INTRODUCTION
CHARGES, PENALTIES, AND AFFIRMATIVE DEFENSES

FINALLY! Since January 6, 2017, the MSPB has been without a quorum for deciding cases on review (i.e., PFR). Accordingly, there have been no full Board decisions since that time; AJs could issue initial decisions and, to the extent that neither party filed a petition for review to the MSPB, the AJ's decision would become the final decision of the Board and could then be appealed to an appropriate court or tribunal (e.g., the Federal Circuit). *See* 5 USC 7703. However, on March 1, 2022, Vice Chair Raymond Limon and Member Tristan Leavitt were confirmed by Congress and sworn into their duties on March 4, 2022. (The President's nomination of Cathy Harris as Chair of the MSPB is pending before the Senate.) The caseload ahead of these new appointees is staggering; 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). But at least, this is progress and we should begin looking forward to MSPB Board decisions in the near future.

Yes, we are still in pandemic mode. The Administration's attempt through EO 14043 to provide a vaccine mandate/option for Executive Branch Federal employees was on hold as a result of a nationwide injunction issued by a Texas Federal District Court. That hold has been lifted. On April 7, 2022, in *Feds for Medical Freedom v. Biden*, No. 22-400-43, the Fifth Circuit reversed the District Court. At the same time, federal government guidance that all agency enforcement actions shall be placed in abeyance is still in effect as is the directive that agencies stop processing requests for medical or religious exceptions to the vaccine mandate as well as that agencies should not "take any other steps related to adjudication of exception requests." Safer Government Workforce Task Force (Jan. 24, 2022). Stay tuned! Also, there is uncertainty about the vaccine mandate for federal contractors (see EO 14042), which is on hold due to a district court nationwide injunction. The federal government has appealed and arguments were heard before the Eleventh Circuit on April 8, 2022, and a decision is expected within weeks.

And, just as with previous years, in the absence of full Board decisions, we review federal and other circuit decisions as well as numerous regional and field office decisions.

I. NEW COURT DECISIONS

The most important (surprising?) appeals court case concerned Chapter 43/performance actions. That case—*Santos*—added a new element, at least according to a panel of the Federal Circuit. As *Santos* provided, an agency must prove that an employee's performance was unacceptable before placement on a PIP. This is new and a big deal. Indeed, it may be the death knell for Chapter 43 actions in lieu of the more straightforward option under Chapter 75. Other cases reflect the continuing use of the general charge of conduct unbecoming/unacceptable conduct, a focus on disparate treatment in penalty, a focus, as well, on the *Carr* factor defense in whistleblower reprisal cases, and continued clarification of the penalty analysis in Section 714 cases. Here they are in alphabetical order.

IRA—Other Circuit Jurisdiction

Abrahamsen v. VA, No. 20-14771, 121 LRP 38544 (11th Cir. 2021 NP): The Eleventh Circuit affirmed the MSPB's denial of the employee's individual right of action appeal. The employee failed to show that his disclosures were protected under the Whistleblower Protection Act. The employee, an orthopedic surgeon, filed a complaint with the Office of Special Counsel alleging that his supervisor retaliated against him for making six protected disclosures over a four-year period. He alleged that his supervisor extended his focused professional practice evaluation period, issued written counseling statements, and changed his job duties and working conditions by precluding him from performing certain surgeries. The OSC terminated its investigation into the petitioner's complaint and provided him with appeal rights to the MSPB. The employee then filed an IRA appeal, citing the same six disclosures. The AJ denied corrective action, concluding that the employee failed to establish a *prima facie* case for whistleblower reprisal because none of his disclosures were protected under the WPA. The AJ found that the employee's disclosures constituted "mere observations, questions, arguments, or disagreements with management policies, positions, or practices, without an accompanying showing that such matters constitute a report of wrongdoing of the type specified by the statute." The AJ further determined that the employee had not established that the disclosures were protected by disclosing a substantial and specific danger to public health and safety or by showing an abuse of authority. In his petition for review to the 11th Circuit, the employee argued that the MSPB erred by: 1) ignoring his disclosures of abuse of authority and substantial and specific danger related to bullying in the healthcare setting; and 2) applying the wrong legal standard to his disclosures of substantial and specific danger to public health and safety. The 11th Circuit affirmed the MSPB's decision. Regarding the employee's first argument, the court determined that although the AJ did not specifically identify each incident of bullying, his overall findings regarding the protected nature of the disclosure covered the incidents. As to the second argument, the court found the AJ's decision to decline to find the petitioner made a protected disclosure of a substantial and specific danger to public health or safety was supported by substantial evidence. There was no dispute that using general anesthesia for the procedures at issue met the accepted standard of care in the orthopedic community.

USERRA—Differential Pay

Adams v. DHS, 3 F.4th 1375 (Fed. Cir. 2021): The Federal Circuit affirmed the MSPB's denial of the petitioner's request for differential pay for three separate periods of military service during which he performed duties in the Arizona Air National Guard. For the petitioner to be entitled to differential pay, he must have served pursuant to a call to active duty that meets the statutory definition of contingency. The appellant was both an employee of the agency and a member of the Arizona Air National Guard. Between April and September 2018, there were three periods during which the appellant performed military service. The appellant requested differential pay for those periods, but the agency determined that his military service did not qualify under the applicable statutes. The appellant challenged that determination in a Board appeal, alleging that the denial of differential pay violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). After developing the record, the administrative judge issued an initial decision, denying the appellant's request for corrective action. He did so based on a determination that the appellant failed to prove that the agency's differential pay decision was based on an improper motivation. Holding: The administrative judge applied an incorrect standard. Nevertheless, the appellant was not entitled to corrective action under USERRA. The court first acknowledged that, when an employee makes a USERRA claim under 38 USC 4311, the burden of proof generally includes proof that their military service was a substantial or motivating

factor in the denial of a benefit of employment. However, the court indicated that an employee need not prove the substantial or motivating factor element where, as here, the benefit of employment at issue is only available to members of the military. Therefore, the appellant was not required to show that his military service was a substantial or motivating factor in the agency's denial of differential pay. Although the appellant was not required to prove the substantial or motivating factor element, he was still required to prove that the agency denied him a benefit of employment. Here, the benefit was differential pay, as provided for in 5 USC 5538(a). That benefit only applies to a call to "active duty" for a "contingency operation," as those terms are defined in the statutory scheme. Here, there appellant had reported for training pursuant to 32 USC 502(a), but that was not "active duty." The appellant had also reported to support military personnel appropriation tours pursuant to 10 USC 12301(d), but those were not "contingency operations." Therefore, the court found that the agency properly denied the appellant's request for differential pay.

Mixed Cases

Ash v. OPM, No. 2021-2194, 122 LRP 5100 (Fed. Cir. 2022): The Federal Circuit lacked jurisdiction over a disability retirement benefits case that alleged discrimination. The court clarified that although mixed cases routinely involve the termination of an employee, mixed cases can also arise from a benefits decision. In sum, the court determined that the OPM decision in this case constitutes a personnel action and that the petitioner had therefore brought a mixed case appeal over which the Federal Circuit lacks jurisdiction. Accordingly, the court transferred the case to the United States District Court for the District of Maryland.

Positive Drug Test—Removal Appropriate

Baker v. Dept. of Navy, No. 2021-1898, 121 LRP 34274 (Fed. Cir. 2021 NP): The Federal Circuit affirmed the Department of the Navy's removal of the employee based on a positive drug test. The medical review officer's conclusions that neither prescription medications nor dietary supplements could cause the levels of amphetamine and methamphetamine documented in the employee's drug test results supported the Navy's decision to remove the employee.

USERRA—Remand

Beck v. Dept. of Navy, 997 F.3d 1171 (Fed. Cir. 021): The Federal Circuit held that the MSPB erred in denying the employee's Uniformed Services and Reemployment Rights Act claim and remanded the case to the Board with instructions to enter corrective action consistent with its opinion. Under USERRA, preselection can buttress an agency's personnel decision to hire a less qualified candidate, but only when the preselection is not tainted by an unlawful discriminatory intent. In sum, the Federal Circuit affirmed in part and reversed in part, holding that the Board erred in finding that the employee's nonselection would have occurred regardless of his prior military service. The court held that the AJ's one-paragraph, *sua sponte* preselection determination, which relied solely on the supervisor's cherry-picked testimony, was not supported by substantial evidence. The exclusion of numerous witnesses by the AJs caused substantial harm and prejudice to the employee's ability to develop a complete case and record on appeal. The record was devoid of the evidentiary threshold necessary to buttress the AJ's determination that the Navy would have hired W__ regardless of the employee's prior military service, as required under the second prong of the USERRA analysis. The court concluded that the Board's preselection and discovery-related determinations were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and unsupported by substantial evidence.

Removal—Leave-Related—Exclusion of Witness Not Error

Bell v. DOD, 842 Fed. Appx. 559 (Fed. Cir. 2021 NP): The Federal Circuit affirmed the employee's removal for unauthorized absence. The MSPB did not abuse its discretion by excluding one of the petitioner's proposed witnesses and limiting the scope of testimony of another. The agency approved the employee for telework four days a week as a medical accommodation. Ten months later, she filed a workers' compensation claim for aggravation of her medical condition and an EEO complaint for disability discrimination and retaliation. She also reported invoicing activities to the Office of Inspector General. The employee subsequently requested full-time telework as a reasonable accommodation. Her new supervisor denied the request and reduced her telework schedule to two days per week. The employee refused to sign the new telework agreement and did not return to work for six months despite repeated requests to report to work, resulting in six months of absence without leave. While she was AWOL, the employee filed a complaint in the U.S. District Court, Eastern District of Virginia, alleging disability discrimination and failure to reasonably accommodate. The district court granted summary judgment for the agency, and the U.S. Court of Appeals, Fourth Circuit affirmed. The agency later removed the employee for AWOL. She had filed a complaint with Congress requesting a stay of her proposed removal, and then a second complaint regarding her removal. In her removal appeal to the MSPB, the petitioner raised affirmative defenses including disability discrimination, failure to accommodate, and whistleblower reprisal based on her: 1) EEO complaint; 2) OWCP claim; 3) reports to the IG; and 4) complaints to Congress. The Board issued a *res judicata* order explaining that the failure to accommodate and disability discrimination claims had been resolved by the Fourth Circuit in a final judgment on the merits. The MSPB affirmed the removal. In her Federal Circuit appeal, the employee asserted she was removed in violation of the Whistleblower Protection Act. She argued that the MSPB erred in its evidentiary rulings regarding the proposed testimony of three witnesses. The Federal Circuit affirmed, concluding the MSPB did not act in an arbitrary manner by preventing the employee's discovery or denying her an opportunity to examine witnesses. The court found the Board did not abuse its discretion by excluding one of the witnesses and limiting the scope of testimony of another. The employee had ample opportunity to seek information from the third witness on his knowledge of the whistleblowing claims, but she chose not to do so during discovery.

Section 714

Brenner v. VA, 990 F.3d 1313 (Fed. Cir. 2021): The Federal Circuit vacated the MSPB's decision affirming the Department of Veterans Affairs' removal of the petitioner under 38 USC 714 for failing to meet performance standards. Subsequent to the MSPB's decision in this case, the Federal Circuit issued *Sayers v. VA*, 954 F.3d 1370 (Fed. Cir. 2020), which mandates that review of the penalty must be included in the Board's review of an adverse action under 38 USC 714 and that 38 USC 714 does not apply to proceedings instituted based on conduct occurring before its enactment. The court reaffirmed its holdings in *Sayers*. Importantly, the court clarified that both the penalty review and retroactivity holdings of *Sayers* extend to performance-based actions under section 714.

Reversal and Remand—Appellant Not Properly Informed of Options

Brock v. MSPB, No. 2021-1000, 121 LRP 41287 (Fed. Cir. 2021) (NP): The Federal Circuit reversed the Merit Systems Protection Board's dismissal of the employee's wrongful removal claim and remanded for consideration of the merits by the MSPB. The MSPB has jurisdiction over the appeal of an employee who first chose to proceed pursuant to the FAA's Guaranteed Fair Treatment process because the employee's choice was not knowing and informed. Further, withdrawal of the choice to proceed under the GFT process to appeal to the MSPB may be allowable under the language of the

applicable statute. The FAA removed the petitioner from his air transportation systems specialist position for insubordination. The removal notice informed the employee that any challenge to his removal could be filed either under the guaranteed fair treatment process, which the manual attached to the notice indicated would be heard by a three-arbitrator panel selected by the parties within 10 days of the appeal, or with the MSPB. The employee initially indicated that he wanted to proceed under the GFT process. However, after the employee was informed that the FAA needed arbitrators to replenish the arbitrator pool and was awaiting resumes, the employee indicated that he elected to file an appeal with the MSPB. An AJ dismissed the appeal for lack of jurisdiction and found that the employee had elected to file a GFT appeal first, and his election was "knowing and informed." The employee appealed to the Federal Circuit. The Federal Circuit reversed the dismissal and remanded for consideration of the merits by the MSPB. The court found that the employee's decision was not knowing and informed because he had not been told that the "GFT appeal option was non-functional" before he initially decided to proceed with that option. The court also noted that after the employee was told about the lack of arbitrators, the employee "promptly withdrew" his request to proceed under the GFT process and timely appealed to the MSPB. Further, the court found that the applicable statute left open the possibility of withdrawing an appeal in one forum and then proceeding in the other forum.

Section 714

Connor v. VA, 8 F.4th 1319 (Fed. Cir. 2021): The Chief of Police Services for the Fayetteville, North Carolina VA Medical Center. was removed him under the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (VA Accountability Act), *codified at* 38 USC 714, based on a charge of failure to provide management oversight, with 27 specifications, of which 24 specifications related to the Chief's alleged failure to provide performance plans and progress reviews to subordinates, two specifications pertained to his alleged failure to provide training and keep training records, and one specification pertained to the alleged improper storage of 4,000 rounds of ammunition. On appeal to the Board, the AJ sustained the charge, but only one of the 27 specifications—the one pertaining to the improper storage of ammunition. Regarding the remaining specifications, he found that the petitioner was not responsible for the missing performance plans and progress reviews, and that he provided training and kept records as required. Nonetheless, the AJ found substantial evidence to support the removal penalty based on the sole sustained specification. On review, the Board determined that the Department of Veterans Affairs and the Merit Systems Protection Board must apply the *Douglas* factors to the selection and review of penalties in actions taken under 38 USC 714. Substantial evidence supported the AJ's finding that the deciding official considered the relevant *Douglas* factors, that the sole sustained specification was serious, and that this specification alone justified removal. Judge Newman wrote separately, concurring in part and dissenting in part.

Last Chance Agreement

Copeland v. Dept. of Army, 847 Fed. Appx. 919 (Fed. Cir. 2021 NP): Mr. Copeland was a sandblaster who was reported for being intoxicated in a work area and cited for Public Intoxication, and the agency proposed his removal based on this incident. To avoid removal, Mr. Copeland entered into a Last Chance Agreement (LCA) in which he agreed to, among other things, "avoid alcohol consumption prior to and during the hours of work," to "never report to work or perform official duties with alcohol and/or an illegal substance in [his] system," and to submit to random alcohol testing. The LCA stated that failure to comply with these requirements constituted a breach of the LCA, any breach could result in his immediate removal, and Mr. Copeland expressly waived all appeal rights. Subsequently, Mr. Copeland submitted to random alcohol breathalyzer tests, the results of which led to him being cited for "Public Intoxication Endangering" and led to his removal based on his breach of the LCA. Mr. Copeland filed a Board appeal, which the administrative judge dismissed for lack of jurisdiction because he did not show that he complied with the LCA. On review, the court addressed and rejected Mr. Copeland's arguments that he complied with the LCA and did not waive his rights. The court affirmed the Board's decision to dismiss the appeal for lack of jurisdiction. Importantly, the court rejected the petitioner's argument that the district court's dismissal of his citation for public intoxication shows he complied with the LCA. The dismissal said nothing that cast doubt on the accuracy of the breathalyzer results. The Federal Circuit also rejected the employee's contention that he was not under the influence of alcohol, which he made with no evidentiary support of any kind.

Section 714—Conduct Unbecoming—Disparate Treatment in Penalty

deLeon v. VA, No. 2020-1199, 121 LRP 31907 (Fed. Cir. 2021 NP): The court affirmed the AJ's initial decision affirming the petitioner's removal under the VA Accountability Act. The petitioner was a police officer at a VA hospital whom the agency removed for conduct unbecoming, based on his physical altercation with a patient. The AJ affirmed the removal. She sustained the charge and found that, due to the Board's lack of mitigation authority, a penalty analysis was unnecessary. In the alternative, she found that the penalty was reasonable, and in particular, that the petitioner's proffered comparator did not engage in similar misconduct. While precedent postdating the initial decision clarified that a penalty analysis is still required under the VA Accountability Act, the court affirmed based on the AJ's alternative finding. There was substantial evidence that the comparator was not similarly situated for purposes of penalty because, unlike the petitioner, the comparator had attempted to deescalate the situation, did not initiate physical contact, and had not previously lost his arrest authority.

Privacy Violation—Covid-19

Edler v. VA, No. 2021-1694, 122 LRP 3979 (Fed. Cir. 2022 NP): The court affirmed the AJ's decision that upheld the petitioner's removal for misconduct under 38 USC 714. The agency removed the petitioner, a supervisory housekeeper, based on two charges: (1) "privacy violation," related to his disclosure of his subordinates' medical information to other employees, and (2) "conduct unbecoming a federal employee," related to comments that he made during a staff meeting regarding potential discipline of a subordinate and suggesting that Somalian refugees were spreading COVID-19 in Michigan. The AJ found that both the charges and the penalty were supported by substantial evidence. The court agreed, finding that the facts underlying the privacy violation charge were essentially undisputed. It was not persuaded by the petitioner's argument that the agency was required to prove his bad intent in connection with the privacy violation, observing that "neither the charge label nor the narrative description required the [agency] to prove that [the petitioner's] disclosure was without reason." There was some dispute of fact regarding the conduct unbecoming charge, but the AJ's findings were supported by demeanor-based credibility determinations, which the court declined to disturb. The court also agreed with the AJ that the penalty of removal was supported by substantial evidence. The record showed that the deciding official considered the pertinent penalty factors and arrived at a reasonable choice of penalty.

Inappropriate Conduct—Comments and Touching—Off Duty—Nexus

Ensley v. Puget Sound Naval Shipyard and Intermediate Maintenance Facility, No. 2021-2082, 121 LRP 39520 (Fed. Cir. 2021 NP): The Federal Circuit affirmed the arbitrator's decision upholding the removal of the employee for inappropriate conduct. The removal of the employee for inappropriate conduct was supported by substantial evidence because not only did numerous witnesses provide corroborating testimony that showed a pattern of inappropriate behavior by the employee, but the employee admitted that he engaged in some of the inappropriate conduct and did not provide

hearing witnesses to refute the charge. In 2020, various Puget Sound Naval Shipyard and intermediate maintenance facility employees told their supervisor that the employee, a PSNS welder, had made inappropriate comments and touched them without their consent. After an investigation, the employee was removed based on an inappropriate conduct charge and six supporting specifications. The employee then invoked arbitration under the collective bargaining agreement. After a hearing, the arbitrator upheld the removal decision finding "extensive" evidence corroborating the employee's inappropriate conduct, which adversely impacted the agency's work environment. The arbitrator also found that removal was a reasonable penalty due to the employee's "egregious, inappropriate, and repetitive" behavior. The Federal Circuit affirmed the decision. The court found that the notice letter was "sufficiently detailed" and specified the elements of the conduct with dates, statements, and actions. Further, the court noted that the employee's detailed response to the allegations showed that he was able to understand the charge and defend himself. Additionally, the court determined that the arbitrator's decision was supported by substantial evidence, which not only included numerous witnesses' corroborating testimony about their experiences that showed a pattern of inappropriate behavior by the employee, but the employee's admission that he engaged in some of the inappropriate conduct. The court also agreed with the arbitrator's determination that the failure of the employee to provide any witnesses at the hearing to refute the charge was "significant." The court found that the evidence supported a nexus between the petitioner's conduct and the agency's performance even if the petitioner's conduct did not occur during work because the employee's behavior affected the ability of his coworkers to efficiently work while at work. Further, the court declined to reverse the arbitrator's decision even though the arbitrator incorrectly cited state law when federal law applied because the citation of state law was "either harmless or extraneous." The court also noted that PSNS was not required to prove that the employee's conduct violated Title VII of the Civil Rights Act because the petitioner was not charged with violating such law.

Due Process Violation Not Proven

Goldenberg v. Fed. Bureau of Prisons, No. 2020-1361, 121 LRP 28235 (Fed. Cir. 2021 NP): The court affirmed an arbitrator's decision, which sustained the employee's removal. The employee argued that the deciding official to her removal committed a due process violation by considering her prior demotion in his penalty determination, without notifying the employee. The court disagreed, finding that the deciding official did not consider the petitioner's demotion as an aggravating factor and his limited consideration of the prior demotion for other reasons did not rise to the level of a due process violation. "We agree with the government that Smith's testimony establishes that he did not rely on Davidson's prior demotion as an aggravating factor in his removal decision, and therefore his reference to the demotion was not a violation of due process.…Read in context, it is evident that Smith [the deciding official] simply acknowledged that he considered demotion as an alternative penalty to removal generally, not Davidson's prior demotion specifically. His reference to 'another' demotion indicates only that he was aware that Davidson had been demoted previously, not that he relied on the prior demotion as an aggravating factor in the current discipline."

Section 714—Remand to Determine Penalty

Goodson v. VA, 835 Fed. Appx. 605 (Fed. Cir. 2021 NP): The Federal Circuit vacated the MSPB's decision which affirmed the petitioner's removal under 38 USC 714. The court remanded the case to the MSPB to consider whether the removal penalty is supported by substantial evidence. 38 USC 714 requires the MSPB to review for substantial evidence the entirety of the VA's removal decision—including the penalty—rather than merely confirming that the record contains substantial evidence that the alleged conduct leading to the adverse action actually occurred.

Conflict With *Sayers*—Remand

Harrington v. VA, 981 F.3d 1356 (Fed. Cir. 2020): The Federal Circuit vacated a police officer's removal and remanded the case to the MSPB for further proceedings consistent with *Sayers*. By failing to consider the reasonableness of the removal penalty, the Federal Circuit determined, the MSPB did not conduct a key portion of the analysis under the proper interpretation of Section 714. The court further held that the Section 714 action brought against the employee was improper because the only remaining charges against him depended on conduct predating enactment of Section 714, which *Sayers* concluded is impermissible. On remand, the AJ reversed the removal and remanded the matter to the VA. *Harrington v. VA*, AT-0714-18-0615-M-1, 121 LRP 12510 (Atlanta Reg'l Office 3/31/21). The AJ found that the agency's decision to remove the employee under the provisions of Section 714 was not in accordance with law because the sustained misconduct occurred prior to the enactment the statute. Although the court's decision indicated it was remanding for the Board to conduct the penalty analysis required when reviewing an agency decision under Section 714, the AJ determined it was impractical to do so in this particular case. This was because the decision reversed the agency's decision to remove the employee in its entirety, including the agency's decision regarding the severity of the penalty. The AJ pointed out that once the matter is remanded to the agency, it could presumably choose to re-propose some disciplinary action based on at least some of the same allegations of misconduct underlying the agency's original decision. If it does so, the AJ explained, the agency must conduct the penalty analysis required by whatever process it might use to take the action.

Unacceptable Conduct—Drug Related—Penalty Analysis—Disparate Treatment Not Proven

Holmes v. USPS, 987 F.3d 1042 (Fed. Cir. 2021): A majority of the Federal Circuit affirmed the employee's removal for unacceptable conduct/purchase and/or possession of an illegal drug while on the clock and in uniform. Judge Newman dissented, on the basis that there was evidence of disparate treatment. The agency removed the employee, along with seven other carriers, for purchasing marijuana from a colleague on agency premises, while in a duty status. During the investigation, the employee invoked his Fifth Amendment right against self-incrimination and declined to admit to the charge. Each of the seven other carriers admitted to their misconduct. On appeal to the MSPB, the AJ affirmed the employee's removal. He found that the agency proved its charge and that the removal penalty was reasonable. The employee sought review before the court. Meanwhile, five of the seven other carriers whom the agency removed for the same misconduct filed grievances that went to arbitration. The arbitrator in each case mitigated the removal to a lesser penalty. In sustaining the charge, the court acknowledged 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, and taking from the cup holder what appeared to be an item in a small plastic bag. Circumstantial evidence came from two agency witnesses who testified that: (1) the petitioner had no official reason to be in his colleague's vehicle at that time, and (2) 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. Regardless of whether this evidence would have been sufficient to prove a criminal charge beyond a reasonable doubt, substantial evidence showed that it was sufficient to satisfy the lesser preponderant evidence standard applicable in a Board proceeding, in the court's view. In affirming the penalty, the court rejected the employee'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. It found that the employee failed to raise this argument before the AJ, even though all five arbitration decisions occurred before the initial decision was issued. The employee was precluded from raising this argument for the first time on judicial review. Even if he had timely raised the issue, the agency treated all of the proffered comparators similarly because it removed each of them. Just because this penalty was later mitigated by arbitrators for five employees who pursued

grievance arbitration, that does not reflect any disparate treatment by the agency itself. Further, 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. Even if the Board was required to consider the mitigated penalties in the other cases, there was a rationale for treating this employee differently. Specifically, the other five employees admitted to their misconduct, but the employee in this case failed to take responsibility for his actions. Regarding the other penalty factors, substantial evidence supported the AJ's conclusion that the agency proved by a preponderance of the evidence that it properly weighed the factors set forth in *Douglas v. VA*, 5 MSPR 280 (1981), in determining the appropriate penalty and that removal was within the tolerable limits of reasonableness. Judge Newman issued a dissenting opinion. She would have mitigated the penalty in light of the fact that five other carriers who committed substantially the same conduct received lesser penalties than removal.

Whistleblower Reprisal—No Board Jurisdiction—Personnel Actions Taken Against Related to Access to Classified Information and Spillage

Knapp v. MSPB, No. 2020-2122, 121 LRP 38188 (Fed. Cir. 2021 NP): The Federal Circuit affirmed the MSPB's dismissal of the employee's individual right of action appeal for lack of jurisdiction. The MSPB is precluded from reviewing allegations of reprisal when the claims relate to agency determinations regarding security clearances. The employee, a civilian sexual harassment/assault response and prevention victim advocate for the U.S. Army Special Operations Command, wrote to a senator regarding retaliation against soldiers who reported sexual harassment and assault during her time as a victim advocate. About five months later, she emailed classified information over an unclassified network, which is referred to as "spillage." She subsequently disclosed additional violations of Department of Defense reporting procedures during a meeting with USASOC officials. That same day, USASOC officials ordered the removal of the employee's computer, quarantined the device, and erased the hard drive. About a month after that, the employee forwarded the email containing classified information to the EEOC. Shortly thereafter, her security clearance was suspended, and she was placed on administrative leave because of the additional spillage. The Army subsequently proposed that the employee be indefinitely suspended from duty and pay status based on the two spillage incidents. The employee filed a complaint with the Office of Special Counsel alleging she made several protected whistleblowing disclosures during her employment as a victim advocate. The OSC terminated its investigation of her complaint. The employee then filed an IRA appeal with the MSPB alleging that the Army retaliated against her for engaging in protected whistleblowing activity based on the following actions: 1) mandatory additional security training to regain access to the agency network and her computer; 2) an administrative investigation into the spillage; 3) administrative leave; 4) clearance suspension; 5) an "unsatisfactory" performance rating (that was later changed to a "fully successful" rating after protest); 6) proposed indefinite suspension; and 7) requiring her to perform filing in the office while her computer was confiscated. The administrative judge dismissed the appeal for lack of jurisdiction because the employee's allegations arose from the agency's determination that she mishandled classified information or the agency's actions taken in response to that determination. The MSPB was precluded from reviewing allegations of reprisal when such claims relate to agency determinations regarding security clearances. The Federal Circuit affirmed the MSPB's decision. All of the actions taken by the Army were based either on its determination that the employee committed security violations or on the Army's decision to suspend her clearance because of these violations. Because the personnel actions taken against her all related to her access to classified information and spillage, the Board was precluded from reviewing her allegations of reprisal.

Conduct Unbecoming—Inappropriate Comments—Mitigation Upheld

Lowe v. Dept. of Navy, 842 Fed. Appx. 584 (Fed. Cir. 2021 NP): The Federal Circuit affirmed the MSPB's decision mitigating the employee's removal for inappropriate comments to a subordinate to a reduction in grade to a nonsupervisory GS-12 position. Nonetheless, the Federal Circuit rejected the employee'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. The Department of the Navy removed the employee 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 proved the conduct unbecoming charge, but not the first 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 employee engaged in conduct unbecoming when, in his conversation with a female subordinate, he referred to "feeding, financing or fornicating with me." The employee'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 employee did not use the word "fornicating," the meaning of what he said was clear. Thus, the court rejected the employee'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 employee used the exact words "feeding, financing or fornicating" when speaking to the subordinate.

Whistleblower Reprisal—Appeal to Other Circuits—*Carr* Determination

Marcato v. USAID, 11 F.4th 781 (Fed. Cir. 2021): Exercising its jurisdiction under 5 USC 7703(b)(1)(B) to review challenges regarding the Board's disposition of whistleblower retaliation claims, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reviewed the employee's removal for misconduct. The agency removed the employee from her position as a management analyst in the Office of the Inspector General based on charges of disclosing sensitive information about an ongoing investigation, violating the agency's security policy and communications protocol (i.e., recording a meeting with her supervisors to discuss the new protocol on her cell phone, despite a USAID security policy barring the unauthorized use, in restricted workspace, of any device that can transmit audio or video), and making false statements. On appeal to the Board, the petitioner alleged whistleblower retaliation. The AJ sustained the removal, finding in relevant part that although the petitioner had established a *prima facie* case of retaliation, the agency had shown by clear and convincing evidence that it would have taken the same action in the absence of the petitioner's protected disclosures. The petitioner sought review of the Board's disposition of her retaliation claim before the D.C. Circuit. The circuit found that the agency met its burden to prove by clear and convincing evidence that it would have removed the petitioner in the absence of her protected disclosures. In determining whether the agency met its burden by clear and convincing evidence, the court considered the factors set forth in *Carr v. SSA*, 185 F.3d 1318 (Fed. Cir. 1999). As to the first *Carr* factor, "the strength of the agency's evidence in support of its personnel action," the court agreed with the administrative judge that the agency presented strong evidence that the petitioner engaged in the charged misconduct. As to the second *Carr* factor, "the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision," the court agreed with the AJ that there was not evidence of a substantial retaliatory motive on the part of the relevant agency officials. As to the third *Carr* factor, whether the agency has taken "similar actions against employees who are not whistleblowers but who are otherwise similarly situated," the court agreed with the AJ that the evidence on that question weighed in favor of the agency. Weighing the *Carr* factors together, the

court agreed with the AJ's determination that the agency proved by clear and convincing evidence that it would have removed the petitioner in the absence of her protected disclosures.

Unbecoming Conduct—Unauthorized Use of a Government Database and Other

Martin v. DHS, 855 Fed. Appx. 691 (Fed. Cir. 2021 NP): The Federal Circuit affirmed an arbitrator's decision upholding the employee's removal based on charges of conduct unbecoming a law enforcement officer, unauthorized use of a government database, unauthorized use of an agency resource, and lack of candor. The employee's off-duty run-in with a driver and subsequent unauthorized access of agency databases to track down the driver warranted removal. The removal of the employee, a deportation officer with Immigration and Customs Enforcement, stemmed from events that occurred when he was off duty and driving his personal vehicle. A car, driven by D__ V__, merged into the petitioner's lane very closely in front of him. V__ braked, and the employee braked behind V__'s car. V__ then turned right into an apartment complex and stopped his car in the driveway. The employee stopped behind V__'s car. The employee's and V__'s accounts of the ensuing confrontation differed. The arbitrator credited V__'s recollection. According to V__, the employee approached him. While V__ was opening the door to his car, the employee allegedly grabbed his arm and pushed him back into the vehicle. V__ claimed he then tried to get away from the employee. The employee returned to his vehicle and called 911. He then called his supervisor and an ICE attorney. According to the employee, the attorney instructed him to take steps to identify the other driver. The employee then logged into an agency database, Consolidated Lead Evaluation and Reporting, to run the license number on V__'s car and obtain his home address. The attorney, however, denied authorizing the employee to use government resources to gather information about V__. on the body camera recordings of county sheriff's office deputies, the employee tells them he grabbed V__ by the arm, took him back to his vehicle, and told him to sit down and shut his engine off; that he asked for V__'s identification; and that he believed V__ was intoxicated. The following day, the employee accessed the National Criminal Information Center database, which required him to first log into the Agency's Treasury Enforcement Communication System, to conduct a record inquiry for V__. Both databases are for official use only. The Office of Professional Responsibility later investigated. The employee was removed based on four charges: conduct unbecoming a law enforcement officer, unauthorized use of a government database, unauthorized use of an agency resource, and lack of candor. The arbitrator sustained all four charges and found removal was a reasonable penalty. The Federal Circuit affirmed, finding the arbitrator's upholding of each of the charges was supported by substantial evidence. The court also determined that the arbitrator properly found sufficient nexus between the employee's off-duty misconduct and the efficiency of the service. The field officer credibly testified that the employee's actions resulted in his superiors losing trust in him to do his job as a LEO.

Disrespectful Conduct—Whistleblower Reprisal

Miranne v. Dept. of Navy, No. 2021-1497, 121 LRP 34357 (Fed. Cir. 2021 NP): The Federal Circuit affirmed the MSPB's decision upholding the employee's removal and rejecting his affirmative defense of whistleblower retaliation. An email described as being "as delicate and nuanced as a cannon blast" with "an air of moral superiority, abrasiveness, condescension, and profound disrespect which simply cannot be minimized or misinterpreted" was not protected as a whistleblower disclosure. Since 1999, the petitioner, a personnel psychologist, had access to the Navy Marine Corps Intranet. His position was initially designated "non-sensitive," meaning it was a position of trust and had no effect on national security. In September 2017, the commanding officer announced that personnel with access to the intranet would require a designation of at least "non-critical sensitive" to comply with Department of Defense and Department of the Navy policy. This designation meant that a person fulfilling the duties of the position "could potentially cause damage to national security." Position descriptions listed as non-sensitive would be updated. The petitioner was skeptical that anything he would do in his position could affect national security, but he was informed his position would require a secret security clearance. The petitioner ultimately sent an email to 20 individuals, including his entire chain of command, to express disagreement over the policy change. Among other things, the petitioner's email alleged that management was involved in a conspiracy to commit fraud. The Navy removed him for disrespectful and improper conduct based on the email. The MSPB sustained the removal and rejected the employee's whistleblower reprisal affirmative defense. The administrative judge described the email as being "as delicate and nuanced as a cannon blast" with "an air of moral superiority, abrasiveness, condescension, and profound disrespect which simply cannot be minimized or misinterpreted." The AJ found the petitioner "showed dreadfully poor judgment" and that, given the nature of his position, termination was reasonable. The AJ further concluded he was not protected under the Whistleblower Protection Act because it could not second-guess the relevant Navy decisions on security designations. In addition, the AJ found, the employee's belief about the activity he attacked was objectively unreasonable. Among others, the court noted the email and a supervisor's reaction to it ("the most disrespectful and unprofessional email I have seen or received in my 35 years of federal service"), which supported the charge.

AWOL Removal—Faulty Penalty Analysis—Remand

Moreno v. Dept. of Interior, No. 2020-1507, 121 LRP 36261 (Fed. Cir. 2021 NP): The Federal Circuit vacated the MSPB's decision affirming the petitioner's removal for unauthorized absence because the Board failed to provide a proper analysis of the *Douglas* factors and finding that the MSPB's "remarkably short and deferential analysis" fell far short of what is required under the court's precedent for a *Douglas* factors analysis in the circumstances of this case. The court remanded the case. Over a period of about a year, the employee, a contract specialist, suffered from ongoing medical and mental health conditions that prevented her from reporting to work. During that period, she took leave under the FMLA, worked part-time, teleworked, took LWOP and was ultimately put in absent without leave status. Medical documentation that accompanied her various leave and accommodation requests did not specify when the employee could be expected to return to duty in a full-time capacity. The employee was removed based on charges of excessive absence and AWOL. The deciding official explained that the employee's prolonged unavailability caused an extra workload for her colleagues. The employee's medical provider maintained repeatedly that she could return to her position with additional time for recovery, but the deciding official noted the medical documentation did not support her inability to perform the essential duties of her position that would initiate the process for a possible reassignment. The AJ sustained the employee's removal, but determined that the agency had not established the excessive absences charge because it could not rely on the 240 AWOL hours for both charges. The AJ upheld the AWOL charge, determining that the agency "had good cause to be weary of the medical provider's weak assurances" of the employee's ability to return to work full-time. The AJ concluded that her absences were a burden on the agency because the agency showed her unavailability created a significant hardship on the agency. The AJ also determined that the agency showed the removal penalty was reasonable based on the AWOL charge alone. Without independently analyzing the *Douglas* factors, the AJ found "nothing unreasonable in the deciding official's weighing of the factors pertinent to the penalty." The Federal Circuit vacated the removal penalty and remanded the case because the AJ failed to provide a proper analysis of the *Douglas* factors. The AJ failed to independently consider all of the *Douglas* factors, including the employee's potential for rehabilitation given that she had returned to work part-time, whether her medical conditions were a mitigating factor, and whether lesser sanctions than removal would have been adequate in her case. Rather than an independent analysis, the AJ summarily concluded he found nothing unreasonable in the deciding official's weighing of the factors pertinent to the penalty and that the absences underlying the AWOL charge were sufficient to render the removal penalty reasonable.

Jurisdiction—Can't Tack Previous Service

Mouton-Miller v. MSPB, 985 F.3d 864 (Fed. Cir. 2021): The Federal Circuit affirmed the MSPB's dismissal for lack of jurisdiction of the employee's appeal of her reassignment from a supervisory to a nonsupervisory position. Because all U.S. Postal Service positions fall within the excepted service, the employee could not tack her former supervisory position at the USPS onto her second supervisory position at the Department of Homeland Security for purposes of calculating her probationary period. More specifically, the circuit determined that the applicable statutory and regulatory provisions expressly limit tacking to two supervisory roles held in the competitive service, and exclude supervisory roles held in the excepted service. Because all USPS positions fall within the excepted service, the petitioner could not tack her former supervisory position at USPS onto her second supervisory position at DHS for purposes of calculating her probationary period. Since the petitioner completed less than the required one year of competitive service in her supervisory role with DHS, she was excluded from seeking review before the MSPB under 5 USC 7512(C).

Probationer Employee—Whistleblower Reprisal—*Carr* Factors Favored Agency

Murray v. Dept. of Army, No. 2021-1560, 121 LRP 29914 (Fed. Cir. 2021 NP): The Federal Circuit affirmed the MSPB's decision sustaining the employee's termination of employment for unprofessional conduct during a probationary trial period. *Carr* factor one strongly weighed in the Department of the Army's favor in that the petitioner engaged in multiple hostile and unprofessional encounters with agency employees in public areas of the hospital.

Removal—Leave-Related

Newman v. Dept. of Air Force, 842 Fed. Appx. 563 (Fed. Cir. 2021 NP): The Federal Circuit affirmed the employee's removal for unauthorized absence and failure to comply with leave procedures. This second removal action remedied the deciding official's *ex parte* communications by describing the nature of the *ex parte* information the deciding official received and giving the petitioner the opportunity to respond, which he did both in writing and orally.

Whistleblower Reprisal—*Carr* Analysis—Remand

Potter v. VA, No. 2021-1460, 121 LRP 35733 (Fed. Cir. 2021 NP). The Federal Circuit vacated in part the MSPB's denial of corrective action in the employee's IRA appeal. The court remanded the case to the Board for further consideration. In conducting its *Carr* analysis, the MSPB failed to consider certain evidence that may have detracted from its overall conclusion. In an earlier decision, *Potter v. VA,* 949 F.3d 1376 (Fed. Cir. 2020), the Federal Circuit vacated a portion of the MSPB's decision denying corrective action in the petitioner's IRA appeal because the Board relied on an erroneous finding—that Dr. Deering (who canceled the Chief Nurse IV vacancy in November 2015) did not know of the petitioner's email which she alleged was a contributing factor to her nonselection for the position. The court remanded with instructions for the Board to consider whether, in view of the doctor's knowledge of the email, the employee presented evidence sufficient to satisfy the knowledge-timing test, or if the employee otherwise presented evidence sufficient to demonstrate a *prima facie* case of whistleblower reprisal, and if so, to consider whether the agency could meet its burden of showing that it would have taken the same personnel action regardless of the employee's protected disclosure. On remand, the AJ found that the email was a protected disclosure and that it was a contributing factor to the employee's nonselection. The AJ subsequently concluded that the first *Carr* factor weighed "heavily" in the agency's favor, that the second *Carr* factor weighed "modestly" in the employee's favor, and that the third *Carr* factor was neutral. As a result of its *Carr* analysis, the Board found that the agency demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure and denied corrective action. The Federal Circuit vacated the MSPB's remand decision in part and remanded for further proceedings. The court determined that in conducting its *Carr* analysis, the Board's decision failed to consider certain evidence that may have detracted from its overall conclusion. Dr. Deering had to testify before Congress about the patient-care crisis at the Phoenix VA Health Care System, whereupon he was asked why he hadn't been fired. The doctor also had received death threats. The employee cited the doctor's testimony that he was "feeling frustrated because people were going to the [Inspector General]," and that he "just wished they would come to [him] and say here's what it is so we could tackle it together." The court could not be assured this evidence was given the consideration and weight appropriate in a *Carr* analysis.

Section 714—Conduct Unbecoming

Rodriguez v. VA, 8 F.4th 1290 (Fed. Cir. 2021): The agency proposed to remove a supervisory consumer affairs specialist under the VA Accountability Act based on 1) disruptive behavior toward a veteran patient, 2) conduct unbecoming a federal supervisor, consisting of his attempt to influence a subordinate's testimony regarding the incident, and 3) lack of candor, based on the fact that the petitioner's account of the altercation deviated substantially from the accounts of the other witnesses to the incident. The deciding official sustained all the charges, finding that they were supported by substantial evidence. She incorporated by reference the proposing official's rationale in deciding that the petitioner should be removed. On appeal, the AJ affirmed the removal, finding that the charges were supported by substantial evidence. The AJ found that the deciding official applied the correct standard of proof in reaching her decision. The AJ further found that the agency was not required to base its penalty determination on the factors set forth in *Douglas v. VA*, 5 MSPR 280, 305–06 (1981), and even if it were, removal was not grossly disproportional to the sustained misconduct. The circuit disagreed, finding that the deciding official applied the wrong standard of proof in sustaining the charges (i.e., substantial evidence) and erred in failing to consider the *Douglas* factors in her penalty determination. 38 USC 714 provides for substantial evidence review by the MSPB and does not alter the traditional standard of proof by preponderant evidence for agency disciplinary proceedings. The agency's contrary interpretation was inconsistent with the plain text of the statute and longstanding universal principles of administrative law. The appeal would therefore be remanded to the Board for further proceedings. The court indicated that "[p]resumably those further proceedings will include" the deciding official determining whether the charges in the proposal notice were supported by preponderant evidence. Even though the Board lacks authority to mitigate the agency's chosen penalty under 38 USC 714, the agency is still required to consider the *Douglas* factors in making its penalty decision. Moreover, employee failed to show that he was denied due process. The evidence was insufficient to show that the deciding official failed to consider his response to the notice of proposed removal, and both the proposal notice and the decision letter were adequate to inform the petitioner of the reasons for his removal. The employee failed to show that the delegation of removal authority by the Secretary of Veterans Affairs to the deciding official was improper; and, failed to show that the substantial evidence standard of Board review violated his right to due process. The current absence of a Board quorum did not mean that the AJ was exercising unconstitutional authority due to the absence of any possibility of Board review of the initial decision. The absence of a quorum was a temporary circumstance and not a structural defect. It may entail delays in Board review of initial decisions, but it does not foreclose that avenue of review, and it does not render the statutory adjudicative scheme constitutionally suspect.

Chapter 43 Performance—New Element—The Agency Must Justify the Imposition of the PIP

Santos v. NASA, 990 F.3d 1355 (Fed. Cir. 2021): The Federal Circuit vacated the MSPB's decision that upheld the employee's removal and rejected his

Uniformed Services Employment and Reemployment Rights Act claim. The court remanded the case for further proceedings. It found that the plain language of 5 USC 4302 demonstrates that an agency must justify its initiation of a performance improvement plan when an employee challenges a PIP-based removal. Mr. Santos was a mechanical engineer for NASA and a commander in the U.S. Navy Reserve, with 18 years of service and numerous accolades. Following his transfer to a new division, Santos began receiving letters of instruction and reprimand from his new supervisor, alleging poor performance. The timing of many letters coincided with Santos's request for or absences for military leave, and emphasized his alleged inability to "report to work in a timely manner and maintain regular attendance at work." After months of difficulties, the supervisor placed Santos on a performance improvement plan (PIP), and ultimately removed him under Chapter 43. Santos then filed a Board appeal, in which he alleged, among other things, that the agency discriminated against him because of his military service, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Pursuant to 5 USC Chapter 43, the Board considered whether the agency proved by substantial evidence that: (1) Santos's performance failed to meet the PIP-established standards in one or more critical elements of his position, (2) the agency established performance standards and critical elements and communicated them to Santos at the beginning of the PIP, (3) the agency warned Santos of the inadequacies of his performance during the PIP and gave him adequate opportunity to improve, and (4) after an adequate improvement period, Santos's performance remained unacceptable in at least one critical element. After considering the evidence concerning Santos's performance during the PIP, the Board concluded that the agency established each element by substantial evidence. The Board declined to address Santos's argument that he should not have been put on a PIP in the first place. As justification for that decision, the Board cited *Wright v. Dept. of Labor*, 82 MSPR 186 (1999), in which the Board held that "an agency is not required to prove that an appellant was performing unacceptably prior to the PIP." The Board also rejected Santos's USERRA claim, finding that he failed to show that his uniformed service was a substantial or motivating factor in his removal. In reaching that conclusion, the Board found that there was no evidence supporting his claim because Santos's supervisor "thanked him for his service," was "very patriotic," and did not express to others that Santos took too much military leave. Santos appealed the Board's decision to the Federal Circuit, arguing that the Board (1) failed to consider the events preceding his PIP in assessing the propriety of his removal, (2) failed to engage in the correct inquiry when assessing his USERRA claim, and (3) predicated its conclusion that his military service was not a primary motivating factor in his removal on inadequate facts. The court interpreted 5 USC 4302(c)(6) to require that in an appeal of performance-based removal following a PIP, the agency must show by substantial evidence that the employee's unacceptable performance "continued"—i.e., that it was unacceptable *both* before the PIP and during the PIP. In other words, the agency must justify the imposition of the PIP. The court found that the events leading to the PIP were also relevant to the employee's USERRA claim. As to this new pre-PIP requirement, the Court noted that 5 USC 4302(c)(6) provides that employees "who continue to have unacceptable performance" may only be removed "after an opportunity to demonstrative acceptable performance." While *Wilson v. Dept. of Navy*, 24 MSPR 583, 586 (1984), and subsequent cases, determined that this provision does not require an agency to prove that an employee was performing unacceptably prior to the PIP in order to justify a post-PIP removal, the court rejected the Board's interpretation in *Wilso*n, reasoning that, to "continue to have unacceptable performance," an employee must have displayed unacceptable performance prior to the PIP, as well as during the PIP. In sum, the court concluded that, once an agency chooses to impose a post-PIP termination, it must prove by substantial evidence that the employee's unacceptable performance "continued"—i.e., that it was unacceptable before the PIP and remained so during the PIP. Accordingly, the court vacated and remanded the issue for the Board to decide whether Santos performed unacceptably before the PIP. Turning to the USERRA claim, the court explained that, under *Sheehan v. Dept. of Navy*, 240 F.3d 1009 (Fed. Cir. 2001), an employee making a discrimination claim under USERRA bears the initial burden of showing by a preponderance of the evidence that the employee's military service was a substantial or motivating factor in the adverse employment action. In determining whether a showing has been made, factors to be considered include: (1) proximity in time between the employee's military activity and the adverse employment action, (2) inconsistencies between the proffered reason and other actions of the employer, (3) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity, and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses. Once the employee has made the required showing, the agency has the opportunity to show by a preponderance of the evidence that it would have taken the adverse action anyway, for a valid reason. Under *Erickson v. USPS*, 571 F.3d 1364 (Fed. Cir. 2009), an agency may not treat employees on military leave the same as employees on nonmilitary leave. Having vacated and remanded the Board's conclusions regarding Santos's performance, the court found it was also necessary to vacate and remand the Board's assessment of his USERRA claim. The court reasoned that the two inquiries are related, since the validity of the reason proffered for the discharge is a factor in the *Sheehan* analysis. The events leading to Santos's PIP may be directly relevant to Santos's ability to satisfy his initial burden under USERRA. The court stressed that, on remand, the Board should actually apply the *Sheehan* factors, which it had not yet done. In particular, the court noted that Santos had detailed the extent to which his supervisor's complaints about his performance dovetailed with his military obligations, whereas the Board had relied on its findings that Santos's supervisor "thanked him for his service" and was "very patriotic." Those minimal findings did not suffice under *Sheehan*. Judge Hughes issued a brief concurrence in which he agreed that remand was appropriate because Board failed to properly consider Santos's USERRA claims, including his claim that the agency's decision to place him on a PIP was due to unlawful retaliation or discrimination under USERRA.

Reprisal—5 USC 2302 (b)(9)(C)—Abuse of Authority

Smolinski v. MSPB, 23 F.4th 1345 (Fed. Cir. 2022): The Federal Circuit found that the Board erred in dismissing Dr. Smolinski's claims of his reprisal for his April 2018 testimony, because he alleged sufficient factual matter to state a plausible claim under 5 USC 2302(b)(8) and (b)(9)(C). Regarding the (b)(8) claim, the court found it plausible that the appellant's disclosure evidenced an abuse of authority. Although 5 USC 2302 does not define the term "abuse of authority," the court found it appropriate to apply the definitions found in related whistleblower protection statutes at 10 USC 2409(g)(6)(1) and 41 USC 4712(g)(1), and determined that the alleged conduct by Col. H. would qualify. The court held that the petitioner's claim that he was retaliated against for cooperating with the AR 15-6 investigation of the colonel, alone, was sufficient to establish jurisdiction of the Board. The court further clarified that, when considering whether an appellant's allegations are sufficient to establish Board jurisdiction under the Whistleblower Protection Act, the Board is not limited to the four corners of the OSC complaint, and may consider an agency's evidence that supports the appellant's allegations. The court also found that the Board erred in failing to address the appellant's claim under 5 USC 2302(b)(9)(C).

Whistleblower Reprisal—*Carr* Factors

Staley v. VA, No. 2020-2127, 121 LRP 24446 (Fed. Cir. 2021 NP): The court affirmed the AJ's initial decision denying corrective action under the Whistleblower Protection Act. The agency subjected the petitioner to a personnel action by retroactively converting her approved leave under the Family and Medical Leave Act to absence without leave, and the petitioner proved that her prior complaint to Office of Special Counsel was a contributing factor in that action. The agency proved by clear and convincing evidence that it would have taken the same action even absent the appellant's protected activity: the agency's reason for reviewing the previously-granted leave was valid, the original leave request was not supported by adequate medical documentation, the petitioner failed to provide additional documentation during the review process, the officials involved had little or no retaliatory motive, and the agency treated non-whistleblowing employees similarly.

IRA—Failure to Allege Hostile Environment Personnel Action

Stern v. VA, No. 2020-2192, 121 LRP 19285 (Fed. Cir. 2021 NP): The court affirmed the AJ's decision to dismiss for lack of jurisdiction the employee's hostile work environment claim prior to conducting the hearing in her individual right of action appeal. The court agreed that the petitioner's allegations of discourteous treatment, even in combination with two other agency actions, did not approach the level of severe or pervasive conduct needed to establish a hostile work environment. The court also concluded that any error the AJ committed in finding that the employee failed to nonfrivolously allege that other agency actions created a hostile work environment was harmless.

IRA—AJ Errors—Reassignment to New AJ

Tao v. MSPB, 855 Fed. Appx. 716 (Fed. Cir. 2021 NP): The Federal Circuit reversed in part, vacated in part, and remanded the MSPB's decision that dismissed the petitioner's IRA appeal for lack of jurisdiction. Given the magnitude of the AJ's errors, the court instructed the MSPB to reassign the petitioner's appeal to a different AJ on remand. Of the 16 total items raised by the employee, the MSPB admitted that the AJ's ruling was erroneous with respect to five of them, admitted the AJ erroneously failed to consider two items, and took no position as to the remaining actions. OSC filed an *amicus* brief arguing that the AJ committed reversible error with respect to five of the actions raised by the employee.

Penalty

Valles v. Dept. of State, 17 F.4th 149 (Fed. Cir. 2021): The Federal Circuit determined that the AJ erred by not considering a "fully successful" performance appraisal in regard to one of the four charges and the reasonableness of the penalty, but the petitioner failed to show that the error was harmful. The employee was a passport specialist for the agency, who in 2016 served a 3-day suspension for making inappropriate comments at work, and in 2018 served a 5-day suspension for failure to follow instructions and failure to protect personally identifiable information. Nevertheless, the petitioner received a fully successful performance rating for calendar year 2018. On May 9, 2019, the agency removed the petitioner based on four charges: (1) failure to follow instructions (11 specifications), (2) failure to protect personally identifiable information (one specification), (3) failure to follow policy (five specifications), and (4) improper personal conduct (one specification). Some of this conduct occurred during the 2018 rating period. The petitioner filed a Board appeal, and the AJ issued an initial decision affirming his removal. The AJ credited the agency's distinction between issues of performance and misconduct, the former involving employees who "can't do" and the latter involving employees who "won't do." Finding that the charges "presented an issue of misconduct more than performance," the AJ declined to consider the 2018 performance evaluation as a rebuttal to the charges. He found that the agency proved its charges and established nexus and that the removal penalty was reasonable under the circumstances. The initial decision became final, and the petitioner sought judicial review. The circuit found that performance and misconduct may overlap and, while the existence of a fully successful performance evaluation does not necessarily bar discipline for matters covered by that evaluation, it still must be considered in determining whether the employee committed the offenses charged and the reasonableness of the penalty imposed. In this case, the employee's performance plan required that he follow instructions, and some of the specifications under the failure to follow instructions charge occurred during the period covered by the 2018 performance evaluation. Accordingly, the AJ should have considered that evaluation in assessing that charge 2. Nevertheless, the AJ's failure to consider the 2018 performance evaluation did not constitute reversible error because the petitioner failed to show that it likely affected the outcome of the Board's decision. First, the deciding official considered the evaluation in reaching his penalty determination, in the context of his thorough *Douglas* factor analysis. Second, even if the evaluation suggested that the 2018 specifications of failure to follow instructions were not serious in and of themselves, their seriousness was magnified in light of the petitioner's prior discipline for similar infractions and his continued failure to follow instructions after the 2018 appraisal period ended.

Disclosure of Taxpayer Information—Penalty

Vestal v. Dept. of Treasury, 1 F.4th 1049 (Fed. Cir. 2021): The Federal Circuit affirmed the Internal Revenue Service's removal of the employee for intentionally disclosing taxpayer information to an unauthorized person. The employee failed to show that the penalty of removal was too severe for her knowing transmission of a taxpayer's record to her attorney. The employee was an Internal Revenue Agent who performed examinations for small businesses and self-employed taxpayers. In preparing her defense to a proposed suspension, the petitioner sent her attorney a document that contained personally identifiable and other taxpayer information, which her attorney was not authorized to receive. Subsequently, the agency proposed and then effected the petitioner's removal for disclosing taxpayer information to an unauthorized person. In sustaining the penalty of removal, the deciding official found that the employee's disclosure was intentional. On appeal to the MSPB, the AJ affirmed the employee's removal. The AJ found that the agency proved its charge, the agency showed a nexus between the employee's conduct and the efficiency of the service, and the penalty of removal was not unreasonable. On review, the court affirmed the Board's final decision, finding that the penalty of removal was not so harsh and unconscionably disproportionate to the offense as to amount to an abuse of discretion. The court concluded that the deciding official properly assessed the factors set forth in *Douglas v. VA*, 5 MSPR 280 (1981), in imposing the penalty of removal. In particular, the deciding official found that the employee intentionally disclosed taxpayer information to an unauthorized person for her own benefit. The petitioner was aware that any disclosure of taxpayer information outside of the agency was prohibited. She failed to seek advice from agency officials or her attorney or redact taxpayer information before disclosing the information. Her disclosure was particularly serious because disclosing taxpayer information erodes taxpayer confidence when entrusting such information to the agency. The court rejected the employee's argument that the agency incorrectly imposed the penalty for willful disclosure and should have imposed a lesser penalty associated with a negligent disclosure because she incorrectly believed that attorney-client privilege protected the disclosure from being unauthorized. The court found that the agency imposed the penalty of removal consistent with its guidelines for an intentional disclosure of information to unauthorized individuals, the employee's disclosure of taxpayer information to her attorney was intentional in that it was made on purpose, even if she did not know that the disclosure was wrong, an intentional disclosure is not synonymous with a willful disclosure, which is made voluntarily and intentionally with the full knowledge that it is wrong, and under the agency's penalty guidelines, a finding of willfulness is not required. The agency properly considered the employee's disclosure as intentional, rather than negligent and the agency's penalty guidelines regarding careless, reckless, or negligent disclosures pertain to disclosures made without any intent to disclose information to an unauthorized person.

II. MSPB REGIONAL AND FIELD OFFICE CASES

MSPB Regional and Field Office cases have taken on more importance, with the unfortunate absence (until now) of the opportunity to seek full Board review. These cases show (just as with the Appeals court cases above), the continuing use of general charges like unbecoming conduct. Also, as with the last few years, due process; *Stone v. FDIC* defenses, both in terms of number, and employee success, continue unabated. There are also a number of cases concerning sexual misconduct and several Covid-19-related cases. Below, we have included many Regional and Field Office cases, by office and alphabetically, and nearly exclusively for the 2021–2022 time period. These cases are also provided separately in Chapter 24, "What's Current and Happening in Real Time," along with previous Regional and Field Office summaries by category.

A. WASHINGTON REGIONAL OFFICE

Involuntary Retirement Claim—Rejected—Telework Requirements and Covid-19

Al-Faleh v. Dept. of Educ., DC-0752-21-0553-I-1, 121 LRP 34940 (Washington Reg'l Office 10/14/2021): The AJ rejected the former information technology specialist's claim that his retirement was involuntary because he was subjected to a hostile work environment which included discrimination, harassment, and retaliation for standing up against unlawful acts by his supervisor. Due to the COVID-19 pandemic, the employee and his coworkers were assigned to full-time telework. Their supervisor instructed them to log in to Microsoft Teams each workday so they could have a tool to be able to communicate as a team or individually in lieu of face-to-face communication. The employee objected to his supervisor's policy and would not log in each day. He told his supervisor he saw Teams as "nothing but a distraction with no added value to my work," and said she could always reach him via phone, email, or text. He would, however, use Teams for meetings and training. After his supervisor issued him a "letter of counseling and expectation" for failing to log in to Teams each day, the employee decided to immediately retire. In support of his claim of involuntary retirement, he appeared to assert that he had no choice in light of the possibility of disciplinary activity. The employee also contended that his supervisor's requirement to use Teams was "unlawful," but the AJ found he presented no evidence of that. Rather, the AJ noted, management has the right to instruct employees, and employees have a responsibility to comply with the instruction absent unusual circumstances, such as when complying would cause irreparable harm, place the employee in a clearly dangerous situation, or would cause the employee to violate the law.

Unauthorized Accessing of Database for Personal Use

Coy v. Dept. of Treasury, DC-0752-20-0325-I-1, 121 LRP 15725 (Washington Reg'l Office 4/15/2021): The AJ upheld the removal of a director of compensation and benefits for misuse of government property. In an earlier USERRA appeal, the director alleged the Office of the Comptroller of the Currency improperly set his pay. To support his allegations, he provided documents which included information that was accessed from the OCC's website, which was accessible only to certain Office of Human Capital employees, including the director. This unauthorized access of the OCC's system resulted in the removal action at issue in this case. During a sworn deposition, the director stated that he accessed and downloaded personnel data from the OCC's system, to include names, titles, band levels, series, salary information, social security numbers, birth dates, and service computation dates of approximately 94 employees in the OCC's Office of Human Capital. The director also stated that he accessed and downloaded 80 pages of OCC new hire salary justification rollup information. The agency alleged that the director accessed this information for his own personal use and without authorization. The AJ concluded that the director's conduct clearly constituted a misuse of government property. He collected sensitive electronic data containing personnel information concerning agency employees as well as outside candidates from the agency's websites to use that information to support his personal litigation efforts, and then he provided that information to agency attorneys during discovery. In addition to being unauthorized activity, the director's actions constituted a serious violation of the agency's right to control and safeguard its property. His actions also interfered with the agency's responsibility to ensure that such records are used only for the official government purposes for which they were created.

Attendance-Related—Mitigation to Two-Day Suspension

Dicus v. Dept. of Commerce, DC-0752-20-0792-I-2, 121 LRP 16680 (Washington Reg'l Office 4/21/2021): The AJ determined that the removal of a Patent Examiner must be mitigated to a two-day suspension. The agency removed a patent examiner based on a charge of AWOL, with 59 specifications. The AJ sustained only three of the 59 specifications, and upheld the AWOL charge. While AWOL is a serious offense and the penalty determination made by the agency should be subject to deference, the AJ explained, only three of the 59 proposed specifications were sustained. The AJ further found that even if all specifications were sustained, the penalty of removal may not be within the parameters of reasonableness because the agency failed to properly weigh mitigating factors "including the appellant's past disciplinary and work record; the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in her ability to perform assigned duties; the clarity with which the appellant had been warned about the conduct in question; and the potential for the appellant's rehabilitation." In particular, the AJ noted that the employee began her employment with the agency in 2001, and that she had no prior discipline. The majority of her performance appraisals were at the satisfactory level or above, and she did not have any performance issues until she went to law school in 2017. The employee acknowledged her sub-par performance while in law school, but said that she left law school to concentrate on her career at Patent and Trademark Office. Once she returned to the Washington, D.C., area after law school, her performance improved. Further, as found by the AJ, the charged AWOL had a minimal impact on the petitioner's ability to perform at a satisfactory level. She had zero errors on her 2019 mid-term performance appraisal. In addition, neither the proposing official nor the deciding official noted any significant impact on her work product caused by the charged AWOL. The PTO also failed to consider the clarity with which the employee was on notice that the agency's rules were violated. The employee's supervisor and the telework coordinator could not recall if the employee was ever warned that her actions could result in a charge of AWOL. There also was nothing in the agency's telework agreement that warned she could be charged with AWOL or disciplined. The AJ further found the deciding official failed to properly consider the employee's potential for rehabilitation. She had almost 20 years of government service without misconduct. The employee testified she was sorry for the mistakes she made, and accepted responsibilities for her actions. She also made a good faith effort to change her telework address, and once she was re-established in the Washington, D.C., area, her work product improved. And finally, the AJ determined the employee was treated more harshly than other agency employees accused of similar misconduct. These comparators received only short-term suspensions.

B. NEW YORK FIELD OFFICE

Conduct Unbecoming—Mitigation to Non-LEO Position—*Giglio*-Impaired

Bonojo v. DHS, NY-0752-20-0056-I-3, 121 LRP 12132 (New York Field Office 3/31/2021): The AJ mitigated the removal of a deportation officer to placement in a non-law enforcement position. Immigration and Customs Enforcement removed a deportation officer based on charges of conduct unbecoming a law enforcement officer (one specification) and lack of candor (four specifications). The removal was the result of a chain of events during which the employee got into a physical altercation with his wife, who wanted to see a text message he received from a woman. The employee bit his wife on her upper right arm during the dispute. The AJ sustained all of the specifications (merging two of the four specifications in the lack of candor charge) and both charges. However, The AJ found there were several points that the deciding official did not consider. First, the deciding official did not consider that the employee's wife was not seriously injured as a result of the incident, and she did not require medical attention. The deciding official also did not give very much weight to the employee's performance following the incident at issue. The employee was given an overall rating of outstanding for the next two rating periods. In addition, at the time of his removal, the employee had more than 10 and a half years of federal civilian service. He also did not have a prior disciplinary record. Finally, given *Giglio v. United States*, 405 U.S. 150 (1972), the deciding official expressed the view that if it was necessary for the employee to testify, his testimony could be impeached. He also acknowledged that he did

not consider imposing a penalty short of removal for the appellant. Based on her review of the record, the AJ found that the maximum reasonable penalty was placement in a non-law enforcement position for which he was qualified.

Attendance-Related—Impact of COVID-19 on Mental Health

Chen v. NCUA, NY-0752-21-0066-I-1, 121 LRP 36227 (New York Field Office 10/29/2021): The AJ affirmed the removal of a credit union examiner based on charges of excessive absences and AWOL. Effective March 16, 2020, due to the COVID-19 pandemic, the NCUA placed all examination staff, including credit union examiners, in a mandatory off-site status, in effect precluding NCUA employees from performing any work at a credit union. In response to her supervisor's letter regarding her prolonged absence and need to provide updated medical information, the examiner identified herself at high risk for COVID-19 by virtue of the fact she has chronic obstructive pulmonary disease. She also indicated that her depression, anxiety, and stress were exacerbated by self-isolation in her effort to minimize the risk of contracting COVID-19 and, that "the original timeline of returning to work full-time is by year-end 2020, but is likely to be postponed to 2021 due to COVID-19." The deciding official considered the effects of COVID-19 on the examiner while analyzing mitigating circumstances in regard to the removal penalty. He noted that she raised different concerns that were impacting her and her ability to return to work. The deciding official stated that the COVID-19 pandemic, as well as the examiner's postpartum depression and COPD, meant she would be at risk of long-term illness or potential death if she were to contract the virus. He also considered the fact the entire NCUA was in an off-site, completely virtual, status since March 16, 2020, which meant the examiner's health concerns related to having to travel to the NCUA for work were negated. Despite the remote work status, it was clear the examiner was unable to work for the NCUA remotely. In light of this fact, the deciding official found this factor was neutral as to the penalty.

Attendance-Related—Reversal—Failure to Provide FMLA Entitlements

King v. DOD, NY-0752-21-0005-I-1, 121 LRP 11033 (New York Field Office 3/23/2021): The AJ reversed the removal of a food store worker for AWOL, failure to follow leave instructions, and failure to follow instructions. The action arose in the context of the 2020 COVID-19 emergency. Before the start of his last shift, the employee was not feeling well physically or mentally. He was experiencing symptoms that he had "never before" felt: diarrhea, congestion, dry nose, loss of smell and taste, symptoms commonly associated with COVID-19. He explained this to his supervisor and asked for leave but it was denied. The supervisor responded that he would not approve any leave until the employee had seen a doctor and could provide a note for the requested leave. The employee remained absent from work beginning on the first day noted in his leave request and was ultimately removed almost six months later. During the period he was absent, the agency repeatedly told the employee not to come back without a doctor's note. The AJ reversed the AWOL charge, finding that the employee had been constructively suspended. In regard to FMLA, the AJ found that the employee gave the supervisor information sufficient to trigger his FMLA rights. There was no indication that the agency attempted to provide him his FMLA entitlements. The AJ also noted that the employee had 1,200 hours of FMLA-protected leave without pay, as well as 170 hours of annual leave and 50 or more hours of sick leave, available. The AJ also found that the supervisor made it clear that the employee was not welcome back to work until he could supply a doctor's note. The employee explained that he could not get an appointment for a COVID-19 test until almost six months after he began his absence, and he could not see his doctor until the month after that. Because the agency repeatedly told the employee not to come back without a doctor's note, the agency was culpable for his continued absence. The AJ concluded that charging the employee AWOL for a circumstance the agency initiated was improper.

Misuse of Government Property—Cellphone—Storing Nude Images of Female Fugitive

Ledogar v. DOJ, NY-0752-20-0161-I-3, 121 LRP 41385 (New York Field Office 12/14/2021): The AJ sustained the removal of a criminal investigator based on six charges, including misuse of government property—IT. That charge stated that the investigator misused his government-issued cellphone when he stored nude images of a female fugitive on it for no investigative purpose. The agency had extracted the photographs from his government-issued cellular device. Some of the photos depicted a nude female with exposed breasts and genitalia. The images appeared to have come from a magazine photoshoot. When the agency interviewed the investigator about the photos, he explained that the subject depicted in the photographs was a fugitive he had arrested. The investigator stated that the pictures were sent to the U.S. Attorney's Office to show "evidence of her," and that the photos were used to assist in her arrest. The investigator said a Playboy magazine containing these pictures was seized from the fugitive at the time of her arrest, and the images of her found on his phone were photographs taken of the pictures in the magazine and would be used to assist in future hearings regarding the fugitive's removal proceedings. The investigator could not explain why the photos were maintained on his phone from an arrest which took place several years prior. He stated he did not take the photos for his self-gratification, but later added, "She's absolutely beautiful though, isn't she? You can't answer, but it's really true. "In upholding the charge, the AJ noted there was no documentary evidence showing that the investigator actually sent the nude photographs to the USAO. In fact, a review of the property inventory list, which was sent to the USAO following the fugitive's arrest, failed to include a Playboy magazine and/or photographs taken from such magazine. The fugitive's arrest and extradition hearing took place in 2015, after which the nude photos remained on the investigator's telephone until 2019, when the agency retained it as part of the investigation into this matter.

Failure to Show Intentional Accessing of Medical Records—Reversal

Rozentul v. VA, NY-0714-20-0220-I-1, 121 LRP 6451 (New York Field Office 2/16/2021): The AJ reversed the removal of a program support assistant under 38 USC 714 based on a charge of unauthorized access to an employee's medical records. The employee had twice accessed through the Computerized Patient Record System medical records of a staff member, DF, a physician. Dr. F's last name has five letters and is also a male first name. The day after the access occurred, the New York Post ran an article stating that a physician at the employee's medical center had COVID-19 and was quarantined at home. The article didn't indicate the physician's name, but it was undisputed that Dr. F was the physician referred to in the article. The employee stated that she must have selected Dr. F's name while she was using the CPRS to locate the record of a patient with the same name. Seven patients had the same name as Dr. F. The employee asserted that what occurred was an innocent mistake. She did not intend to look at the file of a staff member, and she did not realize at the time that it was a staff member's file. The employee explained that she was trying to locate the file of a patient whose first name is the same as Dr. F's last name. That patient's initials were FJ. In explaining the second entry into Dr. F's records, the employee stated that the system defaulted to the last file she opened. Based on that evidence, the AJ concluded that the VA did not prove the employee intentionally accessed Dr. F's records. The record indicated that, when checking the employee's explanation regarding FJ, the agency erred in trying to ascertain whether a patient with the initials "JF"—not "FJ"—had an appointment at the medical center during the relevant period. In addition, the employee did not know Dr. F, and the newspaper article did not appear until after she accessed Dr. F's record. The employee also knew, based on her training, that the agency could easily find out if an employee accessed a medical record without a proper basis for doing so.

C. CENTRAL REGIONAL OFFICE

Sex Harassment

Boone v. DOD, CH-0752-21-0144-I-1, 121 LRP 37581 (Central Reg'l Office 11/8/2021): The AJ affirmed the removal of an assistant commissary officer for two charges: violation of DeCA's policy on sexual harassment (seven specifications) and failure to follow instructions (four specifications). The sexual harassment charge, determined under Title VII standards, involved conduct such as hitting an employee on the butt, a statement to the employee on the telephone ("Are you thinking about coming over since my wife is gone because now is the time" or words to that effect."), an attempted kiss, and a suggestion to provide oral sex, all of which were sustained and other conduct which was not sustained such as a statement to another employee ("I need some."), touching another employee's breasts. The AJ further found that the failure to follow charge merged into the sex harassment charge and further rejected the appellant's claim of laches for a delay in bringing the charge, because an unreasonable delay had not been proven ("I find that the 14-month period between the most recent complaint (by C__) and the issuance of the revised proposal in November 2020 did not constitute an unreasonable or inexcusable delay.") as well as a lack of material prejudice. Removal was affirmed, despite the appellant's 20 years of unblemished service, based on the appellant's high level position, the seriousness of the conduct and the lack of remorse.

Constructive Removal—Due Process Violation Proven

Casto v. VA, CH-0752-19-0357-I-1, 120 LRP 12708 (Central Reg'l Office 4/9/2020): The AJ reversed the resignation/removal of a program specialist, based on a finding that the agency constructively removed the appellant. As stated by the AJ, "Here, the agency removed Appellant under the strictures of 38 U.S.C. § 714, which was enacted on June 23, 2017. However, Appellant was entitled to the legal protections in place during the period in which the alleged misconduct occurred. *Sayers*, 2020 WL 1520125. All of the alleged misconduct essentially, 5 hours of AWOL and corresponding leave-certification failures occurred prior to June 23, 2017.4. Thus, in removing Appellant under the authority of 38 U.S.C. § 714, the agency violated Appellant's due process rights. Because the agency could not remove Appellant under § 714 without the statute having impermissible retroactive effect, I reverse the agency's decision to constructively remove Appellant."

Due Process Violation Proven

Cunningham v. DOD, CH-0752-20-0491-I-1 121 LRP 5401 (Central Reg'l Office 2/5/2021): The AJ reversed the property specialist's removal finding "that DLA violated the appellant's due process rights and failed to follow its procedures governing discipline [i.e., harmful procedural error], resulting in harsher discipline for the appellant than it would have imposed had it followed those procedures" As to the due process denial, the AJ determined, as follows: "In explaining his rationale for why removal was the appropriate penalty, the deciding official Mr. __ considered a factor that was not included in DLA's notice to the appellant proposing that action. He took into account and described in detail his disappointment that the appellant did not to sign a Last Chance Agreement (LCA) that would have substituted a 14-day suspension for the proposed removal." As to the HPE finding, the AJ held that the agency violated the labor agreement and a past practice as to its' interpretation that a letter of reprimand, which the agency relied on in imposing the removal, should have been removed from the appellant's OPF and that the violation caused harm because the proposing official relied on the previous LOR in proposing the appellant's removal.

Cynor v. USDA, CH-0752-20-0574-I-1, 121 LRP 23200 (Central Reg'l Office 6/24/2021): The AJ reversed the agency's 30 day suspension of the appellant for (1) failure to enforce safety and health regulations and (2) neglect of duty, finding a due process violation. The due process violation consisted of the deciding official failing to consider the appellant's supplemental evidence file (the failure apparently relate to a failure to route mail from one office to another and due to a short staff). Importantly, the AJ found that whether the failure caused harm was not relevant (i.e., "When an appellant is invited to present documentary evidence to support her statement in response to disciplinary charges, they are entitled to have that evidence considered and afforded the proper weight in the deciding official's deliberations before a decision is rendered. It may make a difference in the outcome, or it may not. But in either case the appellant is entitled to have it reviewed in advance of the decision before the process that was actually afforded can be described as a meaningful opportunity to respond to the charges.").

Disclosure of Medical Condition—Covid-19 Related Statements

Edler v. VA, CH-0714-20-0448-I-1, 120 LRP 36003 (Central Reg'l Office 11/17/2020): The AJ sustained the removal of a housekeeping supervisor under 38 USC 714 based on charges of privacy violation and conduct unbecoming a federal employee. When the supervisor was conducting a team huddle (a weekly team meeting) at the beginning of the shift, he made comments about several employees' inability to work in rooms used to treat COVID-19 patients. As he did so, the supervisor identified each affected employee and announced the specific medical condition that precluded them from doing the work. He also made several comments about an employee who needed to be fit-tested for a mask but had not yet shaved his beard, which was necessary for the proper fit. The supervisor stated that this employee was likely to bring COVID-19 home to his family and be responsible for their deaths. The AJ sustained both charges. On the conduct unbecoming charge, the AJ found that the supervisor's conduct toward the employee who had not shaved his beard supported the charge of conduct unbecoming. The supervisor's behavior was bullying and it harmed the overall morale of the unit. The AJ also determined that removal was a reasonable penalty. The deciding official observed that the supervisor's conduct during the huddle was bullying and put the employees in fear of retribution or retaliation. The deciding official further noted that his actions profoundly impacted employees in his unit and he had destroyed unit morale. In addition, the supervisor had received training on privacy and was put on clear notice that he was not authorized to disclose the medical conditions of other employees.

Conduct Unbecoming—Nexus

Malinski v. DOJ, CH-0752-21-0084-I-1, 121 LRP 28836 (Central Reg'l Office 8/20/2021): The AJ sustained the removal of this Deputy U.S. Marshal for conduct unbecoming a Deputy United States Marshal (seven specifications) and lack of candor (two specifications). The underlying facts concerned "sexual intercourse" between the appellant and a former deputy U.S, Marshal in a parking garage (identified as VB), where the appellant took photographs of the naked participant and then distribute the photographs and described the incident to other employees in the workplace. The specifications of the conduct unbecoming charge were upheld and consisted of having intercourse (not Disputed), taking photographs, distributing them and describing the incident to coworkers. The lack of candor charge, also sustained, was based on the appellant's denial of the misconduct during an investigation. It took the agency nearly five years to bring the charges after notice but the AJ rejected the laches defense. Nexus was determined based on the impact on VB (for example, she testified that she "was completely crushed" and that it "destroyed her" from the moment she was told about the disclosures) and because of the *Giglio* effect that the lack of candor charge had on the appellant's ability to testify. Removal was appropriate, despite the appellant's 11 years of unblemished service and numerous letters of reference, based primarily on the seriousness of the misconduct, the impact on VB, the appellant's status as a law enforcement officer, and the impact of *Giglio*.