INTRODUCTION
Charges, Penalties, and Affirmative Defenses

This is our tenth edition. In this new edition, we have sought to preserve the guts of *Charges and Penalties* but we have made a few changes.

We have reorganized the manual, so that it follows the analysis of an adverse action at the MSPB. Part One includes specific charges and proof requirements; Part Two addresses the construction or framing of charges; Part Three discusses the penalty; and Part Four concerns affirmative defenses raised by the employee. Part Four is new and amplifies the defenses sections under each of the individual charges.

We also wanted to address the status of the current Board. In keeping with the framework of the Civil Service Reform Act of 1978, the MSPB, typically consists of two members of the President's party and a minority member. As of the writing of this new edition, the MSPB consists only of one member Mark A. Robbins, a Republican appointee, after the expiration of Chair Susan Grundmann's term in early 2017. While the Board can operate and decide cases with two members—as it has since February 2015—it is unable to decide cases with one member. The next move is up to President Donald Trump, who will have an opportunity to appoint two new MSPB members. Given the current pace of appointments, we are likely in for a long wait. But, in the meantime, there will be no new cases, precedential or nonprecedential. Indeed, there have been no new cases from the Board since early 2017.

The only new cases have come from the Federal Circuit or other circuits (as to Whistleblower Reprisal). To the extent significant, those cases have been incorporated into this edition.

This is a good time to briefly review the legacy of the "Obama Board," the Board that operated between 2009 and January 2017.

Of course, the current case law is largely a product of that Board. The Obama Board, with Susan Grundmann at the helm, was much more moderate, at least from the point of view of employees, than that of the Board during the years 2000–2009. That previous Board was marked by a clear deference to agencies, particularly in connection with adverse actions. It was easier for agencies to prove cases—the term "slam dunk" comes to mind. Charges were scrutinized less rigorously than in past years and significant penalties were nearly a foregone conclusion upon proof of the charge.

As we noted in previous editions, much of this changed since 2009. There was more scrutiny of the wording of agency charges. *Gamboa v. Dept. of Air Force*, 120 MSPR 594, 2014 MSPB 13 (2014); *Downey v. VA*, 119 MSPR 302, 2013 MSPB 24 (2013); *Rodriguez v. DHS*, 117 MSPR 188, 2011 MSPB 103 (2011); *Thomas v. USPS*, 116 MSPR 453, 2011 MSPB 62 (2011).

Most significantly, though, there was a different and more employee oriented approach to addressing disparate treatment in penalty claims. We reported on many of those cases in the last four editions. *See Portner v. DOJ*, 119 MSPR 365, 2013 MSPB 28 (2013); *Boucher v. USPS*, 118 MSPR 640, 2012 MSPB 126 (2012); *Villada v. USPS*, 115 MSPR 268, 2010 MSPB 232 (2010); *Woebcke v. DHS*, 114 MSPR 100, 2010 MSPB 85 (2010); *Lewis v. VA*, 113 MSPR 657, 2010 MSPB 98 (2010). In effect, under the Obama Board's new formulation, an appellant must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors" and the burden then shifts to the agency to show a legitimate reason for the different treatment. *Boucher v. USPS* at 647. The cases illustrate the ease in showing "enough similarity" and the expanded nature of "similarity." E.g., *Portner*, *supra*; *Voss v. USPS*, 119 MSPR 324, 2013 MSPB 26 (2013); *Lewis*, *supra*. However, there had not been much Board guidance on the ways in which an agency might show "a legitimate reason for the difference in treatment." Beginning in 2014, while the Board continued to apply a broadened standard, the penalty cases seem less employee-oriented and with the Board providing better guidance as to legitimate reasons for differences. E.g., *McNab v. Dept. of Army*, 121 MSPR 661, 2014 MSPB 79 (2014) (dissent by Vice Chair); *Ramos v. DHS*, AT-0752-13-0637-I-1 (NP 11/21/2014) (dissent by Vice-Chair); *Arellano v. DHS*, SF-0752-12-0211-I-1 (NP 11/27/2013); *Davis v. USPS*, 120 MSPR 457, 2013 MSPB 100 (2013); *see also Figueroa v. DHS*, DA-0752-12-0001-B-1 (NP 2/28/2014). Still, there are many examples of cases that have been mitigated during the last year or so of Board activity—cases involving serious misconduct, a clear contrast to pre-Obama Board decisions. E.g., *Ellis v. USPS*, 121 MSPR 570, 2014 MSPB 73 (2014); *Chavez v. SBA*, 121 MSPR 168, 2014 MSPB 37 (2014); *Hill v. Dept. of Army*, 120 MSPR 340, 2013 MSPB 88 (2013) (Dissent by Member Robbins); *Finch v. VA*, DE-0752-12-0205-I-2 (NP 9/9/2013); *Lawson v. DOJ*, SF-0752-11-0833-I-1 (NP 7/23/2013); *Valerius-Simonds v. DOJ*, PH-0752-12-0155-I-1 (NP 7/3/2013). In any event, the cases suggest that the focus is often less on proof of the charge—obviously still quite important—but on the nature of the penalty, with the Board frequently wading through numerous comparators. E.g., *Ramos v. DHS*, AT-0752-13-0637-I-1 (NP 11/21/2014) (dissent by Vice-Chair); *Figueroa v. DHS*, DA-0752-12-0001-B-1 (NP 2/28/2014); *Arellano v. DHS*, SF-0752-12-0211-I-1 (NP 11/27/2013). A consequence of the Board's change in membership is a need for agencies to once again pay special care to the particulars of their charges and especially the consideration of reasonable penalties, with the related opportunities of employees and their representatives to get more of a fair shake.

As evidenced by our citations above, there are many Board cases that the Board classifies as "nonprecedential" that contain valuable indicators of Board. Indeed, the Board nonprecedential cases sometimes contain dissents and concurring opinions and are often quite lengthy. This seems somewhat contrary to the typical understanding of "nonprecedential" cases. The message, though, is to urge advocates and practitioners to pay attention to both Board precedential and nonprecedential cases.

This Obama Board also changed or clarified the elements of some charges. As noted in our previous editions, these changes include excessive leave (*McCauley v. Dept. of Interior*, 116 MSPR 484, 2011 MSPB 59 (2011)); lack of candor (*Rhee v. Dept. of Treasury*, 117 MSPR 640, 2012 MSPB 26 (2012) (rev'd as to "convincing mosaic" by *Savage v. Dept. of Army*, 122 MSPR 612, 2015 MSPB 51 (2015)); falsification (*Boo v. DHS*, 122 MSPR 100,

2014 MSPB 86 (2014); conduct unbecoming/responsibility for actions of subordinates (*Prouty & Weller v. GSA*, 122 MSPR 117, 2014 MSPB 90 (2014); apparent conflicts of interest (*Ryan v. DHS*, 123 MSPR 202, 2016 MSPB 7 (2016); and, suitability-based adverse actions (*Aguzie and Barnes v. OPM*, 116 MSPR 64, 2011 MSPB 10 (2011); *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015) (withdrawing 773 F.3d 1289 (Fed. Cir. 2014)).

Further, the Obama Board was quite active—in a positive way, in our view—in making sensible distinctions in the case law as to certain charges and actions. These have included medical inability to perform charges, distinguishing between employees subject to medical standards and those not (e.g., *Clemens v. Dept. of Army*, 120 MSPR 616, 2014 MSPB 14 (2014); *Fox v. Dept. of Army*, 120 MSPR 529, 2014 MSPB 6 (2014)); and involuntary actions, distinguishing between enforced leave and constructive suspension actions (*Bean v. USPS*, 120 MSPR 397, 2013 MSPB 96 (2013); *Romero v. USPS*, 121 MSPR 606, 2014 MSPB 76 (2014); *Abbott v. USPS*, 121 MSPR 294, 2014 MSPB 47 (2014)). Most recently, these distinctions and changes in case law included Title VII discrimination and retaliation actions, where the Board distinguished between the standard for the private sector and that for the federal government (*Savage v. Dept. of Army*, 122 MSPR 612, 2015 MSPB 51 (2015) and *Gardner v. VA*, 123 MSPR 647, 2016 MSPB 36 (2016).

Two defenses, due process violation claims and whistleblower reprisal, have gotten traction during the Obama Board tenure and warrant particular mention.

Due process defenses are based on the Federal Circuit's decision in *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999) (*ex parte* communications with a deciding official must be viewed as due process rather than harmful procedural error violations). The Obama Board (and circuit) have set aside or remanded agency actions in numerous recent cases for due process violations. *See Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011); *Fed. Educ. Ass'n v. DOD*, 841 F.3d 1362 (Fed. Cir. 2016); *Terrano v. USPS*, SF-0752-13-0369-I-1 (NP 9/11/2014); *Favreau v. Dept. of Army*, SF-0752-11-0273-I-1 (NP 2/21/2014); *Gordon v. NASA*, DA-0752-13-0032-I-1 (NP 2/19/2014); *Kolenc v. DHHS*, 120 MSPR 101, 2013 MSPB 70 (2013); *Bennett v. DOJ*, 119 MSPR 685, 2013 MSPB 64 (2013); *Pace v. Dept. of Treasury*, CB-7121-11-0010-V-3 (NP 11/18/2013); *Evans v. Dept. of Air Force*, AT-0752-13-0310-I-1 (NP 9/27/2013); *Lewis v. DHHS*, SF-0752-11-0517-I-1 (NP 6/17/2013); *Kilpatrick v. VA*, CB-7121-13-0181-V-1 (NP 5/8/2014); *Seeler v. Dept. of Interior*, 118 MSPR 192, 2012 MSPB 36 (2012) (Dissent by Member Rose); *Jenkins v. EPA*, 118 MSPR 161, 2012 MSPB 70 (2012); *Howard v. Dept. of Air Force*, 118 MSPR 106, 2012 MSPB 61 (2012); *Silberman v. Dept. of Labor*, 116 MSPR 501, 2011 MSPB 65 (2011); *Lopes v. Dept. of Navy*, 116 MSPR 470, 2011 MSPB 63 (2011); *Gray v. DOD*, 116 MSPR 461, 2011 MSPB 64 (2011); *Pickett v. USDA*, 116 MSPR 439, 2011 MSPB 58 (2011). One gets a better sense of the large number of these reversals and remands by looking at the nonprecedential cases, which are not formally reported, from just the last couple years. E.g., *Eimer v. Dept. of Army*, DE-0752-15-0135-I-1 (NP 9/28/2015); *Rose v. DOD*, AT-0752-12-0063-B-2 (NP 8/10/2015); *Carder v. DOD*, DA-0752-14-0620-I-1 (NP 4/13/2015); *Heimer v. VA*, DE-0432-14-0347-I-1 (NP 3/24/2015); *Lundy v. DHS*, DA-0752-13-4522-I-1 (NP 2/19/2015); *Paulic v. Dept. of Army*, PH-0752-14-0606-I-1 (NP 2/6/2015); *Payton v. VA*, AT-0752-14-0055-I-1 (NP 1/29/2015); *Favreau v. Dept. of Army*, SF-0752-11-0273-I-1 (NP 2/21/2014); *Gordon v. NASA*, DA-0752-13-0032-I-1 (NP 2/19/2014); *Taylor v. DOJ*, AT-0752-12-0253-I-1 (NP 2/10/2014); *Edgin v. USPS*, CH-0752-12-0767-I-1 (NP 12/30/2013); *Mosby v. USPS*, CH-0752-13-0349-I-1 (NP 12/23/2013); *Jennings v. USPS*, SF-0752-12-0283-I-1 (NP 11/21/2013); *Pace v. Dept. of Treasury*, CB-7121-11-0010-V-3 (NP 11/18/2013); *Kader v. USPS*, NY-0752-13-0060-I-1 (NP 10/29/2013); *Evans v. Dept. of Air Force*, AT-0752-13-0310-I-1 (NP 9/27/2013). In addition to agency reversals based on disparate treatment, *Stone* due process claims present a great risk of reversal for agency actions, a risk that has been magnified with the current Board and Federal Circuit. We note though that there have been fewer reversals of agency actions for due process reasons during this past year. E.g., *Pauli v. DHS*, DC-0752-13-6815-I-1 (NP 3/10/2016); *Hicks v. USDA*, AT-0752-16-0105-I-1 (NP 9/22/2016); *Peters v. Dept. of Interior*, SF-0752-15-0751-I-1 (NP 1/6/2017); *Manning v. DOD*, SF-0752-13-0632-I-1 (NP 12/20/2016); *Klippel v. DHS*, DC-0752-13-0616-I-1 (NP 12/20/2016). Arguably, this reflects improved advocacy by agencies, more accustomed to defending such claims.

Importantly, the Board's *Stone* due process defense includes an agency's failure to identify aggravating factors as the basis for the imposition of a penalty, denying the employee a fair opportunity to respond to those factors before the agency's deciding official. *Lopes v. Dept. of Navy*, 116 MSPR 470, 2011 MSPB 63 (2011); and, *Silberman v. Dept. of Labor*, 116 MSPR 501, 2011 MSPB 65 (2011). While it hard to look at this as a trend, the Board recently gave the agency the benefit of the doubt in a nonprecedential decision, finding, in effect, that the aggravating factors relied on were implicit in the proposal. *McCook v. DHUD*, SF-0752-14-0389-I-1 (NP 8/3/2015); *see also Damewood v. VA*, DC-0752-14-1038-I-1 (NP 2/12/2016) (Board sustains 21 day suspension of a prosthetics representative for two charges, failure to comply with a supervisor's instruction and failure to follow procedures; as to failure to follow instructions, Board rejects claim that employee did not have proper training or access to a necessary computer program; as to second charge, Board very generously incorporates a "list" into the proposal to find that employee on due process notice of what he had been charged with; alternatively Board agrees with AJ that employee could have requested additional information but failed to do so).

It is noteworthy, as well, that the Board and Circuit expanded the nature of its due process reviews to other aspects of the administrative process. *Nguyen v. DHS*, 737 F.3d 711 (Fed. Cir. 2013) (*Giglio* reliance); *Palafox v. Dept. of Navy*, 124 MSPR 54, 2016 MSPB 43 (2016); *Massey v. Dept. of Army*, 120 MSPR 226, 2013 MSPB 80 (2013) (oral reply); *Lange v. DOJ*, 119 MSPR 625, 2013 MSPB 52 (2013); *Martinez v. VA*, 119 MSPR 37, 2012 MSPB 121 (2012); *Rose v. DOD,* AT-0752-12-0063-B-2 (NP 8/10/2015) (all involving issues of unbiased decision makers; offshoot of *Stone* due process claim); and *Thome v. DHS*, 122 MSPR 315, 2015 MSPB 27 (2015) (misrepresentation of nature of action by agency).

At the same time, the Obama Board was reined in by the Federal Circuit and due process was limited in cases involving security clearances in *Gargiulo v. DHS*, 727 F.3d 1181, 1187 (Fed. Cir. 2013), where the court found that "the Board erred by holding that due process provides an employee with procedural rights in connection with a security clearance determination and justifies an inquiry into whether the agency had reasonable grounds for suspending or revoking the employee's security clearance."

Likewise, the Federal Circuit held that *Dept. of Navy v. Egan*, 484 U.S. 518 (1988), limits the Board's review of cases involving not only security clearance determinations, but also agency determinations that an employee is ineligible to occupy a noncritical sensitive position. The Board's jurisdiction in these instances is limited to procedural review. *Kaplan v. Conyers and Northover and MSPB*, 733 F.3d 1148 (Fed. Cir. 2013) (*en banc*).

A whistleblower reprisal claim—either as an affirmative defense or as an Individual Right of Action (IRA)—is the other defense besides *Stone* due process violation claims that present significant jeopardy for agencies (and consequent opportunity for employees). This is reflected in recent Board, circuit, and even Supreme Court case law. *DHS v. Maclean*, 135 S. Ct. 913 (2015); *Whitmore v. Dept. of Labor*, 680 F.3d 1353 (Fed. Cir. 2012); *Aquino v. DHS*, 121 MSPR 35, 2014 MSPB 21 (2014); *Chambers v. Dept. of Interior*, 116 MSPR 17, 2011 MSPB 7 (2011) (Rose concurring), *on remand from* 603 F.3d 1370 (Fed. Cir. 2010). Also, the Board has begun addressing the Whistleblower Protection Enhancement Act of 2012. *Alarid v. Dept. of Army*, 122 MSPR 600, 2015 MSPB 50 (2015); *Hamley v. Dept. of Interior*, 122 MSPR 290, 2015 MSPB 23 (2015); *Webb v. Dept. of Interior*, 122 MSPR 248, 2015

MSPB 6 (2015); *Nasuti v. Dept. of State*, 120 MSPR 588, 2014 MSPB 12 (2014); *Shannon v. VA*, 121 MSPR 221, 2014 MSPB 41 (2014); *Carney v. VA*, 121 MSPR 446, 2014 MSPB 62 (2014); *Mudd v. VA*, 120 MSPR 365, 2013 MSPB 90 (2013); *O'Donnell v. USDA*, 120 MSPR 94, 2013 MSPB 69 (2013); *Rumsey v. DOJ*, 120 MSPR 259, 2013 MSPB 82 (2013); *Day v. DHS*, 119 MSPR 589, 2013 MSPB 49 (2013); *King v. Dept. of Air Force*, 119 MSPR 663, 2013 MSPB 62 (2013). That law is a big deal. It sought to tighten up and make it harder for the Board and Circuit to dismiss whistleblower reprisal claims on the basis that there was no proven "protected disclosure." The WPEA also specified a thirteenth and new Prohibited Personnel Practice ("unlawful to 'implement or enforce any nondisclosure policy…,'" WPEA, Section 104); allows for compensatory damages for proven whistleblower reprisal; and, expanded the Board's IRA jurisdiction (5 USC 2302(b)(9)(D); *but see Rebstock Consolidation v. DHS*, 122 MSPR 661, 2015 MSPB 53 (2015)).

Concerning defenses, there was a modest revival of the harmful procedural error defense in more recent Board case law. Some of that is a response to the Federal Circuit's decision in *Gargiulo v. DHS*, 727 F.3d 1181, 1187 (Fed. Cir. 2013), where the circuit rejected the Board's case law permitting a due process challenge to the security clearance process. The Board now is examining such actions under harmful procedural error considerations. E.g., *Doe v. DOJ*, 121 MSPR 596, 2014 MSPB 75 (2014); *Putnam v. DHS*, 121 MSPR 532, 2014 MSPB 70 (2014); *Buelna v. DHS*, 121 MSPR 262, 2014 MSPB 45 (2014). *Ulep v. Dept. of Army*, 120 MSPR 579, 2014 MSPB 9 (2014); *Blatt v. Dept. of Army*, 121 MSPR 473, 2014 MSPB 65 (2014); *Schnedar v. Dept. of Air Force*, 120 MSPR 516, 2014 MSPB 5 (2014); *Munoz v. DHS*, 121 MSPR 483, 2014 MSPB 66 (2014); *but see Rogers v. DOD*, 122 MSPR 671, 2015 MSPB 54 (2015).

As an aside, something has got to give here. These Board decisions are principally based on a DOD Manual provision that requires certain actions before an agency can take an "unfavorable administrative action" (i.e., a removal or other action based on a security clearance determination). *See Blatt v. Dept. of Army*, *supra*; *Schnedar v. Dept. of Air Force*, *supra*. These cases suggest that DOD agencies will continue to lose these security clearance/noncritical sensitive position actions until this manual provision is changed. Perhaps, the work around is to allow the local commander to suspend access, appearing to permit indefinite suspensions without committing harmful procedural error. *Rogers v. DOD*, 122 MSPR 671, 2015 MSPB 54 (2015).

But there has been a harmful procedural error revival in other kinds of cases as well. *Goeke & Bottini v. DOJ*, 122 MSPR 69, 2015 MSPB 1 (2015) (wrong proposing official); *Lofton v. Dept. of Army*, DA-0752-12-0582-I-1 (NP 1/24/2014) (failure of deciding official to consider FMLA certification documentation); *Willis v. SSA*, AT-0752-11-0867-B-1 (NP 8/19/2014) (deficient notice of certain performance deficiencies).

Finally, Congress has enacted new legislation concerning penalties for Department of Veterans Administration SES employees. Veterans, Access, Choice and Accountability Act of 2014, 38 USC § 713; 79 Fed. Reg. 63031 (Oct. 22, 2014) (codified at 5 CFR § 1210.18). In effect, as interpreted by the Board in its regulations, this authority provides that the efficiency of the service standard and *Douglas* do not apply and that the express statutory language creates a rebuttable presumption in favor of the VA Secretary's discretion to select the appropriate penalty. *Ibid*. As of this writing, there have been five initial Board decisions applying this new law. *See MSPB Annual Performance Results for FY 2015 and Annual Performance Plan for FY 2016 (Final) and 2017 (Proposed)*. There is now a Federal Circuit decision, *Helman v. VA*, No. 2015-3086 (Fed. Cir. May 9, 2017) (reviewing the new executive scheme involving expedited Board review, finding some provisions unconstitutional but severable, reviewing but remanding the Board decision). This statute, along with other changes in law (i.e., the WPEA) as well as furlough appeal processing have led to slower processing of cases overall by the Board. *Ibid*. Additionally, the Administrative Leave Act of 2016, part of the National Defense Authorization Act, S. 2943, limits the length of time that an agency may place an employee on paid administrative leave to 10 work days within a calendar year. This, of course, only applies to employees covered by that law.

Finally, we thank you for expressing an interest in this manual. Please feel free to contact us with any suggestions or comments.

PART ONE

The Agency Charge

CHAPTER 1
THE BASICS, THE ESSENTIALS—ADVERSE ACTIONS

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-
>
> (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 (NP 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); *see 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. DOJ*, 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 (NP 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;