CHAPTER 1
THE BASICS, THE ESSENTIALS—ADVERSE ACTIONS

Major Topics

- MSPB jurisdiction
- Minor disciplinary actions
- Adverse actions
- Employees with appeal rights
- Process and procedural requirements
- Indefinite suspension
- Actions Against SESers and ALJs
- Petitions for review and advocacy tips

I. INTRODUCTION

This text deals with the charges and penalties that are brought against employees (with appeal rights) in adverse actions. The adverse action is the most significant remedial tool for regulating work-related conduct, e.g., misconduct and related problems (such as inability to perform).

The penalty is the objective of the adverse action, but the charge is the centerpiece. We start by briefly reviewing the adverse action and its technical and legal requirements. In the following chapters, we turn to the essentials of charging and imposing penalties; how charges and penalties are won and how charges and penalties are lost. At the end of this text, one very simple thing will be apparent: employees do not win adverse actions; agencies lose adverse actions.

Appealable adverse actions fall under the jurisdiction of the MSPB, the quasi-judicial forum created by the Civil Service Reform Act to hear, among other things, federal employee appeals on major disciplinary actions.

Before focusing on appealable adverse actions and more specifically on the charges and penalties in those actions, some comment on MSPB jurisdiction is necessary. MSPB jurisdiction is considerably broader than adverse actions.

A. JURISDICTION

The MSPB has both original jurisdiction and appellate jurisdiction. 5 CFR 1201.1. Its original jurisdiction is spelled out in 5 CFR 1201.2:

> The Board's original jurisdiction includes the following cases:
>
> (a) Actions brought by the Special Counsel under 5 U.S.C. 1214, 1215, and 1216;
>
> (b) Requests, by persons removed from the Senior Executive Service for performance deficiencies, for informal hearings; and
>
> (c) Actions taken against administrative law judges under 5 U.S.C. 7521.

The MSPB's appellate jurisdiction depends on the nature of the action (what is appealed) and the type of employee (who is appealing). Appellate jurisdiction is spelled out in 5 CFR 1201.3:

> (a) *Generally*. The Board's appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule or regulation. The Board's jurisdiction does not depend solely on the label or nature of the action or decision taken or made but may also depend on the type of federal appointment the individual received, e.g., competitive or excepted service, whether an individual is preference eligible, and other factors. Accordingly, the laws and regulations cited below, which are the source of the Board's jurisdiction, should be consulted to determine not only the nature of the actions or decisions that are appealable, but also the limitations as to the types of employees, former employees, or applicants for employment who may assert them. Instances in which a law or regulation authorizes the Board to hear an appeal or claim include the following:
>
> (1) *Adverse Actions. Removals (terminations of employment after completion of probationary or other initial service period), reductions in grade or pay, suspension for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; an involuntary resignation or retirement is considered to be a removal (5 U.S.C. 7511-7514; 5 CFR part 752, subparts C and D)* (emphasis added)*;*
>
> (2) *Retirement Appeals*. Determinations affecting the rights or interests of an individual under the federal retirement laws (5 U.S.C. 8347(d)(1)-(2) and 8461(e)(1); and 5 U.S.C. 8331 note; 5 CFR parts 831, 839, 842, 844, and 846);
>
> (3) *Termination of Probationary Employment*. Appealable issues are limited to a determination that the termination was motivated by partisan political reasons or marital status, and/or if the termination was based on a pre-appointment reason, whether the agency failed to take required procedures. These appeals are not generally available to employees in the excepted service. (38 U.S.C. 2014(b)(1)(D); 5 CFR 315.806 & 315.908(b));

(4) *Restoration to Employment Following Recovery from a Work-Related Injury*. Failure to restore, improper restoration of, or failure to return following a leave of absence following recovery from a compensable injury. (5 CFR 353.304);

(5) *Performance-Based Actions Under Chapter 43*. Reduction in grade or removal for unacceptable performance (5 U.S.C. 4303(e); 5 CFR part 432);

(6) *Reduction in Force*. Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901); Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011);

(7) *Employment Practices Appeal*. Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104);

(8) *Denial of Within-Grade Pay Increase*. Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 U.S.C. 5335(c); 5 CFR 531.410);

(9) *Suitability Action*. Action based on suitability determinations, which relate to an individual's character or conduct that may have an impact on the integrity or efficiency of the service. Suitability actions include the cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment. A non-selection or cancellation of eligibility for a specific position based on an objection to an eligible or a pass over of a preference eligible under 5 CFR 332.406 is not a suitability action. (5 CFR 731.501, 731.203, 731.101(a));

(10) *Various Actions Involving the Senior Executive Service. Removal or suspension for more than 14 days (5 U.S.C. 7543(d) and 5 CFR 752.605); Reduction-in-force action affecting a career appointee (5 U.S.C. 3595); or Furlough of a career appointee (5 CFR 359.805); and*

…

(c) *Limitations on appellate jurisdiction, collective bargaining agreements, and election of procedures*:

(1) For an employee covered by a collective bargaining agreement under 5 U.S.C. 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(i) An appealable action involving discrimination under 5 U.S.C. 2302(b)(1), reduction in grade or removal under 5 U.S.C. 4303, or adverse action under 5 U.S.C. 7512, may be raised under the Board's appellate procedures, or under the negotiated grievance procedures, but not under both;

(ii) An appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) may be raised under not more than one of the following procedures:

(A) The Board's appellate procedures;

(B) The negotiated grievance procedures; or

(C) The procedures for seeking corrective action from the Special Counsel under subchapters II and III of chapter 12 of title 5 of the United States Code.

(iii) Except for actions involving discrimination under 5 U.S.C. 2302(b)(1) or any other prohibited personnel practice, any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

(2) *Choice of procedure*. When an employee has an option of pursuing an action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between those procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first. When an employee has the choice of pursuing an appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) in accordance with paragraph (c)(1)(ii) of this section, the Board considers the choice among those procedures to have been made when the employee timely files an appeal with the Board, timely files a written grievance under the negotiated grievance procedure, or seeks corrective action from the Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1), whichever event occurs first.

(3) *Review of discrimination grievances*. If an employee chooses the negotiated grievance procedure under para-graph (c)(2) of this section and alleges discrimination as described at 5 U.S.C. 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with § 1201.154.

II. ADVERSE ACTIONS

Chapter 75 of Title 5 of the U.S. Code deals with federal employment and is the statutory basis for agency disciplinary and adverse actions.

5 USC CHAPTER 75—ADVERSE ACTIONS

- SUBCHAPTER I—SUSPENSION FOR 14 DAYS OR LESS (§§ 7501–7504)
- SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS (§§ 7511–7514)
- SUBCHAPTER III—ADMINISTRATIVE LAW JUDGES (§ 7521)

- SUBCHAPTER IV—NATIONAL SECURITY (§§ 7531–7533)
- SUBCHAPTER V—SENIOR EXECUTIVE SERVICE (§§ 7541–7543)

The Office of Personnel Management (OPM) and the MSPB have both issued regulations as to adverse actions. OPM's regulations focus on coverage, standards, procedures (mainly preappeal), and are found at 5 CFR Part 752. The MSPB's regulations focus on coverage and appeal procedures and as noted above are found at 5 CFR Parts 1201 and 1209.

Actions are often classified or referred to as minor discipline (short suspensions or non-adverse actions) or major adverse actions. The former are not appealable to MSPB; the latter are appealable to MSPB.

For less serious matters that do not rise to a level warranting formal discipline, agencies often issue warning or caution letters or undertake oral or written counseling. Counseling can be considered an aggravating factor (or to demonstrate notice) when deciding upon the appropriate penalty in a subsequent disciplinary action. If an agency anticipates such subsequent use, the agency is well-advised to maintain written documentation. Admonishments and reprimands are often referred to as lesser disciplinary actions. These actions are in writing and are maintained in the employee's official personnel file (OPF) for a specified period of time. Reprimands and admonishments are not appealable to the MSPB, but they may be grieved. Keep in mind as we discuss appealable actions and employees with MSPB appeal rights that nearly all employees have some kind of "appeal" right over almost any kind of "action," for example, individual right of action appeals to MSPB under the Whistleblower Protection Act; discrimination complaints to EEOC; prohibited personnel practice complaints to Office of Special Counsel; and grievances. Our focus is adverse actions appealable to MSPB.

Before turning to a basic discussion of adverse actions, some brief comment is needed as to actions against SES employees and administrative law judges. As noted, MSPB has original jurisdiction on actions against ALJs and SES employees.

SES employees may be removed from the SES service for unsuccessful performance, usually with a fallback right; the SES employee would have the right to request an informal hearing before an official appointed by the MSPB. 5 USC § 3592(a)(2); 5 CFR 359.502; 5 CFR 1201.143–145. Of course, an SES employee may be removed, without any fallback right, for misconduct pursuant to disciplinary procedures applicable to the competitive service. Note that the Veterans Access, Choice, and Accountability Act of 2014, P.L. 113-146, allows for the expedited removal or transfer of VA SES employees. 38 USC § 713(a)(1)(A)–(B)

Also, there has been in the last few years somewhat of a proliferation of adverse actions against ALJs; such actions are no longer uncommon. An ALJ position is a career appointment subject to removal for good cause:

> § 7521. *Actions against administrative law judges*
>
> (a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.
>
> (b) The actions covered by this section are-
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> (1) a removal;
>
> (2) a suspension;
>
> (3) a reduction in grade;
>
> (4) a reduction in pay; and
>
> (5) a furlough of 30 days or less;
>
> but do not include-
>
> (A) a suspension or removal under section 7532 of this title;
>
> (B) a reduction-in-force action under section 3502 of this title; or
>
> (C) any action initiated under section 1215 of this title.

Good cause, like service efficiency, is not defined in the law: however, good cause is generally understood to mean conduct that undermines confidence in the adjudicatory process. An adverse action against an ALJ starts with the agency filing a complaint with the MSPB. The matter must be heard by an ALJ who will issue a decision authorizing the agency to take action against the ALJ. The process tracks roughly 5 CFR 1201. However, there are numerous nuances, e.g., the inapplicability of certain defenses, and recent Federal Circuit and MSPB law on the use of statistics in actions based on low productivity have made it considerably easier for agencies to bring actions against ALJs. *Shapiro v. SSA*, 800 F.3d 1332 (Fed. Cir. 2015). A significant problem is that the agency can take no final action against an ALJ until MSPB finds in the agency's favor; that can be a long process and the agency has no good option but to leave the ALJ in an on-duty-full-pay status or place the ALJ on administrative leave. *SSA v. Larry Butler*, CB-521-14-0014-T-1 (Nonprecedential 8/25/2016). And, of course, administrative leave has its own issues.

A. SHORT SUSPENSIONS (5 USC 7501–7504 NON-ADVERSE ACTIONS)

"Minor adverse actions" are suspensions for 14 days or less and are not appealable to the MSPB. 5 USC 7501–7504. Certain employees may be able to grieve short suspensions through the agency grievance system or the negotiated grievance system. Title V, Ch. 75, Subchapter I; 5 CFR 752.201–203. A short suspension may be taken "for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct)." 5 USC 7503(a); s*ee Jennings v. MSPB*, 59 F.3d 159, 160–61 (Fed. Cir. 1995) (two 14 day suspensions not appealable, if they arise out of separate circumstances or events).

B. MAJOR ADVERSE ACTIONS

Major adverse actions, as noted in the MSPB regulations above, consist of five actions as set out in 5 USC 7512:

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less.

See also 5 CFR 752.401–406. Additionally and as noted in the MSPB's regulations, "an involuntary resignation or retirement is considered to be a removal," that is, an appealable adverse action. 5 CFR 1201.3(a)(1); *see Terban v. Dept. of Energy*, 216 F.3d 1021, 1024 (Fed. Cir. 2000) (to overcome the presumption of voluntariness, an appellant must show that the retirement was the product of misinformation or deception by the agency or that it was the product of coercion by the agency); *Staats v. USPS*, 99 F.3d 1120, 1123–24 (Fed. Cir. 1996) (a retirement is presumed to be a voluntary act and beyond the Board's jurisdiction; an involuntary retirement is tantamount to a removal and subject to Board jurisdiction).

A few other actions may be treated as appealable adverse actions: e.g., constructive suspensions: (*Tardio v. Dept. of Justice*, 112 MSPR 371, 378 ¶ 24, 2009 MSPB 188 (2009) (the employee was able to work within his medical restrictions, he communicated his willingness to work, but the agency prevented him from returning to work). *Thomas v. Dept. of Navy*, 123 MSPR 628, 2016 MSPB 34 (2016); *Rosario-Fabregas v. MSPB*, 833 F.3d 1342 (Fed. Cir. 2016); *Turner v. USPS*, 123 MSPR 640, 2016 MSPB 35 (2016). Constructive downgrades or "*Russell* appeals," occur where the employee is reassigned (moved to job at existing grade) from a job that is then "upgraded" due to a new classification standard or the correction of a classification error (in other words, without a significant increase in duties and responsibilities). In such cases, the employee qualified for the upgrade in his old position, that is, would have otherwise been promoted. *See Russell v. Dept. of Navy*, 6 MSPR 698, 711 (1981); *see also Manlogon v. EPA*, 87 MSPR 653, 657–58, ¶ 9 (2001). It is not always easy to identify a constructive adverse action, especially downgrades. There is no adverse action if there is saved pay and saved grade, but in situations involving the conversion from one pay schedule to a different pay schedule, the equivalency is often not readily apparent. *Simmons v. DHUD*, 120 MSPR 489, 2014 MSPB 1 (2014) (noncompetitively promoting appellant was error in hiring process; agency's action to correct such error by retroactively canceling the appellant's promotion and placing her in a different GS-14 position held to be an appealable reduction in grade and pay); *Kim v. Dept. of Army*, 119 MSPR 429, 434 ¶ 7, 2013 MSPB 34 (2013) (cancelation of an effected promotion is an appealable reduction in grade); *Arrington v. Dept. of Navy*, 117 MSPR 301, 306–08 ¶¶ 10–13, 2012 MSPB 6 (2012) (appellant suffered an appealable reduction in grade; she was a GS-14 prior to her conversion to the National Security Personnel System but was returned to a GS-13 position when the NSPS was abolished); *Ellis v. Dept. of Navy*, 117 MSPR 511, 2012 MSPB 31 (2012) (no appealable action where appellant was hired into the NSPS at the YA-2 level and was converted to a GS-12 level position when the NSPS was abolished); *Marrero v. VA*, 100 MSPR 424, 426 ¶ 7 (2005), *overruled on other grounds by Deida v. Dept. of Navy*, 110 MSPR 408, 414 ¶ 16, 2009 MSPB 8 (2009) (Board jurisdiction found over cancelation of a promotion or appointment where the promotion was approved by an authorized official aware that he or she was making the promotion or appointment; the appellant took some action denoting acceptance of the promotion or appointment; and the promotion or appointment was not revoked before the appellant performed in the position); *Trotter v. USPS*, 91 MSPR 282, 285 ¶ 8 (2002), *overruled on other grounds by Deida*, 110 MSPR 408, 414 ¶ 16, 2009 MSPB 8 (2009) (reduction in grade or pay to correct a classification error or pay-setting error that is contrary to law or regulation is not appealable); *Peele v. DHHS*, 6 MSPR 296, 299 (1981) (the loss of potential pay; future step increases is not a reduction in pay; pay for adverse action purposes means the basic rate of pay for the position held); *Alger v. Dept. of Interior*, CH-0752-13-0229-I-1 (Nonprecedential 1/26/2014) (an appealable reduction in pay where directed reassignment resulted in a loss of pay; appellant moved from law enforcement pay schedule to general pay schedule).

Certain actions are specifically excluded from the coverage of 5 USC 7512:

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321 (a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

There are additional personnel actions, but unless an action is listed, a covered employee may not appeal. For example, a covered employee reassigned with a considerable loss in status but no loss in grade or pay would not be able to appeal absent something more. *Aliota v. VA*, 60 MSPR 491 (1994); *Dixon v. USPS*, 64 MSPR 445 (1994). If the reassignment was combined with an appealable action, e.g., a demotion or a suspension, the MSPB could review the reassignment.

A major adverse action may be taken "only for such cause as will promote the efficiency of the service." 5 USC 7513(a). This means that the disciplinary action must serve some legitimate governmental interest, and questions as to the government's interest generally arise in cases of nonserious off-duty misconduct. In Chapter 3, we discuss in detail service efficiency and point out that it is the one true statutory charge. In fact, we are seeing more and more such charges as "prejudicial to service efficiency"; such charges are like generic charges (i.e., improper conduct) wholly dependent on the specification, the specified misconduct. As noted in Chapter 3, as agencies increasingly use benign, innocuous, vanilla charges to circumvent arduous proof requirements, service efficiency and penalty considerations will warrant increased scrutiny.

For the MSPB to have jurisdiction over the appeal, the action at issue must not only be either a removal, reduction in grade or pay, or suspension for more than 14 days but the appellant must be a covered employee with appeal rights. MSPB jurisdiction is a function of the action at issue and of the appellant's status.

Note that in *Abbott v. USPS*, 121 MSPR 294, 2014 MSPB 47 (2014), the Board clarified the difference (burdens, required proof) between enforced leave suspensions and constructive suspensions.

C. COVERED EMPLOYEES

Covered employees are entitled to procedural due process and the right of appeal to the MSPB. Covered employees are defined by statute and regulation. Title 5, United States Code, section 7511(a)(1) defines the meaning of "employee":

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

OPM's regulations at 5 CFR 752.401(c) and (d) reflect case law interpreting 5 USC 7511 and explain covered and excluded employees:

(c) *Employees covered*. This subpart covers:

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period;

(2) An employee in the competitive service who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(3) An employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission and who has completed 1 year of current continuous service in the same or similar positions;

(4) A Postal Service employee covered by Public Law 100–90 who has completed 1 year of current continuous service in the same or similar positions and who is either a supervisory or management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at section 105 of title, 5, United States Code, and who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter;

(7) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and who still occupies that position;

(8) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(9) An employee of the Government Printing Office.

(d) *Employees excluded*. This subpart does not apply to:

(1) An employee whose appointment is made by and with the advice and consent of the Senate;

(2) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by the President for a position that the President has excepted from the competitive service; the Office of Personnel Management for a position that the Office has excepted from the competitive service (Schedule C); or the President or the head of an agency for a position excepted from the competitive service by statute;

(3) A Presidential appointee;

(4) A reemployed annuitant;

(5) A technician in the National Guard described in section 8337(h)(1) of title 5, United States Code, who is employed under section 709(a) of title 32, United States Code;

(6) A Foreign Service member as described in section 103 of the Foreign Service Act of 1980;

(7) An employee of the Central Intelligence Agency or the Government Accountability Office;

(8) An employee of the Veterans Health Administration (Department of Veterans Affairs) in a position which has been excluded from the competitive service by or under a provision of title 38, United States Code, unless the employee was appointed to the position under section 7401(3) of title 38, United States Code;

(9) A nonpreference eligible employee with the U.S. Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, the National Security Agency, the Defense Intelligence Agency, or any other intelligence component of the Department of Defense (as defined in section 1614 of title 10, United States Code), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, United States Code;

(10) An employee described in section 5102(c)(11) of title 5, United States Code, who is an alien or noncitizen occupying a position outside the United States;

(11) A nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless he or she meets the requirements of paragraph (c)(5) of this section;

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority in the absence of any provision to place the employee within the coverage of chapter 75 of title 5, United States Code; and (13) An employee in the competitive service serving a probationary or trial period, unless he or she meets the requirements of paragraph (c)(2) of this section; and

(13) An employee in the competitive service serving a probationary or trial period, unless he or she meets the requirements of paragraph (c)(2) of this section.

Current continuous employment, as referred to above in Title V and OPM's regulations, is defined by 5 CFR 752.402 as "a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday." *See McCormick v. Dept. of Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), *pet. for reh'g en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003) (under 5 USC 7511(a)(1)(A)(ii) competitive service appellant had appeal rights although serving one-year probation because she had completed one year of continuous competitive service before transferring to Air Force) and *Van Wersch v. DHHS*, 197 F.3d 1144 (Fed. Cir. 1999) (excepted service); *see also* Navigating the Probationary Period After *Van Wersch* and *McCormick*: A Report to the President and the Congress of the United States, MSPB; *Ellefson v. Dept. of Army*, 98 MSPR 191 (2005) (under 5 USC 7511(a)(1)(A)(ii) current continuous means no break of even a workday; service need not be in same or similar position); *Payano v. Dept. of Justice*, 100 MSPR 74 (2005) (under 5 USC 7511(a)(1)(A)ii) service need not be in same agency); *see generally Briggs v. Nat'l Council on Disability*, 60 MSPR 331 (1994); *Todd v. Dept. of Defense*, 63 MSPR 4 (1994); *Thompson v. Dept. of Defense*, 61 MSPR 364 (1994); *Chavez v. VA*, 65 MSPR 590 (1994). An employee may have appeal rights even though serving a probationary period. This can get confusing and it is critical that agencies get it right. Removing a covered employee without rights, without minimum due process, will result in reversal of the action. *Thomas v. GSA*, 78 MSPR 29 (1998). In some situations, an employee will move from one job with appeal rights to another job without appeal rights. If the move is within the same agency, the waiver of rights must be made knowingly. *Boudreault v. DHS*, 120 MSPR 372, 2013 MSPB 91 (2013) (when an employee moves in the same agency from a job with appeal rights to a job without appeal rights, the employee must be informed and knowingly relinquish his rights); *Yeressian v. Dept. of Army*, 112 MSPR 21, 27 ¶ 12, 2009 MSPB 123 (2009); *Exum v. VA*, 62 MSPR 344, 349–50 (1994); *Carrow v. MSPB*, 626 F.3d 1348 (Fed. Cir. 2010) (no retained appeal rights where employee moves from job with appeal rights to job without appeal rights in a different agency); *Cotto v. Dept. of Navy*, DC-0752-16-0100-I-1 (Nonprecedential 8/10/2016) (excepted service, preference-eligible veteran with less than one year of current continuous service in the same or a similar position).

D. THE PROPOSAL: PREDECISIONAL DUE PROCESS AND STATUTORY, REGULATORY ENTITLEMENTS

When bringing an adverse action against a covered employee, the agency must provide the following procedural entitlements:

(1) at least 30 days advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefore at the earliest practicable date.

5 USC 7513(b); 5 CFR 752.404; *see also Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999). Additionally, as noted above, constitutional due process requires that an employee receive (predeprivation) notice (e.g., charges plus an explanation of the evidence) and the opportunity to reply. As explained below, there may be certain violations of 5 USC 7513(b) (e.g., failure to provide 30 days, or seven days, both an oral and written reply) that nevertheless do not rise to the level of a due process violation, assuming that the employee received adequate notice and the opportunity to make a meaningful reply. For example, due process requires predeprivation notice and the right to reply; as long as the proposal notice is clear and the employee has a fair opportunity to reply, a failure to provide the materials relied upon or the full seven days to reply may be a statutory, regulatory violation to be tested as a harmful error but there would probably be, without more, no due process violation.

But 5 USC 7513(b), the crime exception/provision allows the agency to collapse the 30-day advance notice period to as little as seven days when the agency reasonably believes that the employee has committed a crime for which imprisonment may be imposed. Because the employee is entitled to a seven-day response time, the advance notice period cannot be less than seven days. *Id.* The shortened notice period is often used in connection with an indefinite suspension, pending the resolution of the criminal charges or an investigation into possible criminal conduct.

> The "crime exception"…adequately provides for those situations in which an employee must be barred from the agency premises quickly by permitting a shortened notice period in any adverse action where "there is reasonable cause to believe," the employee has committed a crime for which a sentence of imprisonment may be imposed.

Littlejohn v. USPS, 25 MSPR 478, 482 (1984); *see also* 5 CFR 752.404(d)(1).

An interesting point is that Title V does not actually refer to charges; rather, Title V refers to "reasons." The notice of proposed decision must include all charges and specifications, and it must discuss any aggravating penalty factors, e.g., prior discipline. The proposal must be sufficiently specific to allow the employee to make an informed reply. *Brown v. USPS*, 47 MSPR 50 (1991); *Smith v. Dept. of Labor*, 25 MSPR 102 (1984); *Johnston v. GPO*, 5 MSPR 354 (1981); *Otero v. USPS*, 73 MSPR 198 (1997).

1. Importance of the Proposal

The proposal is unquestionably the most important document in an adverse action. First, it fulfills the statutory and constitutional due process requirement for notice. Second, it is the "indictment" and, most likely, the first document that the AJ will read when she gets into the appeal. It will be her first impression of the adverse action.

The proposal must not only notice all the reasons for the adverse action as well as notice all aggravating penalty factors that the agency intends to rely on in its penalty analysis. Again, the proposal fulfills the constitutional requirement of due process, e.g., notice, an explanation of the evidence. But the proposal must also start to "sell" the adverse action and the proposed penalty. That an agency can bring an adverse action does not mean that an agency should bring an adverse action. The misconduct at issue may or may not be harmful to agency efficiency; misconduct harmful to agency efficiency at one agency may not be harmful to service efficiency at another agency with another mission. It can be easy for an AJ to conclude "no harm, no foul, no penalty."

Popular Misconception

Many agencies still believe erroneously that aggravating factors do not have to be noticed in the proposal notice. But as we will discuss further in the penalty chapters (Part 2), any aggravator not noticed in the proposal cannot be relied upon to enhance the penalty. Reliance on an impermissible factor should result in a loss of deference, in a due process violation, e.g., the latter voiding the adverse action.

2. No Predecisional Discovery; Materials Relied Upon, *et al*.

As a constitutional matter, an employee is entitled to an explanation of the agency's evidence. However, under 5 USC 7513(e), an appellant is entitled to any supporting material relied upon by the agency. *See Bize v. Dept. of Treasury*, 3 MSPR 155 (1980). OPM regulations expand upon, or explain in more detail, the covered employee's entitlements, particularly with regard to the employee's right to review the materials relied upon:

> (b) *Notice of proposed action*. (1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.

5 CFR 752.404(b)(1). Problems with the agency's materials relied upon (a statutory requirement) may not rise to the level of a due process violation, assuming the agency has met the constitutional due process requirement of providing an adequate explanation of its evidence.

Schaules v. USPS, 19 MSPR 390 (1984), makes clear that the agency is under no obligation to compile an investigative file containing the evidence on which the charge was based: "[a]ppellant has referred to no agency regulation or other authority requiring such compilation and, indeed, we are aware of none." The agency provided appellant with the material the agency assembled prior to the removal. *Hoover v. United States*, 513 F.2d 603, 607 (Ct. Cl. 1975), makes clear that the agency was responsible for providing only the materials relied on:

> Another claim is that claimant was entitled, in the proceedings following the letter of charges, to see all of the inspector's report, even that portion which was unconnected with the charges actually made. The answer is that the regulations require the employee to be supplied with only "the material…relied upon (by the agency) to support the reasons in that notice"…and that was done here.
>
> Although an agency must make available the evidence relied upon, it is under no obligation to go beyond that and respond, at the predecisional stage, to discovery requests.
>
> [T]he administrative judge correctly found that the agency was not required to make witnesses available on official time for interview prior to the appellant's removal and appeal to the Board, at which time he could ask the Board to compel the presence of witnesses through the timely use of discovery procedures.

See Hatch v. Dept. of Air Force, 40 MSPR 260, 264 (1989). Many experienced employee representatives will make requests at the predecisional stage for such routine materials as the employee's official personnel file (OPF), the table of penalties, and other discipline for similar misconduct. This is often a simple ploy, because most, if not all, of these things are usually readily available to the employee. If the agency denies production of such routine information, even at the predecisional stage, by relying upon a strict definition of materials relied upon, the employee's representative will then seek to paint the agency as having taken the adverse action prematurely and without deliberation.

Appellant Practice Tip

Before responding, always request all basic and pertinent information and materials, including but not limited to the OPF, the table of penalties, and other discipline for similar misconduct (including the proposals, decisions for each comparator).

Agency Practice Tip

Never overlook or fail to review all basic materials in issuing the agency proposal notice; with a complete review, the agency presents a much more credible appearance.

3. Oral, Written Replies

An employee has a statutory right to make both a written and oral response to the proposal notice. An employee has a constitutional due process right to reply. This coupled with notice is the key entitlement and fundamental right. But this fundamental right is often taken too lightly. A failure

to provide a meaningful opportunity for both an oral and written reply may constitute a statutory violation, but assuming the employee was provided with a meaningful opportunity to make either an oral or written reply, the error should not rise to the level of a due process violation. And note that the due process violation occurs at the time of the reply and cannot be cured later on appeal before the Board.

For the agency, the oral response is an opportunity to hear the employee and see if they can use any legitimate points. If there is a problem with the agency charge or penalty or anything else, this is the time to correct that problem.

Although the reply official is often the deciding official, the reply official does not have to be the deciding official. The requirement is that the reply official must be an official authorized to make or recommend a final decision on the proposal.

> The appellant also claims that her due process rights were violated when she made her oral reply to an agency official who did not serve as the deciding official. ("An employee cannot be said to have had a meaningful opportunity to present his side of the story and invoke the discretion of the deciding official if the deciding official did not hear the appellant's oral reply."). Neither our decisions nor the Office of Personnel Management's regulations require that the oral reply official also serve as the deciding official. *See Peterson v. Department of Health & Human Services*, 25 M.S.P.R. 572, 573 (1985); *Monroe v. Department of the Treasury*, 20 M.S.P.R. 620, 621 (1984), *aff'd*, 770 F.2d 1044, 1046–47 (Fed. Cir. 1985); 5 C.F.R. § 752.404(c)(2) ("The agency will designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action."). We find no evidence of a due process violation based upon the agency's removal process.

Pelcher v. FMCS, DC-0752-13-0152-I-1 (Nonprecedential 1/23/2014).

Under 5 USC 7513(c), an agency may opt to hold a predecisional hearing in lieu of or in addition to the employee's right to answer the notice of proposed action. The employee does not have the right to such a hearing absent an agency regulation requiring a hearing. 5 CFR 752.404(c)(2).

Employees will frequently request that the deciding official look into this or that matter or even conduct certain interviews. This is often a ploy to bait the deciding official into a *Stone/Ward* (see Chapter 14) due process violation, e.g., the deciding official then uncovers information and does not notify the employee. The agency is under a duty "to make reasonable inquiries into the exonerating facts which appellant [brings] to its attention before effecting his removal." *Steger v. Defense Investigative Serv.*, 19 MSPR 462 (1984), 717 F.2d 1402 (D.C. Cir. 1983) (*per curiam*) (failure to investigate will result in finding that agency should have known it would not prevail and in fee liability); *Cooper v. Dept. of Navy*, 26 MSPR 108, 111 (1985) ("The agency is obligated to make reasonable inquiries into exonerating facts brought to its attention by appellant before removing him."). An agency is not obligated to delay its decision in order to investigate each and every canard advanced by an employee. As the Board explained in *Uske v. USPS*, 60 MSPR 544, 550 (1994):

> [T]he administrative judge erred to the extent he suggests that the agency had a duty to investigate the appellant's conduct. An agency is obligated to make reasonable inquiries into exonerating facts brought to its attention by appellant before removing him. Here, however, the appellant made no reply to his proposed removal, and thus presented no exonerating evidence triggering a duty on the part of the agency to inquire. The appellant did not allege or show below that the agency had any affirmative duty to investigate or that he was harmed by a failure to more fully investigate his conduct.

A word of warning: employees frequently use the oral response to "conduct discovery" or grill the deciding official. The oral response is the employee's opportunity to make his case, not cross the deciding official. That noted, any legitimate questions to clarify the nature of the charges are certainly appropriate.

Oral Response Pitfall

If the employee turns the response opportunity into a protracted grilling of the deciding official, the agency should end the interrogation by informing the employee that this is his opportunity to persuade the deciding official, not an opportunity to depose the deciding official.

4. Preappeal Advocacy

Agencies and appellants routinely fail to capitalize on several preappeal opportunities. Most importantly, neither party takes advantage of the oral response. Too often, both give more thought to "abusing" the oral response. That is, misusing it as an opportunity for discovery or interrogation, rather than using it as an opportunity to find common ground.

Agency Missed Opportunities, Preappeal

- *No or inadequate factfinding*: agencies too often charge what appellant is thought to have done and then later scurry about seeking facts to fit to the charge; proper charging starts with proper factfinding and then fitting the charge to the facts.
- *Clear charge drafting*: agencies typically misdraft the charge selected, fail to match the charge to the specification, and then prove a different charge at hearing.
- *Written and oral response*: agencies undervalue and underappreciate the value of the appellant's response; that response is an opportunity to check for problems in the charge, affirmative defenses, and mitigating factors.

Employee's Missed Opportunities, Preappeal

- *Written and oral response*: appellants typically undervalue and underappreciate the constructive role that a significantly well-done written and oral response can play; as noted, at that stage there are few if any controlling rules and the employee is free to say virtually anything and the deciding official is free to fashion almost any kind of alternative sanction, assuming one is called for.
- Although predecisional discovery is not available, the employee is certainly free, even encouraged, to seek clarification of the nature of the charges and ask for any documents obviously relevant to those charges.

E. THE AGENCY FINAL DECISION

The agency's final decision should state the reasons for the action, not consider any reason not specified in the notice of proposed action, and inform the employee of her appeal rights. Title 5 CFR 752.404(g)(1), provides:

> (g) *Agency decision*.
>
> (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.
>
> (2) The notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under § 752.405 of this part. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

Title 5 CFR 1201.21, provides:

> When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:
>
> (a) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;
>
> (b) A copy, or access to a copy, of the Board's regulations;
>
> (c) A copy of the MSPB appeal form available at the Board's Web site (http://www.mspb.gov), and
>
> (d) Notice of any right the employee has to file a grievance or seek corrective action under subchapters II and III of 5 U.S.C. chapter 12, including:
>
> (1) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board;
>
> (2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board;
>
> (3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.155 of this part; and
>
> (4) The effect of any election under 5 U.S.C. 7121(g), including the effect that seeking corrective action under subchapters II and III of 5 U.S.C. chapter 12 will have on the employee's appeal rights before the Board.
>
> (e) Notice of any right the employee has to file a complaint with the Equal Employment Opportunity Commission or to grieve allegations of unlawful discrimination, consistent with the provisions of 5 U.S.C. 7121(d) and 29 CFR 1614.301 and 1614.302.
>
> (f) The name or title and contact information for the agency official to whom the Board should send the Acknowledgment Order and copy of the appeal in the event the employee files an appeal with the Board. Contact information should include the official's mailing address, email address, telephone and fax numbers.

In specifying the reasons, the final decision must state what charges and specifications are upheld; that can often be done in one simple sentence. And the rationale for upholding a charge is unimportant; the MSPB hearing is *de novo* and the deciding official's rationale is wholly irrelevant. Absent something unusual, the deciding official is not a fact witness and, in fact, should not be "involved" in any sense in the underlying misconduct. *See House v. USPS*, 80 MSPR 138 (1998) (deciding official too close in that he conducted an "investigation by staking out" the appellant's moonlighting job); *Eichner v. USPS*, 83 MSPR 202 (1999) (the deciding official was the principal complaining witness); *see also Wilkowski v. Dept. of Treasury*, 86 MSPR 496, 498–500 (2000) (discussion of the propriety of changing the deciding official).

A long debated topic is the extent to which or the detail that the final decision should provide *vis-à-vis* the charges at issue. Given that the deciding official's reasoning is basically unimportant (absent prohibited considerations, due process issues) and there is no requirement for a nexus, service efficiency statement, a final decision need do no more than say what is sustained and then move immediately to its penalty discussion.

Popular Misconception

A major, if not the major, misconception as to the agency decision is that the deciding official's rationale for upholding the proposal is at issue or of importance. The hearing at the Board is *de novo,* making the deciding official's rationale essentially irrelevant. That said, it may be that the deciding official's consideration of unnoticed issues or evidence could constitute a due process violation. For that reason, it is always wise to depose the deciding official, to examine the deciding official as to his rationale, what he or she considered. As to the charges, all the final decision need note is which are upheld. But if the agency believes some clarification is needed or some explanation would be persuasive, there is no problem in doing that. A word of caution is that agencies too often write themselves into trouble.

The heart of the decision is really the penalty. The extent of the final decision's detail on penalty and on the charges is a product of the circumstances of each adverse action. Aside from that kind of "it-depends" answer, this is certainly true: although a final decision cannot win an adverse action, a final decision can easily lose an adverse action. In recent years, the final decision's penalty analysis has become increasingly important. The importance of the penalty analysis in the final decision is a function of the fact that the Board's penalty analysis is not *de novo* but deferential. The deciding official will most likely be the agency's chief penalty witness and will have to provide a reasoned analysis showing that all relevant penalty

factors were considered and that the penalty decided upon is within the limits of reasonableness. A final decision that provides a well-reasoned and credible penalty discussion (e.g., balanced analysis with a fair treatment of all mitigating factors) will serve to take pressure off the deciding official's hearing testimony.

From a trial perspective, the proposing official usually need not testify and the deciding official would not need to testify but for her penalty decision. Absent a unique situation, these officials should not be involved in the underlying situation. They would not have first-hand knowledge or be fact witnesses. These officials have knowledge that is usually derived solely from their review of the case file. For example, X is disciplined for punching coworker Y; the agency's direct case would be Y or another coworker who witnessed the altercation and the deciding official to testify on penalty.

F. THE EMPLOYEE'S STATUS PENDING THE AGENCY FINAL DECISION: FULL DUTY, PAY STATUS; REASSIGNMENT OR DETAIL; ADMINISTRATIVE LEAVE; INDEFINITE SUSPENSION

The general rule is that the employee remains in a full duty, full pay status, in his regular position, during the notice period, i.e., pending a final decision on the proposed removal.

> Under ordinary circumstances, an employee whose removal or suspension…has been proposed shall remain in a duty status in his or her regular position during the advanced notice period.…

5 CFR 752.404(b)(3).

Until recently, an agency could, following the regulation below, determine that the employee's continued presence during the advance notice period may, (1) pose a threat to the employee or others, (2) result in the loss or damage of government property, or (3) jeopardize legitimate government interests, and then place the employee on administrative leave.

> (3) …In those rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:
>
> (i) Assigning the employee to duties where he or she is no longer a threat to safety, the agency mission, or to Government property;
>
> (ii) Allowing the employee to take leave, or carrying him or her in an appropriate leave status (annual, sick, leave without pay, or absence without leave) if the employee has absented himself or herself from the worksite without requesting leave;
>
> (iii) Curtailing the notice period when the agency can invoke the provisions of paragraph (d)(1) of this section; or
>
> (iv) Placing the employee in a paid, nonduty status for such time as is necessary to effect the action.

5 CFR 752.404(b)(3).

Despite restrictions on or admonishments against using administrative leave (*Miller v. Dept. of Defense*, 45 MSPR 263, 267 (1990) ("The Comptroller General, however, has repeatedly stated that its decisions and OPM guidelines 'limit an agency's discretion to grant administrative leave to brief absences.'"); *McDavid v. Dept. of Army*, 46 MSPR 108 (1990); 67 Comp. Gen. 126 (1987); 64 Comp. Gen. 542 (1984); 61 Comp. Gen. 652 (1982)), placing employees on administrative leave concomitantly with the issuance of a proposal notice became almost routine. But the "Administrative Leave Act" or more appropriately the National Defense Authorization Act, December 24, 2016, now restricts the use of administrative leave. Briefly put, an "agency may place an employee in administrative leave for…not more than a total of 10 work days" during a calendar year; additionally, administrative leave must be recorded "separately from leave authorized under any other provision of law." Following the initial 10 days, an employee may be placed for 30 work days on "investigative leave." And following the investigation, the employee may be placed on "notice leave," but that cannot exceed the applicable notice period. In using either category of leave, the agency must comply with the statute and applicable OPM regulations and make appropriated findings to that end, e.g., that the employee should not, for a valid reason, remain in on-duty status.

Reassignment or detail:	Assign the employee to duties or a location where his presence is no longer a problem.
"Administrative Leave Act":	Notice, investigative leave; administrative leave for 10 days.
Indefinite suspension:	As explained below, the agency may indefinitely suspend an employee for one of three authorized reasons.

An indefinite suspension is without pay and treated as an appealable adverse action, that is, a suspension for 14 days or more. All the same procedural requirements involved in a proposed adverse action must be followed. As such, the agency notice must (1) inform the employee of the basis for the suspension, (2) state a condition subsequent that will bring the suspension to an end, e.g., the end of criminal proceedings, (3) show the suspension (penalty) is reasonable, and (4) show a nexus, that is, satisfy service efficiency. *Martin v. Dept. of Treasury,* 12 MSPR 12 (1982); *Vega v. Dept. of Justice*, 37 MSPR 115 (1988). The purpose of the indefinite suspension is not to punish but to allow the reason for the indefinite suspension to run its course. The authorized reasons for an indefinite suspension include a pending criminal proceeding (or investigation), a pending fitness for duty determination, and a pending determination on access to classified information. *Rittgers v. Dept. of Army*, 117 MSPR 182, 2011 MSPB 101 (2011) (hearing on indefinite suspension related to crime provision does not involve a determination on the merits of the underlying "misconduct" but rather a determination as to reasonable cause, ascertainable end, nexus, reasonable penalty); *Sanchez v. Dept. of Energy*, 117 MSPR 155, 2011 MSPB 95 (2011) (indefinite suspension may be unreasonable if reassignment possible); *Carey v. Dept. of State*, DC-0752-11-0195-I-1 (Nonprecedential 11/17/2011) (indefinite suspension based on security revocation); *Rogers v. Dept. of Defense*, 122 MSPR 671, 2015 MSPB 54 (2015); *McCulloch v. Dept. of Navy*, SF-0752-15-0353-I-1 (Nonprecedential 9/25/2015); *Gonzalez v. DHS*, 114 MSPR 318, 326 ¶ 13, 2010 MSPB 132 (2010) ("reasonable cause to believe that an employee has committed a crime for which a sentence of imprisonment could be imposed" equates to "probable cause" and will support an indefinite suspension); *Hernandez v. Dept. of Navy*, 120 MSPR 14, 16–17 ¶¶ 6, 7, 2013 MSPB 54 (2013) (a grand jury indictment satisfies "reasonable cause"); *Henderson v. VA*, 123 MSPR 536, 2016 MSPB 29 (2016) ("grand jury indictment is a

conclusive determination of the issue of probable cause"; there is "no requirement that the agency look into the judgment of the grand jury to determine whether the indictment was founded upon sufficient proof."). See also Chapter 19.

Agency Practice Tip

The agency must monitor the underlying situation (e.g., criminal proceeding, investigation, medical condition) and be ready to move quickly upon the resolution of that underlying condition.

For a discussion of the charge of indefinite suspension, please see Chapter 19.

G. *LACHANCE* AND PROPERTY/LIBERTY INTERESTS

Before turning to the final decision and Board appeals, a threshold discussion of due process may be helpful, given the court and the Board's emphasis on due process over the last several years. In Chapter 14 we discuss that an appellant must be on notice as to the charge, the penalty and the underlying reasons for minimum due process to be satisfied. Here, we focus on due process as to the procedural entitlements discussed above and spelled out in Title V. In the past, most employee complaints about procedural fairness before the agency were unsuccessful. Those complaints were usually treated as harmful error issues, requiring the employee to prove that the matter complained about was outcome determinative, a nearly impossible burden. Several court decisions moved the focus (mainly, but not always) from harmful procedural error to a due process analysis. Due process is a much easier burden for an employee to meet, i.e., simply showing the denial of a meaningful opportunity to be informed and to reply.

Statutory due process rights were recapped by the Supreme Court in *LaChance v. Erickson*, 118 S. Ct. 753, 755 (1998):

> Title 5 USC § 7513(a) provides that an agency may impose the sort of penalties involved here "for such cause as will promote the efficiency of the service." It then sets forth four procedural rights accorded to the employee against whom adverse action is proposed. The agency must:
>
> > (1) give the employee "at least 30 days' advance written notice"; (2) allow the employee "a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish…evidence in support of the answer"; (3) permit the employee to "be represented by an attorney or other representative"; and (4) provide the employee with "a written decision and the specific reasons therefore." 5 USC § 7513(b).

Other than the statutory and regulatory entitlements afforded certain employees under federal personnel laws, there is no right to due process unless compelled by constitutional concerns based on property rights or liberty interests. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

Property rights are created by the legitimate expectation of continued employment. That expectation is based on statute, regulation, rules, handbooks, and personnel manuals. *Ashton v. Civiletti*, 613 F.2d 923 (D.C. Cir. 1979). Covered federal employees, e.g., non-probationary employees, have a constitutionally protected property interest in employment. *Johnson v. United States*, 628 F.2d 187, 192, 194 (D.C. Cir. 1980); *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 1053 (1978); *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985).

The Federal Circuit, in *Stone v. FDIC*, 179 F.3d 1368, 1374–77, discussed the property rights of a tenured federal employee and his right to constitutional due process:

> Mr. Stone's federal constitutional due process claim depends on his having a property right in continued employment…. If Mr. Stone does possess such a property interest, then the government cannot deprive him of this property without due process. *See Loudermill*, 470 U.S. at 538. Property interests are not created by the Constitution; "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source [such as a statute]…." *Roth*, 408 U.S. at 577.… If the government gives a public employee assurances of continued employment or conditions dismissal only for specific reasons, the public employee has a property interest in continued employment.…
>
> …
>
> On the other hand, if the public employee is hired for a limited appointment or is at will, then the employee does not have a property interest in continued employment.…
>
> In this case, the federal statutory employment scheme plainly creates a property interest in continued employment. Mr. Stone was a civil service employee who could not be dismissed except for cause or unacceptable performance. *See* 5 U.S.C. 7513 (a) (1994) (agency may take an action against an employee only for such cause as will promote efficiency of the service); 5 U.S.C. 4303 (1994) (agency may reduce in grade or remove an employee for unacceptable performance). The statute therefore entitled Mr. Stone to continue in his position unless the agency could show he needed to be removed for cause or unacceptable performance. Mr. Stone was not an at will employee or hired for a limited term.
>
> …
>
> The next question we face is what process is due Mr. Stone before he can be deprived of his property interest. We begin by noting that his property interest is not defined by, or conditioned on, Congress' choice of procedures for its deprivation. *See Loudermill*, 470 U.S. at 541. In other words, 7513 and 4303 do not provide the final limit on the procedures the agency must follow in removing Mr. Stone. Procedural due process requires "that certain substantive rights 'life, liberty, and property' cannot be deprived except pursuant to constitutionally adequate procedures." *Id*. Congress need not confer a property interest in public employment. However, once it does confer such an interest, it may not remove it without constitutional safeguards. *See id.*
>
> The process due a public employee prior to removal from office has been explained in *Loudermill*. The Supreme Court has stated: An