INTRODUCTION
Charges, Penalties, and Affirmative Defenses

Against the background of major changes to federal sector employment by President Donald J. Trump, we publish our 17th edition to the *Charges and Penalties* treatise. Here, we include MSPB and Federal Circuit decisions made and issued during the period (roughly) calendar year 2024 and early 2025.

In this introduction, in addition to case summaries, we seek to describe recent developments in the federal sector, to include Executive Orders and Presidential Memoranda; OPM, OSC, and MSPB guidance, rule and regulatory changes; and the State of the MSPB.

I. EXECUTIVE ORDER AND PRESIDENTIAL MEMORANDUM CHANGES

President Trump has issued more than 100 Executive Orders and presidential memoranda. They range from topics such as tariffs to water pressure in showers. Several concern federal employment. Many of these are in the process of challenge in the courts (e.g., *NTEU, et al. v. Trump, et al*. (D.D.C No. 25-cv-420 (CRC) 2025). Nonetheless, we review and briefly describe some of those Executive Orders and presidential memoranda below.

A. EXECUTIVE ORDER 14284, STRENGTHENING PROBATIONARY PERIODS IN THE FEDERAL SERVICE, APR. 24, 2025

With this EO, President Trump establishes a new Civil Service Rule XI to govern probationary and trial periods by federal employees (although it does not apply to probationary periods in the Senior Executive Service). It requires certain reporting requirements by agencies to OPM and allows the OPM Director to establish an appeals process for probationary terminations in some instances. It immediately supersedes 5 CFR Part 315, Subpart H, so that "when terminating a probationary or trial period employee, agencies are no longer required to provide notice that his or her unsatisfactory performance or conduct is the basis for the termination, or written notice 'specifically and in detail' for the proposed action when the termination is based, in whole or part, on conditions arising before appointment." Significantly, this EO requires a designee of agency leadership to meet with probationary employees at least 60 days before their probationary period ends to discuss their performance and continued employment. It is important, as well, that this EO provides that a probationary employee has the burden of "demonstrating why their continuation in employment through the finalization of their appointment to the Federal service is in the public interest" and provides standards to consider when evaluating a "public interest" showing, to include: 1. The employee's performance and conduct; 2. The needs and interests of the agency; 3. Whether the employee's continued employment would advance organizational goals of the agency or the government; 4. Whether the employee's continued employment would advance the efficiency of the service. Moreover, "if not terminated sooner, an employee's service terminates before the end of the tour of duty on the last day of their probationary or trial period unless their agency certifies within the 30 days prior to that date that finalizing their appointment advances the public interest."

This EO is supplemented by OPM's Initial Guidance on President Trump's Executive Order Strengthening Probationary Periods in the Federal Service (Apr. 28, 2025).

B. PRESIDENTIAL MEMORANDUM, HIRING FREEZE, JAN. 20, 2025, AND PRESIDENTIAL MEMORANDUM, EXTENSION OF HIRING FREEZE, APR. 17, 2025

As provided in the initial hiring freeze memorandum, "As part of this freeze, no Federal civilian position that is vacant at noon on January 20, 2025, may be filled, and no new position may be created except as otherwise provided for in this memorandum or other applicable law." The memorandum further states that, "Except as provided below, this freeze applies to all executive departments and agencies regardless of their sources of operational and programmatic funding." The memorandum does not apply to "military personnel of the armed forces or to positions related to immigration enforcement, national security, or public safety. Moreover, nothing in this memorandum shall adversely impact the provision of Social Security, Medicare, or Veterans' benefits." The Office of Personnel Management director also has authority to grant exemptions from the hiring freeze. In addition, within 90 days, "the Director of the Office of Management and Budget (OMB), in consultation with the Director of OPM and the Administrator of the United States DOGE Service (USDS), shall submit a plan to reduce the size of the Federal Government's workforce through efficiency improvements and attrition. Upon issuance of the OMB plan, this memorandum shall expire for all executive departments and agencies, with the exception of the Internal Revenue Service (IRS). This memorandum shall remain in effect for the IRS until the Secretary of the Treasury, in consultation with the Director of OMB and the Administrator of USDS, determines that it is in the national interest to lift the freeze." The hiring freeze was extended by the extension citation provided above.

See also Federal Civilian Hiring Freeze Guidance, Jan. 20, 2025 (issued jointly by OPM and OMB).

C. EXECUTIVE ORDER 14171, RESTORING ACCOUNTABILITY TO POLICY-INFLUENCING POSITIONS WITHIN THE FEDERAL WORKFORCE, JAN. 20, 2025 AND PRESIDENTIAL FACT SHEET, APR. 18, 2025

With EO 14171, President Trump reinstated Executive Order 13957 of Oct. 21. 2020, Creating Schedule F in the Excepted Service "immediately…with full force and effect" with some changes, to include redesignating Schedule F to "Schedule Policy/Career." The new EO will add the following, as well: "Employees in or applicants for Schedule Policy/Career positions are not required to personally or politically support the current President or the policies of the current administration. They are required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President. Failure to do so is grounds for dismissal." President Trump also ordered the OPM director to "promptly amend the Civil Service Regulations to rescind all changes made by the final rule of April 9, 2024, 'Upholding Civil Service Protections and Merit System Principles,'…that impede the purposes of or would otherwise affect the implementation of Executive Order 13957. Until such rescissions are effectuated (including the resolution of any judicial review), 5 CFR part 302, subpart F, 5 CFR 210.102 (b)(3), and 5 CFR 210.102b)(4) shall be held inoperative and without effect."

This EO and EO 13957 seek to move employees in other schedules into this new civil service schedule, as at will employees (i.e., with no MSPB appeal rights, among other changes). This EO is already the subject of litigation. *NTEU, et al. v. Trump, et al.* (D.D.C. No. 1:25 cv 00170 2025).

In compliance with this EO, OPM has issued a Proposed rule, Improving Performance, Accountability, and Responsiveness in the Civilian Service (Apr. 23, 2025). In that rule, OPM estimates that this new schedule will impact approximately 50,000 employees (i.e., OPM estimates that about 45,000 would be filled by incumbent employees and 5,000 would involve vacancies filled by new hires, once the hiring freeze expires).

These authors will be preparing a resource book that will detail this new Schedule Policy/Career, and which will update the status of OPM regulations and the various challenges to the creation of this new schedule (and there are and will be many). For now, a Cyberfeds analysis prepared by Peter Broida, titled "Schedule Policy/Career in the Excepted Service (formerly Schedule F)" is a valuable resource.

Finally, this EO, in Section 6, also revoked EO 14003, issued by then-President Biden, which in turn, had revoked EO 13839, issued during the first Trump administration, which sought to make changes in discipline and performance policies. In turn, OPM's Guidance on Revocation of Executive Order 14003 (Feb. 7, 2025), noted that agencies must reverse any changes made because of EO 14003 and "return to the policies of the first Trump Administration." Those policies, provided in EO 13839, are outlined below in "Reversing Policies on Discipline and Unacceptable Performance."

D. PRESIDENTIAL MEMORANDUM, RETURN TO IN-PERSON WORK, JAN. 20, 2025

This memorandum states simply that "Heads of all departments and agencies in the executive branch of Government shall, as soon as practicable, take all necessary steps to terminate remote work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis, provided that the department and agency heads shall make exemptions they deem necessary. This memorandum shall be implemented consistent with applicable law."

Specific details about this EO are provided in OPM Guidance, as follows: Guidance on Presidential Memorandum Return to In-Person Work (Jan. 22, 2025); FAQs on Return to In-Person Work Implementation Questions; and Guidance on Collective Bargaining Obligations in Connection with Return to In-Person Work (Feb. 3, 2025).

E. EXECUTIVE ORDER 14281, RESTORING EQUALITY OF OPPORTUNITY AND MERITOCRACY, APR. 23, 2025

This EO illustrates the efforts made by the Trump administration to change basic and longstanding principles of federal law. The EO directs the elimination of the use of disparate-impact liability "in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws and. Basic American ideals."

A disparate impact claim involves a contention that an agency policy, though appearing neutral on its face, disproportionately impacts a protected class. Once a complainant establishes a *prima facie* case of disparate impact, the agency must demonstrate that the policy was justified by business necessity. The complainant must then show that there is an alternative policy or practice that can achieve the same goal without a disparate impact. It is specified in 42 USC Section 2000e-2(k). The Supreme Court first announced this theory of discrimination in *Griggs v. Duke Power Co*., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971), in striking down certain racially discriminatory employer practices.

Among other requirements, this EO directs agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability, including but not limited to" 42 USC Section 2000e-2(k).

It is important to question how this EO will be fully applied given such authorities as the Supreme Court's decision in *Griggs*.

F. OTHER EOS AND PRESIDENTIAL MEMORANDA

There are several other EOs and Presidential Memoranda, which we cite here in a summary way, to include:

- Presidential Memorandum, Strengthening the Suitability and Fitness of the Federal Workforce, Mar. 21, 2025 (orders the Director of the Office of Personnel Management to be delegated the authority to make final suitability determinations and take suitability actions regarding employees in the executive branch based on post-appointment conduct, consistent with applicable law);
- Presidential Memorandum, Ensuring the Enforcement of Federal Rule of Civil Procedure 65 (c), Mar. 11, 2025 (establishes a policy to enforce the Federal Rule of Civil Procedure 65(c) by requiring parties seeking injunctions against the federal government to cover the costs and damages incurred if the government is ultimately found to have been wrongfully enjoined or restrained);
- EO 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, (Jan. 21, 2025) (rescinds all DEI practices and programs across executive departments, revokes related executive actions, and directs agencies to end DEI initiatives in the private sector);
- Presidential Memorandum, Restoring Accountability for Career Senior Executives, Jan. 20, 2025 (directs the issuance of new SES Performance Plans within 30 days and reassigns SES officials to support the President's agenda, while terminating the Executive Resources Board and its Performance Review Board);
- EO 14251, Exclusions from Federal Labor-Management Relations Programs (Exclusions), Mar. 27, 2025 (EO exempts specified Title 5 agencies from the labor relations statute's coverage, and exempting foreign-service entities from the labor-relations provisions in Title 22. This was based on the president's determination under 5 USC 7103 b)(1) that: the specified agencies had intelligence, counterintelligence, investigative, or national security work as a primary function; and that the LR statute's provisions couldn't be applied to such agencies "in a manner consistent with national security requirements and considerations." The Office of Personnel Management has now issued guidance to assist agencies with implementing that EO. Notably, the guidance explains that those agencies and subdivisions listed in the EO "are no longer required to collectively bargain with federal unions." See Guidance on Executive Order Exclusions from Federal Labor-Management Programs (Mar. 27, 2025);
- EO 14210, Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative, Feb. 11, 2025 (among others, provides "(c) Reductions in Force. Agency Heads shall promptly undertake preparations to initiate large-scale reductions in force (RIFs), consistent with applicable law, and to separate from Federal service temporary employees and reemployed annuitants working in areas that will likely be subject to the RIFs. All offices that perform functions not mandated by statute or other law shall be prioritized in the RIFs, including all agency diversity, equity, and inclusion initiatives; all agency initiatives, components, or operations that my Administration suspends or closes; and all components and employees performing functions not mandated

by statute or other law who are not typically designated as essential during a lapse in appropriations as provided in the Agency Contingency Plans on the Office of Management and Budget website. This subsection shall not apply to functions related to public safety, immigration enforcement, or law enforcement."

II. NEW BOARD REGULATIONS

A. NEW REGULATIONS, 89 FED. REG. 72957-966 (SEPT. 9, 2024)

By notice dated October 30, 2015, in the Federal Register, the Merit Systems Protection Board issued an interim final rule to amend its rules of practice and procedure. That final rule amends the following regulations (Those descriptions in quotation marks are taken from the Federal Register).

- **5 C.F.R. § 1200.3 How the Board Members Make Decisions** (This amendment modifies the authority of Board members or Board staff to take certain actions when the Board otherwise would be unable to act due to vacancies, recusals, or other reasons. Under the new regulation, when there is only one Board member able to act, that member may direct to "an administrative judge or other official" specific matters such as further development of a record or review of a settlement that occurred after the issuance of an initial decision. Where there are no Board members able to act, the amendment gives the same delegation authority to the Clerk of the Board.)
- **5 C.F.R. § 1200.5 Conduct Policy** (This addition to the MSPB's regulations would permit the Board to issue "rules regarding prohibited conduct and vexatious filing by a party,…as well as potential sanctions or other consequences for violations of the policy.")
- **5 C.F.R. § 1201.23 Computation of Time** (This amendment provides that, "at MSPB's discretion," filing deadlines for all pending appeals can be "changed" due to events that broadly affect the MSPB process, such as technical outages or government shutdowns)
- **5 CFR 1201.41 Judges** ("This amendment clarifies that MSPB administrative judges may only hold a hearing if requested by an appellant. This modification reemphasizes that the right to request a hearing belongs solely to appellants, and that neither administrative judges nor agencies may order a hearing if the appellant does not wish to have a hearing.")
- **5 CFR 1201.56 Burden an Degree of Proof** ("This amendment clarifies which types of Office of Personnel Management decisions may be appealed. The prior version of the regulation incorrectly suggested that appeals may only come from reconsideration decisions from the Office of Personnel Management (OPM), and it did not recognize that pursuant to longstanding Board case law, initial decisions from OPM may also be considered final appealable decisions, when OPM refuses or improperly fails to issue a final decision. This modification reflects the Board's decision in *Okello v. Office of Personnel Management*, 120 M.S.P.R. 498 (2014).")
- **5 CFR 1201.72 Explanation and Scope of Discovery** ("The amendments to this section clarify that discovery during an MSPB appeal may involve individuals who are not parties to the appeal. The amendment further removes reference to the Federal Rules of Civil Procedure, reflecting the Board's desire to establish its own discovery rules and limitations to better align with its statutory and regulatory time limits for processing appeals.")
- **5 C.F.R. § 1201.73 Discovery Procedures** ("This amendment modifies the Board's discovery procedures with respect to how parties serve discovery requests and responses, as well as how parties resolve discovery disputes. The amendment eliminates the need to request permission to serve discovery responses electronically. It also provides parties with additional time before needing to file a motion to compel, in order to reduce the number of discovery disputes between parties. Finally, it puts limitations on the number of document requests and requests for admission that may be issued, which are also aimed at reducing discovery disputes and expediting the processing of appeals.")
- **5 CFR 1201.81 Requests for Subpoenas** ("This amendment provides notice of which requirements must be met to obtain a subpoena. The Board has received multiple requests for the issuance of subpoenas from parties who have not complied with all requirements. The Board is making this amendment to ensure parties are aware of the requirements before making a subpoena request.")
- **5 CFR 1201.82 Motions to Quash Subpoenas** ("This amendment modifies the Board's procedures regarding the filing and service of motions to quash a subpoena. The Board is amending its procedures to facilitate the filing of such motions by nonparties, who are not able to otherwise access the Board's electronic filing system to file such motions themselves. Administrative judges will now have discretion to provide methods to nonparties to electronically file motions to quash subpoenas without needing to utilize the Board's electronic filing system.")
- **5 CFR 1201.83 Serving Subpoenas** ("This amendment clarifies that any party who desires a non-federal employee to serve as a witness must still comply with Federal statutes governing fees and expenses for the witness.")
- **5 C.F.R. § 1201.84 Proof of Service** (This amendment builds on the currently permissible methods of service by adding "any other method that is in accordance with applicable State law.")
- **5 C.F.R. § 1201.85 Enforcing Subpoenas** ("This amendment eliminates the ability to file an oral motion to enforce a subpoena, instead requiring the moving party file a written motion that includes a document certifying that the subpoena was served and an affidavit describing the alleged refusal or failure to obey the subpoena.")
- **5 CFR 1201.113 Finality of Decision** ("This amendment clarifies the finality date of initial decisions after a party requests an extension of the deadline to file a petition for review. Under the current statutory and regulatory scheme, the Board is authorized to extend the deadline for a party to file a petition for review of an initial decision past the 30-day deadline. However, after such a request for extension is granted, a petition for review is not always filed, leading to potential uncertainty as to whether the finality date of an initial decision is the original 35-day date set by the initial decision, or the extended petition for review deadline date granted by the Board. Consistent with current Board practice, the regulation now reflects that, if no petition for review is filed by the granted extension date (assuming the extension request is granted), the initial decision of the judge will become the Board's final decision upon the expiration of the extended time limit, and judicial appeal deadlines likewise run from the date of expiration.")
- **5 C.F.R. § 1201.114 Petition for Review—Content and Procedure** (This amendment, among other things, eliminates the ability of parties to file cross petitions for review.)
- **5 C.F.R. § 1201.115 Criteria for Granting Petition for Review** (This amendment reflects the elimination of cross petitions for review)

- **5 C.F.R. § 1201.116 Compliance with Orders for Interim Relief** ("This amendment simplifies the Board's procedures regarding interim relief. Under the prior version of the regulation, parties were frequently confused by the distinction between a challenge to an agency's certification of compliance with an interim relief order and an allegation of noncompliance with an initial decision that ordered interim relief. The amendment will further simplify the processing of challenges to interim relief by imposing a requirement that the agency provide evidence of interim relief when filing a petition for review. However, the amendment does not alter, contradict, and/or overrule any requirements regarding when interim relief may be required, including, but not limited to, the Board's recent decision in *Stewart v. Department of Transportation*, 2023 MSPB 18.")

- **5 C.F.R. § 1201.117 Board Decisions; Procedures for Review or Reopening** ("This amendment reflects the clarification to Section 1201.118 that the Board retains sole discretion to reopen decisions (versus vesting in the parties a right to request reopening).")

- **5 C.F.R. § 1201.118 Board Reopening of Final Decisions** ("This amendment clarifies that parties do not have the right to request reopening an appeal under the Board's procedures, and further do not have the right to a response from the Board to any request for reopening. This amendment further clarifies that any response to a request for reopening from the Office of the Clerk of the Board does not constitute a final order or decision of the Board. The Board is making this modification in light of recent decisions from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) that questioned whether letters from the Office of the Clerk of the Board in response to requests to reopen an appeal constituted a final order or decision of the Board subject to judicial review.")

- **5 C.F.R. § 1201.155 Requests for Review of Final Grievance or Arbitrator's Decisions** ("This amendment is primarily made to the title of the section and is made to clarify that requests for review of decisions arising out of negotiated grievance procedures are not limited to decisions issued by arbitrators.")

- **5 C.F.R. § 1201.182 Petitions for Enforcement** ("This amendment reflects the longstanding requirement that all submissions related to the issuance of a final Board decision or order issued pursuant to 5 CFR 1201.155 must be filed with the Office of the Clerk of the Board. On occasion, parties send such submissions to other offices within the Board, which can lead to processing delays for the submissions.")

- **5 C.F.R. § 1201.183 Procedures for Processing Petitions for Enforcement** ("This amendment makes multiple modifications to the Board's procedures for petitions for enforcement to simplify and expedite the processing of petitions for enforcement. The amendment makes clear that only settlement agreements that have been entered into the record for purposes of enforcement will be enforceable by the Board, to dispel any notion that the Board can enforce the terms of a settlement agreement that was not entered into the record before the Board. The amendment also requires agencies to provide the Board with an email address where pleadings can be served, as the Board has been notified on occasion that agencies were not receiving submissions in petitions for enforcement due to the departure of staff.

  The amendment also clarifies that discovery in petitions for enforcement is limited to issues regarding enforcement, by removing the phrase "regular discovery procedures," which led parties to believe that discovery on issues outside of enforcement could be conducted. The amendment further specifies what a noncomplying party must submit to demonstrate compliance after a finding of noncompliance. Under the prior version of the regulation, parties often submitted evidence of purported compliance without explaining why the evidence demonstrated compliance, making it difficult for the Board to determine whether compliance was reached. Finally, the amendment specifies that petitions seeking attorney fees for work on enforcement proceedings will be governed by the Board's regulation covering attorney fees at 5 CFR 1201.203(d).)

- **5 C.F.R. § 1201.204 Proceedings for Consequential, Liquidated, or Compensatory Damages** ("This amendment primarily rearranges the prior 1201.204 in order to make the process more easily understood. The amendment also eliminates the requirement that parties make a request for consequential, liquidated, or compensatory damages by the end of the prehearing conference. The prior requirement that the parties make requests for consequential, liquidated, or compensatory damages by the end of the prehearing conference unnecessarily risked precluding the parties from raising such claims, and it created potential confusion about their option to pursue them in addendum proceedings. Finally, the amendment amends the regulation to remain consistent with the modification made to 5 CFR 1201.41 that only appellants may request a hearing for damages, and that an administrative judge cannot force an appellant to have a hearing for damages without the appellant's consent.")

- **5 C.F.R. § 1203.12 Granting or Denying the Request for Regulation Review** ("This amendment modifies the prior 1203.12 to better communicate what action the Board will take when it grants a request to review an OPM regulation. It is the Board's view that the prior version of the regulation focused too heavily on what the Board includes in its orders, and it did not sufficiently communicate the Board's role and functions during the regulation review process. The amended regulation explains that the Board's role is to determine whether any regulation would require, on its face or as implemented, an individual to commit a prohibited personnel practice.")

- **5 C.F.R. § 1203.13 Filing Pleadings** ("This amendment reduces the number of filings that must be sent to the Board to properly file a request to review an OPM regulation, and it allows requests to be filed with the Board electronically. Both modifications are being made in order to aid the Board's ongoing transition away from maintenance of paper files.")

- **5 C.F.R. § 1203.14 Serving Documents** ("This amendment modifies the Board's procedures to allow requests to review OPM regulations to be filed with the Board and served on other parties electronically, in order to aid the Board's ongoing transition away from maintenance of paper files.")

- **5 C.F.R. § 1203.21 Final Order of the Board** ("This amendment clarifies that, consistent with Federal Circuit case law, the Board's decision in a regulation review case will be considered a final decision of the Board subject to judicial review if the Board grants a request to review a regulation and considers the merits of the request. The Board previously relied on 5 CFR 1201. 113 as its authority for the finality of decisions in regulation review matters, but upon further study of the matter, the Board believes that section 1201.113 should not serve as the authority for finality because that section applies to petitions for review in appellate cases, whereas the Board's regulation review procedures arise under its original jurisdiction. The amendment will specify which decisions in regulation review matters can be considered final, appealable decisions of the Board, and will avoid confusion by not treating the matter like a case under the Board's appellate jurisdiction.")

III. NEW OPM GUIDANCE, REGULATIONS AND RULES

A. ABOVE, WE CITED TO OPM GUIDANCE, INTERPRETING VARIOUS EOS AND PRESIDENTIAL MEMORANDA AND NOTICES. HERE, WE SIMPLY LIST SOME OF THOSE AUTHORITIES

- Guidance on Implementing President Trump's Executive Order titled, "Restoring Accountability To Policy-Influencing Positions Within the Federal Workforce," Jan. 27, 2025 (e.g., new schedule)
- Guidance on Presidential Memorandum Return to In-Person Work, Jan. 22, 2025
- OPM Memorandum, Initial Guidance on President Trump's Executive Order Strengthening Probationary Periods in the Federal Service, Apr. 28, 2025 (Ezell)
- OPM Guidance on Presidential Memorandum Return to In-Person Work, Jan. 22, 2025
- FAQs on Return to In-Person Work Implementation Questions and Guidance on Collective Bargaining Obligations in Connection with Return to In-Person Work, Mar. 20, 2025
- Guidance on Agency RIF and Reorganization Plans Requested by Implementing The President's "Department of Government Efficiency" Workforce Optimization Initiative, Feb. 26, 2025 (Issued jointly with OMB)
- Guidance on Collective Bargaining in Connection with RIFs, Mar. 12, 2025
- New Senior Executive Service Performance Appraisal System and Performance Plan, and Guidance on Next Steps for Agencies to Implement Restoring Accountability for Career Senior Executives, Feb. 25, 2025
- Additional Guidance on Compliance with the Age Discrimination in Employment Act as amended by the Older Workers Benefit Protection Act in the Implementation of Deferred Resignation Program Agreements, Feb. 11, 2025
- Guidance on Probationary Periods, Administrative Leave and Details, Jan. 20, 2025 (Rev. Mar. 4, 2025) (Initial Guidance on President Trump's Executive Order Strengthening Probationary Periods in the Federal Service, Apr. 28, 2025)
- Federal Civilian Hiring Freeze Guidance, Jan. 20, 2025 (issued jointly with OMB)
- Notice of Proposed Rulemaking, May 2, 2025, removing the prohibition of a forced distribution of performance rating levels within the Senior Executive Service and eliminate diversity, equity, and inclusion language within SES performance management regulations
- Proposed rule, Improving Performance, Accountability, and Responsiveness in the Civilian Service, Apr. 23, 2025
- Guidance on Revocation of Executive Order 14003, Feb. 7, 2025

B. REVERSING POLICIES ON DISCIPLINE AND UNACCEPTABLE PERFORMANCE

The impact of the authority listed in the last bullet above, Guidance on Revocation of Executive Order 14003, Feb. 7, 2025 (Exell) requires more detail because of its likely impact on the processing and adjudication of MSPB appeals.

President Trump, in his first term, issued Executive Order 13839, 83 FR 25343, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, May 25, 2018 (See also OPM's Guidance for Implementation of Executive Order 13839—Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, July 5, 2018). That EO sought to make important MSPB-related changes. However, President Biden during his term issued EO 14003, revoking EO 13839, requiring agencies to rescind the EO 13839 changes. This led to EO 14171, Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce (Jan. 20, 2025) OPM, which, among others, rescinded President Biden's EO 14003 in Section 6., providing that "any rules, regulations, guidance or other agency policies effectuated under Executive Order 14003 shall not be enforced" and that "[t]he heads of each executive department and agency shall review existing agency actions relating to or arising under section 3(e)(v) and 3(f) of Executive Order 14003 (relating to suspending, revising, or rescinding revisions to discipline and unacceptable performance policies) and, as soon as practicable, suspend, revise, or rescind such actions identified in the review." Thus, OPM in its Guidance on Revocation of Executive Order 14003, provides that "agencies should return to the policies of the first Trump Administration on discipline and unacceptable performance.…as soon as practicable." (i.e., The revocation of Executive Order 14003…does not immediately reinstate those orders.") In its Guidance, OPM directed that agencies report regarding all policies enacted under Biden's EO 14003 that are modified or repealed in accordance with new EO 14171.).

See chart prepared by Cyberfeds (Sean Hurley, titled "Charting performance, discipline principles in regs, EO 13839") for valuable suggestions on which regulations could be removed under EO 14171 and OPM's Guidance.

Because it is likely that the policies described in EO 13839 will resurface, we describe them below, with our bulleted separate commentary in italics, by EO 13839 section:

- Sect 2(b) Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances.

  Arguably, no different from current procedures. No requirement to use progressive discipline when first offense is so severe that removal is appropriate; currently, the Douglas factors (or good cause standards) provide that "misconduct should be tailored to the facts and circumstances."

- Sect. 2(c) Each employee's work performance and disciplinary history is unique, and disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time—particularly where the employees are in different work units or chains of supervision—and agencies are not prohibited from removing an employee simply because they did not remove a different employee for comparable conduct. Nonetheless, employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions.

Claim of uniqueness is consistent with the Douglas Factors and their application.

Claim that similar conduct does not necessarily justify similar discipline or removal, especially in consideration of time period, different work units or different chains, and that failure to remove another employee does not warrant more lenient treatment of someone else is clearly an attempt to push back against then MSPB case law in Woebcke v. DHS, 114 MSPR 100 (2010), and subsequent cases. Clearly, the tone here gives agencies more flexibility in disparate treatment penalty determinations [but see requirement to treat employees "equitably"]. But, the Woebcke case law and progeny has been reversed by the Board's decision in Singh v. USPS, 2022 MSPR 15, 122 LRP 18045 (2022), which seems to satisfy this provision.

- Sec. 2 (d) Suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require suspension of an employee before proposing to remove that employee, except as may be appropriate under applicable facts.

  While tone is important, this Section is no different from current case law (i.e., to impose the appropriate penalty so that if removal is appropriate, it can be applied).

- (e) When taking disciplinary action, agencies should have discretion to take into account an employee's disciplinary record and past work record, including all past misconduct—not only similar past misconduct. Agencies should provide an employee with appropriate notice when taking a disciplinary action.

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

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

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

  Under current law, employees must receive "at least" 30 days advance notice of an adverse action, including removals and a "reasonable time," to reply to a proposed action "orally or in writing." Obviously, these provisions are an attempt to speed up the process and, for example, to make the minimum period of 30 days advance notice into a maximum period. Most likely, the tone of these provisions will result in agencies providing fewer request extensions to employees to make oral and written replies.

  We opine, as well—and this will undoubtedly be litigated—to the extent that an agency has agreed with a union as to reply periods and requested extensions, those provisions must be observed.

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

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

  Please note that agencies that have terminated CBAs agreements under EO 14251, Exclusions from Federal Labor-Management Relations Programs, Mar. 27, 2025, and related OPM Guidance on Executive Order Exclusions from Federal Labor-Management Programs, Mar. 27, 2025, that had agreed to use Chapter 75 exclusively for underperforming employees, are now required to use Chapter 75 in such circumstances. See OPM Guidance on Executive Order Exclusions from Federal Labor-Management Programs, Mar. 27, 2025 (this guidance provides though that "Agencies may continue to use chapter 43 procedures in appropriate cases").

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

  This is consistent with current standards and is simply a reminder to agencies. Our view is that most agencies are already aggressive in appropriately terminating probationary employees during the probationary period. Please note, as described above, that Executive Order 14284, Strengthening Probationary Periods in the Federal Service Apr. 24, 2025), does seek to make certain changes in monitoring a probationary period, specifying certain notice/warning requirements.

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

  Currently, RIF regulations require that employees' retention standing, in the event of a RIF, should be based on tenure, veterans' preference, length of service and performance. OPM's regulations were amended in the late 1990s to give employees additional service credit based on the 3 most recent ratings of records received within the previous 4 years. See 5 CFR 351.504. This EO provision is apparently intended as a directive to OPM to give performance appraisals more weight than length of service in determining retention standing.

  While President Trump's Executive Order 14210, Implementing The President's "Department of Government Efficiency" Workforce Optimization Initiative (Workforce Optimization, Feb 11. 2025 and OPM Guidance issued thereunder, to include Guidance on Agency RIF and Reorganization Plans Requested by Implementing The President's "Department of Government Efficiency" Workforce Optimization Initiative, Feb. 26, 2025, which requires certain agency deadlines for planning to conduct "large-scale" reductions in force and other guidance seeking to limit collective bargaining and provisions addressing RIFs in CBAs, there is no provision that amends retention standards. See also OPM and OMB Guidance on Collective Bargaining in Connection with RIFs, Mar. 12, 2025.

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

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

  Nonetheless, this provision, as well as CBAs more generally, must be considered in light of EO 14251, Exclusions from Federal Labor-Management Relations Programs, Mar. 27, 2025, and related OPM Guidance on Executive Order Exclusions from Federal Labor-Management Programs, Mar. 27, 2025. As noted above, these authorities seek to limit collective bargaining requirements or even collective bargaining itself.

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

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

  (i) the assignment of ratings of record; or

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

  One may question whether the exclusion of such matters will promote good morale.

  Again, this provision will not affect current agreements but will ensure that agencies will seek to exclude (or not include) such matters through mid–term reopeners or in term bargaining. More work for FSIP. Moreover, this may be a moot point (i.e., although undoubtedly subject to court challenge by unions) for those CBAs that have been terminated under EO 14251, Exclusions from Federal Labor-Management Relations Programs, Mar. 27, 2025, and related OPM Guidance on Executive Order Exclusions from Federal Labor-Management Programs, Mar. 27, 2025.

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

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

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

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

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

  See previous comments as to using Chapter 75 instead of Chapter 43, and progressive discipline.

- Section 4(c): [No agency shall] make any agreement, including a collective bargaining agreement [that]:

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

  Many CBAs provide for minimum opportunity periods of more than 30 days. Of course, changes will need to be bargained. Significantly, the statute at 5 USC 4302(c)(6) requires a meaningful opportunity to perform, which, with some jobs, may be inconsistent with a 30 day period. Arguably, and especially for certain jobs, a 30 day period may conflict with the statutory obligation to provide a "meaningful opportunity to demonstrate acceptable performance." This standard and limitation is repeated in OPM Guidance on Executive Order Exclusions from Federal Labor-Management Programs, Mar. 27, 2025. This Guidance specifies that after a CBA has expired or terminated, agencies must seek to limit PIPs to 30 days.

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

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

IV. NEW OSC HATCH ACT GUIDANCE

OSC announced new enforcement guidelines in an advisory opinion published on April 25, 2025, rescinding previous guidance. The OSC opinions that are being rescinded were issued on May 20, 2024, along with a related advisory from October 15, 2024, under the Biden administration.

The new guidance makes three points. Here, we quote from the Guidance.

> First, the May 20 Advisory stated that OSC would pursue disciplinary action for Hatch Act violations by White House commissioned officers before the U.S. Merit Systems Protection Board (MSPB). OSC had previously sought disciplinary action against such employees by submitting a report to the President because of concerns that the MSPB might lack jurisdiction to discipline commissioned officers. Those jurisdictional concerns have not been alleviated. Therefore, OSC will return to its traditional practice of referring Hatch Act violations by White House commissioned officers to the President for appropriate action.
>
> Second, the May 20 Advisory stated that in appropriate cases OSC would seek disciplinary action at the MSPB against a former employee who left federal service before OSC filed a complaint alleging that the former employee violated the Hatch Act. OSC is currently litigating such a case before the MSPB. Until the legal question concerning jurisdiction is resolved to OSC's satisfaction, OSC will refrain from filing any new complaints against former employees.
>
> Third, the May 20 Advisory created a "year-round workplace political item prohibition" for items related to the campaigns of "current or contemporaneous political figures" (CCPFs). Having seen the policy applied in practice, OSC concludes that the CCPF rule creates too great a burden on First Amendment interests and must therefore be discarded. OSC is therefore returning to its previous advice that the Hatch Act does not prohibit displaying campaign items in the work-place after election day, which was most recently published on November 4, 2020. A copy of that November 4, 2020 advisory opinion is attached.

In our view, the last point is the most important. Thus, the new guidance opined in April 28, 2025 supplemental notes, as follows:

> In addition, since at least the year 2000, OSC advised that the Hatch Act did not bar federal employees from wearing or displaying in the workplace items that supported or opposed any former—but not current—candidate for partisan political office. For example, OSC regularly advised that while an employee could not display a campaign mug from a presidential candidate in the federal workplace prior to the presidential election, an employee could display that same mug after the presidential election. In 2024, OSC issued an Advisory Opinion dated May 20 that added a year-round prohibition on campaign items related to "current or contemporaneous political figures," based on a perceived link between a former candidate and that candidate's political party. OSC has received many questions about allowable items indicating confusion based on the 2024 Advisory Opinion, as well as a concern about the Advisory Opinion's infringement on First Amendment rights. The 2024 Advisory Opinion failed to account for the fact that voters can vote by individual candidate, rather than by party line, i.e., showing support for a candidate does not necessarily equate support for the party. Also, because the 2024 Advisory Opinion prohibited only "campaign-related items" post-election, OSC was in the untenable position of advising what employees could and could not display based on, for example, whether the items were purchased at a pre-election political rally or at an inauguration event. Accordingly, OSC has reinstituted its longstanding prior position—based on the Hatch Act, the Hatch Act regulations, and the legislative history of the Hatch Act—that the display in the workplace of items promoting or opposing any former candidate of any political party does not constitute a Hatch Act violation.

V. STATE OF THE BOARD AND CATHY A. HARRIS AS MSPB CHAIR (FORMER)

The state of the Board is not encouraging. Once again—as in President Trump's first term between January 7, 2017, and March 3, 2022, the Board is without a quorum; Chair Henry Kerner is the remaining Board member as of April 9, 2025. This is due to the retirement of member Raymond Limon on February 28, 2025, and the removal by President Trump of Cathy Harris (this removal is subject to a current court challenge). While administrative judges may continue to process appeals and issue initial decisions, the Board is unable to rule of petitions for review of initial determinations. One April 8, 2025, the Board issued a useful FAQ, describing the lack of a quorum and its impact. The EEOC is without a quorum as well, because President Trump removed two commissioners, Charlotte Burrows and Jocelyn Samuels, leaving the EEOC with two members. The EEOC's lack of a quorum will have a lesser impact than the Board's; the EEOC's lack does not impact the intake, processing, investigation, or resolution of charges of discrimination. The Board's lack could not come at a worse time. As shown in recent Board report, 4,313 cases have been submitted to the MSPB's regional and field offices in the last five months (for fiscal year 2025), with 2,423 of them filed since Feb. 9 and 2,743 filed since January 19, the day before inauguration day. See Cyberfeds "Cases at MSPB Offices Jump with 2400+ Filed Since Feb. 9."

VI. MSPB AND COURT CASES—2024 AND EARLY 2025

There were a number of interesting cases for the period of time covered by this edition and summarized below. They included cases on framing charges (*Flannigan and Gaskin v. Dept. of Air Force*, DC-0752-13-0367-I-4, DC-0752-13-0354-I-4 (NP 3/11/2024) (no denial of due process, despite "little information" as to misconduct in proposal), *Sharp v. Dept. of Air Force*, DE-0752-20-0103-I-1 (NP 10/9/2024) (vague charge), *Siefring v. DOJ*, CH-0752-20-0509-I-1 (NP 7/9/2024) (conduct unbecoming; intent added); and specific charges such as AWOL (*Haller v. DHS*, CB-7121-20-0002-V-1 (NP 9/4/2024) (failure to prove underlying denial of sick leave), *Manga v. SBA*, PH-0752-17-0096-I-1 (NP 7/10/2024) (incapacitation), *Purohit v. DHHS*, CB-7121-21-0002-V-1 (NP 1/31/2025) (telework revocation); conduct unbecoming (*Wriglesworth v. Dept. of Army*, DC-0752-15-0860-I-2 (NP 1/9/2024) (among others, negative leadership creating toxic work environment); drug use (*Hagg v. Fed. Bureau of Prisons* (Fed. Cir. No. 2023-1071 2024 NP); excessive absence charges (*Butler v. FDIC*, DA-0752-20-0060-I-1 (NP 10/22/2024) (25 days of absence is not sufficient for an agency to establish that an employee's absence continued beyond a reasonable time), *Williams v. Dept. or Commerce*, 2024 MSPB 8 (2024) (in denying the appellant's petition for review and modifying the AJ's decision, Board held that an agency must "warn" an employee before removal for excessive absences; failure to follow policy (*Siefring v. DOJ*, CH-0752-20-0509-I-1 (NP 7/9/2024) (not sustained); negligent performance of duty (*Jones v. GPO*, DC-0752-21-0345-I-1 (NP 9/4/2024) (proven); lack of candor (*Siefring v. DOJ*, CH-0752-20-0509-I-1 (NP 7/9/2024) (not proven); misuse of a government vehicle (*Galasso v. DOJ*, NY-0752-20-0104-I-1 (NP10/10/2024)).

And, just as in previous years, there is also the continuing trend that agencies are more frequently using general charges, such as conduct unbecoming or improper conduct (*Doe v. Dept. of Commerce*, DE-0752-20-0416-I-1 (NP 8/12/2024) (off duty misconduct), *Flannigan and Gaskin v. Dept. of Air Force*, DC-0752-13-0367-I-4, DC-0752-13-0354-I-4 (NP 3/11/2024) (improperly collaborating on exam), *Galasso v. DOJ*, NY-0752-20-0104-I-1 (NP10/10/2024) (off duty misconduct), *Sharp v. Dept. of Air Force*, DE-0752-20-0103-I-1 (NP 10/9/2024) (sexual harassment)).

Likewise, as with previous years, nexus was interpreted broadly (*Doe v. Dept. of Commerce*, DE-0752-20-0416-I-1 (NP 8/12/2024), *Galasso v. DOJ*, NY-0752-20-0104-I-1 (NP10/10/2024), *Ornelas v. DHS*, SF-0752-22-0206-I-1 (NP 3/21/2025), and, *arra v. DOJ* (Fed. Cir. No. 2024-1848 2025 NP)). *But see Hagg v. Fed. Bureau of Prisons* (Fed. Cir. No. 2023-1071 2024 NP) (remand for new hearing as to off duty marijuana use)).

In terms of defenses, there were several unsuccessful due process/*Stone* defenses. (E.g., *Jackson v. DOD*, PH-0752-22-0084-I-2 (NP 8/19/2024) (DO simply responding to issues raised in reply).) But, there were significant due process cases, involving successful claims by the appellant (E.g., *Cledera v. DOJ*, DA-0752-21-0013-I-3 (NP 3/25/2024) (standard is "likely" to result in undue pressure, not that it actually did).) There were other due process cases, not involving *Stone* claims (*Esparraguera v. Dept. of Army*, 101 F.4th 28 (D.C. Cir. 2024) (SES employee; no notice), *Jones v. SSA*, PH-315H-21-0050-I-1 (NP 1/30/2025) (denial of opportunity to respond)).

Interestingly, and consistent with previous years, the Board and circuits have begun carefully addressing affirmative EEO claim defenses, especially with regard to burdens of proof (*Abbott v. DHHS*, AT-0752-15-0427-I-1 (NP 5/30/2024) (disability discrimination; failure to accommodate claim), *Flannigan and Gaskin v. Dept. of Air Force*, DC-0752-13-0367-I-4, DC-0752-13-0354-I-4 (NP 3/11/2024) (insufficient proof of EEO reprisal; but-for standard not met), *Manga v. SBA*, PH-0752-17-0096-I-1 (NP 7/10/2024) (disability discrimination; failure to accommodate and disparate treatment proven), *Nishimura v. Dept. of Navy*, SF-0752-20-0282-I-1 (NP 8/13/2024) (disability discrimination; employee neither disabled or a qualified individual with a disability), *Purohit v. DHHS*, CB-7121-21-0002-V-1 (NP 1/31/2025) (disability discrimination; travel as essential duty), *Siefring v. DOJ*, CH-0752-20-0509-I-1 (NP 7/9/2024) (EEO retaliation claim; remand warranted), *Sutton v. DHS*, CB-7121-24-0003-V-1 (NP 11/25/2024) (performance action; Board reversed the arbitrator's denial of the employee's Rehabilitation Act claim, citing to its precedent in *Pridgen v. OMB*, 2022 MSPB 31 (2022)).

In relation to other affirmative defenses, there were the usual large numbers of whistleblower reprisal claims, with several interesting decisions on jurisdiction (*Austin v. DOJ*, 2025 MSPB 3 (2025) (Board jurisdiction over FBI employees), *O'Quinn v. DHS*, AT-0752-18-0001-I-1, AT-1221-22-0478-W-1 (NP 1/30/2025) (security clearance)); retaliatory investigations (*Young v. DHS*, 2024 MSPB 18 (2024)); personnel actions (*Jones v. MSPB* (4th Cir. No. 23-1328 2024), *Mallonee v. Dept. of Interior* (Fed. Cir. No. 2024-2155 2025 NP), *Muhammad v. VA* (Fed. Cir. No. 2023-2132 2024 NP)); protected activity [i.e. (b)(9) cases] (*Reese v. Dept. of Navy*, 2025 MSPB 1 (2025), *Sharp v. Dept. of Air Force*, DE-0752-20-0103-I-1 (NP 10/9/2024)); protected disclosures (*Collier v. SBA*, 2024 MSPB 13 (2024) (abuse of authority), *Jenkins v. DHS*, DC-1221-20-0415-W-1 (NP 7/2/2024) (gross waste of funds), *Yomi v. Dept. of Navy*, SF-1221-17-0580-W-1 (NP 1/24/2024) (violation of law)); proof and clarification of the *Carr* factors (*Biswas v. VA*, 127 F.4th 332 (Fed. Cir. 2025), *Muhammad v. VA* (Fed. Cir. No. 2023-2132 2024 NP), *Young v. DHS*, 2024 MSPB 18 (2024)); and compensatory damages (*Gilewicz v. DHS*, 2024 MSPB 7 (2024), *Perlick v. VA*, 104 F.4th 1326 (Fed. Cir. 2024)).

And, as expected, there were numerous penalty-related decisions, to include *Doe v. Dept. of Commerce*, DE-0752-20-0416-I-1 (NP 8/12/2024) (off duty behavior; proven loss of trust), *Galasso v. DOJ*, NY-0752-20-0104-I-1 (NP10/10/2024) (no penalty disparate treatment), *Jones v. GPO*, DC-0752-21-0345-I-1 (NP 9/4/2024) (proven lack of confidence), *Lee v. DHS* (Fed. Cir. No. 2024-1334 2024 NP) (error in considering past discipline; remand), *Purohit v. DHHS*, CB-7121-21-0002-V-1 (NP 1/31/2025) (AWOL; telework revocation; travel was an essential duty of the appellant's position and couldn't be restructured without causing undue hardship to the agency's operations and there were no vacant positions to which he could be reassigned), *Sharp v. Dept. of Air Force*, DE-0752-20-0103-I-1 (NP 10/9/2024) (removal for sexual harassment), *Ybarra v. DOJ* (Fed. Cir. No. 2024-1848 2025 NP) (consideration of serious prior discipline).

Other instructive cases include *Cadena v. DHS*, DE-0432-19-0321-I-1 (NP 7/15/2024) (Chapter 43 action not proven; failure to communicate critical elements and performance standards; failure to warn during appraisal period), *Sutton v. DHS*, CB-7121-24-0003-V-1 (NP 11/25/2024) (Chapter 43 action reversed; communication of performance standards; roller coaster employee), *Zepeda v. NRC*, 2024 MSPB 14 (2024) (Chapter 43 action reversed; performance standards invalid because agency filed set forth the minimum level of performance that an employee must achieve to avoid removal for unacceptable performance under Chapter 43; also performance standards written backwards and agency failed to cure), *Kelly v. TVA*, 2024 MSPB 1 (2024) (MSPB may award attorney fees based on the current rates at the time of the award, rather than historic rates), *Wong v. USDA*, SF-0752-17-0382-A-1 (NP 8/23/2024) (attorney fees awardable in the interest of justice under 5 USC 7701 (g) when the agency knew or should have known it would not prevail on the merits of the action at the time it removed the employee), *Flannigan and Gaskin v. Dept. of Air Force*, DC-0752-13-0367-I-4, DC-0752-13-0354-I-4 (NP 3/11/2024) (evidence; Board not bound by expert testimony-related principles in *Daubert* or in Fed. R. of Evidence 702), *Sadler v. Dept. of Army* (Fed. Cir. No. 2023-1981 2025) (evidence; motion for sanctions; Rule 37(e) of Fed. R. Civ. Proc. applies), *Sprouse v. VA*, 2024 MSPB 12 (2024) (exclusionary rule not applicable in MSPB appeals).

Here are the case summaries themselves, by category.

AFFIRMATIVE DEFENSES

Affirmative Defense—Disability Discrimination—Employee Neither Disabled or a Qualified Individual With a Disability

Nishimura v. Dept. of Navy, SF-0752-20-0282-I-1 (NP 8/13/2024) (employee failed to prove that agency constructively suspended her when it refused to return her to duty because the employee was not medically cleared without restrictions to return to duty and was unable to comprehensively or safely perform her essential duties within his medical restrictions; moreover, the employee, who had limited use of her right arm for approximately 10 weeks while she recovered from right shoulder surgery did not show that her injury was sufficiently severe that this short–term impairment constituted a disability under the Rehabilitation Act; also, even if she is an individual with a disability, she was not a qualified individual with a disability; this matter involved a maintenance worker, who, for an approximate two month period, was not permitted to work by the agency, because she was not cleared for duty and was still under medical restrictions; she filed an appeal with the Board claiming an unlawful suspension).

Affirmative Defense—Disability Discrimination—Failure to Accommodate and Disparate Treatment

Manga v. SBA, PH-0752-17-0096-I-1 (NP 7/10/2024) (in reversing the AJ, the Board determined that the agency failed to prove its AWOL charge because the appellant provided administratively acceptable evidence that she was incapacitated for duty at her duty station, and the agency's denial of leave and handling of the appellant's situation was not reasonable under the circumstances and, moreover, that the employee was a qualified individual with a disability and the agency failed to reasonably accommodate her and the disability discrimination was a but-for cause of her removal, constituting disparate treatment discrimination; the appellant was employed as a business opportunity specialist with the Small Business Administration; after she collapsed at work, the agency granted her leave; she never returned to work; her medical documentation stated it was necessary for her to be reassigned to a closer district office due to the long commute; nonetheless, the agency did not reassign her to a closer office and documented her status as absent without leave; she was removed from her position for AWOL and failure to follow leave procedures; on appeal, the appellant challenged the removal and raised affirmative defenses of disparate treatment on the bases of age, national origin, sex, and disability; retaliation for prior EEO activity; and failure to provide reasonable accommodation for her disability; the administrative judge found that the agency proved its AWOL charge and one specification of the failure to follow leave procedures charge, denied the affirmative defenses and found removal reasonable; on review, the Board reversed; the Board found that the agency's AWOL charge could not be sustained because the appellant provided administratively acceptable evidence that she was incapacitated for duty at her duty station; also, the Board noted that the agency's denial of leave and handling of the appellant's situation was not reasonable under the circumstances (i.e., "Had the agency properly acknowledged that the appellant's medical documentation supported her incapacitation from working out of the Baltimore District Office and as discussed further below, properly acknowledged and engaged with her request for a reasonable accommodation, leave would not have been an issue. Thus, the agency's denial of leave, and handling of the appellant's situation generally, was not reasonable under the circumstances."); the agency alleged that the appellant failed to follow leave procedures because she failed to provide medical certification certifying her incapacitation; the Board disagreed and noted that the failure to follow the leave procedures charge could not be sustained (i.e., "Under specification 2, the agency alleged that the appellant failed to follow leave procedures because she 'failed to provide medical certification, signed by a registered practicing physician or other practitioner, certifying [her] incapacitation.' As explained above in connection with the AWOL charge, this allegation is demonstrably untrue. As a result, this charge cannot be sustained."); the Board also found that the appellant was a qualified individual with a disability in a lengthy and helpful analyses; it concluded that the agency failed to reasonably accommodate her ("[A]n effective accommodation for the appellant was one where '*she did not have an onerous commute*.'") and she proved that the disparate treatment disability discrimination was a but-for cause of her removal, citing to its precedent in *Pridgen*, 2022 MSPB 31; the Board reversed the removal action and found the appellant proved her affirmative defenses of disability discrimination based on disparate treatment and a failure to provide a reasonable accommodation).

Affirmative Defense—Disability Discrimination—Failure to Accommodate Claim

Abbott v. DHHS, AT-0752-15-0427-I-1 (NP 5/30/2024) (separate opinions by Chair Harris and Vice Chair Limon) (in a case such as this, where the two Board members cannot agree, the initial decision became the final decision of the Board, a decision in which the AJ sustained the charges, found the 14 day suspension reasonable and determined that the agency did not fail to accommodate the appellant's disability; Chairman Harris found that it was an error for the agency to rescind the appellant's temporary accommodation based on the appellant's alleged decline in work product and not offer any other temporary accommodation; she also concluded that the appellant established that the agency failed to provide him with reasonable accommodation; she determined that the appellant's petition for review should have been granted and the initial decision reversed; however, Vice Chairman Limon agreed with the AJ's initial decision sustaining the appellant's removal and finding that he failed to prove his affirmative defenses, noting that the agency had no obligation to provide the appellant with a different supervisor as a form of accommodation; he also noted that although a reasonable accommodation may include a reassignment to a vacant position, the appellant did not identify such a position; the vice chairman found further that DHHS was not obligated to offer an interim accommodation to the appellant, noting that the appellant's psychiatrist indicated that he could perform the essential functions of his position without an accommodation; accordingly, he found that the appellant's petition for review should have been denied and the initial decision affirmed; the appellant was employed as an auditor by the DHHS; he requested to be transferred due to his disability (depression and anxiety); DHHS provided him with a temporary accommodation to telework; it then rescinded its temporary accommodation, citing the appellant's decline in work product; the agency did not offer any other temporary accommodation, such as leave, reassignment, or increased supervision to assist the appellant with the decline; the Federal Occupational Health Service found the appellant's medical information insufficient to support an accommodation; DHHS issued the appellant a 14-day suspension for unprofessional conduct; during the meeting held to provide the appellant with the proposed suspension, he allegedly engaged in unprofessional conduct; the agency removed the appellant for unprofessional conduct and damage to government property; the appellant challenged the removal, alleging that the agency had failed to accommodate him; the administrative judge determined that the agency did not fail to accommodate the appellant's disability, which, as provided above, became the Board's final decision).

Affirmative Defense—Disability Discrimination—Performance Action

Sutton v. DHS, CB-7121-24-0003-V-1 (NP 11/25/2024) (in reversing the arbitrator, the Board found that the agency did not clearly communicate to the appellant what was necessary to achieve a satisfactory rating, and therefore she was not given a meaningful opportunity to improve her performance; moreover, "The arbitrator summarily decided that there was 'no credible evidence' of reprisal without addressing the aforementioned conflicting evidence or making any credibility findings in the first instance with respect to whether the appellant's disability EEO complaint and accommodation request were a but-for cause in H.M.'s decision to issue the appellant a counseling memorandum and place her on an EPP for not timely submitting fact sheets."; the appellant was employed as an environmental protection specialist for the U.S. Customs and Border Protection; she inquired about the agency's COVID-19 safety measures and if clear face masks would be available to facilitate lipreading for hearing-impaired individuals; subsequently, the appellant was issued a counseling memorandum concerning past-due environmental facts sheets that she was responsible for completing; she was issued a 60-day employment proficiency plan, which placed her under a performance improvement period based on unacceptable performance; she passed the EPP but her performance went back to sub par, in the agency's view (she was a roller coaster employee); thus, she was removed for unacceptable performance and for working outside normal work hours without authorization; an arbitrator sustained the removal; on review, the Board found that the agency did not clearly communicate to the appellant what was necessary to achieve a satisfactory rating, and therefore she was not given a meaningful opportunity to improve her performance; the Board noted that to assure that an employee receives a *bona fide* opportunity to improve, an agency must prove both that it communicated the standards against which an employee's performance would be measured and that it gave the employee adequate instructions regarding the way she was expected to perform the duties of her position prior to holding her accountable for performance deficiencies; the Board further noted that performance standards must be sufficiently precise and specific as to invoke a consensus as to their meaning and content, and provide a firm benchmark toward which the employee may aim her performance; the Board found that in this case, the appellant was not provided with a firm benchmark toward which to aim her performance, observing that the agency's failure to show that its performance standards were valid was also relevant to the other elements in the agency's case, including that the employee's performance was unacceptable prior to the PIP; the Board also, as provided above, reversed the arbitrator's denial of the employee's Rehabilitation Act claim, citing to its precedent in *Pridgen v. OMB*, 2022 MSPB 31 (2022)).

Affirmative Defense—Disability Discrimination—Travel as Essential Duty

Purohit v. DHHS, CB-7121-21-0002-V-1 (NP 1/31/2025) (removal, following telework revocation, was sustained; travel was an essential duty of the appellant's position and couldn't be restructured without causing undue hardship to the agency's operations and there were no vacant positions to which he could be reassigned; appellant was employed as a public health analyst with the Department of Health and Human Services; agency had granted his request for reasonable accommodation, allowing him to telework full-time rather than reporting to his duty station, and not requiring