INTRODUCTION
Charges, Penalties, and Affirmative Defenses

At the writing of this 11th edition of *MSPB Charges and Penalties*, there has been no change to the MSPB's composition; no new members have been appointed and the Board therefore continues to lack the ability to decide cases. Thus, new cases derive from the Federal Circuit or other circuits (as to Whistleblower Reprisal) and those cases have been incorporated into this edition. Noteworthy circuit court decisions include:

- *Bal v. Dept. of Navy*, 729 Fed. Appx. 923 (Fed. Cir. 2018 NP) (the court vacated and remanded the Board's decision to sustain the appellant's removal because, in assessing the reasonableness of his removal, the Board improperly discounted the appellant's medical evidence that his misconduct was due to his depression, erred in requiring the appellant to show that his depression was so severe as to incapacitate him instead of assessing whether it was a mitigating factor to the charged misconduct, and failed to consider the appellant's potential for rehabilitation as a mitigating factor, the consistency of the penalty, and the adequacy and effectiveness of alternative sanctions under *Douglas v. VA*, 5 MSPR 280, 5 MSPB 313 (1981));

- *Boss v. DHS*, ___F.3d___, No. 2017-2231 (Fed. Cir. November 13, 2018) (circuit agreed with the arbitrator that the due process violation in connection with the first charge did not require that the entire suspension be reversed; the court held that the constitutional due process analysis should be applied on a charge-by-charge basis);

- *Delgado v. MSPB*, 880 F.3d 913 (7th Cir. 2018) (as to the Board's explanation that the appellant failed to prove exhaustion of his OSC remedies,"With respect, we believe this reasoning takes bureaucratic rigidity to a dysfunctional level. Under 5 U.S.C. § 1214(a)(3), Delgado had to prove only that he 'sought corrective action,' not that he gave the OSC every scrap of information he possessed.");

- *Holton v. Dept. of Navy*, 884 F.3d 1142 (Fed. Cir. 2018) (rigger supervisor tested following property damage resulting from improper movement of a crane under the supervisor's control; the test was of the entire team, even though the rigger supervisor was not close enough to the operation to see the crane's movement at the time it struck a building, causing damage; "To be sure, at the time that testing was ordered, Mr. Holton's supervisor could not have known for certain whether Mr. Holton had caused or contributed to the accident. But drug testing, if it is to be meaningful, must occur very soon after the accident and preferably on the same day. *Skinner* itself recognized the importance of prompt testing. In *Skinner* [*Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-33 (1989)], the Court declined to impose a warrant requirement on drug testing, partially because 'alcohol and other drugs are eliminated from the bloodstream at a constant rate.' 489 U.S. at 623. The court recognized that 'blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible.' *Id*. In *Skinner*, the Court acknowledged that, given the short timeframe, reasonable suspicion will often be based on the incomplete information assembled at the time of the testing decision. *Id.* at 631. The relevant standard is whether it is reasonable to *suspect* that the employee caused or contributed to the accident, not that there was necessarily such a connection. The Board did not err in concluding that the test here met the applicable constitutional and regulatory standard.");

Jolly v. Dept. of Army, 711 Fed. Appx. 620 (Fed. Cir. 2017 NP) (no due process issue just because a deciding official is aware of or even involved in the events leading to an adverse action; "First, '[a]t the pre-termination stage, it is not a violation of due process when the proposing and deciding roles are performed by the same person. The law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case.' *DeSarno v. Dep't of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985). Second, the standards of impartiality applicable to post-termination adjudications do not apply in the context of pre-termination hearings. 'Nothing…limits the deciding official to being a neutral arbiter or requires that the deciding official be unfamiliar with the individual, the facts of the case, or the employee's prior conduct' during the pre-termination hearing. *Norris v. S.E.C.*, 675 F.3d 1349, 1354 (Fed. Cir. 2012). We agree with the reasoning in *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995), where the Third Circuit adopted the rule that an impartial decision-maker at the pre-termination stage is not needed, citing to Fifth, Sixth, Ninth, and Eleventh Circuit precedents, because '[u]sually, an employment termination decision is made initially by the employee's direct supervisor…—a sensible approach given that such person often is already familiar with the employee[]…. Yet, these individuals are also likely targets for claims of bias or improper motive simply because of their positions.…[T]o require…an impartial pretermination hearing in every instance would as a practical matter require that termination decisions initially be made by an outside party rather than the employer as charges of bias always could be made following an in-house discharge.'");

- *Koester v. U.S. Park Police*, ___Fed. Appx.___, No. 2017-2613 (Fed. Cir. January 3, 2019 NP) (removal of Park Police Officer for alcohol use and refusal to take breathalyzer; reversed and remanded; "In this case, the arbitrator abused his discretion when, during his independent assessment of the *Douglas* factors, he refused to consider evidence that he believed was never presented to the agency. He gave no weight to Mr. Koester's ability to demonstrate improvement after completing the Employee Assistance Program, the impact of Hurricane Sandy, the unfriendly work environment, and the effect of Mr. Koester's wife's poor immigration interview because the Union did not refer to that evidence at the agency level in its response to the Park Police's proposed removal.");

- *Miskill v. SSA*, 863 F.3d 1379 (Fed. Cir. 2017) (consideration of post removal evidence is sometimes appropriate; after removal for timekeeping problems, as the case proceeded to arbitration, the union obtained information showing that coworkers of the grievant seemed to have committed similar infractions during the same time period as the grievant and, at the time of the arbitration hearing, were under investigation but not charged; the arbitrator found there were no comparators as to employees under investigation; the arbitrator should not have imposed a categorical rule of exclusion; in some circumstances, an ongoing investigation may be a legitimate basis to exclude an employee as a comparator; at argument in court, the agency asserted that on completion of the investigation, the agency did not discipline six of the comparators and counseled the

other two; "To be clear, we are not creating an opposite categorical rule—that consideration of an ongoing investigation is never relevant to the question of consistency of punishment. Nor do we implicitly hold that punishment of one employee cannot occur until all possible investigations of all potential employees have been completed. Such rules would be unworkable. Rather, when a particular employee under investigation is raised as a comparator, the arbitrator must evaluate that as one factor, among others, to determine the consistency of the agency punishment."; remand for arbitrator's consideration of comparability);

- *Tartaglia v. VA*, 858 F.3d 1405 (Fed. Cir. 2017) (Chief of Police's removal was affirmed by the Board on basis of proof of one of three charges, abuse of authority, i.e., the appellant had a subordinate officer drive him in a government-owned vehicle on a personal errand (dropping off a rental car to the appellant's wife) while in duty status; in this decision, the circuit reversed the Board, determining that the MSPB miscalculated federal service (Board had determined four years but appellant worked 14, with five years in the military); error affected analysis of the appellant's past disciplinary record and his past work record and remanded for a determination of a penalty for the sustained charge; on remand, in DC-0752-14-1108-M-1, 119 LRP 12130 (Mar. 28, 2019), the Board AJ, based on the parties agreement, mitigated the penalty to a 30-day suspension);

- *Villareal v. Bureau of Prisons*, 901 F.3d 1361 (Fed. Cir. 2018) (no error in replacement of deciding official);

Moreover, Congress recently enacted the Chris Kirkpatrick Whistleblower Protection Act (Oct. 26, 2017). That Act:

- requires the head of any agency to refer to the Office of Special Counsel ("OSC") any instance "in which the head of the agency has information indicating" that an employee of the agency committed suicide after making a protected whistleblower disclosure;
- amends existing statutory law to include a fourteenth "prohibited personnel practice," making it illegal to "access the medical record of another employee or an applicant for employment as part of, or otherwise in furtherance of, [other prohibited personnel practices]" described in the statute's statement of the prior thirteen prohibited personnel practices;
- amends 5 U.S.C. chapter 75 and *requires* agency heads to discipline any supervisor who is found to have committed one of three specific personnel practices: the eighth (whistleblower retaliation), ninth (retaliation for the exercise of an appeal, grievance, or complaint), or fourteenth (accessing the medical records of another employee in furtherance of a prohibited personnel practice);
- sets statutory requirements for the type of discipline, establishing a requirement that the head of the agency propose a *minimum* of a 3-day suspension for a first offense of one of the three prohibited personnel practices listed above. For the second offense, if one occurs, the new legislation requires that an agency head propose the employee's removal, and;
- provides that those employees (both permanent and probationary) who request and obtain a stay of a personnel action they believe is motivated by retaliatory intent receive "priority" in a request for a transfer.

It is also useful to consider President Trump's Executive Order, 13839, 83 FR 25343, *Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles*, May 25, 2018. (See also OPM's *Guidance for Implementation of Executive Order 13839—Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles*, July 5, 2018). President Trump also issued two other EOs on May 25, 2018, EO 13836 (83 FR 25329), *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*, and EO 13837 (83 FR 25335) *Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use*.

Among others, EO 13839 provides the following, with our bulleted separate commentary in italics, by section:

> Sect 2(b) Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances.
>
> - *Arguably, no different from current procedures. No requirement to use progressive discipline when first offense is so severe that removal is appropriate.*
> - *Currently, the Douglas factors (or good cause standards) provide that "misconduct should be tailored to the facts and circumstances."*
>
> Sect. 2(c) Each employee's work performance and disciplinary history is unique, and disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time—particularly where the employees are in different work units or chains of supervision—and agencies are not prohibited from removing an employee simply because they did not remove a different employee for comparable conduct. Nonetheless, employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions.
>
> - *Claim of uniqueness is consistent with the Douglas Factors and their application.*
> - *Claim that similar conduct does not necessarily justify similar discipline or removal, especially in consideration of time period, different work units or different chains, and that failure to remove another employee does not warrant more lenient treatment of someone else is clearly an attempt to push back against MSPB case law in Woebcke v. DHS, 114 MSPR 100 (2010), and subsequent cases. Clearly, the tone here gives agencies more flexibility in disparate treatment penalty determinations [but see requirement to treat employees "equitably"] but, in the end, will require Board reversal of decisions to the contrary. Even without reversal strengthens argument that disparate treatment is only one of the Douglas factors. Likely, that will not be a problem once Board is staffed with a Republican majority.*
>
> Sec. 2 (d) Suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require suspension of an employee before proposing to remove that employee, except as may be appropriate under applicable facts.
>
> - *While tone is important, this Section is no different from current case law (i.e., to impose the appropriate penalty so that if removal is appropriate, it can be applied).*
>
> (e) When taking disciplinary action, agencies should have discretion to take into account an employee's disciplinary record and past

work record, including all past misconduct—not only similar past misconduct. Agencies should provide an employee with appropriate notice when taking a disciplinary action.

- *No different from current case law but a useful reminder that past discipline does not have to be identical even if dissimilar. Doesn't seem to erode principal that while dissimilar past disciple should be considered, it may have lesser value that identical or similar past misconduct*

(f) To the extent practicable, agencies should issue decisions on proposed removals taken under chapter 75 of title 5, United States Code, within 15 business days of the end of the employee reply period following a notice of proposed removal.

(g) To the extent practicable, agencies should limit the written notice of adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code.

- *Under current law, employees must receive "at least" 30 days advance notice of an adverse action, including removals and a "reasonable time," to reply to a proposed action "orally or in writing."*
- *This is an attempt to speed up the process and, for example, to make the minimum period of 30 days advance notice into a maximum period. Most likely, the tone of these provisions will result in agencies providing fewer request extensions to employees to make oral and written replies.*
- *To the extent that an agency has agreed with a union as to reply periods and requested extensions, those provisions must be observed.*

(h) The removal procedures set forth in chapter 75 of title 5, United States Code (Chapter 75 procedures), should be used in appropriate cases to address instances of unacceptable performance.

- *This is an effort to encourage agencies to take actions under Chapter 75, rather than under the performance Chapter 43. Of course, agencies have always had this option; about 50% of performance actions that are appealed to the MSPB are taken under chapter 75. This provision reflects the belief that Chapter 75 cases are easier to prove and win, and, for example, may even be taken without putting an employee on a PIP. But, there are advantages and disadvantages to taking an action under Chapter 75. While a PIP may not be necessary, it may be considered as a penalty mitigating factor. Moreover, the standard of proof under Chapter 75 is preponderant evidence, as contrasted with substantial evidence under Chapter 43. Moreover, if an agency proves the charge under Chapter 43 procedures, the removal penalty may not be mitigated. That said, there are certain actions that may warrant a Chapter 75 performance action, to include situations that involve both performance and conduct.*

(i) A probationary period should be used as the final step in the hiring process of a new employee. Supervisors should use that period to assess how well an employee can perform the duties of a job. A probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before the candidate's appointment becomes final.

- *Consistent with current standards. Simply a reminder to agencies. Most agencies already aggressive in appropriately terminating probationary employees during the probationary period.*

(j) Following issuance of regulations under section 7 of this order, agencies should prioritize performance over length of service when determining which employees will be retained following a reduction in force.

- *Currently, RIF regulations require that employees' retention standing, in the event of a RIF, should be based on tenure, veterans' preference, length of service and performance. OPM's regulations were amended in the late 1990s to give employees additional service credit based on the three most recent ratings of records received within the previous four years. See 5 CFR 351.504. This EO provision is apparently intended as a directive to OPM to give performance appraisals more weight than length of service in determining retention standing.*

Sec. 3. *Standard for Negotiating Grievance Procedures*. Whenever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance. Each agency shall commit the time and resources necessary to achieve this goal and to fulfill its obligation to bargain in good faith. If an agreement cannot be reached, the agency shall, to the extent permitted by law, promptly request the assistance of the Federal Mediation and Conciliation Service and, as necessary, the Federal Service Impasses Panel in the resolution of the disagreement. Within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal, the agency head shall provide an explanation to the President, through the Director of the Office of Personnel Management (OPM Director).

- *Under the law, parties to a Negotiated Agreement may exclude 'any Matter" from the procedure. 5 USC 7121(a). Most unions do not exclude removals, so that an employee would have the right to have removal (through union invocation) heard by an arbitrator or alternatively appeal to the MSPB. This provision directs agencies to attempt to exclude removals, and take issues to the FSIP, thereby assuring that the appeals will go to the MSPB (and thereby reflecting more faith in the MSPB AJ's decisions and a prescribed appeal procedure. (The review procedure from an arbitrator's decision, which is almost exclusively to the circuit, is less agency friendly.) In the face of agreements to the contrary, which have been in existence for decades, this take it or leave it provision could arguably be a hard sell at the FSIP. Additionally, this direction from the White House—which is not the exclusive representative—may be inconsistent with good faith bargaining obligations under Section 7114(b).*

Sec. 4. *Managing the Federal Workforce*. To promote good morale in the Federal workforce, employee accountability, and high performance, and to ensure the effective and efficient accomplishment of agency missions and the efficiency of the Federal service, to the extent consistent with law, no agency shall:

(a) subject to grievance procedures or binding arbitration disputes concerning:

(i) the assignment of ratings of record; or

(ii) the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments;

- *One may question whether the exclusion of such matters will promote good morale.*
- *Again, this provision will not affect current agreements but will ensure that agencies will seek to exclude (or not include) such matters through mid-term reopeners or in term bargaining. More work for FSIP.*

Section 4(b)(i) and (ii):

[No agency shall] make any agreement, including a collective bargaining agreement:

(i) that limits the agency's discretion to employ Chapter 75 procedures to address unacceptable performance of an employee;

(ii) that requires the use of procedures under chapter 43 of title 5, United States Code (including any performance assistance period or similar informal period to demonstrate improved performance prior to the initiation of an opportunity period under section 4302(c)(6) of title 5, United States Code), before removing an employee for unacceptable performance; or

(iii) that limits the agency's discretion to remove an employee from Federal service without first engaging in progressive discipline; or

- *See previous comments as to these substantive provisions. This provision seeks to ensure that Negotiated Agreements are consistent with EO provisions Sections 2(g) and (2)(i).*

Section 4(c):

[No agency shall] make any agreement, including a collective bargaining agreement:

(c) generally afford an employee more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, except when the agency determines in its sole and exclusive discretion that a longer period is necessary to provide sufficient time to evaluate an employee's performance.

- *Many CBAs provide for minimum opportunity periods of more than 30 days. Of course, changes will need to be bargained. Significantly, the statute at 4302(c)(6) requires a meaningful opportunity to perform, which, with some jobs, may be inconsistent with a 30 day period. Arguably, and especially for certain jobs, a 30 day period may conflict with the statutory obligation to provide a "meaningful opportunity to demonstrate acceptable performance." Section 4 (c) has been challenged in court by federal labor unions.*

Sec. 5. *Ensuring Integrity of Personnel Files*. Agencies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.

- *There is already a provision of the 2017 National Defense Authorization Act, Section 3322 to Title V, which requires a permanent official personnel file notation if the employee subject to a personnel investigation (including an action under Chapter 43 or 75) resigns and there is an adverse determination against the employee based on the investigation. This NDAA provision also requires due process rights and the right to appeal the adverse determination to the MSPB. (See OPM Letter dated May 7, 2018 to Chief Human Capital Officers). This EO section, however goes further; it prohibits the use of a settlement agreement providing for expungement of adverse notations from a personnel file. This may make it difficult to settle cases for clean paper.*

Sec. 6. *Data Collection of Adverse Actions*. (a) For fiscal year 2018, and for each fiscal year thereafter, each agency shall provide a report to the OPM Director containing" numbers of employees removed during the probationary period; number of employees reprimanded in writing; number of employees afforded a PIP, broken out by numbers receiving a PIP longer than 30 days; number of adverse actions broken down by type; number of decisions on proposed removals not issued within 15 business days of the end of the employee reply period; number of adverse personnel actions by the agency for which employees received written notice in excess of the 30 days; number and key terms of settlements reached by the agency in cases arising out of adverse personnel actions; and resolutions of litigation about adverse personnel actions reached by the agency.

Further, OPM is obligated, with certain exceptions, to publish this data. Within 60 days of the date of the order, OPM is directed to issue guidance regarding implementation of the data collection requirements and any necessary exemptions.

- *Obviously, this section is intended to allow oversight of agency compliance with the EO.*

Sec. 7. *Implementation*. This section provides a 45 day timeline for OPM and agency heads to amend its procedures and regulations to comply with the EO. *See* Sections (a) and (b)(i). It also directs agency heads to seek to renegotiate CBA provisions inconsistent with the EO or any final OPM regulations. *See* Section (b)(ii). The Section also requires a report by OPM to the President within 15 months of any final rules, evaluation the effect of the rules (Section (c)) and a Government-wide initiative within a reasonable period of time, to educate Federal supervisors about "holding employees accountable for unacceptable performance or misconduct under those rules." (Section (d)).

- *No changes can be made to existing CBAs regarding discipline and unacceptable performance without bargaining proposed changes. Additionally, if provisions on discipline and unacceptable performance are the subject of term agreements, agencies must wait until a mid-term reopener clause provides the opportunity to renegotiate or until the term agreement can be renegotiated.*

Finally, please note that as of the last edition, 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; Part Four contains hypothetical situations for the reader to apply techniques laid out throughout the book, and Part Five concerns affirmative defenses raised by the employee. Part Five amplifies the defenses sections under each of the individual charges.

Particularly noteworthy is the new Part Four, where we have added two new chapters, Chapters 21 and 22, both presented in the sense of a "how-to-do-it" analysis. A hypothetical situation is used and the reader is invited to follow along and decide what charges he or she may have used, to agree or disagree with the agency's charge selection in that problem. The companion chapter goes into a somewhat more analytical look at that problem, the charges, essentially from the viewpoint of how an appellant could attack and how the agency could defend. There is no right or wrong in the analysis there; we simply detail an overall approach and hope it is helpful.

Please note, as well that in this edition we relook at the standard rules and tips on charging in light of a few more recent decisions, mainly from the Federal Circuit. We also revisit and revise our discussion of notice and due process in light of the circuit's *Boss* decision, summarized above; *Boss* holds that a due process violation may not always void an adverse action in its entirety. Under *Boss*, it may be necessary to trace the actual effect of the due process violation.

As always, 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.