INTRODUCTION
CHARGES, PENALTIES, AND AFFIRMATIVE DEFENSES

As of this 13th edition of *MSPB Charges and Penalties*, the MSPB is still—and have been since January 6, 2017—without a quorum for deciding cases on review (i.e., PFR). Accordingly, there are no full Board decisions; AJs can issue initial decisions and, to the extent that neither party files a petition for review to the MSPB, the AJ's decision will become the final decision of the Board and may be appealed to an appropriate court or tribunal (e.g., the Federal Circuit). *See* 5 USC 7703. That remains the only way that the parties can currently gain review of MSPB initial decisions (absent review of a mixed case through the EEO process). Indeed, without any Board members, the MSPB is unable to issue whistleblower stays during Office of Special Counsel (OSC) investigations.

It is noteworthy that as of December 31, 2020, over 2,378 Petition for Review (PFR) cases were pending at the MSPB. *See* MSPB FY 2018–2020 APR-APP (Feb. 10, 2020). We note too that despite the new administration's rescission of Trump administration Executive Orders (*See, e.g.*, rescission of EO 13839, Sect. 5), OPM regulations, issued on October 16, 2020, and based on those EOs are still in effect, which make it more difficult to resolve cases. (Changes to 5 CFR 752 prohibit the use of a settlement agreement providing for expungement of adverse notations from a personnel file, which makes it difficult (impossible) to settle cases for clean paper).

In this new edition and introduction, we have provided a summary of the OPM Regulations, and summaries of noteworthy court decisions.

Moreover, in the absence of MSPB Board decisions, we again reviewed many MSPB initial decisions mostly for the 2020 time period. These initial decisions are not precedential and cannot be cited to, of course. But, these initial decisions allow us to take the "temperature" of the MSPB, to get a sense of what is actually happening on the ground in real time, so to speak. We have included them in Chapter 24, combining them with the initial decisions for the 2019 time period, which we had included for the first time in last year's edition. These initial decisions reflect several trends: the use of the general or narrative charges (e.g., conduct unbecoming); the use of lack of candor in lieu of falsification charges; the continued commission of due process and whistleblower reprisal violations; except for due process and whistleblower reprisal claims, the difficulty of appellants in proving affirmative defenses; more frequent charges of managerial negligence; numerous defiance of supervision actions (e.g., failure to follow, etc.); a number of Veterans Affairs 38 USC 714 cases; an uptick in sexual and racial misconduct (and other disrespectful conduct cases); the continuing effort by agencies to characterize performance-related conduct as adverse actions; the recurring problem of alcohol and drug abuse (including CBD abuse); and, the importance of agency deference, resulting from proof of each charge.

Below, we provide summaries of President Biden's new EO, OPM regulations and summaries of recent court decisions.

I. NEW EO, RESCINDING PREVIOUS EOS REGARDING LABOR AND EMPLOYEE RELATIONS AND CREATION OF SCHEDULE F

This new EO by President Joseph Biden seeks to negate three previous 2018 EOs by Former President Trump, which limited collective bargaining, cut official time and made changes to facilitate employee firings and discipline. President Biden's new executive order also eliminated Schedule F, the new excepted service classification Former President Trump created via executive action in the last few months of the Trump presidency. In those regards, the new EO provided that: "(b) The heads of all executive departments and agencies (agencies) shall, consistent with law, immediately suspend, revise, or rescind proposed actions, decisions, petitions, rules, regulations or other guidance pursuant to, or to effectuate, Executive Order 13957. The Director of the Office of Personnel Management (OPM) shall immediately cease processing or granting any petitions that seek to convert positions to Schedule F or to create new positions in Schedule F." In addition to revoking the Trump administration's workforce executive orders and rescinding the Schedule F action, it instructs agencies to "bargain over permissible, non-mandatory subjects of bargaining when contracts are up for negotiation," and it directs the Office of Personnel Management to develop recommendations "to pay more federal employees" and contractors at least $15 per hour.

II. NEW REGULATIONS

This OPM Final Rule, dated Oct 16, 2020, stems from the EO signed by former President Trump in May 2018. Changes made to 5 CFR 315, 432, and 752 are effective Nov. 16, 2020 and include the following:

A. 5 CFR 315 CHANGES OR ADDITIONS

- A probationary period should be used as the final step in the hiring process to evaluate potential before the appointment becomes final. (5 CFR 315.803)
- Agencies must notify supervisors an employee's probationary period is ending three months prior to the expiration of a probationary period, and then again one month prior to the expiration of the probationary period. (5 CFR 315.803)

B. 5 CFR 432 CHANGES OR ADDITIONS

- For purposes of performance assistance, other than those requirements listed in the statute, there is no specific requirement regarding any assistance offered or provided during an opportunity period. (432.104)
- The nature of the assistance is in the sole and exclusive discretion of the agency.(432.104)

- Also, no additional PIP or similar informal period to demonstrate acceptable performance to meet the required performance standards shall be provided prior to or in addition to the opportunity period under this part. (432.104)
- Moreover, in considering adequate assistance, an agency can rely on assistance provided pre PIP. Further, agencies are not required to help employees improve or provide an improvement period longer than required by law.(432.105)
- If an agency believes that an extension of the advance notice period is necessary for another reason (e.g., besides to consider disability as reasonable accommodation, etc.), it may request prior approval for such extension from OPM (432.105)
- Just as with adverse actions, "Agreements to alter personnel records. An agency 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 action." (432.108)

C. 5 CFR 752 CHANGES OR ADDITIONS

- An agency should not be required to use progressive discipline. (752.202, 752.403)
- The penalty should be tailored to a particular instance of misconduct. (752.202, 752.403)
- Additionally, if the facts and circumstances of a case warrant removal, an agency should not substitute a suspension. (752.202, 752.404)
- As to disparate treatment "Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate." (752.202, 752.404)
- A suspension should not be a substitute for removal where removal is appropriate. Agencies should not require that an employee have previously been suspended or reduced in pay or grade before a proposing official may propose removal. (752.202, 752.404)
- All applicable prior misconduct can be taken into account, not just similar past misconduct when determining an appropriate penalty. (752.202, 752.404)
- [T]o the extent an agencyin its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7513(b)(1)…. Advance notices of greater than 30 days must be reported to the Office of Personnel Management." (752.404).
- "To the extent practicable," agencies should issue decisions on proposed removals within 15 business days of the conclusion of the employee's opportunity to respond. (752.404)
- As to clean record settlements, "An agency 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 action. (exception for discovery of material agency error) (752.104, 752.203, 752.404).

III. NEW COURT CASES

A. ADVERSE ACTIONS

1. Appropriate Relief

Foster v. Dept. of Army, No. 2020-1691, 120 LRP 31531 (Fed. Cir. 2020 NP) (circuit reversed-in-part, and remanded the MSPB's denial of the petitioner's petition for enforcement of a prior MSPB order requiring the Department of the Army to reinstate him and pay him appropriate backpay and benefits, finding that the employee was entitled to a higher uniform allowance than that provided by the agency; the Army determined to remove the petitioner, a lead firefighter, based on a charge of conduct unbecoming of a federal employee but he retired in lieu of removal; the administrative judge reversed the removal based on a due process violation and ordered the Army to: 1) cancel the removal and retroactively restore the petitioner; 2) pay him the appropriate amount of back pay, with interest, and adjust benefits with appropriate credits and deductions within 60 calendar days; and 3) inform the petitioner in writing of all actions taken to comply with the MSPB's order; after cancelling the petitioner's removal, the Army removed him a second time, and the MSPB sustained this removal; the petitioner filed a PFE of the MSPB's decision reversing his first removal, arguing that the Army was not in compliance because he was still in a leave without pay status and had not been paid any back pay; the Army later paid the petitioner $17,459.97, reflecting $43,336.65 in gross backpay, offset by $25,876.68 in deductions for retirement, income tax, investment, and healthcare premiums; following further proceedings, the AJ denied the PFE; although the Army was not in compliance with the Board's order when the petitioner filed his PFE, it had since submitted satisfactory evidence of compliance with its obligations to cancel the first removal and retroactively restore him to his position until he was subsequently removed; the AJ also found that the Army paid the petitioner the correct amount of back pay, interest on back pay, and other benefits due; the Federal Circuit concluded that substantial evidence supported the MSPB's finding that the Army paid the petitioner the proper amount of back pay; the court rejected the petitioner's arguments that the Army failed to provide a sufficient explanation for its gross back pay calculations and retirement deductions, improperly deducted health insurance premiums,

and should have paid him overtime; however, the Federal Circuit reversed the MSPB's finding that the Army complied with the Board's order as to the petitioner's uniform allowance; the MSPB had concluded he was only entitled to a $400 semi-annual uniform allowance. The petitioner argued that he should have been treated as a new hire with full initial uniform allowance benefits of $1,600 because he was required by the Army to turn in his uniforms and safety equipment; the court agreed with the petitioner and remanded this issue for further proceedings).

2. Illegal Appointment

Avalos v. DHUD, 963 F.3d 1360 (Fed. Cir. 2020) (the Federal Circuit affirmed the MSPB's decision upholding the Department of Housing and Urban Development's finding that while the Board had jurisdiction, the removal of the petitioner to correct his illegal appointment was proper; the petitioner, who previously held an excepted service political appointment at the Department of Agriculture, applied for a field office director position at HUD; he did not make the certificate of eligibles, which listed only one candidate, a preference-eligible veteran; the administrator, who was the selecting official, apparently was disappointed with the applicant choices and let the certificate expire; before the certificate for the first vacancy announcement expired, the administrator began revising the announcement; after the first certificate expired, HUD again announced the vacancy and the petitioner applied; this time he was the only candidate on the certificate; the administrator stated that she recused herself from acting as selecting official because she had been a fellow USDA political appointee with the petitioner, but there was ambiguity about the manner, scope, and timing of her recusal; the petitioner was selected for the position (which was subject to a one-year probationary period) and started the day after he resigned from the USDA; it was later determined by OPM that HUD could not certify that the appointment met merit and fitness requirements because the administrator's involvement in interviewing and selecting candidates left the appearance of a prohibited personnel practice; HUD removed the petitioner because of the impropriety in his appointment; the administrative judge affirmed the removal, holding that the MSPB could not review OPM's corrective action directing HUD to regularize the petitioner's appointment; the AJ found that HUD reasonably withheld certification that the petitioner's appointment was free from political influence; finally, the AJ determined that HUD's only option to comply with OPM's order to regularize the petitioner's appointment was to remove him; the Federal Circuit initially determined that OPM's failure to approve the petitioner's appointment did not act as an absolute statutory prohibition that would divest him of his appeal rights; the agency's blunders during the selection process—prior to the appointment, and through no fault of the appointee—did not render the appointment voidable and prevent review of the removal; the Federal Circuit also determined that the petitioner had the right to appeal to the MSPB even though he had not completed his probationary period; he petitioner had worked almost eight years at the USDA prior to his appointment, meeting the current continuous service requirement for MSPB jurisdiction; the court went on to affirm the removal, finding that HUD could not reasonably certify the appointment to be free from political influence).

B. AGE DISCRIMINATION—STATUTORY CONSTRUCTION

Babb v. Wilkie, 140 S. Ct. 1168 (2020) (the Supreme Court held that the federal-sector provision of the ADEA demands that personnel actions be "untainted by any consideration of age"; plaintiff does not have to show that her age was a but-for cause of the action, just that it was a "consideration"; Babb was employed by the Department of Veterans Affairs as a Clinical Pharmacist; in 2014 she filed a complaint in district court alleging, among others, that the agency subjected her to age discrimination in violation of the federal-sector provision of the Age Discrimination in Employment Act (ADEA), *codified at* 29 USC 633a(a); the district court granted the agency's motion for summary judgment on the petitioner's ADEA claim, finding that the appellant established a *prima facie* case of age discrimination, but that the agency proffered legitimate nondiscriminatory reasons justifying its actions and that no jury could reasonably conclude that those reasons were pretextual; the petitioner filed an appeal with the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the denial of her ADEA claim; the circuit court explained that, despite its misgivings, it was bound by precedent to apply the but-for causation standard and the *McDonnell-Douglas* framework to the petitioner's age discrimination claim; Babb petitioned the Supreme Court of the United States, which granted a *writ of certiorari* and heard the case to resolve a circuit split regarding the interpretation of 29 USC 633a(a) and rule on the appropriate causation standard for federal-sector ADEA claims; holding: in an 8-1 decision (written by J. Alito), the Supreme Court held that the federal-sector provision of the ADEA demands that personnel actions be "untainted by any consideration of age"; in relevant part, and absent some exceptions, 29 USC 633a(a), provides that "personnel actions" affecting employees or applicants for employment aged 40 and older shall be "made free from any discrimination based on age"; after scrutinizing the syntax and plain meaning of the operative phase, the Court concluded that the statutory language unambiguously "demands that personnel actions be untainted by any consideration of age"; in other words, a plaintiff may establish a violation of section 633a(a) by showing that her age was a consideration in the making of a personnel decision; she need not show that her age was a but-for cause of the action; the Court rejected the government's argument that the "any consideration" standard was inconsistent with its holdings in *Safeco*, *Gross*, and *Nasser*; the Court determined that *Safeco* was inapposite; moreover, unlike in *Gross* and *Nasser*, in which the Court determined that the "based on" language mandated the application of a but-for causation standard to prove a violation, "the object of [the but for] causation [in section 633a(a)] is 'discrimination,' i.e., 1 *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013); *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167 (2009); *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007); differential treatment, not the personnel action itself"; the Court recognized that, in applying the expansive "any consideration" standard, the federal government would be held to a stricter standard than private employers under the ADEA; it concluded that Congress acted deliberately to hold the federal government to this higher standard; the Court recognized that, although but-for causation is not necessary to prove a violation of section 633a(a), it is "important in determining the appropriate remedy"; allowing an appellant to obtain relief related to the end result of the action without showing that it was the but-for cause of the action would unfairly place that individual in a more favorable position than she would have been in absent the discrimination; "injunctive or other forward-looking relief" may be available to individuals who show that age discrimination played a lesser part in the decision; the Court declined to reach a finding as to what the particular remedy should be in this case, leaving it to the district court to decide in the first instance; the Court reversed the eleventh circuit's decision and remanded the case for further consideration; Justice Sotomayor filed a concurring opinion, in which Justice Ginsburg joined, emphasizing that 29 USC 633a(a) does not foreclose claims arising from discriminatory processes or consequential damages related to such actions; Justice Thomas filed a dissenting opinion, arguing that the "default rule" of but-for causation should apply because the "any consideration" standard of liability set forth in the majority opinion was ambiguous and contrary to "settled expectations of federal employers and employees").

C. ARBITRATION

1. Applicable Precedent

Buffkin v. DOD, 957 F.3d 1327 (Fed. Cir. 2020) (Federal Circuit determined that the arbitrator was bound by the Board's substantive rules and the decisions of the Federal Circuit, not those of the Federal Labor Relations Authority (FLRA); Federal Circuit vacated and remanded an arbitrator's decision that a removal grievance was untimely; the court gave remand instructions to address whether the union's premature request for arbitration ripened into a timely request; the appellant was employed by the agency as a teacher in a school for the children of military personnel operated by the agency; the appellant is a member of the Federal Education Association—Stateside Region (the "union") and covered by a collective bargaining agreement (CBA) between the union and the agency; the agency removed the appellant for misconduct; she elected to challenge her removal through the CBA's negotiated grievance process; in relevant part, the CBA provided that to invoke arbitration, a party must submit a written request for arbitration on the opposing party within 20 days of the "last day of mediation"; the parties engaged in mediation in 2012, but did not reach an agreement; in 2014, the union submitted a written request for arbitration to the agency on the appellant's behalf; between 2014 and 2017, the appellant and the agency prepared for arbitration, including holding another mediation session in 2015 and selecting an arbitrator in 2017; in January 2018, the agency argued before the arbitrator, for the first time, that the union's request was untimely; after holding a hearing, the arbitrator dismissed the case as untimely under the CBA because the union did not make its request within 20 days of the end of the 2012 mediation; the appellant filed an appeal with the Federal Circuit, challenging the arbitrator's dismissal of her case; the arbitrator had applied FLRA law because he concluded that he was bound to do so by the CBA; the court disagreed, explaining that, under the Civil Service Reform Act's scheme, Congress intended for FLRA law to apply in a case that is appealable to the FLRA, such as an unfair labor practice charge; in contrast, "matters involving hiring, firing, failure to promote, and the like," such as the removal at issue here, are within the Board's jurisdiction; accordingly, the court determined that, under the long-standard Supreme Court precedent set forth in *Cornelius v. Nutt*, 472 U.S. 648 (1985), and consistent with Congress' intent, arbitrators therefore must apply the Board's substantive rules and the decisions of the Federal Circuit when reviewing otherwise appealable actions an individual has elected to challenge through arbitration, rather than before the Board; the union's 2014 request for arbitration was not untimely; the arbitrator strictly construed the CBA to find that "the last day of mediation," which triggered the filing period, was the end of the 2012 mediation, not the 2015 mediation, because the CBA did not provide for a second mediation; the court disagreed, finding that, under the plain language of the CBA, the union had 20 days after the last day of mediation, which occurred in 2015, to invoke arbitration; the past practices of the agency in over 60 contemporaneous grievances it handled and the conduct of the parties during this process showed that the parties intended for the grievance to remain open through the second mediation; thus, the invocation of arbitration in 2014 was not too late under the CBA; the court next considered whether the request was premature; it observed that, both in practice and as codified in its rules, the Federal Circuit may consider prematurely filed notices of appeals to be ripe for review upon the entry of a final judgment below; further, it recognized that forfeiture of rights due to a timeliness issue generally is disfavored when the issue is not jurisdictional, but rather is a procedural defect, and unless the defect is "clearly harmful to the resolution of the merits"; the court noted that the union's 2014 arbitration request was not a clearly harmful procedural defect; however, it determined that the arbitrator should address the issue in the first instance before reaching a finding; the Federal Circuit vacated the arbitrator's dismissal and remanded the case to the arbitrator).

2. Due Process—Right to Review Evidence

Ramirez v. DHS, 975 F.3d 1342 (Fed. Cir. 2020) (the court held that (1) the arbitrator did not exceed his authority by seeking additional evidence after issuing the Interim Award, and (2) "when an agency relies, directly or indirectly on the results of a psychological assessment in justifying an employee's removal, the agency must provide the employee with a meaningful opportunity to review and challenge the data, analysis, and results of that assessment"; because Mr. Ramirez was denied that opportunity, the court vacated the Final Award and remanded for further proceedings; following a domestic incident involving the alleged use of a firearm, the agency ordered Mr. Ramirez, a Customs and Border Protection Officer, to complete a psychiatric evaluation; the evaluation was inconclusive, but the examining psychiatrist, Dr. Skop, reported that he could not "confidently say" that Mr. Ramirez was able to safely carry a government-issued weapon, because there was evidence that he was not "totally forthcoming" during the assessment; the agency ordered a second evaluation by a different psychiatrist, Dr. Nahmias, who also did not reach a definite conclusion as to Mr. Ramirez's dangerousness or ability to safely weapon, but nonetheless recommended that he be restricted from a weapon-carrying position based on his "lack of full cooperativeness" during his evaluation; both psychiatrists based their conclusions on the findings of a third-party clinical psychologist, Dr. Frederick, who determined that the results of the Minnesota Multiphasic Personality Inventory (MMPI), a written assessment Mr. Ramirez completed as part of each evaluation, were "invalid" due to "extreme defensiveness"; based on the report by Dr. Nahmias, the agency found that Mr. Ramirez was no longer fit for duty and proposed his removal; the agency provided Mr. Ramirez with copies of the reports by the two examining psychiatrists, but did not provide him access to the MMPI scores or their interpretation by Dr. Frederick; after considering his responses, the agency removed Mr. Ramirez; Ramirez elected to challenge his removal through arbitration; during the arbitration proceeding, Mr. Ramirez requested copies of the MMPI assessments and Dr. Frederick's tabulation and interpretation of the scores; the agency denied the requested records on the ground that it had not obtained them from Dr. Frederick; Mr. Ramirez objected to the agency's introduction of evidence that relied on the MMPI assessments, on the ground that he did not have access to the test results, but the arbitrator reserved judgment and allowed the agency to present its evidence; during the hearings, Mr. Ramirez called his own expert witness, who had administered him another MMPI assessment and interpreted his scores as being within the range typical for law enforcement personnel; following the hearings, the arbitrator issued an Interim Award ordering Mr. Ramirez to undergo yet another psychiatric evaluation; in concluding that another examination was necessary, the arbitrator declined to credit Mr. Ramirez's expert witness, but found that the conclusions of the agency's medical witnesses fell "technically short of preponderantly proving" that Mr. Ramirez was unfit for duty; Ramirez appealed the Interim Award to the Federal Circuit, which determined that it lacked jurisdiction because the award was not yet final; Ramirez then reported for the new examination, during which he completed another MMPI assessment; the new MMPI assessment was again reviewed by Dr. Frederick, who again interpreted the results as invalid due to "high defensiveness"; based in part on Dr. Frederick's interpretation, the new examining psychiatrist, Dr. Yi, concluded that she could not declare the petitioner was safe to return to the workplace; the petitioner requested copies of all records relating to that evaluation, including the MMPI assessments, but the agency refused, stating that that it had not received the test results; the petitioner challenged the agency's response, renewed his earlier objections to the agency's medical evidence, and requested that the arbitrator order the agency to produce the MMPI records; the arbitrator issued a Final Award affirming Mr. Ramirez's removal; he also denied Mr. Ramirez's request to order the agency to produce the records of his MMPI assessments, and declined to reopen the record for a new hearing; Mr. Ramirez petitioned for

review, arguing (1) that the arbitrator exceeded his authority in ordering a new psychiatric evaluation and considering the merits of the removal after issuing the Interim Award; and (2) that the agency's denial of access to the records of the MMPI assessments deprived him of due process; the court held that (1) the arbitrator did not exceed his authority by seeking additional evidence after issuing the Interim Award, and (2) "when an agency relies, directly or indirectly on the results of a psychological assessment in justifying an employee's removal, the agency must provide the employee with a meaningful opportunity to review and challenge the data, analysis, and results of that assessment"; because Mr. Ramirez was denied that opportunity, the court vacated the Final Award and remanded for further proceedings).

3. Election

Baldwin v. MSPB, 805 Fed. Appx. 992 (Fed. Cir. 2020 NP) (the petitioner's failure to affirmatively disavow the union's initiation of the grievance process on his behalf constituted a binding election of the negotiated grievance procedure, precluding MSPB jurisdiction over his appeal; the Defense Logistics Agency removed the petitioner; under the negotiated grievance procedure covering his position, he could appeal his removal by filing a grievance under the Master Labor Agreement or by appealing to the MSPB, but not both; after his removal, the union sent an email requesting a formal grievance to his third-line supervisor; the petitioner was copied on the email; the grievance email also stated that a formal signed letter would be sent, but no such letter appeared in the record; the third-line supervisor, the petitioner, and two union representatives met, and the petitioner presented at least three arguments against his removal; the third-line supervisor sustained the removal; the union emailed the third-line supervisor to notify him of its intent to advance the petitioner's case to arbitration; the petitioner was copied on the email; three days later, the petitioner appealed his removal to the MSPB; he contended that he had not elected to file a grievance, as evidenced by the lack of a signed document as promised in the grievance email; he argued that the union initiated the grievance process without his consent and that, therefore, he did not make a binding election of the grievance process; he also argued that the email only suggested an intent to file a formal grievance, and even if it were considered a formal grievance, it was untimely because it was not filed within 10 working days of his removal; the administrative judge dismissed the petitioner's appeal for lack of jurisdiction, finding that he made a binding election of the grievance process by participating in and failing to disavow the grievance process before his appeal to the MSPB; the Federal Circuit affirmed, concluding that the petitioner's failure to affirmatively disavow the union's initiation of the grievance process on his behalf constituted a binding election of the negotiated grievance procedure; this precluded the MSPB's jurisdiction over the petitioner's appeal).

D. CHARGE—CONDITION OF EMPLOYMENT

Miller v. VA, No. 2020-1845, 120 LRP 4231 (Fed. Cir. 2020 NP) (the court agreed that the employee was required to maintain her LPN license as a condition of her employment, and she failed to do so; a condition of the petitioner's employment as an LPN was that she maintain her LPN license; in 2018, the Department of Veterans Affairs gave her a courtesy notice that her LPN license was about to expire, and she timely renewed her license; in August 2019, the VA again gave the petitioner a courtesy notice; this time, she did not renew her license, and it expired on Sept. 5, 2019; she was on leave-without-pay status at the time; the VA subsequently proposed to remove the petitioner because of her failure to maintain her LPN license; in the proposal notice, the agency proposed to detail her to a non-LPN position if and when she returned to work; the detail would continue until the proposed removal was decided; the petitioner never returned to work, and she was eventually removed, based on a charge of failure to maintain a current, full, and unrestricted license as a licensed practical nurse; the administrative judge upheld the removal, finding that maintaining LPN licensure was a condition of the petitioner's employment as an LPN and that it was her responsibility to ensure that she remained licensed; the petitioner had contended that because she was on leave at the time her license expired, she was not able to access the agency's training resources; however, the AJ found she had complete access to the agency's computer systems and her workplace prior to the time she was removed; the AJ also concluded that even if the petitioner did not have access to her workplace, the agency could not be held responsible for the lack of access because she entered leave status at her own request; the AJ further found the petitioner could have satisfied the requirements for her license renewal by accessing training resources from outside the agency; the Federal Circuit affirmed the removal, finding no merit to the petitioner's arguments that the removal decision was unsupported by substantial evidence or that the agency interfered with her ability to renew her license; the evidence that can be presented to the MSPB to support a charge is not limited to the evidence [i.e., as to certain rebuttal evidence] recited in the agency's notices of proposed and final action; also, the AJ's procedure with respect to the agency's rebuttal statement was not improper and did not deprive the petitioner of her right to due process of law).

E. DISCOURTESY

Aviles-Wynkoop v. DOD, 825 Fed. Appx. 834 (Fed. Cir. 2020 NP) (court determined that the Department of Defense properly removed a "discourteous" program analyst who refused to modify her behavior after she was reprimanded; the Department of Defense removed the employee, a program analyst, for 1) refusing to recognize the chief of acquisition management in her department as a supervisor; 2) demonstrating a pattern of discourteous behavior towards contractors, fellow employees and management; 3) refusing to modify her behavior after being reprimanded; and 4) sending inappropriate emails to senior staff; the administrative judge affirmed the removal; regarding the reasonableness of the penalty, the AJ noted that a failure to follow instructions may be sufficient cause for removal; the petitioner had committed several acts of misconduct and "each act of unprofessional conduct constituted intentional conduct of a serious nature"; the AJ further determined that the petitioner had failed to correct her behavior despite a clear warning from her supervisor; therefore, the AJ concluded, removal was reasonable; in addition, the AJ rejected the petitioner's claims that she had been denied due process and removed in retaliation for whistleblowing; on appeal to the Federal Circuit, the petitioner argued that the MSPB committed reversible error in reviewing three challenges: 1) DOD did not properly assess the factors relevant to imposing the penalty of removal; 2) deprived her of due process; and 3) retaliated against her for two protected whistleblowing disclosures; the court affirmed the removal and rejected the petitioner's arguments; the Federal Circuit found that the petitioner did not show that DOD disregarded or misevaluated pertinent *Douglas* factors; the petitioner also failed to show that DOD's initial mistake about her probationary or full-employee status deprived her of the guaranteed right to respond to the proposed termination; the court further determined that the petitioner did not show DOD failed to provide adequate notice of the charges against her; finally, the Federal Circuit concluded that substantial evidence supported the Board's finding that—even if the specified disclosures qualified as "protected" and contributed to DOD's termination decision—DOD would have made the same decision to terminate in the absence of those disclosures; the MSPB determined that DOD proved its firm belief that the petitioner created a toxic work environment; in addition, the petitioner made her hotline complaint to the DOD Inspector General months after she was placed on administrative leave, and most of the relevant misconduct took place before her email exchange with senior staff).

F. DISCRIMINATION—"BECAUSE OF SEX"

Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020) (Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of…sex," encompasses discrimination based on an individual's sexual orientation; in each of three consolidated cases, employers fired long-time employees for being gay or transgender; each employee sued under Title VII of the Civil Rights Act of 1964, alleging sex discrimination: the courts of appeal reached conflicting decisions as to whether Title VII prohibits discrimination based on sexual orientation or gender identity; the Court granted *certiorari* to resolve the conflict; Justice Gorsuch first addressed the ordinary public meaning of Title VII's language that it is "unlawful…for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"; 42 USC 2000e-2(a)(1); although the parties offered competing definitions of the term "sex," the Court assumed for purposes of this decision that the term refers only to biological distinctions between male and female; Title VII prohibits employment actions taken because of one's sex, and the Court held that if sex is a but-for cause of an action, the action has necessarily been taken because of sex; the Court acknowledged the 1991 amendments to Title VII that provided for limited relief based on the lower "motivating factor" standard, but it determined that it need not address that standard for purposes of this decision; the Court then looked to the term "discriminate"; the Court defined that term to mean intentionally treating an individual worse than others who are similarly situated; thus, the Court held, "an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against the person in violation of Title VII"; the Court rejected an argument that discrimination should be defined in terms of the treatment of groups rather than individuals, noting that Title VII specifically makes it illegal to discriminate against "any individual"; the Court derived the following rule from the plain meaning of the statute: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex."; accordingly, if changing the employee's sex would have yielded a different choice by the employer, a statutory violation has occurred; the Court held that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex; a man who is fired for his attraction to men has been discriminated against because of his sex if he would not have been fired had he been a woman attracted to men; similarly, an employee who was identified as male at birth and who is fired for identifying as female has been discriminated against because of her sex if she would not have been fired had she been identified as female at birth; just because another factor besides the employee's sex (i.e., sexual orientation or gender identity) played a role in the firing does not preclude liability for sex discrimination if sex remains a but-for cause of the action; in light of the law's focus on the treatment of individuals, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups (e.g., by demonstrating that it fires all homosexual or transgender employees, whether male or female); the Court acknowledged concerns that complying with Title VII's requirements as applied here might require some employers to violate their religious convictions; the Court noted here that Title VII itself exempts religious organizations and that both the First Amendment and the Religious Freedom Restoration Act may provide additional protection for employers; however, because no claim of religious liberty was before the Court, it did not attempt to determine how any of those protections apply in cases like these; Justice Alito, joined by Justice Thomas, dissented; Justice Alito argued that the majority had written protections into the law that were not contemplated at the time Title VII was enacted; Justice Kavanaugh wrote a separate dissenting opinion, arguing that the majority had followed the literal meaning of the statute but not its ordinary meaning).

G. DUE PROCESS VIOLATION—APPELLANT REVIEWED DOCUMENTS RELIED ON

Hairston v. DOD, No. 2020-1607, 120 LRP 34415 (Fed. Cir. 2020 NP) (the employee, a medical records technician, failed to show his due process rights were violated because he did not personally review the evidence on which the agency relied before his termination and removal was reasonable for 1) misuse of government property (for other than official purposes); and 2) conduct unbecoming a federal employee (immoral, indecent or disgraceful conduct); a routine audit and cybersecurity service-provider monitoring process determined that the employee used his government computer to access his personal social media account and converse with individuals about purchasing and using illegal drugs, to engage in sexually explicit conversations, and to view inappropriate pictures of others; the administrative judge affirmed the removal and found the employees due process rights had not been violated and no harmful procedural error had occurred; the proposal notice informed the employee of the charges, his right to representation, and his right to respond; he had an opportunity to review the evidence after he spoke to the HR specialist handling evidence review and scheduled a meeting to review the evidence on the day of his reply; the AJ also determined the union representative who reviewed the evidence and the petitioner's case file was the petitioner's representative; this individual had identified himself as "a union representative," met privately with the petitioner prior to the oral reply, and accompanied the employee to the reply; the employee never informed the agency that the union representative was not his representative; the AJ further found the failure to designate the individual as the petitioner's representative in writing was only a procedural error and not harmful; the Federal Circuit affirmed, writing that the employee "undoubtedly had the opportunity to review the evidence against him"; his phone records indicated that he spoke with the HR Specialist on three occasions about reviewing the evidence; the HR specialist also submitted a sworn statement that the petitioner was scheduled to review all of the evidence the day of his oral reply; just because the employee did not actually avail himself of the opportunity to review the evidence personally did not mean that he had no opportunity to review the evidence; there also was no dispute the union representative reviewed the evidence as the employee's representative; although it was procedural error for the agency to treat the union representative as the petitioner's representative without a written designation, the error was harmless; the employee failed to show the error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error).

H. EVIDENCE—AWOL; ADMINISTRATIVELY ACCEPTABLE EVIDENCE

Michelson v. Dept. of Army, 812 Fed. Appx. 995 (Fed. Cir. 2020 NP) (the court agreed with the MSPB's decision sustaining this supply technician's removal for 1) AWOL, 2) failure to follow directions; and 3) creating a disturbance; as to the AWOL charge, and finding, as well, the petitioner's letter from a nurse practitioner did not qualify as administratively acceptable evidence supporting her absence during the absence without leave period; the Department of the Army removed the petitioner, a supply technician, based on three charges: 1) absent without leave over an 11-day period; 2) failure to follow directions; and 3) creating a disturbance; the Federal Circuit affirmed the removal; regarding the AWOL charge, the court rejected the petitioner's argument that the administrative judge erred by not accepting a letter from a nurse practitioner as administratively acceptable evidence of her anxiety and depression during the AWOL period; the letter had several problems; in particular, it did not go into detail about the relationship between the petitioner's anxiety and depression and her inability to perform her work; in addition, the petitioner three times sought

and was denied various types of leave for much of the time period for which she was AWOL: once as annual leave, once to take care of her ill father, and once based on a letter from a different nurse practitioner; charges 2 and 3 address the petitioner's actions on the first day of her suspension; regarding Charge 2, the agency alleged that the petitioner failed to follow directions by going to work on the day her suspension commenced; the petitioner alleged that the suspension letter was ambiguous as to whether her suspension began when she received an SF 50 or on a date certain; the Federal Circuit rejected her argument, finding that the suspension letter unambiguously stated that the suspension began on a specific date and was not contingent on receipt of an SF 50; as to Charge 3, creating a disturbance, the petitioner's failure to leave after her confrontation with a captain necessitated an "unnecessarily disruptive" search of the workplace and an escort to ensure the petitioner left the premises; it was within the agency's discretion to determine that the incident resulted in an adverse effect on morale, production, or maintenance of proper discipline; the court also concluded that the removal penalty was reasonable; he petitioner failed to show that the AJ erred in sustaining any of the charges, and the agency considered and balanced all of the relevant *Douglas* factors, including her length of service with the agency).

I. FEDERAL EMPLOYEE LIABILITY

Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (government officials may be sued in their personal capacity for alleged violations of the Religious Freedom Restoration Act of 1993 (RFRA); the RFRA provides a right of action to "persons whose religious exercise is substantially burdened by government"; That right of action enables a person to "obtain appropriate relief against a government"; the *Tanzin* plaintiffs were three men who filed suit claiming three FBI agents violated their rights under the RFRA, by placing them on the "No Fly List" in retaliation for refusing to become FBI informants against fellow Muslims; more than one year after the plaintiffs filed their case in federal court, the Department of Homeland Security informed them they could fly; the District Court then dismissed Plaintiffs' individual-capacity claims for money damages, ruling the RFRA does not permit monetary relief; Plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit, which reversed the District Court; Second Circuit held the RFRA's clearly stated provision for relief against the "government," combined with the statute's expansive definition of "government," authorized Plaintiffs' claims against federal officials in their individual capacities; Supreme court reversed finding that the express remedies of the Religious Freedom Restoration Act of 1993 (RFRA) permit litigants to obtain money damages against federal officials in their individual capacities; Justice Clarence Thomas delivered the opinion of the unanimous (8-0) Court).

J. FIFTH AMENDMENT, SELF-INCRIMINATION—DISPARATE PENALTY—EVIDENCE

Holmes v. USPS, 987 F.3d 1042 (Fed. Cir. 2021) (circuit upheld the removal of this city carrier for purchasing marijuana from a colleague on agency premises; despite that the only direct evidence supporting the charge was an unclear surveillance video recording that showed the petitioner entering his colleague's Postal vehicle, handing his colleague what appeared to be money, it was sufficient to satisfy the lesser preponderant evidence standard applicable in a Board proceeding, especially in light of circumstantial evidence came from two agency witnesses who testified that, the petitioner had no official reason to be in his colleague's vehicle at that time, and the actions captured in the recording were consistent with a narcotics transaction, and similar footage was captured of six of the seven other carriers removed as a result of the same investigation; and also in view of the credibility determinations made by the AJ; moreover, in affirming the penalty, the court rejected the petitioner's argument that the removal penalty should be mitigated because it was inconsistent with the lesser penalties meted out to the five other carriers pursuant to arbitration rewards: (1) the petitioner failed to raise this argument before the administrative judge, even though all five arbitration decisions occurred before the initial decision was issued; (2) Even if he had timely raised the issue, the agency treated all of the proffered comparators similarly because it removed each of them; that this penalty was later mitigated by arbitrators for five employees who pursued grievance arbitration does not reflect any disparate treatment by the agency itself; (3) Arbitration decisions are not binding on the Board, and the Board's decision does not need to be consistent with arbitration decisions in other cases; (4) Even if the Board was required to consider the mitigated penalties in the other cases, there was a rationale for treating this petitioner differently because the other five employees admitted to their misconduct, but the petitioner in this case failed to take responsibility for his actions; Judge Newman issued a dissenting opinion; she would have mitigated the penalty because the five other carriers who committed substantially the same conduct received lesser penalties than removal; among others, she noted that the petitioner should not be penalized for exercising his constitutional right against self incrimination and further that the majority's reliance on Supreme Court precedent permitting an agency to consider an employee's invocation of the Fifth Amendment is misplaced).

K. INDEFINITE SUSPENSION—CHARGE VAGUENESS CURED BY INFORMATION PROVIDED

Willingham v. Dept. of Navy, 809 Fed. Appx. 872 (Fed. Cir. 2020 NP) (court upheld the administrative judge's decision affirming the appellant's indefinite suspension based on the suspension of his security clearance, rejecting the claim that the notice of proposed suspension was vague; the information contained in the evidence file provided to the appellant with the proposal notice sufficiently apprised him of the reason his access to classified information was suspended; more specifically, as to this vagueness claim, the court wrote: "Willingham's primary argument is that the agency failed to provide him 'specific reasons' for its proposal to indefinitely suspend him in violation of § 7513(b). Willingham contends that, like the employee in *Cheney v. Department of Justice*, 479 F.3d 1343 (Fed. Cir. 2007), the agency's vague articulation of his alleged offense left him to guess at what he had done wrong. The government responds that § 7513(b) does not entitle Willingham to 'granular details' surrounding the security clearance revocation, Appellee Br. 9, and that Willingham's subsequent response to the proposed action, as well as another communication sent to the Chief of Naval Operations [Appx 046–049], demonstrated his awareness of the allegation against him. We agree with the government. As we stated in Cheney, 'the employee must be given enough information to enable him or her to make a meaningful response to the agency's proposed suspension of the security clearance.' 479 F.3d at 1352. In that case, we concluded that an indefinite suspension stemming from a security clearance revocation failed to comply with § 7513(b)(1) because it was 'based on allegations of potentially derogatory personal conduct and possible violations of law and [agency] standards of conduct,' later explained in the notice of proposed indefinite suspension as a 'fail[ure] to comply with security regulations' and a 'demonstrated…pattern of dishonesty and/or rule violations.' *Id*. at 1352–53 (adding that the agency later alleged he inappropriately queried agency databases). On the facts of that case, it was unreasonable for the Board to have found this sufficient notice. *Compare with Alston*, 75 F.3d at 659, 662 (similar suspension on the ground that the employee 'may suffer from a medical condition which requires further investigation' was sufficient because the employee could focus his response on his medical status). Here, the reason provided in the initial notice of proposed indefinite suspension was certainly vague.…('possible misuse[ ] of [his] position and protected information accessible to [him] [as an EEO specialist]'). But the shortcomings of the initial notice did not prejudice Willingham's ability to effectively respond because Smith's declaration provided a more detailed rationale for the suspension.…(confirming that the suspension was based on Willingham's 'misuse

of his public trust position to support his class complaint,' not a failure to redact information in that complaint). Critically, that declaration was in Willingham's possession before he made his response to the agency, and he made effective use of it. Appx 033 ('Smith has signed a declaration indicating the information in my EEO complaint was the misuse of information.'); *id*. (arguing that the recipients of his EEO class complaint already had access to the allegedly misappropriated information). The record thus amply supports an inference that, at the time Willingham responded to his proposed suspension, he was well-aware that his alleged offense consisted of misappropriating non-public information of other EEO complainants—whose information he had special access to, as an EEO specialist—and using it in his own EEO class complaint. This is sufficient notice under our precedent. *See Alston*, 75 F.3d at 661–62. Thus, substantial evidence supports the Board's finding that Willingham received the notice he was entitled to under § 7513(b)(1).").

L. LACK OF CANDOR

Freeland v. DHS, 825 Fed. Appx. 750 (Fed. Cir. 2020 NP) (Federal Circuit affirmed the Department of Homeland Security's removal of the petitioner for lack of candor based on the petitioner's answers on his employment background questionnaire about the circumstances of his resignation from his prior position; prior to his appointment with the Department of Homeland Security, the petitioner was a supervisory human resources specialist with the Army Civilian Human Resources Agency; he resigned after he was issued a proposed 14-day suspension for negligent performance of duties; he also was the subject of a workplace sexual harassment investigation at the time he resigned; after the petitioner received a tentative offer from DHS, he was twice required to complete an SF-85P employment background questionnaire for a position of public trust; both times he answered "no" to Questions 12, which asked whether in the past seven years he had left a job under various sets of unfavorable circumstances; DHS removed the petitioner based on a charge of lack of candor, supported by three specifications; two of the specifications were based upon his response to Question 12 on the two SF-85P forms; the third specification was based on a follow-up interview in which the petitioner initially denied having any problems or issues in his prior employment with ACHRA; the MSPB upheld the removal, finding that DHS established that the petitioner had engaged in lack of candor and that he could not reasonably have believed the circumstances surrounding his resignation from ACHRA were not unfavorable; the Federal Circuit affirmed; the court rejected the petitioner's argument that the MSPB failed to consider the reasons that the Office of Personnel Management decided to close his background investigation; according to its policy, OPM referred the matter back to DHS to take further action in its discretion based on the petitioner's conditional appointment and pending EEO activity; in addition, the Federal Circuit explained that lack of candor does not require intentionality or an intent to deceive; the Board's finding that the petitioner's failure to disclose the unfavorable circumstances regarding his prior employment was enough to support the charge of lack of candor was supported by substantial evidence, regardless of any intentionality; the Federal Circuit also rejected the petitioner's argument that the MSPB disregarded that he did not take his ethics training until after the dates on which he completed the SF-85P forms and, therefore, he was not on notice that he had to be forthcoming on the forms; the petitioner acknowledged at the hearing that he was aware he had to provide truthful and complete answers and the actual form required him to certify as such).

M. MIXED CASE

1. Election

Punch v. Bridenstine, et al., 945 F.3d 322 (5th Cir. 2019) (circuit found that the petitioner improperly attempted to bifurcate the case by filing claims in different fora over different aspects of the case; the court agreed with other circuits that bifurcation of federal employment claims is not allowed, and held that the first choice the petitioner made to file her appeal with MSPB was a binding, irrevocable election; the court further held that, since the petitioner's complaint included claims of discrimination, her request for judicial review of MSPB decision was required to be filed within 30 days of MSPB's decision; because she did not file her appeal with the Federal Circuit until 58 days after MSPB's decision issued, her request was untimely filed and therefore properly dismisse; the petitioner was removed from her Program Analyst position for unacceptable performance; she initially appealed her removal to MSPB, alleging that her removal was discriminatory based on her race, color, sex, and age; she subsequently filed a discrimination complaint with her agency's EEO office (EEO Complaint 1), alleging that her "unacceptable" performance rating, her placement on a performance improvement plan, and her proposed removal were also based on discrimination; in February 2016, MSPB issued a decision affirming the petitioner's removal and finding the petitioner failed to prove her affirmative defense of discrimination; in March 2016, the petitioner appealed MSPB's decision to the EEOC (EEO Complaint 2) pursuant to mixed case procedures; in April 2016, the petitioner also appealed MSPB's decision to the Federal Circuit; in May 2016, the petitioner filed a complaint regarding the charges of EEO Complaint 1 in the Southern District of Texas; in April 2017, the Federal Circuit determined that, because the petitioner's appeal involved discrimination claims, her appeal should be transferred to the Southern District of Texas; at the Southern District of Texas, a magistrate judge found that the petitioner's complaint related to EEO Complaint 2 involved the same set of facts as her transferred complaint, and thus consolidated the two matters; analyzing the two cases together, the magistrate judge determined that the complaint related to EEO Complaint 2 must be dismissed, because the petitioner filed her MSPB appeal regarding the removal before filing EEO Complaint 2, and thus was precluded by the CSRA's election of remedies provisions; the magistrate judge then found that, because the petitioner filed her Federal Circuit appeal 58 days after the issuance of MSPB's decision, she failed to meet the 30-day statutory deadline for district court complaints and therefore was untimely in district court, requiring dismissal of that complaint, as well; district court judge adopted the magistrate judge's recommended disposition, and the Fifth Circuit affirmed; circuit found that the petitioner improperly attempted to bifurcate the case by filing claims in different fora over different aspects of the case; court agreed with other circuits that bifurcation of federal employment claims is not allowed, and held that the first choice the petitioner made to file her appeal with MSPB was a binding, irrevocable election; court further held that, since the petitioner's complaint included claims of discrimination, her request for judicial review of MSPB decision was required to be filed within 30 days of MSPB's decision; because she did not file her appeal with the Federal Circuit until 58 days after MSPB's decision issued, her request was untimely filed and therefore properly dismissed).

2. Petition for Enforcement

Fuerst v. Sec'y of Air Force, 978 F.3d 369 (6th Cir. 2020) (even though the employee petitioned the MSPB to enforce an order issued in a mixed case, the petition for enforcement was not a mixed case; since it wasn't an appeal of an agency action and instead a petition for enforcement it could not be a mixed case within the District Court's jurisdiction; an employee of the Air Force appealed her removal to the Merit Systems Protection Board; she also asserted that her removal was motivated by disability discrimination and that she should have been placed on the priority reemployment list; the MSPB disagreed that the removal was improper or motivated by discrimination but determined that the agency should have been put

on the reemployment list; the employee later returned to the MSPB and sought to enforce its order; the MSPB ruled that the agency complied by offering her two jobs; the employee then appealed to a federal district court; the agency sought to dismiss for lack of jurisdiction; the District Court dismissed the claim; the 6th U.S. Circuit Court of Appeals affirmed the dismissal; the court explained that the employee's first case before the MSPB qualified as a mixed case; however, the petition for enforcement was not a mixed case; since it wasn't an appeal of an agency action and instead a petition for enforcement it could not be a mixed case within the District Court's jurisdiction; this was true even though the employee petitioned the MSPB to enforce an order issued in a mixed case).

N. NATIONAL GUARD TECHNICIANS—MSPB JURISDICTION

Dyer v. Dept. of Air Force, 971 F.3d 1377 (Fed. Cir. 2020) (in reversing the AJ, the Federal Circuit determined that the Board lacks jurisdiction over the petitioner's appeal of his termination from his dual-status technician position, as a result of his separation from the National Guard; in 1990, while the petitioner was enlisted in the West Virginia National Guard (WVNG), the serving adjunct general of the WVNG appointed him to a dual-status military technician position with the Department of the Air Force; as a dual-status technician, the petitioner's position was part civilian, as a federal employee of the U.S. Air Force, and part military, as a member of the state national guard; under 32 USC 709(b), (f)(1)(A), dual-status technicians must maintain military membership with the National Guard, and the adjunct general must terminate from dual-status employment any technician who has been separated from the National Guard; effective June 30, 2018, the serving adjunct general separated the petitioner from the WVNG and terminated him from his dual-status technician position for failure to fulfill the section 709(b) requirement of National Guard membership; the petitioner filed an initial appeal challenging his termination; in response, the agency argued that the Board lacked jurisdiction over the appeal; the administrative judge agreed that the Board had no authority to consider the WVNG's decision to separate the petitioner, but determined that the National Defense Authorization Act of 2017 (2017 NDAA) gave the Board jurisdiction over the termination action; the administrative judge adjudicated the appeal on the merits and affirmed the petitioner's termination; on review at the Federal Circuit, the agency reargued that the Board lacks jurisdiction over the appeal and the court agreed; the court discussed the changes made to the National Guard Technicians Act of 1968, as codified in relevant part at 32 USC 709, and Title 5 by the 2017 NDAA; the court recognized that the 2017 NDAA provided that dual-status technicians are employees under 5 USC 7511, allowing them adverse action appeal rights to the Board, except as limited by section 709(f); pursuant to section 709(f)(4), such appeal rights do not apply, in relevant part, when the appeal "concerns fitness for duty in the reserve components"; in such a case, the appeal rights are limited to those available before the state adjutant general; the court observed that, despite the changes, section 709 retained the above-mentioned provisions requiring National Guard membership for a dual-status technician and the technician's termination upon his separation from the National Guard; the court found that it was clear from the statute that the petitioner's "membership in the National Guard is a fundamental military-specific requirement"; thus, the petitioner's termination from dual-status employment as a result of his separation from the National Guard concerned his "fitness for duty in the reserve components"; the court found that the administrative judge erred in relying on cases when an adverse action is taken for failure to maintain a security clearance to find jurisdiction to review the termination at issue here; the court stated that security clearance cases were inapposite because the petitioner's termination was not "for cause," but rather compelled by statute; the court therefore vacated the Board's decision and remanded with instructions to dismiss the appeal for lack of jurisdiction).

O. NEGLIGENCE

1. Penalty

Messam v. NARA, No. 2019-2417, 120 LRP 30644 (Fed. Cir. 2020 NP) (the petitioner's errors in tracking interagency agreements established that she was negligent and removal was an appropriate penalty; the petitioner, a financial management analyst in the Office of the Chief Financial Officer, was responsible for tracking interagency agreements; when she received an IAA or a modification of a preexisting IAA, she was responsible for updating her personal financial tracking report as well as NARA's report; the petitioner would then send the updated NARA report to the Bureau of Fiscal Services, NARA's financial-management shared-services provider; BFS would then enter the information into a financial system; to ensure the accuracy of the information entered, petitioner also was responsible for performing monthly reconciliations, during which she would compare information that was entered into the financial system to what she entered into her personal tracking sheet; if she discovered any differences, she was responsible for flagging and reconciling them; the petitioner was removed for negligence based on two specifications concerning her twice exceeding the Internal Revenue Service's IAA budget authority and a third specification pertaining to the petitioner's use of an incorrect methodology to reach funding levels; the administrative judge upheld the removal; the petitioner admitted that on two occasions she submitted reports that resulted in an overstatement of budgetary authority as NARA explained in its removal; she also acknowledged using flawed methodology when determining the amounts to include on her report; the AJ explained that in both instances the petitioner did not identify or correct the overstatements until someone else discovered her error; based on these findings, the AJ found that the petitioner failed to exercise the degree of care of a financial analyst and was therefore negligent; the Federal Circuit affirmed, finding no error in the AJ's conclusion; given the petitioner's admitted conduct, the court could not say that the penalty of removal exceeded the range of permissible punishment or was so harsh and unconscionably disproportionate to the offense that it amounted to an abuse of discretion).

2. Performance-Related Actions

Braun v. DHHS, 983 F.3d 1295 (Fed. Cir. 2020) (by a 2-1 decision, the court affirmed the petitioner's removal and held that the agency was permitted to remove him without first de-tenuring him, rejecting the employee's harmful procedural error and due process claims; petitioner had worked at NIH for more than 30 years and had obtained tenure in 2003; in 2015, the petitioner notified his director that he had deviated from the approved protocol for screening human subjects of a study; the agency commissioned an audit of the petitioner's records, which found among other things that complete records existed for less than 9% of participants in the petitioner's study, which had been ongoing for 6 years; the agency suspended the study pending appropriate remediation; it also proposed the petitioner's removal for negligence in the performance of his duties; the petitioner argued that under its own policy the agency could not remove him on performance grounds without first de-tenuring him; the agency nevertheless removed the petitioner, who filed a Board appeal; the administrative judge found that the agency removed the petitioner "for cause" and therefore it was not required to de-tenure him before taking the removal action; the administrative judge also rejected the petitioner's claims of harmful procedural error, age discrimination, and reprisal for prior equal employment opportunity activity; on appeal, the circuit, the majority held that the agency was authorized under its policy to remove the petitioner for cause without first de-tenuring him; the petitioner had argued that agency policy provided for the removal of tenured scientists for unacceptable performance only after de-tenuring, and thus the

agency could only remove him based on his performance if it first de-tenured him; the majority rejected that argument, holding that a separate provision of the agency policy, which authorized removals "for cause" without de-tenuring, could be applied to cases of scientific misconduct; the majority analogized the two agency policy provisions to Chapter 43 and Chapter 75 of Title 5 and noted that although Chapter 43 deals specifically with actions based on unacceptable performance, an agency may nevertheless take a performance-based action under Chapter 75; the majority found that the specific allegations against the petitioner here, which involved a failure to comply with scientific protocols over a long period of time, fell within the scope of the "for cause" provision; the majority also rejected the petitioner's argument that the agency denied him due process in its penalty determination; specifically, the petitioner argued that the agency considered the recommended penalty in its Table of Penalties for "violation[s] of recognized professional or agency standards of medical ethics or patient care," which was not the specific charge set forth in his notice of proposed removal; additionally, he asserted that the agency violated his due process rights by using the term "misconduct" in its removal decision, while that term did not appear in the notice of proposed removal; the majority agreed with the Board that the notice of proposed removal provided the petitioner with sufficient information to prepare an informed reply, thereby satisfying the requirements of due process; the majority also rejected the petitioner's argument that the agency committed harmful procedural error by misrepresenting the timing of his removal to its Institutional Review Board; the majority agreed with the Board that the petitioner failed to show that any error by the agency was harmful; finally, the majority declined to consider the petitioner's argument regarding alleged disparate treatment because he failed to raise it in his opening brief; Judge Newman dissented, asserting that the majority had erroneously conflated negligence in the performance of one's duties with misconduct, which in her view had the effect of rendering virtually meaningless the tenure protections for NIH scientists).

P. OFF DUTY—DISPARAGING REMARKS OF RACIAL NATURE

Jenkins v. Dept. of Transp., 824 Fed. Appx. 1028 (Fed. Cir. 2020 NP) (the court affirmed the administrative judge's decision sustaining the petitioner's removal for inappropriate conduct, making disparaging remarks racial in nature, and lack of candor; the court rejected the petitioner's arguments as to nexus, the lack of candor charge, and penalty; concerning nexus and a first amendment-related contention, the circuit wrote: "'As long as the agency can prove that the removal of [the employee] promoted the efficiency of the service, however, nothing prevents the agency from relying upon off-duty behavior.'…Here, the misconduct at issue consists of Jenkins' prolonged history of repeatedly making disparaging and racial comments about FAA leadership to other FAA employees, including one of her subordinates. Substantial evidence supports the Board's finding that such misconduct was related to Jenkins's job responsibilities and was detrimental to the Agency's performance. First, Jenkins's misconduct negatively affected the job performances and work environments of Bartley and Strickland, who were the recipients of the offending messages. For example, in a statement provided to Agent Busser, Bartley described the toxic environment and the effects of Jenkins's behavior on Bartley's health and job performance: I have put up with [Jenkins's] abusive behavior for many months now and the only reason I filed a complaint with the Accountability Board on July 24, 2017, was because [Jenkins] has created such a hostile work environment it has greatly affected my health. AHR has now become like a gossip show instead of a workplace of professionals.…('[Jenkins] is the main pivot point for the toxic environment I, and others, are subjected to.');…('[Jenkins] also created the hostile work environment that has now affected my health so much I am faced with quitting the FAA if I cannot transfer to another position in the agency.');…('Working in that environment has changed me [sic] my health, I can't sleep…my health has been so affected by what I've endure[d] these past few months.'). Additionally, according to Agent Busser's Record of Interview with Strickland, she 'felt like quitting her AHR detail because of all the stress.…It was the stress of all the drama and negativity caused by, and perpetuated by, [Jenkins].'…Strickland also noted that '[Jenkins's] behavior created so much tension and mistrust in AHR that many employees want to transfer out of AHR.'…In addition to directly affecting Bartley and Strickland, substantial evidence supports the Board's finding that Jenkins's messages undermined the authority and credibility of senior officials at the FAA, a point that was emphasized in both the Notice of Proposed Removal and the Decision on Proposed Removal.…This court has cited with approval the 'principle of Board law holding that insolent disrespect toward supervisors seriously interferes with an agency's fulfillment of its mission.'…Here, the evidence, including statements from Bartley and Strickland, confirms that Jenkins's misconduct had the effect of undermining senior officials in a way that interfered with the Agency's ability to function.…(Bartley stating that Jenkins 'really had me believing a lot of things about people in HR/Leadership');…(Strickland's Record of Interview noting that Jenkins 'many times disparaged AHR employees by calling them backstabbers, dumb and that they did not know how to do their jobs, including AHR-1 and AHR-2'). Moreover, substantial evidence supports the Board's finding that Jenkins's pattern of misconduct created serious questions about the quality of her judgment.…Once the messages were revealed, the Agency lost confidence and trust in Jenkins and her ability to perform her job in a senior leadership role.…This court has recognized that loss of trust in an employee's judgment can be a sufficient nexus to support disciplinary action for misconduct.…These connections to Jenkins's job individually and collectively demonstrate that Jenkins's comments directly impacted the work environment at the FAA's Office of Human Resources Management. Thus, substantial evidence supports the Board's finding that the misconduct had a nexus to the Agency's ability to perform its functions. In challenging the Board's findings, Jenkins argues that her text messages did not affect the Agency's functions because they have nothing to do with safe air travel. But such an argument, if extended to its logical conclusion, would likely insulate most government employee misconduct from penalty. The law requiring a nexus to the Agency's 'ability to perform its functions' should not be read so narrowly. Jenkins's misconduct directly affected the environment in which she worked—namely, the FAA's Office of Human Resources Management—and thus adversely affected the Agency's ability to function. Jenkins also argues that there is no nexus because her comments 'were intended to be and were private using personal cell phones and no government resources.'…Jenkins contends that 'private off-duty speech is not intended to be the government's business' and 'searching private speech for statements potentially subject to discipline is beyond the government's reach.' But this is not a case in which the Agency violated Jenkins's right to privacy or free speech by illegally searching Jenkins's private communications for disciplinable conduct. The offending text messages were provided to the Agency by its employees, Bartley and Strickland, in connection with the Agency's investigation into a complaint about a hostile work environment. Once Jenkins's misconduct and its effect on the work environment became known to the Agency, there was no law, rule, or regulation that prevented the Agency from addressing the misconduct merely because Jenkins used a personal phone to send messages that she 'intended' to be private. Additionally, Jenkins argues that a government employee can only be disciplined for speech if it is speech in public, in the workplace, or on social media.…Jenkins attempts to support that argument by contrasting her allegedly 'private' speech with instances in which federal employees have been disciplined for what she argues was non-private speech. But the comparison is inapposite. The fact that other federal employees have been disciplined for other misconduct does not immunize Jenkins's behavior from punishment in this case. Overall, Jenkins's arguments focus entirely on the 'where,' 'when,' and 'how' of her misconduct—i.e., that it was done outside the workplace, while she was off-duty, using her personal phone—while ignoring the substance of what she actually did. The Board, by contrast, properly considered those circumstantial facts in the context of the actual misconduct, namely, that Jenkins repeatedly sent disparaging and racial comments to a subordinate and other

employee about senior officials at the FAA. Substantial evidence supports the Board's finding that such prolonged and persistent misconduct—whether achieved through text messages, in person, or by carrier pigeon—has a nexus to the work of the Agency.").

Q. PENALTY

1. Board Mitigation Affirmed Charge

Lowe v. Dept. of Navy, No. 2020-1564, 121 LRP 1283 (Fed. Cir. 2021 NP) (Federal Circuit affirmed the MSPB's decision mitigating the petitioner's removal to a reduction in grade to a nonsupervisory GS-12 position and rejecting the petitioner's claim that the MSPB violated his due process rights by relying on a new ground outside the scope of the conduct described in the proposal notice (i.e., exact words used need not be proven); the Department of the Navy removed the petitioner from his regional dispatch center manager position based on two charges: 1) "Careless or Negligent Performance of Duties"; and 2) "Conduct Unbecoming"; the MSPB mitigated the removal to a reduction in grade to a nonsupervisory GS-12 position; the Board found that the Navy had not proved the first charge, but that it had proved the second charge; the Federal Circuit affirmed the MSPB's decision, concluding that the rule that the Board can affirm a disciplinary action based only on the charges actually noticed and relied on by the agency was not violated; the Navy alleged that the petitioner engaged in conduct unbecoming when, in his conversation with a female subordinate, he referred to "feeding, financing or fornicating with me"; the petitioner's sworn statement given during the investigation included his response to a question relating to his conversation with the subordinate: "Have you ever made the following statement: 'If they are not feeding, financing or fornicating with me, then you should not worry about anyone and that I am not looking at firing you'"? The petitioner answered: "I was talking with [the subordinate], I think, and I believe that [another subordinate] was in there as well and we were all talking about issues that were going on with [the subordinate]. I said to her that I live by the three f rules that 'if they are not feeding, financing, or I am not going to say the last "f" word, then you don't have to worry about them' or something close to that. I never said the last 'f' word nor made a reference about firing her."; the Federal Circuit saw no reason to disturb the MSPB's conclusion that, even if the petitioner did not use the word "fornicating," the meaning of what he said was clear; the court found that the petitioner's claim of a due process violation was based upon the argument that, in order to prove the conduct unbecoming charge, the Navy had to demonstrate that the petitioner used the exact words "feeding, financing or fornicating" when speaking to the subordinate; that, the Federal Circuit found, was not the law).

2. Impact of Excessive Absenses

Heslop v. IRS, No. 2020-1314, 120 LRP 38499 (Fed. Cir. 2020 NP) (agency's charges of excessive absence and AWOL were supported by a preponderance of the evidence and the employee's extensive absences undermined agency functioning and forced other agency employees to take on significant additional responsibilities; between March 2015 and January 2017, the petitioner, a revenue agent, was absent for approximately 2,445 hours for a chronic migraine condition; this represented nearly 85 percent of her regular days of work; by early 2016, she had used all the leave available to her, and she began to request leave without pay; the IRS determined the petitioner was absent without leave for many of the absences; the agency warned the petitioner that her absences were excessive and instructed her to return to work; she later was removed for AWOL and excessive absence; the removal notice stated that her continuous prolonged and extended unscheduled absences had put a severe undue burden on the IRS and undermined the public's confidence in the agency's ability to deliver quality service; an arbitrator sustained the removal, concluding that the agency's charges of excessive absence and AWOL were supported by a preponderance of the evidence; the arbitrator found that the petitioner's inability to perform her duties greatly impacted her group's morale and placed an undue burden on other members of the group to perform audit examinations and other duties that would have been assigned to and performed by her; the Federal Circuit affirmed the arbitrator's decision; substantial evidence supported the arbitrator's determination that the agency needed to fill the petitioner's position; the court rejected the petitioner's contention that the arbitrator erred in failing to properly consider post-removal evidence of her improved medical condition; the court noted that the arbitrator expressly considered whether the petitioner's medical condition had improved and whether she would be able to resume her job duties without extensive absences in the future; the court also found that the arbitrator had ample support for his conclusion that removal was appropriate based on the seriousness of the petitioner's excessive absences and the lack of any effective rehabilitation measures to ensure her regular attendance).

3. Mitigating Factors—Whistleblower Reprisal

Higgins v. VA, 955 F.3d 1347 (Fed. Cir. 2020) (the Board properly considered the employee's PTSD as a mitigating factor and found the penalty reasonable; as to a whistleblower reprisal defense, and the petitioner failed to prove a strong institutional motive to retaliate; Mr. Higgins was employed at the Memphis Veterans Administration Medical Center (VAMC); throughout his employment, he reported unlawful activity at the VAMC, and he had a reputation for being a whistleblower; he also had a history of conflict with his supervisors and coworkers; in 2016, Mr. Higgins was diagnosed with chronic post-traumatic stress disorder (PTSD); because Mr. Higgins continued to experience significant anxiety at work and ongoing conflict, his psychologist concluded that he "cannot work, even with restrictions, and this [status] is permanent"; in March 2017, the VAMC suspended Mr. Higgins for using disrespectful language toward a supervisor during a December 2016 interaction with his immediate supervisor and a new second-level supervisor; in June 2017, the VAMC removed Mr. Higgins based on charges of disruptive behavior and use of profane language; these charges stemmed from 3 incidents: (1) in February 2017, Mr. Higgins was observed to have said to the Interim Associate Medical Director "remember I know where you live" or words to that effect; (2) during a March 2017 meeting in the equal employment opportunity office, Mr. Higgins appeared very upset and made threatening and profane statements that caused a witness to contact the VA police; (3) in April 2017, Mr. Higgins loudly confronted another VAMC employee who was escorting a veteran's family to the morgue after the employee greeted Mr. Higgins by his first name; Mr. Higgins appealed the suspension and removal decisions to the Board, the appeals were joined, and a hearing was held; the petitioner appealed the suspension and removal actions to the MSPB, which consolidated the appeals, denied corrective action with respect to the suspension, and affirmed the removal; the administrative judge determined that the agency's suspension of the petitioner was reasonable given that he was previously disciplined for similar misconduct and did not meaningfully deny using the language charged in the context of meeting his new second-level supervisor; the AJ also concluded that the petitioner failed to establish a whistleblower defense because he did not show an institutional motive to retaliate; regarding the removal, the AJ concluded that the agency proved its disruptive behavior and use of profane language charges and considered and balanced the relevant *Douglas* factors, including mitigating factors such as the petitioner's PTSD; the AJ found that the mitigating factors could not overcome the extreme seriousness of the charges; the AJ further determined that the petitioner established a *prima facie* whistleblower retaliation defense; however, the AJ found that the agency's evidence was strong, and the petitioner