIONS	3851
A.	STAY THROUGH INDIVIDUAL APPEAL.....	3851
1.	Basis for Stay Sought by Appellant.....	3853
	a. Intervention by OPM.....	3855
2.	Scope of Stay	3855
3.	MSPB Review of Judge's Stay Decision	3855
B.	STAY THROUGH OSC PROCEEDING	3856
1.	Statutory, Regulatory Provisions	3858
2.	Initial Stay.....	3860
	a. Potential for Disruption by Employee's Return to Workplace	3862
	b. Obtaining Clarification of Stay Order	3862
3.	Extension of Stay	3862
	a. Indefinite Stay.....	3866
4.	Proof Supporting Stay Application	3866
5.	Nature of Relief.....	3866
	a. Hostile Environment; Protective Order.....	3868
	b. Restraint on Employee Communication With OSC, Congress.....	3870
6.	Termination of Stay.....	3872
7.	Relation of Stay and Appeal Proceedings	3873
8.	Use of Stay to Protect Other Proceeding.....	3873
	a. EEO Case	3873
	b. Union Rights Under Statute.....	3873
9.	Effect of Prior Settlement Agreement.....	3873
10.	Employees Covered by Stay	3873
	a. SES	3874
	b. Presidential Appointee; Policymaker	3874
	c. At Will Employee	3874
	d. Former Agency Employee	3874
C.	DEPARTMENT OF VETERANS AFFAIRS	3874

CHAPTER 14: RETIREMENT AND RESTORATION RIGHTS3875

I.	RETIREMENT.....	3875
A.	OVERVIEW OF THE PRINCIPAL RETIREMENT SYSTEMS.....	3876
1.	Background and History.....	3877
2.	Conversions.....	3879
B.	FEDERAL EMPLOYMENT.....	3880
1.	Effect of Reemployment	3882
C.	COVERED AND CREDITABLE SERVICE.....	3882
1.	Service Requirements.....	3883
2.	When-Actually-Employed; Seasonal Employee; Leave Without Pay; Part-Time	3886
3.	Indefinite Appointment.....	3887
4.	Temporary Employment.....	3888
5.	Personal Service Contract	3888
6.	Nonappropriated Fund	3894
7.	Others.....	3895
8.	Effect of Military Service; Deposit for Military Service.....	3895
	a. National Guard, Other Uniformed Service	3909
	(i) Abandonment of Civilian Career for Military Service	3911
9.	Period of Receipt of OWCP Benefits	3916
10.	Sick Leave Credit.....	3917
D.	DISABILITY RETIREMENT.....	3917
1.	Statutory, Regulatory Standards.....	3919
	a. Concept of Disability	3921
	b. Cause of Disability	3923
	c. Medical Condition Postdating Disability Retirement.....	3923

2.	Disability Incurred While in the Federal Service.....	3923
a.	Preexisting Condition	3924
3.	Position Last Occupied.....	3924
a.	Qualifying Position.....	3925
4.	Disability Must Continue at Least One Year	3925
a.	Possible Future Disability.....	3927
5.	Situational or Transitory Condition; Hostile Environment.....	3927
a.	Workplace Stressor May Be Sufficient.....	3928
b.	Workplace Stressor May Be Insufficient	3929
c.	Alcoholism or Drug Addiction; Inability to Control Condition.....	3930
6.	Partial Disability Does Not Qualify	3931
7.	New Condition Raised With Judge or in PFR; Condition That Should Have Been Considered by OPM.....	3931
a.	Evidence of Progression of Disease Presented in PFR.....	3932
8.	Reassignment in Lieu of Disability Retirement	3932
a.	Adequacy of Position Offered Through Reassignment	3933
b.	Permanent Light Duty Position	3935
c.	Postal Service: Different Craft.....	3938
d.	OWCP Position Suitability Determination	3941
9.	Effect of Disability Accommodation on Annuity Entitlement.....	3942
a.	Conflicting Agency Evidence Concerning Accommodation	3942
10.	Necessity for Cessation of Pay or Separation From the Federal Service.....	3943
11.	One Year for Disability Retirement Application.....	3943
a.	Waiver; Separation for Medical Reason: Notice Not Provided.....	3945
b.	Waiver; Mental Incompetence.....	3948
c.	Technical Constructions Concerning Filing Date: Method of Filing; Filing With Former Agency.....	3952
12.	Agency-Initiated Disability Retirement Application.....	3955
a.	Service Credit Requirement.....	3957
13.	Application After Employee's Death.....	3957
14.	Bar to Concurrent Receipt of Disability Retirement, OWCP Benefit.....	3957
15.	Withdrawal of Disability Retirement Application	3958
16.	Evidence of Disability.....	3959
a.	Scope of Board Review; <i>Chavez</i>	3960
b.	Significance of Position Description, Qualification Requirements	3964
c.	Objective Medical Evidence	3964
d.	Content of Medical Report.....	3965
e.	Lack of Evidence of Precise Medical Causation Not Determinative	3965
f.	<i>Mullins-Howard</i> : Disability Established Without Unduly Detailed Medical Causation Analysis	3968
g.	Subjective Evidence.....	3973
h.	Testimony of Supervisor; Performance Appraisal.....	3973
i.	Hearsay.....	3973
j.	Absence; Use of Leave	3973
k.	Post-Separation Medical Evidence.....	3974
l.	Medical Condition Not Presented to OPM	3976
m.	Removal for Physical Inability to Perform; <i>Bruner</i> ; Settlement.....	3976
n.	Loss of Military Status	3981
o.	OWCP Determination	3982
p.	Social Security Administration Determination	3982
q.	VA Disability Rating.....	3985
r.	Security Clearance Determination	3985
s.	Agency Medical Disqualification	3986
t.	Removal for Misconduct.....	3986
17.	Refusal to Undergo Diagnostic or Other Procedure.....	3987
a.	Possible Improvement Through Future Surgery	3988
18.	Specific Conditions.....	3988
19.	Earnings Recovery	3989
a.	Current Rate of Pay	3991
b.	Basic Pay; Cost of Living Adjustment	3991
c.	Bonus	3992
d.	Miscellaneous Income	3993
e.	Business Expense.....	3993
f.	Pension Contribution.....	3993

20. Decline of Earnings.....	3994
a. Discontinued Service Annuity Upon Recovery of Earning Capacity	3994
21. Conversion From Disability to Optional Retirement	3995
22. Conversion From Optional to Disability Retirement	3995
23. Rescission of Disability Retirement Grant	3995
24. Recovery From Disability: Burden of Proof	3995
a. Restoration of Annuity.....	3997
25. Calculation of Annuity.....	3998
26. Loss of Annuity for Certain Offenses.....	3999
E. LUMP SUM DEATH BENEFITS.....	4000
1. Submission of Designation.....	4007
2. Child Who Qualifies to Receive Lump Sum Payment	4009
3. Other Distributions.....	4010
a. Slayer Statute	4011
4. Time for Application.....	4011
F. SURVIVOR ANNUITIES	4011
1. Eligibility of Employee for Retirement as Condition to Annuity	4014
2. Application for Annuity.....	4015
3. Time, Method of Election	4015
a. Effect of Remarriage After Retirement.....	4017
b. Notice to Annuitant of Necessity to Notify OPM of Remarriage to Secure Annuity	4017
c. Delay in Notice to OPM of Annuity Election	4018
d. Lack of Proper Notice From OPM Concerning Annuity Election	4019
e. Incorrect Information From Employing Agency Concerning Annuity Election.....	4031
f. Annuity Election Form; Signature; Submission	4033
g. Effect of Mental Incompetence on Timeliness of Election	4034
h. Authority to Act on Behalf of Incompetent Employee to Create Annuity	4036
i. Employee Mentally Incompetent to Make Adverse Election	4036
j. Community Property Interests	4037
4. State Law Defines Marital Status; Common Law Marriage; Qualifying Widow.....	4039
a. Current Spouse; Duration of Marriage; Widow: Issue of Marriage; Children	4040
b. Accidental Death	4041
c. Putative Spouse	4041
5. Calculation.....	4043
a. Survivor Annuity Based on Disability Annuity.....	4043
b. Health Benefits	4045
c. Social Security Benefit Offset—CSRS	4045
d. Social Security Benefit—FERS.....	4046
6. Consent of Spouse to Waiver of Survivor Annuity	4047
a. Consent by Current Spouse to Discontinue Survivor Annuity.....	4054
b. Attempt to Modify Amount of Spousal Survivor Annuity	4055
c. Consent by Current Spouse for Former Spouse Annuity	4056
7. Marriage of at Least Nine Months; Parent of Issue by Marriage; Exceptions	4056
8. Survivor Annuity for Child Incapable of Self-Support	4057
a. Children in School	4064
G. DISCONTINUED SERVICE ANNUITY	4065
H. LAW ENFORCEMENT RETIREMENT	4074
1. Process of Determining and Appealing LEO Status.....	4074
2. Agency Head Determination; Timeliness of Request for LEO Status.....	4076
3. Substantive Criteria for LEO Determination	4085
a. Customs and Border Patrol Officers.....	4096
b. Decisions Before 2000.....	4098
4. Evidence Considered	4102
5. Supervisory Credit	4106
6. Effect of Disability Retirement.....	4108
I. FIREFIGHTER RETIREMENT	4109
J. AIR TRAFFIC CONTROLLER RETIREMENT.....	4118
K. OTHER ANNUITY INTERESTS	4118
1. Deferred Annuity.....	4118
2. FERS Minimum Retirement Age Annuity.....	4119
3. Supplemental, Redetermined Annuity	4119

4.	Alternative Form of Annuity.....	4123
5.	Voluntary Early Retirement Authority.....	4126
L.	APPORTIONMENT OF ANNUITY BY COURT ORDER.....	4127
1.	Lifetime Annuity.....	4128
2.	Former Spouse Survivor Annuity.....	4128
a.	Intent to Create Former Spouse Survivor Annuity or Other Benefit.....	4130
b.	Reduction in Lifetime Annuity.....	4133
c.	Wording of Decree.....	4134
d.	Ambiguous Provision in Divorce Decree; Extrinsic Evidence; Rules of Construction.....	4136
3.	Challenge to Court Order Affecting Annuity Interest.....	4139
4.	Qualifying Court Order.....	4141
5.	Amendment to Court Order Affecting Former Spouse Annuity; Construction of Annuity Interest Following Ineffective Amendment.....	4151
6.	Bifurcated Decree.....	4163
7.	Spouse Equity Act of 1984 as Amended.....	4166
M.	ANNUITY CALCULATION ISSUES.....	4168
1.	Estoppel as Basis to Create, Continue, or Adjust Benefit or Overpayment.....	4168
2.	Refund.....	4170
3.	Redeposit.....	4177
a.	Personal Service Agreement.....	4179
4.	High Three Salary Calculation: Basic Pay; Lump Sum Back Pay Settlement.....	4180
5.	Onset of Disability Annuity Payment.....	4183
6.	VA Medical Professional; VA Benefit Reduction.....	4185
7.	Annuity Reduction for VA Employees Removed for Certain Performance or Misconduct.....	4186
8.	Law Enforcement Enhanced Annuity Rate.....	4186
9.	Minimum, Maximum Annuity.....	4186
10.	Annuity Allotment.....	4186
11.	Impact of Receipt of Medicare Benefits, Social Security on CSRS, FERS.....	4187
12.	Deposit for Post-1956 Military Service.....	4189
13.	Deposit for Creditable Service; Annuity Supplement.....	4190
14.	Interest.....	4191
15.	Taxes.....	4191
16.	Cost of Living Adjustment for Reinstated Annuity.....	4191
17.	Diversion of Annuity Payment.....	4192
18.	Reemployed Annuitant.....	4192
19.	Individual Retirement Record.....	4192
20.	Reconstructing Employment Record.....	4195
N.	OVERPAYMENTS.....	4195
1.	Proving the Debt; Evidence Supporting Waiver; OPM Records.....	4196
2.	Basis for Waiver.....	4197
a.	Annuitant Without Fault and Recovery Against Equity and Good Conscience.....	4199
b.	Knowledge of Overpayment; Set-Aside Rule.....	4201
c.	OPM Fault in Creating Overpayment.....	4202
d.	Unconscionability of Recovery; Recovery Delay.....	4203
e.	Financial Hardship.....	4207
f.	Ordinary and Necessary Living Expenses; Future Events.....	4209
g.	Assets Available to Satisfy Overpayment; Income/Expense Margin.....	4210
h.	Detrimental Reliance.....	4211
i.	Adjustment of Repayment Schedule; Length of Recovery.....	4214
j.	Calculation of Overpayment; Interest.....	4215
k.	Recovery Schedule Adjustment When There Is No Annuity Entitlement.....	4216
l.	Collection From Survivor for Debt of Original Annuitant.....	4216
m.	Insurance Issue Related to Overpayment.....	4219
O.	OFFSETS; DEBT COLLECTION FROM ANNUITY.....	4221
II.	RESTORATION RIGHTS UPON RECOVERY FROM OCCUPATIONAL INJURY OR ILLNESS.....	4226
A.	SEPARATION OR FURLOUGH MUST RESULT FROM COMPENSABLE INJURY.....	4229
1.	Separation for Reason Other Than Result of Injury or Illness.....	4231
a.	Factual Determination on Cause of Separation.....	4238
b.	Termination When OWCP Determination Supports Employee's Refusal to Return to Work.....	4240
c.	AWOL Covered by Period of Compensation.....	4242
d.	Effect of Resignation.....	4242

e. Separation by Settlement Agreement.....	4243
B. SIGNIFICANCE OF OWCP DETERMINATION; RECEIPT OF COMPENSATION.....	4244
1. Requirement of Medical Examination.....	4247
C. MEANING OF "RECOVERY".....	4248
1. Fully Recovered Within a Year.....	4249
2. Fully Recovered After a Year.....	4251
a. Priority Consideration: Necessity for Position to Be Filled by Another Person.....	4254
b. Geographic Extent of Consideration.....	4256
c. Method, Duration of Priority Consideration.....	4256
3. Partially Recovered.....	4257
a. Geographic Extent of Consideration: Local Commuting Area.....	4261
b. Arbitrary or Capricious Restoration Effort.....	4265
c. Accommodation Requirement.....	4267
d. Postal Service National Reassessment Process; Realignment of Employees; <i>Latham</i>	4268
e. Other Postal Service Limited Duty Restoration Decisions.....	4280
f. Discontinuation of Modified Assignment.....	4281
4. Physically Disqualified Employee.....	4282
a. Geographic Extent of Consideration.....	4283
D. PARTICULAR GROUPS OF EMPLOYEES.....	4283
1. Probationer.....	4284
2. Reemployed Annuitant.....	4284
3. Postal Service.....	4285
4. Nonappropriated Fund.....	4288
E. WHEN RESTORATION IS TO OCCUR.....	4289
1. Light Duty.....	4290
2. Effect of Disability Retirement.....	4290
F. TIME TO APPLY FOR RESTORATION.....	4292
1. Form of Restoration Request.....	4293
G. REMEDY.....	4294
1. Same or Equivalent Position.....	4295
a. Return to <i>Status Quo</i>	4295
b. Interim Promotion.....	4296
2. Regraded Position.....	4296
3. Seniority Inapplicable.....	4297
4. Priority Placement Program.....	4297
5. Benefits Upon Restoration.....	4298
H. MSPB APPEAL RIGHTS.....	4304
1. Time for Appeal.....	4304
a. Lack of Notice of Appeal Right.....	4305
b. Settlement.....	4306
2. Burden of Proof; Jurisdictional Allegations.....	4306

CHAPTER 15: ATTORNEY FEES.....4309

I. ENTITLEMENT STANDARDS.....	4309
A. STATUTORY AND REGULATORY BASIS FOR FEES.....	4309
1. Use of Counsel; Licensure.....	4310
2. Governing Statutes and Regulation.....	4313
a. Civil Rights Statutes.....	4314
b. Whistleblower Protection Act.....	4314
3. Jurisdiction Over Action Under Appeal.....	4315
4. Miscellaneous Appeals.....	4315
a. Regulation Review Proceeding.....	4315
b. Retirement Appeal.....	4315
c. OSC Case: Prohibited Personnel Practice and Hatch Act Litigation.....	4316
d. Sanction.....	4324
B. PREVAILING PARTY STATUS.....	4324
1. Mitigation.....	4326
2. Other Relief.....	4327
3. Must Prevail Through MSPB Procedures.....	4328
a. Mixed-Motive Determination.....	4329
4. Cancellation of Action Appealed.....	4330

a.	Enforcement Proceeding Mooted by Agency Action	4336
5.	Settlement	4339
a.	Prevailing Party Status Through Settlement	4339
b.	Relief Through Settlement Must Be Related to MSPB Appeal.....	4341
c.	Interest of Justice Criteria	4341
d.	Jurisdiction to Accept and Enforce Settlement Providing for Fees or Supporting Fee Motion	4342
C.	INTEREST OF JUSTICE: AN OVERVIEW	4346
1.	<i>Allen</i> Criteria	4346
a.	Financial Hardship.....	4347
2.	Preservation of Claims Supporting Entitlement; Significance of Final Merits Decision	4347
a.	Overlapping Fee Entitlement Standards	4348
3.	Statutory Examples Not Exclusive	4348
D.	BAD FAITH	4348
1.	Malicious Action; Inadequate Inquiry	4349
2.	Disparate Treatment.....	4349
3.	Action Reversed but Some Charges Sustained.....	4349
4.	Unreasonable Litigation Tactics; Failure to Settle.....	4349
a.	Frivolous PFR	4349
5.	Enforcement	4350
E.	CLEARLY WITHOUT MERIT OR WHOLLY UNFOUNDED	4350
1.	Failure to Adhere to Legal Precedent.....	4351
2.	Inadequate Initial Inquiry Into Facts	4351
3.	Lack of Legitimate Basis for Agency Action	4352
a.	Development of Dispositive Information During Appeal.....	4352
4.	Mitigation	4352
5.	Factual Dispute	4352
6.	Performance Appeal	4354
7.	Retirement Appeal.....	4354
a.	Legal Error by OPM	4358
b.	Incorrect Advice From OPM	4358
c.	Issue of Mental Incompetence	4358
F.	KNEW OR SHOULD HAVE KNOWN	4361
1.	Lack of Reasonable Inquiry	4361
2.	Disregard of Legal Precedent	4362
3.	Regulatory Error.....	4362
4.	Reduction in Force.....	4363
5.	Performance-Based Action	4363
6.	Mitigation	4363
a.	Not All Charges Sustained	4366
7.	Negligent Presentation of Case	4367
8.	Decision of Another Tribunal	4367
9.	Retirement Appeal	4367
a.	Failure of OPM to Evaluate Evidence Available During Reconsideration Process; Hearing Evidence	4367
b.	Legal Error by OPM	4370
10.	Settlement	4371
G.	GROSS PROCEDURAL ERROR.....	4371
1.	Denial of Advance Notice or Appeal Right	4373
a.	Involuntary or Constructive Adverse Action	4375
b.	Enforced Leave	4375
c.	Indefinite or Emergency Suspension	4376
2.	Mitigation.....	4376
3.	Performance-Based Action.....	4376
4.	Reduction in Force.....	4376
H.	SUBSTANTIALLY INNOCENT.....	4377
1.	<i>Yorkshire</i>	4379
2.	MSPB Treatment of <i>Yorkshire</i>	4380
3.	Appellant Who Ensnares the Agency	4381
4.	Mitigation: <i>Boese, VanFossen</i>	4382
a.	Factually Close Case.....	4385
b.	Prior Law.....	4386
5.	Performance-Based Appeal	4386

6. Other Legal Error	4386
I. OTHER AUTHORITY FOR FEE AWARDS	4387
1. Back Pay Act	4387
a. Postal Service Employee	4387
2. Equal Access to Justice Act	4389
a. Administrative Law Judge Case	4391
b. Basis for Compensating Court Time	4392
c. Prevailing Party	4393
d. Substantial Justification	4398
e. Bad Faith; Common Fund	4401
f. Basis for Awarding MSPB Time	4402
g. Hourly Rate; <i>Pro Bono</i> or Contingent Representation; COLA; Expenses	4402
h. Procedure; Time for Filing; Application	4405
i. Application to MSPB Cases	4406
3. Civil Rights Case	4406
a. Result Achieved	4409
4. Prohibited Personnel Practice Case	4410
5. USERRA; VEOA	4411
6. Other Bases for Fee Claims; Equitable Assessment of Fee	4412
II. PROCEDURES FOR OBTAINING FEES	4413
A. HOW FEES ARE INCURRED	4413
1. Attorney-Client Relationship; Fee Payment	4413
a. Law Clerk, Paraprofessional; <i>Pro Se</i> Appellant.....	4413
2. Union Counsel	4414
a. Demise of the Cost-Plus Formula.....	4414
b. History of the Cost-Plus Rule	4416
c. Repayment of Fees to Union Required	4417
3. Federally Employed Attorney	4418
4. Public Interest Organization	4418
B. COMPENSABLE SERVICES	4418
1. Work Performed Before Final Adverse Action or Other Decision	4418
2. Research	4421
3. Discovery	4421
4. Settlement, Mediation.....	4421
5. PFR	4421
6. OPM Reconsideration Petition	4422
7. Time in Court	4423
a. Appropriate Charge for Court Time	4426
b. Practice Notes	4426
8. Preparation of Fee Motion	4426
9. Defense of Fee Motion	4427
10. Enforcement Proceeding.....	4427
11. Related Proceeding	4432
a. MSPB	4433
b. Grievance	4434
c. Privacy Act	4434
d. Unemployment Compensation	4434
e. Criminal Case	4435
f. EEO Complaint.....	4435
g. Media Contact; Congressional Activity.....	4437
12. Anticipated Time; Supplemental Petition	4437
13. Unsuccessful Claim, Issue, or Defense	4437
a. <i>Hensley</i>	4437
b. Mitigation.....	4444
c. Tangentially Related Issue	4445
d. Clearly Separate Claim	4446
e. Unsuccessful EEO Claim	4446
f. Unsuccessful Whistleblower Claim	4448
C. REASONABLENESS OF FEES.....	4448
1. Hourly Rate.....	4449
a. Evidence of Reasonableness; Fee Agreement; Result Achieved	4450

b.	Initial Decision in Another Appeal; Decision of Another Tribunal	4457
c.	Settlement	4457
d.	Out-Of-Town Counsel	4457
e.	Travel Time	4458
2.	Contingency Arrangement, Enhancement; <i>City of Burlington</i>	4458
a.	Early Treatment by MSPB of Contingent Adjustments	4461
b.	Enhancement for Payment Delay; Interest	4462
c.	Enhancement for Quality Work	4463
d.	Enhancement for Wear and Tear	4465
e.	Traditional Contingency Agreement; Fee Cap	4466
3.	<i>Laffey Matrix</i>	4467
4.	Below Market Rate	4472
5.	Reasonableness of Time Invested	4475
a.	Responsibility of Judge	4476
b.	Articulated Analysis Required	4478
c.	Notice to Counsel of Defect in Fee Motion	4479
d.	Expertise and Diligence of Counsel; Likely Outcome	4480
e.	Record Review	4480
f.	Time at Hearing	4481
g.	PFR	4481
h.	<i>Amicus</i> Brief	4482
i.	Time Preparing Attorney Fees Motion	4482
j.	Consolidated Appeals	4483
k.	Multiple Counsel; Duplicative Work.....	4483
l.	Clerical, Secretarial Work	4485
6.	Examples of Fee Awards	4486
a.	Rates	4486
b.	Amounts	4486
D.	COSTS AND EXPENSES.....	4487
1.	Transcript.....	4488
2.	Photocopy; Electronic Production	4489
3.	Travel	4489
4.	Secretarial Expense.....	4489
5.	Postage; Courier	4489
6.	Fee for Expert, Consultant	4489
7.	Investigator	4489
8.	Accounting Expense	4490
9.	Telephone or Facsimile	4490
10.	Electronic Research	4490
11.	Taxes	4491
12.	EEO, Whistleblower Protection Act, USERRA, and VEOA Cases; Broader Coverage.....	4491
13.	Direct Recovery of Costs by Appellants	4492
E.	FEE MOTION	4494
1.	Who May File	4495
2.	Time and Place of Filing	4495
a.	Premature Motion	4496
b.	Timing of Agency Response	4496
c.	Late Motion	4496
3.	Motion Must Be Complete When Filed	4500
a.	Incomplete Motion	4501
4.	Developing Evidence to Support Motion	4501
a.	Hearing Concerning Fee Entitlement in Settled Appeal	4501
b.	Hearing and Discovery Concerning Reasonableness	4502
5.	Format of Motion	4502
a.	What to Include.....	4503
b.	Fee Agreement	4504
c.	Itemization of Time	4504
d.	Retrospective Reconstruction of Time	4505
6.	Supplemental or Corrected Motion	4506
7.	Unopposed, Moot, or Settled Motion.....	4507
8.	Service of Motion	4507

9. Opposition to Motion	4507
10. Initial Decision on Motion.....	4507
a. Obligation of Judge to Ensure Due Process	4507
b. Requirements of Addendum Initial Decision	4508
c. Initial Decision Controls Basis for Fee Determination	4508
d. Change in Judge	4509
e. Hourly Rate Analysis.....	4510
11. Waiver of Fee Through Settlement Agreement	4510
a. Effect of Settlement on Claims of Multiple Counsel	4511
12. Settlement of Fee Claim	4512
13. Payment of Fee to Counsel and Client	4513
a. Payment to Counsel	4513
b. Repayment of Fee by Counsel to Client	4513
14. PFR of Fee Decision	4514
a. Interim Fee	4514
b. Time Spent on PFR	4514

CHAPTER 16: SETTLEMENT, REMEDIES, AND ENFORCEMENT4517

I. SETTLEMENT.....	4517
A. ELEMENTS OF SETTLEMENTS	4517
1. Settlement Resources; Mediation Appeals Program.....	4519
2. Minimum Requirements	4520
a. Hatch Act Case.....	4520
3. Settlement After Initial Decision	4521
4. Regulatory Process	4521
5. Filing, Acceptance of Settlement for Enforcement	4522
a. Intent That Agreement Be Subject to MSPB Enforcement Authority	4523
b. Unfiled Settlement	4525
c. Oral Advice of Settlement	4525
d. Specific Oral Settlement Agreement Entered Into the Record	4528
e. Distinguishing Oral Agreement and Ongoing or Incomplete Negotiation	4532
f. Oral Agreement to Be Followed by Written Agreement	4535
g. Appellant's Understanding of Agreement	4537
6. Jurisdiction to Accept Settlement: <i>Delorme</i>	4537
a. Prior Law	4539
b. Settlement Arising From Disputed Last Chance Agreement.....	4542
7. Flexibility, Scope of Settlement	4543
a. Incomplete Settlement; Omitted Terms	4544
b. Regulatory Limitations	4545
8. Conditional Settlement; Lapsed Offer; Implied Term	4546
9. Settlement Requiring Specific Action by Judge	4548
10. Integration or "Zipper" Clause	4549
11. Modification, Amendment of Agreement.....	4553
12. Waiver of Statutory Right; Release	4553
a. Unemployment Compensation	4555
b. Workers' Compensation	4556
c. Older Workers' Benefit Protection Act	4556
d. RIF Benefit	4564
e. Limitation on the Right to Seek Future Federal Employment	4565
13. Retirement Benefit.....	4565
14. Settlement Provision Affecting Other Agencies	4566
15. OSC Case	4566
B. SETTING ASIDE A SETTLEMENT	4567
1. Agreement Challenged as Invalid; Use of PFR	4568
2. Timing of PFR.....	4570
3. Bases for Setting Aside a Settlement	4571
a. Threat of Unwarranted Action; Duress	4573
b. Hardship.....	4575
c. Disappointment; Confusion	4575
d. Lack of Understanding	4576
e. Mental Incapacity; Stress	4576

f.	Time Pressure	4579
g.	Coercion or Bias by Judge	4580
h.	Coercion by Counsel or Union Representative; Lack of Signature by Counsel	4584
i.	Error or Lack of Authority of Appellant’s Counsel or Union Representative—Agreement Sustained	4586
j.	Error or Lack of Authority of Appellant’s Counsel or Union Representative— <i>Bona Fide</i> Challenge to Agreement	4590
k.	Error or Lack of Authority of Government Counsel.....	4593
l.	Fraud; Misrepresentation; Bad Faith; Merit of the Underlying Action	4595
m.	Mutual, Unilateral Mistake	4600
n.	Lack of Mutual Assent.....	4607
o.	Lack of Consideration	4609
p.	Incorrect Information From the Agency Concerning Retirement Eligibility.....	4610
q.	Provision Unlawful or Contrary to Public Policy	4610
r.	Change in Law	4615
4.	Unfiled Settlement Agreement; Preappeal Settlement	4615
5.	Collateral Attack on Settlement Through New Appeal	4618
6.	Breach of Settlement: Election Between Rescission or Enforcement.....	4619
a.	Agency May Rescind	4620
b.	Restoration of Consideration Received; “Tender Back”.....	4620
c.	Enforcement Petition to Rescind Settlement.....	4622
II.	APPELLATE REMEDIES	4623
A.	REMEDIAL AUTHORITY	4623
1.	Statutory Basis for Remedial Authority	4624
2.	OPM Regulation	4624
3.	Collateral Result of Restoration Order; Action Related to Case Under Appeal	4624
a.	Effect on Remedial Order of Decision of Another Tribunal	4629
b.	Reversal of Criminal Conviction	4629
B.	BACK PAY AND RELATED REMEDIES.....	4630
1.	Necessary Findings.....	4630
2.	Pay Entitlement: Ready, Willing, and Able to Work	4630
3.	Maximum Recovery Period.....	4636
a.	Liability for Event Preceding Adverse Action	4637
4.	Method of Payment	4637
5.	Method of Calculation.....	4637
6.	Reinstatement With No or Limited Pay; Time-Served or Other Suspension; Shortened Notice Period	4638
a.	After Acquired Evidence	4639
7.	Loss of Security Clearance.....	4639
8.	Bonus or Award; Differential; Relocation Expense	4640
9.	Premium, Overtime, Holiday Pay.....	4642
a.	Overtime for Postal Service Employee	4646
10.	Interest—Back Pay Act	4647
a.	Interest—Postal Service Employee	4651
11.	Insurance Benefit.....	4652
12.	Retirement, TSP Contribution or Loan.....	4653
13.	Leave Account; FMLA; Military Leave	4657
14.	Leave Restoration for MSPB, Related Proceedings; Compensatory Time; Official Time	4661
15.	Interim Promotion; WIGI; Pay Increase	4663
16.	Applicant for Employment	4667
17.	Federal Aviation Administration Employee.....	4667
C.	DUTY TO MITIGATE BACK PAY THROUGH INTERIM EMPLOYMENT	4667
1.	Employee Other Than Postal Service	4667
2.	Postal Service Employee.....	4668
D.	DEDUCTIONS FROM BACK PAY	4670
1.	Retirement, TSP Contribution	4671
2.	Debt to Retirement Fund	4672
3.	Annuity Entitlement or Adjustment.....	4672
4.	Union Dues; Insurance; Medicare.....	4673
5.	Taxes; Increased Taxes	4678
6.	Unemployment, OWCP, Workers’ Compensation	4679
7.	Interim Earnings; Job Search, Relocation Cost; Replacement Earnings; Retirement Income; Fraudulent Earnings Information	4683

8. Other Deductions	4686
E. RETRAINING	4686
F. REEMPLOYMENT RIGHT.....	4686
G. PURGING OF RECORDS; MODIFICATION OF DOCUMENTATION, PERFORMANCE APPRAISAL.....	4687
1. Coding of Personnel Document	4690
2. Adjustment to AWOL Charge.....	4690
H. DAMAGES; REGULATION GOVERNING RECOVERY	4691
1. Availability of Compensatory Damages	4694
2. Awards of Compensatory Damages—Civil Rights Acts.....	4699
a. Effect of Receipt of FECA and Insurance Benefits on Recovery of Compensatory Damages	4708
3. Consequential Damages and Costs—Whistleblower Case.....	4709
4. Compensatory Damages—Whistleblower Case.....	4719
5. Damages Under VEOA, USERRA.....	4723
6. Monetary Relief for Prohibited Personnel Practices Not Covered by the WPA or EEO Law.....	4724
7. Punitive Damages	4727
8. Taxation of Damages, Attorney Fees.....	4728
I. NONTRADITIONAL REMEDIES	4729
1. Waiver of Debt.....	4729
2. Apology; Evidence Destruction	4729
3. Protection Against Intervening Event	4729
a. Protection Against Future Event	4730
4. Front Pay.....	4730
5. Equitable Relief; Other Remedies.....	4730
III. ENFORCEMENT	4732
A. ENFORCEMENT OF MSPB DECISION	4732
1. Authority to Order Compliance; Sanctions.....	4733
a. Sanction Against Agency	4734
2. Authority to Award Back Pay or Monetary Remedy	4735
a. Mootness	4737
b. Burden of Proof; Proof of Compliance	4738
3. Enforcement Procedure	4739
a. Enforcement Petition Regulation, Guidance	4740
b. Time for Initiating Enforcement.....	4742
c. Agency Request for Extension of Time.....	4745
d. Duty to Supply Information; Accounting.....	4745
e. Unclear or Impossible Compliance	4747
f. Evidence of Compliance; Statement of Intent; Representative’s Statement.....	4747
g. Hearing.....	4749
h. Discovery	4749
i. Referral to Comptroller General	4751
j. Multiple Enforcement Petitions; <i>Res Judicata</i>	4751
k. Analysis by Judge	4752
l. Evidence Supplied After Decision of Judge	4752
m. MSPB Review of Initial Decision on Enforcement Petition	4753
4. Allegation of Reprisal, Bad Faith, Discrimination, or Harassment	4755
a. Discipline Related to Agency Noncompliance	4756
b. Performance Appraisal Dispute	4756
5. Back Pay Dispute	4757
a. Delay in Payment.....	4759
b. Damages.....	4759
6. Reinstatement to the Same Position; <i>Status Quo Ante</i> Remedy	4759
a. Medical Limitation	4763
b. Effect of Retirement.....	4765
c. Obligation Under Collective Bargaining Contract	4765
d. Other Post-Reinstatement Action; Medical Certification Requirement.....	4765
e. Postal Service Reorganization.....	4766
f. Security Clearance Problem.....	4767
g. Demotion	4769
h. Term or Temporary Appointment.....	4777
i. Seniority Adjustment	4777
j. Pay System Change	4778

k.	Insurance	4778
l.	Other Working Conditions	4779
7.	Compelling Reason for Reassignment; Detail; Different Duties.....	4780
a.	Replacement Employee	4780
b.	Placement on Administrative Leave Pending Subsequent Removal Attempt.....	4781
c.	Intervening Abolition of Position	4781
d.	Detail or Other Variation of Permanent Position.....	4783
e.	Intervening Adverse Action.....	4783
f.	Reasons Related to Original Action.....	4784
g.	Overriding Interest.....	4785
8.	Reinstatement With Accommodation for Disability	4792
9.	Lack of Authority to Enforce Compliance.....	4796
10.	Sovereign Immunity Issue.....	4796
B.	ENFORCEMENT AND INTERPRETATION OF SETTLEMENT AGREEMENTS	4796
1.	Scope of Enforcement Authority	4798
a.	Only Filed Settlement May Be Enforced	4799
b.	Allegation of Discrimination; Whistleblowing Reprisal	4800
c.	Damages.....	4802
2.	Agency Enforcement Initiative	4802
a.	Appellant's Agreement to Resign or to Take Other Action; Agency Self Help	4803
b.	Agreement Not to Reapply for Employment With Agency	4804
c.	Agreement to Withdraw EEOC Case or Other Litigation	4805
3.	Agreement That Appellant First Notify Agency of Noncompliance Allegation	4805
a.	Agreement That the Parties Attempt to Adjust Disputes Under the Settlement.....	4806
4.	Election Between Enforcement and Rescission; Pleading in the Alternative	4807
a.	Modification of Settlement Provision	4808
5.	Role of MSPB Regional or Field Office	4809
a.	Treatment of Enforcement Issue; Evidence on PFR	4809
6.	Time for Compliance if None Set in Settlement Agreement	4809
7.	Time for Initiating Enforcement.....	4811
a.	Reasonableness of Timing of Enforcement; Laches Defense	4816
8.	Burden of Proof	4818
a.	Evidence Required	4821
b.	Mutual Breach; "Clean Hands"	4822
9.	Interpretation and Application of Settlement: Legal Principles	4824
a.	Materiality of Breach	4824
b.	Good Faith Required; Bad Faith.....	4830
10.	Interpretation of Agreement: External Law; Extrinsic or Parol Evidence; Ambiguous Term; History of Performance; Hearing.....	4833
a.	Back Pay, Other Obligation; Omitted Term.....	4839
b.	Amendment to Agreement; Counterproposal	4841
11.	Specific Settlement Provisions	4842
a.	Term of Art	4842
b.	Obligation to Reinstatement or Restore to Duty; Precondition to Restoration.....	4842
c.	Agreement to Reassign; Work Schedule Change; Light Duty Position; Duration of Agency's Commitment	4844
d.	Employee May Be Terminated or Will Resign or Retire on Specified Condition; Agreement Not to Reapply	4846
e.	Promotion, Placement Consideration; Priority Consideration	4848
f.	Agreement to Provide Affirmative, Neutral, or Controlled Reference	4852
g.	"Clean Record" or "Clean Paper"; Expungement or Withdrawal of Record; Implied Requirement; NDAA; Executive Order 13,839; Executive Order 14,003	4860
h.	Nondisclosure or Confidentiality Clause.....	4876
i.	"Need to Know" Exception to Confidentiality Clause.....	4884
j.	Whistleblower Protection Enhancement Act Provision.....	4888
k.	Waiver of Protection of Confidentiality or Affirmative Reference Provision	4888
l.	Adjustment of Performance Appraisal, Documentation.....	4889
m.	Agreement to Provide Assistance to Employee	4891
n.	Agreement to "Cancel" Action; Back Pay, Interest, Damages, or Other Entitlement; Bonus or Award; Lump Sum Provision	4891
o.	Annuity Issues	4896
p.	Unemployment Compensation	4901
12.	Debt Recoupment	4902

13. Settlement Reached in Another Tribunal	4902
14. Settlement Involving Action of Third Party	4903
15. Privacy Act Issue	4903
16. Provision That Violates Collective Bargaining Contract.....	4903
17. Unlawful Provision	4904
18. Damages Unavailable for Breach of Clause Requiring Affirmative Reference, Other Violations	4905
19. Reprisal or Harassment	4906
a. Foreclosure of Future Discipline or Other Agency Action for Past Conduct.....	4909

CHAPTER 17: JUDICIAL REVIEW.....4913

I. OVERVIEW OF THE APPELLATE PROCESS	4913
A. NATURE OF THE DECISION UNDER REVIEW	4913
1. Final Decision.....	4913
a. Denial of Request for Reopening.....	4915
b. Collateral MSPB Order.....	4918
c. Decision Remanding Case to Judge	4919
2. Statutory Basis for Review; CSRA and Whistleblower Protection Enhancement Act of 2012	4921
3. Proper Parties in Court; Standing; Mootness	4922
a. Proper Respondent in Court	4923
b. OSC Disciplinary Case	4927
c. Arbitration Award	4928
4. Authorization to Appeal	4928
5. <i>Amicus</i> Submission	4928
6. Government Appellate Review Request; Cross-Appeal.....	4928
a. Review Request by OPM	4929
b. Discrimination Issue	4930
7. Court of Appeals for the Federal Circuit.....	4931
a. Nonprecedential Decision.....	4932
b. Summary Affirmation	4934
c. Court Practice	4934
d. Counsel Authorized to Appear in Appeal; Federal Circuit Admission.....	4938
e. <i>Pro Se</i> Appeal	4938
f. Appointment of Counsel	4938
g. Stay Pending Court Review.....	4939
8. Record and Issues Below	4939
a. Appendix	4940
b. New and Material Evidence	4941
B. SCOPE OF REVIEW	4941
1. Arbitrary and Capricious.....	4942
2. Issues of Law, Jurisdiction; Constitutional Issues.....	4943
a. Decisional Rationale Omitted by MSPB; Departure From Precedent	4944
3. Procedural Error by MSPB.....	4946
a. Ruling on Witnesses and Evidence	4946
b. Ruling on Discovery	4947
c. Timeliness of MSPB Filing.....	4949
4. Substantial Evidence; Factual Dispute.....	4949
a. Credibility	4954
b. Nexus	4958
5. Agency Rule of Conduct	4958
6. Penalty Determination	4958
a. Performance Action.....	4963
7. Reduction in Force	4964
8. Retirement Appeals.....	4964
a. Disability Retirement.....	4965
b. Optional Retirement.....	4973
9. Whistleblower Reprisal: Circuits Other Than the Federal Circuit	4973
C. DEFERENCE; INTERPRETATION OF STATUTES, REGULATIONS, LABOR AND OTHER CONTRACTS	4974
1. Agency Statutory Interpretation	4974
a. Regulation Applying Statute; Agency Interpretation of Regulation	4977
2. Agency Handbook, Instruction	4982
3. MSPB Decision	4984

4.	Principles of Statutory and Regulatory Interpretation	4984
a.	Language Controls.....	4984
b.	Consideration of the Statutory Scheme	4987
c.	Avoidance of Absurd Consequences	4988
d.	Statements of Legislators	4988
e.	Amendment; Failure to Amend.....	4988
f.	Retroactivity	4989
g.	Change in Law	4992
5.	Interpretation of Collective Bargaining Contract	4993
6.	Settlement; Last Chance Agreement	4995
D.	DISCRIMINATION ISSUES	4997
1.	Reprisal.....	5001
a.	Individual Right of Action.....	5002
2.	Jurisdictional Issue; Constructive Adverse Action; <i>Perry</i>	5003
3.	Timeliness, Procedural Issue; <i>Kloeckner</i>	5010
4.	Review of Board Decisions That Include EEO Defenses or Both EEO and Whistleblower Reprisal Defenses.....	5015
5.	Attorney Fees Award, Application.....	5018
6.	Transfer To and From District Courts.....	5019
7.	District Court Review	5020
a.	Exhaustion of Administrative Remedies	5021
b.	Summary Adjudication of EEO Issues; Disposition of Civil Service Issues	5022
c.	Scope of Review	5023
d.	Compliance With District Court Decision	5024
8.	Discharge of Probationer	5024
E.	REVIEW OF ARBITRATION AWARDS.....	5026
1.	Mixed Case.....	5028
2.	Time for Seeking Review	5034
3.	Decisional Standards for Arbitrator	5035
a.	Arbitrability	5039
b.	Bargaining History	5040
c.	Past Practice.....	5041
d.	<i>Functus Officio</i> ; Interim Award	5042
4.	Attorney Fees Award.....	5043
5.	Review Sought by OPM	5044
6.	Award Involving Department of Veterans Affairs Title 38 Employee	5045
7.	Award Involving Nonappropriated Fund Instrumentality Employee.....	5046
8.	Award Reviewed by Federal Labor Relations Authority.....	5047
F.	VEOA, USERRA CLAIMS.....	5047
II.	PREREQUISITES FOR JUDICIAL REVIEW	5048
A.	TIME FOR INITIATING JUDICIAL REVIEW.....	5048
1.	Equitable Tolling	5052
B.	EXHAUSTION OF MSPB ADMINISTRATIVE REMEDIES	5056
1.	Issue Must Be Raised With the MSPB	5056
a.	Exception to Exhaustion Requirement	5058
2.	Necessity for PFR to MSPB.....	5059
a.	Challenge to Settlement.....	5061
3.	Ripeness for Judicial Review	5062
4.	Mandamus.....	5063
III.	JUDICIAL REMEDIAL AUTHORITY	5064
A.	AUTHORITY TO REMAND	5064
1.	Remand to Effect Settlement	5066
2.	Judicial Control of MSPB Procedures	5066
B.	AUTHORITY TO TRANSFER	5066
C.	SANCTIONS	5067
1.	Examples of Sanctionable Conduct	5069
IV.	JUDICIAL RELIEF OUTSIDE THE REFORM ACT	5071
A.	PARTIES TO THE SUIT	5075
1.	Sovereign Immunity.....	5075
2.	Absolute Immunity.....	5076
3.	Qualified Immunity.....	5076
a.	Action Against Union	5076
B.	SUITS BASED ON STATUTE AND CONSTITUTION	5076

1. Administrative Procedure Act	5076
a. Use of the APA	5077
b. Scope of Review; Preclusive Effect of the Reform Act	5077
c. Scope of Relief	5081
2. Privacy Act	5081
a. Scope of the Act	5082
b. Enforcement of the Act	5082
c. Use of the Privacy Act	5083
d. Position Classification	5084
3. Mandamus Act	5084
a. Position Classification	5084
4. Tucker Act	5088
a. Position Classification	5093
b. Overtime Pay Claim	5093
c. Environmental Differential, Hazard Pay, Travel Pay	5094
d. Claims Concerning Tenure, Contract Employment, Promotion, and Bonuses	5097
e. Whistleblower Reprisal Claim	5101
f. Claims Based on Constitution	5103
g. EEO Settlement	5104
h. MSPB Settlement	5110
5. Federal Tort Claims Act	5112
6. Back Pay Act	5113
a. Implied Preclusion Under the CSRA	5116
b. Promotion Claim	5117
7. Family Medical Leave Act	5118
8. Overtime, Pay Statutes	5118
9. Unfair Labor Practice	5120
10. Constitution	5120
a. Property Interest	5122
b. Liberty Interest; Name Clearing Hearing	5123
(i) Termination of Probationer	5124
c. First Amendment	5126
11. Injunction Action	5127
C. ACTIONS FOR DAMAGES AGAINST INDIVIDUALS AND GOVERNMENT; <i>BIVENS</i>	5134
1. Preclusion in the Circuits	5138
a. D.C. Circuit	5138
b. First Circuit	5141
c. Second Circuit	5141
d. Third Circuit	5141
e. Fourth Circuit	5142
f. Fifth Circuit	5142
g. Sixth Circuit	5143
h. Seventh Circuit	5143
i. Eighth Circuit	5144
j. Ninth Circuit	5144
k. Tenth Circuit	5146
l. Eleventh Circuit	5146
2. Claims Based on State Law; Westfall Act; Federal Tort Claims Act; Defamation; Tort Action Arising From Assault; No FEAR Act; Religious Freedom Restoration Act; FECA	5147

CHAPTER 18: RESEARCH, REFERENCE MATERIALS, AND FORMS.....5155

I. RESEARCH AND REFERENCES	5155
II. FORMS	5156

BIBLIOGRAPHY5177

TABLE OF CASES5185

INDEX5339