

# What is Due Process in Federal Civil Service Employment?

A Report to the President and the Congress of the United States  
by the U.S. Merit Systems Protection Board

May 2015







U.S. MERIT SYSTEMS PROTECTION BOARD  
1615 M Street, NW  
Washington, DC 20419-0001

The President  
President of the Senate  
Speaker of the House of Representatives

Dear Sirs:

In accordance with the requirements of 5 U.S.C. § 1204(a)(3), it is my honor to submit this U.S. Merit Systems Protection Board (MSPB) report, *What is Due Process in Federal Civil Service Employment?* This report explains the interactions between the U.S. Constitution and adverse personnel actions in a merit-based civil service.

In the Civil Service Reform Act of 1978 (CSRA), Congress sought to ensure that agencies could remove poor performers and employees who engage in misconduct, while protecting the civil service from the harmful effects of management acting for improper reasons such as discrimination or retaliation for whistleblowing. Recently, Congress has expressed an increased interest in amending the CSRA, including those provisions that apply to adverse actions.

To assist Congress in these endeavors, this report explains the current civil service laws for adverse actions and the history behind their formation. It also explains why the Constitution requires that any system to remove a public employee for cause must include: (1) an opportunity – before removal – for the individual to know the charges and present a defense; and (2) the ability to appeal a removal decision before an impartial adjudicator. The report discusses why the circumstances of the case can determine whether the individual has been given the process that is “due” and how this enables the employing agency to act even more swiftly when there is reason to believe that a serious crime has been committed. The report also contains an appendix that clarifies any confusion about how the current civil service operates.

Due process is available for the whistleblower, the employee who belongs to the “wrong” political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit-based civil service rather than a corrupt spoils system.

I believe that you will find this report useful as you consider issues affecting the Federal Government’s ability to maintain a high-quality workforce in a merit-based civil service.

Respectfully,

A handwritten signature in black ink, appearing to read "Susan Tsui Grundmann", with a horizontal line extending to the right.

Susan Tsui Grundmann



## U.S. Merit Systems Protection Board

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## Executive Summary

Recently, there has been extensive public discourse comparing the Federal civil service and employment in the private sector, particularly pertaining to adverse actions such as removals. The truth is that the adverse action laws are not entirely different. As with private sector employers, the Government may be sued for discrimination, violation of the rights of veterans to return to duty after military service, retaliation for protected whistleblowing activities, and for ignoring other laws applicable to the private sector that Congress has deemed necessary for the public good. However, it is also true that there are some rules about the process for removing employees that apply only to the Federal Government. As this report will explain in greater depth, the requirements of the U.S. Constitution have shaped the rules under which civil service agencies may take adverse actions, and the Constitution therefore must play a role in any responsible discourse regarding modifications to those rules.

More than a century ago, the Government operated under a “spoils system” in which employees could be removed for any reason, including membership in a different political party than the President or publicly disclosing agency wrongdoing. The result of such a system was appointment and retention decisions based on political favoritism and not qualifications or performance. In response, Congress determined that there was a need for a career civil service, comprised of individuals who were qualified for their positions and appointed and retained (or separated) based on their competency and suitability. As a part of this system, Congress enacted a law stating that any adverse action must be taken for cause – meaning that the action must advance the efficiency of the service.

Today, that law, as amended, is codified in chapter 75 of title 5. Under chapter 75, an agency may implement an adverse action – up to and including removal – for such cause as will promote the efficiency of the service. Before an agency imposes a suspension for 14 days or less, an employee is entitled to: (1) an advance written notice stating the specific reasons for the proposed action; (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in

support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date.

Before an agency imposes a suspension for more than 14 days, a change to lower grade, reduction in pay, or a removal action, an employee is entitled to: (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date. The law also provides that for these more serious adverse actions, once the action has taken effect, the employee is entitled to file an appeal with the Merit Systems Protection Board.

While a legislature can decide whether to grant property, the Constitution determines the degree of legal process and safeguards that must be provided before the Government may take away that property. The U.S. Supreme Court has repeatedly held that, when a cause is required to remove a public employee, due process is necessary to determine if that cause has been met. Neither Congress nor the President has the power to ignore or waive due process.

Due process “couples” the pre- and post-deprivation processes, meaning that the more robust the post-deprivation process (*i.e.*, a hearing before an impartial adjudicator), the less robust the process must be before the action occurs. However, at a minimum, due process includes the right to: (1) be notified of the Government's intentions; and (2) receive a meaningful opportunity to respond before the action takes place.

Congress has enacted the procedural rules described above to help ensure that adverse actions are taken in accordance with the Constitution and for proper cause. Due process – and the rules that implement it – are in place for everyone, not only for the few problem employees who will inevitably appear in any workforce of more than a

million individuals. Due process is there for the whistleblower, the employee who belongs to the “wrong” political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit-based civil service rather than a corrupt spoils system.

When considering any changes to the current statutes for adverse actions, it will be important for those involved in the debates to consider: (1) how best to achieve the goal of a merit-based civil service that has the respect of the American people, including those citizens that the Government hopes will answer the call to public service; and (2) the extent to which the new language of the statutes will comport with the Constitution as interpreted by the U.S. Supreme Court.

## **Executive Summary**

The issue of due process<sup>1</sup> in Federal employment has received attention in recent years in the decisions of both the U.S. Merit Systems Protection Board (“MSPB” or “the Board”) and its reviewing court, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”).<sup>2</sup> The roots of due process are older than the Republic and are enshrined in the Constitution.<sup>3</sup> In 1912, when Congress established by statute that civil service employees could not be removed except for just cause, it included a list of processes due to employees.<sup>4</sup> Congress also was concerned about due process when it enacted the Civil Service Reform Act of 1978 (CSRA), which created the Board as a successor agency to the Civil Service Commission (CSC) and codified the procedures many agencies still use today to remove or discipline Federal employees.<sup>5</sup> Due process’s deep roots in American jurisprudence, the Constitution, and more than a century of Federal civil service laws ensure that it is an issue that is fundamental to the question of Federal employee rights. The purpose of this report is to describe, in plain English, the

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<sup>1</sup> Due process refers to the steps that the Government must take to ensure fairness before depriving a citizen of life, liberty, or property. As Chapter Two will explain in greater depth, due process is guaranteed by the U.S. Constitution and applies to public employment in which the Government has established that there must be a cause to remove or suspend an individual. See *Gilbert v. Homar*, 520 U.S. 924, 935-36 (1997) (suspension); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (removal). Due process “is flexible and calls for such procedural protections as the particular situation demands.” *Gilbert*, 520 U.S. at 930 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>2</sup> See, e.g., *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (Fed. Cir. 2011) (holding that if a deciding official is given new and material information relevant to the charges or the penalty without providing the employee with an opportunity to respond, then the employee’s due process rights are violated); *Gajdos v. Department of the Army*, 121 M.S.P.R. 361, ¶¶ 18-25 (2014) (arguing that *Mathews v. Eldridge*, 424 U.S. 319 (1976) established the standard to be used to determine due process rights); but see *id.*, dissenting opinion of Vice Chairman Wagner, at ¶ 3 (asserting that the Board’s examination of an employee’s entitlement to due process should be governed by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), not *Mathews*).

<sup>3</sup> *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956) (explaining that our constitutional guarantee of due process follows the tradition set forth in the Magna Carta). See *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 28-34 (1991) (Scalia, J., concurring) (describing the history of due process from the Magna Carta in 1215, to an English statute from 1354, to the American colonists’ understanding of the term in the late 18th century as expressed in their laws and state constitutions, to Supreme Court decisions reached thereafter).

<sup>4</sup> Lloyd-La Follette Act, 37 Stat. 555, Aug. 24, 1912.

<sup>5</sup> S. Rep. 95-969, at 40 (1978 U.S.C.C.A.N. 2723, 2762) (explaining that the CSRA’s “new procedures [were expected to] make it possible to act against ineffective employees with reasonable dispatch, while still providing the employee his due process rights”).

## **Introduction**

history of due process and the sources of due process rights in Federal employment to explain the past and provide a foundation to explore issues that may arise in the future. Appendix A contains a list of some perceptions about the civil service, accompanied by facts to clear up confusion about the system along with citations to allow further research and discovery for those who may be interested in correcting the record. Appendix B contains flowcharts showing how the adverse action system works. The materials contained in the appendixes are repeated in the back of the report on perforated sheets so that they can be removed and shared with others.

## Chapter One: Development of Federal Employee Rights

Due process is the means by which the Government may lawfully deprive an individual of his or her life, liberty, or property.<sup>6</sup> To explain why due process applies to Federal employment we begin with a discussion of why Federal employees have a property interest in their employment.

The right to be removed only for just cause (and not arbitrarily or for a reason that is contrary to the public good) is distinct from due process. However, it is that right to just cause that gives the employee a property interest in the job, which triggers the constitutional requirement that the Government follow due process in the removal of that property interest.

To many people, it may seem odd for the law to give a person a “right” to continue in a Federal job, the thinking being that the job belongs to the Government on behalf of the American people and the incumbent is merely the temporary holder of the position. The job exists to serve the public, not the particular person who happens to be filling it. Why, then, protect the individual’s right to keep the job?

The right to be removed only for cause did not come about purely out of concern for the individual who desires to avoid unemployment. Rather, it was the result of thorough debate over how best to ensure that the individuals responsible for effectuating Federal laws – employees of the executive branch – were the right people for the jobs at hand. The requirement that there be just cause to remove an employee is the opposite side of the coin from the requirement that the appointment of the individual be justified by his or her fitness for service. Both ensure a merit-based system.

### The Spoils System

Prior to 1883, incompetence and corruption flourished throughout the Federal Government, as individuals were appointed and retained (or separated) based upon

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<sup>6</sup> U.S. Const. Amend. V.

political contributions rather than capabilities or competence.<sup>7</sup> This was known as the “spoils system” because Federal positions were considered the spoils of war (elections being the war) available for distribution to supporters as payment for that support.<sup>8</sup> In the words of Theodore Roosevelt (who served as a Civil Service Commissioner before becoming the 26th President), “[t]he spoils system was more fruitful of degradation in our political life than any other that could possibly have been invented. The spoils-monger, the man who peddled patronage, inevitably bred the vote-buyer, the vote-seller, and the man guilty of misfeasance in office.”<sup>9</sup>

Aside from the ethical standards of an individual who was likely to engage in the behaviors necessary to be selected in a spoils system, holding the position itself also did not encourage ethical behavior. In order to keep the appointment, an employee might use his office to grant favors to the leadership of the party in power. “Not only incompetence, but also graft, corruption, and outright theft were common.”<sup>10</sup> George William Curtis, a proponent of a merit-based civil service, said that under the spoils system, “[t]he country seethe[d] with intrigue and corruption. Economy, patriotism, honesty, honor, seem[ed] to have become words of no meaning.”<sup>11</sup> The system was so deeply corrupt that ultimately, a President was assassinated by a disappointed office

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<sup>7</sup> *Elrod v. Burns*, 427 U.S. 347, 354 (1976) (explaining that “strong discontent with the corruption and inefficiency of the patronage system of public employment eventuated in the Pendleton Act”). President Andrew Jackson is famously credited with saying, “If you have a job in your department that can’t be done by a Democrat, abolish the job[.]” *The Independent*, “Andrew Jackson,” available at <http://www.independent.co.uk/news/presidents/andrew-jackson-1391112.html>. See also U.S. Office of Personnel Management, *Biography of an Ideal* (2003), at 175-200.

<sup>8</sup> U.S. Office of Personnel Management, *Biography of an Ideal* (2003), at 184.

<sup>9</sup> *Id.* at 182-83.

<sup>10</sup> *Id.* at 183-84.

<sup>11</sup> *Id.* at 182. In 1871, George William Curtis was appointed by President Ulysses S. Grant to serve as chairman of the first Federal Civil Service Commission. The commission was unable to stop the use of patronage to fill positions and Curtis resigned. Ultimately, the commission’s funding was terminated and reform would not come until the Pendleton Act of 1883. *New York Times*, “On This Day,” available at <https://www.nytimes.com/learning/general/onthisday/harp/1207.html>.



seeker who believed that he was entitled to a Federal job based on the work he had done for his political party and had been denied this entitlement.<sup>12</sup>

### The Pendleton Act of 1883

In 1883, Congress passed the Pendleton Act, which required that the classified civil service (meaning the Federal positions subject to the rules for merit that Congress had established) hire employees based on the “relative capacity and fitness of the persons examined to discharge the duties” in question, following “open, competitive examinations” of candidates.<sup>13</sup>

However, retention of these capable individuals proved to be a different question. In the decades following the Pendleton Act, protections against removals varied based on the whims of the President in office. In 1896, President Grover Cleveland ordered that removals of Federal employees could not be made based on “political or religious opinions or affiliations” and penalties for “delinquency or misconduct” must be “like in character” for “like offenses[.]”<sup>14</sup> In 1897, President William McKinley amended that rule to include that, “No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.”<sup>15</sup>

### The Lloyd-La Follette Act of 1912

Despite these rules, abuses remained. In 1912, when discussing the need to enact legislation to ensure that removals were consistent with merit, Senator Robert La Follette entered into the *Congressional Record* stories of myriad abuses, including that a “particularly efficient” employee who was recently promoted was fired a few weeks

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<sup>12</sup> *Biography of an Ideal* at 199-201.

<sup>13</sup> Pendleton Act of 1883, § 2.

<sup>14</sup> Grover Cleveland, “Executive Order - Civil Service Rules,” Rule II, §§ 3, 6 (May 6, 1896), available at <http://www.presidency.ucsb.edu/ws/?pid=70805>.

<sup>15</sup> *United States v. Wickersham*, 201 U.S. 390, 398 (1906) (quoting the Executive Order of July 27, 1897).

later for notifying the press of dangerous working conditions that had already caused the deaths of four people.<sup>16</sup> One letter entered into the record alleged that reductions in grade and summary removals for reasons unrelated to job performance had caused the civil service to become “a laughing farce and a cruel mockery.”<sup>17</sup>

In 1912, Congress enacted section 6 of the Lloyd-La Follette Act, which stated in part,

That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred [sic] against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof[.]<sup>18</sup>

The Lloyd-La Follette Act included the right of the CSC to review a copy of the records related to the above, but expressly did not provide for the right to a hearing or examination of witnesses unless the management official effectuating the removal chose to provide them.<sup>19</sup>

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<sup>16</sup> 48 Cong. Rec. 10731 (Aug. 12, 1912). The passage of more than a century has not eliminated the need to ensure that removals are for cause and not for an improper reason such as retaliation for whistleblowing. See, e.g., *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35 (2014). In *Aquino*, the appellant, a screener for the Transportation Security Administration (TSA), informed his fourth-level supervisor of actions by his first-level supervisor that he reasonably believed posed a substantial and specific danger to public safety in aviation. The supervisor then alleged that the appellant was inattentive to his duties and the appellant was removed on this basis. The appellant exhausted his remedies with the Office of Special Counsel and filed an individual right of action appeal with MSPB. Following a hearing, MSPB determined that the appellant’s supervisor learned of the appellant’s disclosure on the same day the appellant made his disclosure and that it was only a few days later that the appellant’s supervisor reported the appellant’s alleged misconduct to upper-level management. Additionally, MSPB determined that other employees, who committed offenses similar to the allegations against the appellant, but who were not whistleblowers, were not removed. MSPB therefore found that the appellant’s protected whistleblowing activity was a contributing factor in his removal and ordered the agency to cancel the removal action. *Id.* at ¶¶ 2-4, 14-31, 33.

<sup>17</sup> 48 Cong. Rec. 10729 (Aug. 12, 1912). Senator La Follette alleged that following his inquiries into the state of the civil service, the Postal Service violated postal laws and subjected his mail to “an espionage that was almost Russian in its character[.]” opening and examining mail addressed to the senator sent by Postal Service employees. *Id.*

<sup>18</sup> 37 Stat. 555 (Aug. 24, 1912).

<sup>19</sup> *Id.*

By the time World War II approached, the CSC had carved out a role for itself overseeing the removal process, but it was very limited. Agencies would give the CSC copies of a removal file only upon request by the CSC and only for the purpose of investigating *procedural* compliance with the statute. The CSC made it clear that neither it nor the courts would review whether there was *sufficient cause* for removal or any other “exercise of discretion by the appointing power[.]”<sup>20</sup>

### The Veterans’ Preference Act of 1944

For veterans, this situation – in which the CSC would not look at whether the agency had cause for implementing a removal action – changed in 1944 with the enactment of the Veterans’ Preference Act (VPA). Under the VPA, preference-eligible veterans were allowed to file an appeal with the CSC for discharges, suspensions of more than 30 days, furloughs without pay, reductions in rank or compensation, or debarment.<sup>21</sup> This right included furnishing affidavits in support of the individual and an entitlement to appear before the CSC, which would then issue its findings and recommendations.<sup>22</sup> However, there was an important piece missing from the VPA of 1944 as originally enacted; agencies were not specifically required to abide by the CSC’s decisions.<sup>23</sup> A House Report explaining the need to add a legal requirement for agencies

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<sup>20</sup> “The power of removal for unfitness remains in the appointing officer unimpaired by the restrictions of the civil-service law and rules. He is the judge of the qualifications of his subordinates, and the question whether such cause exists as requires a removal in the interests of the efficiency of the service is for him to determine. The judgment of the appointing officer as to whether or not the causes for removal are sufficient is not reviewable by the courts or by the Civil Service Commission, but the civil-service rules provide that the Commission shall have authority to investigate any alleged failure to follow the procedure required by statute or rule. Courts will not restrain or review the exercise of discretion by the appointing power, except to enforce statutory restrictions, and will not interfere in or review cases of alleged violation of executive rules and regulations relating to removals. An employee’s fitness, capacity, and attention to his duties are questions of discretion and judgment to be determined by his superior officers.” U.S. Civil Service Commission, *Removal, Reduction, Suspension, and Furlough*, Form 505 (Mar. 1937), at 1, 6-7.

<sup>21</sup> 58 Stat. 387 (Veterans’ Preference Act of 1944) § 14.

<sup>22</sup> *Id.*

<sup>23</sup> *See generally* 58 Stat. 387 (Veterans’ Preference Act of 1944). The CSC was given the authority to “make and enforce appropriate rules and regulations” to effectuate the purpose of the VPA. *Id.* at § 19. However, the CSC’s decisions concerning the appeals process under the VPA were often “disregarded” by the employing agencies and departments. H. Rep. 80-1817 (Committee on Post Office and Civil Service) (Apr. 16, 1948).

to comply with recommendations from the CSC stated, “It is obvious that the Veterans’ Preference Act is a nullity unless provision is made to make effective the decisions of the Civil Service Commission with respect to appeals processed by veterans and other employees under the provisions of the Veterans’ Preference Act.”<sup>24</sup> The VPA was amended in 1948 to state that agencies were required to comply with CSC recommendations in appeals brought under the VPA.<sup>25</sup>

While the VPA provided protections for preference eligibles, the system for those without preference remained in a state of disorder. A 1953 study conducted by a subcommittee of the Senate Committee on [the] Post Office and Civil Service described the adverse action review process afforded by the Lloyd-La Follette Act as “comparatively feeble[.]”<sup>26</sup> The report stated that, “[e]veryone interviewed during the study has agreed that appeals and grievances policies and practices in the Federal Government as a whole are in a state of confusion. The legislative basis for the disposition of these matters is a patchwork of laws enacted at different times and for different purposes.”<sup>27</sup> The subcommittee found that a lack of central direction from the CSC, varying levels of protection in different agencies based on individual agency policies, and the inability of employees in some agencies to get a hearing on matters as serious as removal actions, “tend[ed] to breed confusion and misunderstanding and to cause resentment, distrust, and exasperation on the part of employees and management alike.”<sup>28</sup>

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<sup>24</sup> H. Rep. 80-1817 (Committee on Post Office and Civil Service) (Apr. 16, 1948).

<sup>25</sup> 62 Stat. 575, Pub. L. No. 80-741 (Jun. 22, 1948).

<sup>26</sup> Senate Committee on Post Office and Civil Service, *Appeals and Grievance Procedures in the Federal Government*, 83 S. Doc. 33 (Mar. 20, 1953), at 7-8.

<sup>27</sup> *Id.* at 3-4. The laws and executive orders mentioned by the report included protections against discrimination and appeal rights for performance ratings and classification decisions. *Id.* at 8.

<sup>28</sup> *Id.* at 4-5. When it was left up to agencies to decide what protections to grant, the pattern was quite interesting – particularly given that the study occurred during the height of the Cold War. The greater the national security implications of an agency’s mission, the more inclined the agency seemed to be to protect employees from improper actions. Agencies with responsibilities for national defense and veterans, such as the Department of the Army, Mutual Security Agency, and the Veterans’ Administration, opted to “go beyond the letter of the law in establishing hearing procedures.” These agencies chose to give both hearing and appeal rights to non-veterans as well as veterans for adverse actions involving misconduct, poor

The House Committee on [the] Post Office and Civil Service reached similar conclusions regarding the inadequacies of the system in place in the 1950s, concluding that,

In light of all of the circumstances, and recognizing that an increase in appeals before the Commission would result, there seems to be no sound ground for denying equal appeals rights to all Federal employees or for continuance of the present situation which in effect relegates the nonpreference Federal employee to the status of a second-class citizen, in comparison to preference employees, in certain classes of appeals from adverse personnel actions.<sup>29</sup>

### President Kennedy's Executive Order in 1962

On January 17, 1962, President John Kennedy addressed these problems by issuing an executive order to “extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligibles.”<sup>30</sup> This included the right to appeal adverse agency decisions to the CSC.<sup>31</sup>

### The Civil Service Reform Act of 1978

In 1978, Congress enacted the CSRA. “A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action[s], part of the outdated patchwork of statutes and rules built up over almost a

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performance, and malfeasance. *Id.* at 8. The Central Intelligence Agency and Atomic Energy Commission also would always grant a hearing before taking an adverse personnel action. *Id.* at 4. In contrast, the Department of Agriculture chose to deny hearings before removing an employee. *Id.* at 8. Still other agencies, such as the Department of Justice, chose to have no formal policy, so that procedures may have varied in similar cases within the same agency. *Id.*

<sup>29</sup> House Committee on Post Office and Civil Service, *United States Civil Service Commission Report*, 84 H. R. Rept. No. 1844 (Mar. 1, 1956), at 46. “Preference” employees are individuals entitled to preferential treatment in certain hiring and separation situations because of past military service. Levels of preference can vary, and the individual may be a veteran, spouse, widow, or mother, depending on the circumstances. For more information about veterans’ preference and how it operates, see U.S. Merit Systems Protection Board, *Veteran Hiring in the Civil Service: Practices and Perceptions* (2014), available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

<sup>30</sup> Executive Order 10988, *Employee-Management Cooperation in the Federal Service*, Jan. 17, 1962, § 14.

<sup>31</sup> *Id.*

century that was the civil service system.”<sup>32</sup> In the CSRA, Congress recognized the importance of due process and an outside review procedure to ensure that adverse actions were merit-based and comported with constitutional requirements as established by Supreme Court decisions issued as of 1978.<sup>33</sup> It codified the employee’s right to: (1) notice of the charges; (2) a reasonable opportunity to respond to the deciding official; and (3) an appeal to a neutral body after the adverse action takes effect.<sup>34</sup> Congress also made it clear that agency actions would not be permitted to stand if they were the result of prohibited personnel actions, such as discrimination or retaliation for whistleblowing.<sup>35</sup>

As discussed later in this report, some provisions of the CSRA have been modified over the years. But, the core protections (notice of the proposed action, a meaningful opportunity to respond, and a right to be heard by a neutral adjudicator) remain for most employees and have been expanded to encompass additional employees not originally covered by the CSRA.<sup>36</sup> These core protections and the standards of proof to take an adverse action are discussed in greater depth in Chapter Three.

Unfortunately, misunderstandings have occurred about how the adverse action laws operate. Appendix A contains a list of some perceptions that people may have about the ability of agencies to implement adverse actions and provides information to clear up the confusion.

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<sup>32</sup> *United States v. Fausto*, 484 U.S. 439, 444 (1988) (internal punctuations and citations omitted).

<sup>33</sup> S. Rep. 95-969, at 19, 24, 51-52 (1978 U.S.C.C.A.N. 2723, 2741, 2746, 2773-74).

<sup>34</sup> 5 U.S.C. §§ 7503, 7513, 7701-7703. The Lloyd-La Follette Act included the right to notice and an opportunity to respond, but was missing the important post-action review process by a neutral body to ensure that the action was in the interest of the efficiency of the service and had not been taken for an improper reason. *See* 37 Stat. 555 (Aug. 24, 1912).

<sup>35</sup> 5 U.S.C. § 7701(c)(2). *See, e.g., Sowers v. Department of Agriculture*, 24 M.S.P.R. 492, 494, 496 (1984) (ordering the cancellation of a removal action after the Board found that the record showed the agency manipulated circumstances to remove a whistleblower who was excellent in his post).

<sup>36</sup> *See, e.g., Civil Service Due Process Amendments of 1990*, Pub. L. No. 101-376, 104 Stat. 461.

As this chapter has explained, the protections currently provided to Federal employees were the result of a slow evolution involving both congressional action and independent action by various Presidents through executive orders. These protections were provided because it became clear over time that a consistent review process for adverse actions was necessary for an effective merit-based system.

However, as the next chapter explains, in 1985, the third branch of the Government – the judiciary – became involved in the matter and via its interpretation of the U.S. Constitution, it changed the ground rules under which the executive and legislative branches are permitted to operate the civil service. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court held that Congress (through statutes) or the President (through executive orders) can still grant **protections** to employees, but Congress and the President lack the authority to decide whether they will grant **due process rights** for those protections. Rather, according to the Supreme Court, the Constitution guarantees that if there must be a cause to remove the individual from his or her job, then there is automatically a due process requirement to establish that the cause has been met.<sup>37</sup>

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<sup>37</sup> See *Loudermill*, 470 U.S. at 541. See also Eric Katz, “Lawmakers Threaten New Secret Service Chief’s Job, Tell Him to Fire More Agents,” Govexec.com (Mar. 24, 2015), available at, [http://www.govexec.com/defense/2015/03/lawmakers-threaten-new-secret-service-chiefs-job-tell-him-fire-more-agents/108298/?oref=govexec\\_today\\_nl](http://www.govexec.com/defense/2015/03/lawmakers-threaten-new-secret-service-chiefs-job-tell-him-fire-more-agents/108298/?oref=govexec_today_nl), in which the Director of the Secret Service explained, “I am resolved to holding people accountable for their actions. . . . But I want to make clear that I do not have the ability to simply terminate employees based solely on allegations of misconduct. This is not because I am being lenient, but because tenured federal government employees have certain constitutional due process rights which are implemented through statutory procedures.”





## Chapter Two: *Loudermill* and Progeny

*Cleveland Board of Education v. Loudermill* (“*Loudermill*”) is a landmark case that serves as the foundation for nearly any recent case involving the due process rights of public employees, including Federal employees.<sup>38</sup> However, *Loudermill* did not happen in a vacuum and does not stand alone. It is consistent with the Supreme Court decisions about public employment that preceded it.<sup>39</sup> *Loudermill* and its progeny uniformly provide that while governments decide whether employment with them will be at-will, once a government institutes the requirement that it must have a cause to take adverse actions, constitutional requirements will determine a minimum threshold for how those actions can occur.

### The *Loudermill* Case

James Loudermill was employed by the Cleveland Board of Education in 1979-1980. He was classified as a civil servant. Under Ohio state law in effect at the time, “[s]uch employees [could] be terminated only for cause, and [could] obtain administrative review if discharged.”<sup>40</sup>

Prior to his appointment, Loudermill claimed that he had never been convicted of a felony, despite having been convicted of grand larceny more than a decade earlier. He was removed for dishonesty regarding his criminal history without being provided an

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<sup>38</sup> While *Loudermill* originated as a challenge to a state law, the U.S. Supreme Court and the Federal Circuit have clearly and unequivocally held that the decision in *Loudermill* applies to actions taken against Federal employees. The issue is *public* employment, regardless of the level of government. See, e.g., *Lachance v. Erickson*, 522 U.S. 262, 266 (1998) (explaining that while the *Loudermill* holding of due process, particularly the right to notice and a meaningful opportunity to respond, applies to the Federal civil service, there is no right to lie in that response); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1375 (1999) (quoting and citing *Loudermill* extensively to explain a Federal employee’s due process right to present his or her side of the case).

<sup>39</sup> See, e.g., *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988) (citing *Loudermill* and holding that when a state university acts to “impose a serious disciplinary sanction” on a tenured employee, it must comply with due process); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77 (1972) (describing three earlier decisions in which the Court held that due process rights applied to public employment).

<sup>40</sup> *Loudermill*, 470 U.S. at 535.

opportunity to respond to the charge or to challenge the decision to remove him.<sup>41</sup> He appealed the removal decision to Ohio's civil service commission. When the Ohio commission upheld the removal, Loudermill had the right to appeal that decision through the state courts. He opted to file a claim in Federal court instead, asserting that the Ohio statute under which he was removed was unconstitutional because it did not entitle him to respond to the charge against him before the removal took place.<sup>42</sup>

The Federal district court determined that Loudermill had a property right in the position but “held that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due.”<sup>43</sup>

At about the same time, another Ohioan, Richard Donnelly, was removed from his position by the Parma Board of Education. While Donnelly was reinstated by the Ohio civil service commission (without back pay for the period in which he had been terminated), he also challenged the constitutionality of the same law “[i]n a complaint essentially identical to Loudermill’s[.]” Because of the similarities, the two cases were consolidated for appeal.<sup>44</sup> They are jointly known as *Loudermill*.

On appeal, the U.S. Court of Appeals for the Sixth Circuit found that both individuals had a property right to their positions. However, unlike the district court below, the Sixth Circuit found that “the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pre-termination hearing” and that Loudermill and Donnelly had therefore been “deprived of due process.”<sup>45</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 536.

<sup>44</sup> *Id.* at 536-37.

<sup>45</sup> *Id.* at 537 (punctuation added).

The Supreme Court granted certiorari for both cases.<sup>46</sup> The question of whether the appellants had a property interest in their jobs was disposed of quickly. The court noted that the individuals, by statute, were “entitled to retain their positions during good behavior and efficient service, [and] could not be dismissed except for misfeasance, malfeasance, or nonfeasance in office[.]”<sup>47</sup> The Court agreed with the district and appellate courts below that *by limiting the circumstances under which the positions could be taken away, the statute gave the employees property rights in their positions.*<sup>48</sup>

While not disputing the existence of the property right, the Parma Board of Education argued that the same law that granted the property right also provided the conditions under which the property in question (the job) could be taken away. This was known as the “bitter with the sweet” approach because the law simultaneously gave the property in question and enabled the state to take it away on its own terms.<sup>49</sup>

In response to this claim, the Court determined that, “[t]he point is straightforward: the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.” In other words, a statute can give the substance – namely the property right – but the fact that it has done so does not necessarily mean that it can freely limit the procedures by which that right can be taken away.<sup>50</sup>

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<sup>46</sup> Certiorari refers to an order from an appellate court to a lower court instructing it to deliver a case so that it may be reviewed. Most cases heard by the Supreme Court are the results of it granting requests that it issue such orders, causing it to be referred to as “granting certiorari” – meaning that the court has indicated it will agree to review a case. *Black’s Law Dictionary* (10th ed. 2014).

<sup>47</sup> *Loudermill*, 470 U.S. at 538-39 (internal punctuation omitted).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 539-40.

<sup>50</sup> *Id.* at 541. Property rights in continued employment may come from statutes or from other commitments made by the governmental entity. See, e.g., *Roth*, 408 U.S. at 576-77 (describing a case, *Connell v. Higginbotham*, 403 U.S. 207, 208 (1970), which held that an employment contract with a clearly implied promise of continued employment was sufficient to establish the property right); *Leary v. Daeschner*, 228 F.3d 729, 741-42 (6th Cir. 2000)

The Court held that,

Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.<sup>51</sup>

The Court explained that, “once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the Ohio statute.”<sup>52</sup> Rather, it comes from the Federal Constitution.<sup>53</sup>

The *Loudermill* Court explained that the “root requirement” of the Due Process Clause is that “an individual be given an opportunity for a hearing before he is deprived of any significant property interest. This principle requires some kind of a hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.”<sup>54</sup>

One reason for this due process right is the possibility that “[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect.”<sup>55</sup> The Court was emphatic that “the right to a hearing does not depend on a demonstration of certain success.”<sup>56</sup>

The Court recognized that public employers might not want to keep an employee on the job during the pre-termination process. However, its recommended solution was

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(holding that a contract, such as a collective bargaining agreement, may create a property interest).

<sup>51</sup> *Loudermill*, 470 U.S. at 541 (internal punctuation omitted).

<sup>52</sup> *Id.* (internal punctuation and citation omitted).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 542 (internal punctuation and citations omitted). The Court also stated that, “this rule has been settled for some time now.” *Id.*

<sup>55</sup> *Id.* at 543.

<sup>56</sup> *Id.* at 544.

that, “in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.” Removal without a pre-termination process is not an option.<sup>57</sup> Rather, an employee with a property right in the position *must* be given “notice and an opportunity to respond.”<sup>58</sup>

While the decision in *Loudermill* explained that pre-termination procedures are required, it also made it clear that the constitutionality of termination procedures does not depend solely on the pre-termination process. The Court stated that its holding was heavily dependent on “the provisions in Ohio law for a full post-termination hearing.”<sup>59</sup> The two issues (pre- and post-termination procedures) are “coupled” when looking at the question of whether due process has been given.<sup>60</sup>

The “nature of the subsequent proceedings” can determine whether the pre-termination proceedings were adequate.<sup>61</sup> When applying this rule, courts have emphasized the need to look at the “totality” of the procedures.<sup>62</sup> For example, in *Farhat v. Jopke*, 370 F.3d 580, 597 (6th Cir. 2004), the court held that *Loudermill* does not demand that the pre-termination opportunity to respond take place before a neutral and impartial decision-maker when impartiality is provided by a “post-termination proceeding where bias and corruption are ferreted out.”<sup>63</sup> However, while “the nature of subsequent proceedings may lessen the amount of process that the state must provide

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<sup>57</sup> *Id.* at 544-45.

<sup>58</sup> *Id.* at 546.

<sup>59</sup> *Id.* at 545-48.

<sup>60</sup> *Id.* at 547-48.

<sup>61</sup> *Id.* at 545. Because of this coupling, the constitutionality of the process as a whole may depend on the constitutionality of various stages of the process, including which party bears the burden of proof. The Supreme Court has held that for a deprivation of life, liberty, or property, a statute that presumes guilt without “a fair opportunity to repel” that presumption violates the due process clause. *Manley v. State of Georgia*, 279 U.S. 1, 6 (1929). *See also Speiser v. Randall*, 357 U.S. 513, 524 (1958) (explaining that in both criminal and civil cases, the burden of proof cannot be “unfairly” shifted to the defendant).

<sup>62</sup> *West v. Grand County*, 967 F.2d 362, 368 (10th Cir. 1992).

<sup>63</sup> *Farhat*, 370 F.3d at 597. *See Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 332-33 (9th Cir. 1995) (holding that if post-termination proceedings are overseen by individuals who harbor malice for the employee’s whistleblowing activities, the process will fail to meet the due process requirements).

pre-termination, subsequent proceedings cannot serve to eliminate the essential requirement of a pre-termination notice and opportunity to respond.”<sup>64</sup>

### *Loudermill* Applies to the Federal Government

Public employers – whether state or Federal – are covered by the due process guarantees of the U.S. Constitution.<sup>65</sup> For this reason, a decision by a Federal court pertaining to due process in state employment can be instructive when the holding is reached as a result of the Federal Constitution. However, a decision reached by the U.S. Supreme Court is more than instructive – it is an instruction.<sup>66</sup> When the Supreme Court reaches a conclusion based on the requirements of the Federal Constitution, that holding should be considered when setting laws, regardless of whether the legislature in question is state or Federal. While *Loudermill* was a decision involving a state employer, ***both the Supreme Court and the Federal Circuit have explicitly recognized that the Constitutional due process rights described in Loudermill apply to the Federal civil service.***<sup>67</sup>

The two most well-settled (and well-known) issues in all of American jurisprudence are quite simple: “An act of congress repugnant to the constitution cannot become a law” and it is “emphatically the province and duty” of the judiciary to interpret laws and the Constitution.<sup>68</sup> As a result, any decisions by the Supreme Court

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<sup>64</sup> *Clements*, 69 F.3d at 332.

<sup>65</sup> While the Federal Government is covered by the Fifth Amendment and the states by the Fourteenth Amendment, the effect is the same. See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (explaining that, “when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause”); *Block v. Hirsh*, 256 U.S. 135, 159 (1921) (explaining that, “[t]he national government by the Fifth Amendment to the Constitution, and the states by the Fourteenth Amendment, are forbidden to deprive any person of ‘life, liberty, or property, without due process of law’”).

<sup>66</sup> The Supreme Court is the highest court for cases involving claims brought under the Federal Constitution and for claims arising under Federal civil service laws. See 28 U.S.C. § 1254 (granting the Supreme Court jurisdiction to review cases from the courts of appeals); 28 U.S.C. § 1295(a)(9) (granting jurisdiction over MSPB decisions to the Federal Circuit).

<sup>67</sup> *Erickson*, 522 U.S. at 266 (citing *Loudermill* when explaining the due process rights of a Federal civil servant in his employment); *Stone*, 179 F.3d at 1375-76 (holding in the context of Federal employment that the “process due a public employee prior to removal from office has been explained in *Loudermill*”).

<sup>68</sup> *Marbury v. Madison*, 5 U.S. 137, 138, 177 (1803). See *Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (holding based on *Marbury* that, “where

involving constitutional interpretations – including decisions regarding public employment – are binding on Congress and the President. While a Supreme Court decision based on its interpretation of a law may be overruled by the enactment of a new law, a decision based on the Constitution cannot.<sup>69</sup> A decision based on an interpretation of the Constitution can only be altered through a new decision by the Supreme Court or a constitutional amendment.<sup>70</sup>

There are two significant cases relying on *Loudermill* that have highlighted the extent to which the Constitution requires an opportunity to respond before an adverse action can be effectuated: (1) *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011); and (2) *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999). They are sometimes referred to jointly by the label “*Ward/Stone*” because of the extent to which they share a common legal concept – namely, that if a deciding official is exposed to information affecting the outcome of his decision-making process without the employee being told of the information and given the opportunity to present a defense against it, then any opportunity to respond is fundamentally flawed and will fail to meet the constitutional requirements of *Loudermill*.<sup>71</sup>

In *Stone*, a removal case, the deciding official received two *ex parte* communications: one from the proposing official and one from a second official who

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a legislature oversteps its bounds and issues a law repugnant to the constitution, it is void and must be struck down by the courts”) (internal punctuation omitted); *Berkowitz v. United States*, 340 F.2d 168, 173 (1st Cir. 1965) (holding that a court may find that “Congress could not have intended what its words appear to say” if the alternative is to hold that the court “cannot give effect to what was said because it is repugnant to the Constitution”). See also U.S. Supreme Court at [www.supremecourt.gov/about/constitutional.aspx](http://www.supremecourt.gov/about/constitutional.aspx) (explaining that, “[w]hen the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court”).

<sup>69</sup> Compare *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (explaining that “a constitutional decision of this Court may not be in effect overruled by an Act of Congress”) (punctuation omitted) with *Mansell v. Mansell*, 490 U.S. 581, 588 (1989) (explaining that Congress could “overcome” an earlier decision by the Court involving statutory interpretation by enacting new legislation).

<sup>70</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996).

<sup>71</sup> *Ward*, 634 F.3d at 1280; *Stone*, 179 F.3d at 1377.



also advocated for Stone's removal.<sup>72</sup> Stone was not informed of the communications or their content prior to the effectuation of his removal.<sup>73</sup> He appealed his removal to MSPB, asserting that these communications harmed his due process rights.<sup>74</sup> The administrative judge assigned to the case held that there was no statute or regulation prohibiting such communications, and the Board denied the appellant's petition for review.<sup>75</sup> Stone then filed an appeal to the Federal Circuit.<sup>76</sup>

On appeal, citing *Loudermill*, the court stated:

We begin by noting that [Stone's] property interest is not defined by, or conditioned on, Congress' choice of procedures for its deprivation. In other words, [title 5] § 7513 and § 4303 do not provide the final limit on the procedures the agency must follow in removing Mr. Stone. Procedural due process requires "that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures."<sup>77</sup>

The court held that "[i]t is constitutionally impermissible to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process. *Our system is premised on the procedural fairness at each stage of the removal proceedings.*"<sup>78</sup> Accordingly, the case was remanded to the Board with instructions that if the Board found that the communications involved new and material information, the action would have to be reversed and the employee provided with a constitutionally correct removal procedure.<sup>79</sup>

The factors that the Board was instructed to consider when determining if information was new and material included:

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<sup>72</sup> *Stone*, 179 F.3d at 1372-73. An *ex parte* communication is a communication between one party and the decision-maker where the other party is not present and not given the opportunity to present his or her side of the argument.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1373.

<sup>75</sup> *Id.* at 1371.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1375 (internal citation to *Loudermill* omitted).

<sup>78</sup> *Id.* at 1376 (emphasis added).

<sup>79</sup> *Id.* at 1377.



whether the *ex parte* communication merely introduces ‘cumulative’ information or new information; whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. Ultimately, the inquiry of the Board is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances.<sup>80</sup>

These are commonly referred to as the *Stone* factors or the *Stone* test.

In *Ward*, the appellant was removed for improper conduct arising out of a conflict with his supervisor in which she perceived the appellant’s behavior as threatening and disobedient.<sup>81</sup> Before reaching a decision on the penalty, the deciding official spoke with three supervisors and one manager who discussed other alleged incidents involving similar behavior by Ward.<sup>82</sup> Ward was not informed of these conversations.<sup>83</sup> The deciding official later admitted that the repeated pattern of belligerent conduct described in the conversations led him to conclude that Ward could not be rehabilitated by a lesser penalty and that removal was therefore necessary.<sup>84</sup>

On appeal, the Board held that the deciding official’s use of this *ex parte* information was improper but concluded that, because the *ex parte* communication involved the penalty and not the charges, it could remedy the error by doing its own penalty analysis.<sup>85</sup> The Board then held removal was appropriate.<sup>86</sup>

Ward appealed this decision to the Federal Circuit, which held that the Board erred in its conclusion that an impropriety involving the penalty did not raise the same constitutional issues as an impropriety involving charges.<sup>87</sup> The court held that the distinction was “arbitrary and unsupportable” because “[t]here is no constitutionally

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<sup>80</sup> *Id.*

<sup>81</sup> *Ward*, 634 F.3d at 1276.

<sup>82</sup> *Id.* at 1277.

<sup>83</sup> *Id.* at 1278.

<sup>84</sup> *Id.* at 1277.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1280.

relevant distinction between *ex parte* communications relating to the underlying charge and those relating to the penalty.”<sup>88</sup> The Board was instructed that it could not excuse a constitutional violation as a harmless error.<sup>89</sup>

The court remanded the case to the Board with the instruction to apply the *Stone* factors to determine whether new and material information had been introduced to the process without the appellant being granted the opportunity to respond.<sup>90</sup> If this had occurred, then, as with *Stone*, the appellant would be entitled to a new, constitutionally correct procedure.<sup>91</sup>

The court also reminded the Board that, “[a]s *Stone* recognized, the Due Process Clause only provides the minimum process to which a public employee is entitled prior to removal. Public employees are, of course, entitled to other procedural protections afforded them by statute, regulation, or agency procedure.”<sup>92</sup> The Board was instructed that, *if it found the constitutional requirements had been met*, then it was to examine any procedural errors involving statutes or regulations and conduct a “proper” analysis to determine if such errors were harmful.<sup>93</sup> A harmful error is one in which the outcome was affected by the agency’s failure to follow required procedures.<sup>94</sup> The court reminded the Board that, by statute, if there were harmful errors in the agency’s process, the agency could not prevail.<sup>95</sup> Thus, even if the Board concluded that the removal itself was reasonable, it did not have the authority to cure an agency’s procedural errors.<sup>96</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1281 (internal citations and punctuation omitted).

<sup>93</sup> *Id.* at 1282.

<sup>94</sup> *Id.* at 1281-82.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

### Loudermill and Suspensions

In the Federal context, there has not been extensive discussion of the types of actions to which the property right extends because the statute pertaining to the procedures for removing civil service employees, 5 U.S.C. chapter 75, also applies those same procedures to lengthy suspensions and demotions. However, the Supreme Court has addressed the interaction between its *Loudermill* decision and situations in which the penalty is a suspension rather than a removal.

In *Gilbert v. Homar*, 520 U.S. 924 (1997), a policeman employed by the State of Pennsylvania was suspended without pay without first receiving notice and a period to reply. The suspension was triggered by his arrest and the filing of charges for a drug felony.<sup>97</sup>

When deciding whether there would be a due process right to advanced notice and an opportunity to reply in such cases, the Court noted that it had previously held that due process “is flexible and calls for such procedural protections as the particular situation demands.”<sup>98</sup> When “a State must act quickly, or where it would be impractical to provide [a] predeprivation process, [a] postdeprivation process satisfies the requirements of the Due Process Clause.”<sup>99</sup> The Court held that “[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in *limited* cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.”<sup>100</sup>

The Court applied its test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (a benefits case), to explain the factors to consider in determining whether sufficient due

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<sup>97</sup> *Gilbert*, 520 U.S. at 926-27. For purposes of this case, the Court assumed the individual had a property right without actually deciding that the property right existed. *Id.* at 929. *Cf. Tarkanian*, 488 U.S. at 192 (holding in the context of a case involving a suspension that acted as a demotion that, when a state actor “decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution”).

<sup>98</sup> *Gilbert*, 520 U.S. at 930 (quoting *Morrissey*, 408 U.S. at 481).

<sup>99</sup> *Id.* at 930.

<sup>100</sup> *Id.* at 930-31 (quoting *Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230, 240 (1988) (emphasis added)).

process has been granted in the employment context. The three factors are: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest.”<sup>101</sup>

For the private interest factor, the Court reiterated its holdings from other cases that the length and finality of the property deprivation should be considered when assessing the process that an individual is due and concluded that a suspension may be a relatively minor deprivation compared to a removal “[s]o long as the suspended employee receives a sufficiently prompt postsuspension hearing[.]”<sup>102</sup>

For the state interest factor, the Court noted that a police officer holds a position of “great public trust and high public visibility” and that felony charges are serious. Therefore, the state had a strong interest in the matter.<sup>103</sup>

For the last *Mathews* factor, the risk of an erroneous action, the Court noted that the purpose of a pre-suspension hearing would be to determine if there was adequate evidence of the misconduct and found that the arrest and filing of charges against the individual provided an adequate safeguard. Therefore, the Court concluded that the individual’s constitutional right to due process was not violated when he was suspended without advanced notice.<sup>104</sup>

However, in *Gilbert*, the Court noted that the charges against the individual were dropped on September 1st, yet the suspension continued without a hearing until September 18th. The Court held that, “[o]nce the charges were dropped, the risk of erroneous deprivation increased substantially[.]”<sup>105</sup> Accordingly, it remanded the case

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<sup>101</sup> *Gilbert*, 520 U.S. at 931-32 (quoting *Mathews*, 424 U.S. at 335).

<sup>102</sup> *Gilbert*, 520 U.S. at 932.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 933-34.

<sup>105</sup> *Id.* at 935.

to the court of appeals to determine whether, under the facts of the case, the hearing was sufficiently prompt to satisfy the requirements of due process.<sup>106</sup>

In other words, because due process is situationally dependent, as situations evolve, the *minimum* level of process that the Constitution requires can change. One of the dangers of skirting too closely to the minimum amount may be the employer finding itself on the wrong side of that line. The situationally dependent nature of due process may also pose a challenge for the establishment of rigid rules. For example, what constitutes a “meaningful” opportunity to reply may be different in a simple case as opposed to one with highly complex issues or difficult to access evidence. Chapter Three will discuss in greater depth the opportunity to reply.

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<sup>106</sup> *Id.* at 935-36.



## Chapter Three: The Statutory Procedures

### Suspensions of 14 Days or Less

By statute, before an agency imposes a suspension for 14 days or less, an employee is entitled to:

- (1) an advance written notice stating the specific reasons for the proposed action;
- (2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and
- (4) a written decision and the specific reasons therefor at the earliest practicable date.<sup>107</sup>

Appendix B contains a flow chart illustrating this process. The law does not give appellate jurisdiction to MSPB for such actions unless another statute applies, such as MSPB's jurisdiction over cases alleging whistleblower retaliation or discrimination based on military service or obligations.<sup>108</sup>

### Suspensions of More than 14 Days, Demotions, and Removals

Before an agency imposes a suspension for more than 14 days, a change to lower grade, reduction in pay, or a removal action, an employee is entitled to:

- (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
- (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
- (3) be represented by an attorney or other representative; and

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<sup>107</sup> 5 U.S.C. § 7503. The U.S. Office of Personnel Management has issued regulations stating that the employee's period to reply to a proposed suspension of 14 days or less cannot be less than 24 hours. 5 C.F.R. § 752.203(c).

<sup>108</sup> See, e.g., *Johnson v. U.S. Postal Service*, 85 M.S.P.R. 1, ¶ 11 (1999) (finding MSPB had jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for a 7-day suspension when the appellant alleged that he was denied leave and instead was charged with absence without leave (AWOL) for periods during which he served on military reserve duty, leading to him being suspended for AWOL); *Hupka v. Department of Defense*, 74 M.S.P.R. 406, 411 (1997) (finding MSPB had jurisdiction over an appeal of a 5-day and a 4-day suspension where the appellant alleged retaliation for whistleblowing and exhausted his administrative remedies).

- (4) a written decision and the specific reasons therefor at the earliest practicable date.<sup>109</sup>

Additionally, “[a]n agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer” and “[a]n employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.”<sup>110</sup> Appendix B contains a flow chart illustrating this process.

While a conduct-based adverse action must comport with the rules set forth in chapter 75 of title 5, agencies may take a performance-based demotion or removal action under: (1) the rules specific to performance-based actions set forth in chapter 43 of title 5; or (2) the rules for general demotions and removals set forth in chapter 75.<sup>111</sup>

Both chapters have similar requirements for providing an employee with notice of a proposed action and a meaningful opportunity to respond.<sup>112</sup> However, the standard of proof differs.<sup>113</sup> If MSPB is asked to adjudicate an appeal, “the decision of the agency shall be sustained” if the agency’s case is supported by a preponderance of the evidence, unless the agency opts to use the procedures set forth in 5 U.S.C. § 4303, in which case it must be supported by substantial evidence.<sup>114</sup> Substantial evidence means that a reasonable person could have reached the agency’s conclusion, while a

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<sup>109</sup> 5 U.S.C. § 7513(b).

<sup>110</sup> 5 U.S.C. § 7513(c)-(d).

<sup>111</sup> See *Lovshin v. Department of the Navy*, 767 F.2d 826, 834 (Fed. Cir. 1985) (explaining that either chapter may be used for performance-based actions); U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law* (2009), available at [www.mspb.gov/studies](http://www.mspb.gov/studies) (discussing performance-based actions under the two different sets of rules).

<sup>112</sup> Under 5 U.S.C. § 4303, an employee “is entitled to: (1) 30 days’ advance written notice of the proposed action which identifies the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical elements of the employee’s position involved in each instance of unacceptable performance; (2) be represented by an attorney or other representative; (3) a reasonable time to answer orally and in writing; and (4) a written decision” that specifies the instances of unacceptable performance and that has been “concurrent in” by an official at a higher level than that of the proposing official. 5 U.S.C. § 4303(b)(1) (punctuation and numbering modified).

<sup>113</sup> 5 U.S.C. § 7701(c)(1).

<sup>114</sup> *Id.*



preponderance of the evidence means that the evidence shows a charge is more likely to be true than not.<sup>115</sup>

If an action is taken under chapter 75 of title 5, then the agency must also prove that managerial judgment has been properly exercised within “tolerable limits of reasonableness.”<sup>116</sup> This means that the penalty was not clearly excessive; disproportionate to the sustained charges; or arbitrary, capricious, or unreasonable.<sup>117</sup> A penalty will be found unreasonable if it is “so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion[.]”<sup>118</sup>

The tolerable limits of reasonableness standard applies to an agency’s chapter 75 action. For actions taken under chapter 43, the Federal Circuit has held that an agency has “discretion to select one of only two penalties, demotion or removal, for unacceptable employee performance. That discretion is not unfettered. It is measured by the mandated performance appraisal system.”<sup>119</sup> Accordingly, MSPB does not review chapter 43 penalties.<sup>120</sup>

However, under either chapter 43 or chapter 75, the agency’s decision will not be sustained if: (1) there was a harmful error in the application of the agency’s procedures; (2) the action was based on a prohibited personnel practice (such as discrimination or retaliation for whistleblowing); or (3) the decision was otherwise not in accordance with

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<sup>115</sup> A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence. 5 C.F.R. § 1201.56(c)(1). For an in-depth discussion of the rules for agencies to take performance-based adverse actions, see U.S. Merit Systems Protection Board, *Addressing Poor Performers and the Law* (2009), available at [www.mspb.gov/studies](http://www.mspb.gov/studies).

<sup>116</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981); see *Norris v. Securities and Exchange Commission*, 695 F.3d 1261, 1266 (Fed. Cir. 2012).

<sup>117</sup> *Douglas*, 5 M.S.P.R. at 284.

<sup>118</sup> *Villela v. Department of the Air Force*, 727 F.2d 1574, 1576 (Fed. Cir. 1984) (quoting *Power v. United States*, 531 F.2d 505, 507 (1980)).

<sup>119</sup> *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1564 (Fed. Cir. 1985).

<sup>120</sup> *Id.*

the law.<sup>121</sup> These are known as “affirmative defenses.” To prevail on an affirmative defense, the appellant must prove it by a preponderance of the evidence.<sup>122</sup>

As explained above, for performance- and conduct-based adverse actions, the law permits an agency to effectuate an action 30 days after it proposes the action. If the agency has reasonable cause to believe the employee has committed a serious crime, the action can take effect in as little as 7 days. The employee must be told the charges and proposed penalty and have a reasonable opportunity to respond. If the employee wants an attorney, he or she is entitled to have one at his or her own expense.<sup>123</sup> When a decision has been reached, the employee is entitled to be told in writing the reason for that decision. ***This is all that the law requires.***<sup>124</sup>

Responsible agencies may take the time to conduct investigations before proposing actions in order to feel confident that they can prove their charges and that the penalty does not constitute an abuse of discretion. They may determine that it is reasonable to offer an employee more than the statutory bare minimum of time to submit a response to the charges. These are ***choices*** that agencies make – and often for good reasons. Agencies should want to ensure that their charges are true and that information that may prove otherwise comes to their attention before they remove an employee. As the Secretary of the Department of Veterans’ Affairs, Robert McDonald, stated in an interview on *60 Minutes*, when asked whether employees who lie and put themselves before veterans should be fired: “Absolutely. Absolutely. But we’ve got to make it stick.”<sup>125</sup>

The statute, as currently constructed, was designed to comport with the Constitution so that agencies could make their actions “stick.” It balances the importance of speedy action with the constitutional right of an employee to respond and

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<sup>121</sup> 5 U.S.C. § 7701(c)(2); see 5 U.S.C. § 2302(b) (listing the prohibited personnel practices).

<sup>122</sup> 5 C.F.R. § 1201.56.

<sup>123</sup> *Marsheck v. Department of Transportation*, 15 M.S.P.R. 423, 425 (1983).

<sup>124</sup> 5 U.S.C. § 7513.

<sup>125</sup> CBS News, “Cleaning up the VA,” Nov. 9, 2014, transcript available at <http://www.cbsnews.com/news/robert-mcdonald-cleaning-up-the-veterans-affairs-hospitals/>.

show the agency that it has wrongly charged or will wrongly penalize him or her. Any amendments to the statute should do the same. It would not serve the public interest for agencies to take actions that violate the Constitution or that fail to advance the efficiency of the service.



## Chapter Four: Efforts to Modify the System

While MSPB is a successor agency to the CSC and was given adjudicatory responsibilities that had belonged to the CSC, the law that established MSPB also provided a new statutory framework to protect employee rights and the merit systems. This chapter describes some of the changes that have taken place in the adverse action system following its initial establishment in the CSRA and the role of due process in those changes.

When reviewing case law, it is important to recognize that the rules have been subjected to some modifications since the CSRA and that many changes applied only to specific agencies, while others were Government-wide.<sup>126</sup> Additionally, some (but not all) of the agency-unique changes were later repealed in part or whole. Therefore, individuals with an interest in this area should be careful when reviewing older cases and cases involving agency-specific rules.

### Government-Wide Modifications

There have been a number of modifications to the civil service adverse action processes since 1978; however, many of these changes were unique to a single agency. Some modifications were by statute and others by case law. The modifications that had an effect on the entire civil service include: (1) the Civil Service Due Process Amendments of 1990 (DPA), Pub. L. No. 101-376, 104 Stat. 461 (which changed important rules for excepted service (“ES”) employees); (2) *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002) (overruling previous holdings regarding competitive service (“CS”) probationary period employees and the legal definition of

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<sup>126</sup> The definition of “employee” in the competitive excepted services has evolved since the CSRA as a result of both new statutes and case law. The history is complex, as we explained in our 2006 report, *Navigating the Probationary Period After Van Wersch and McCormick*, available at [www.mspb.gov/studies](http://www.mspb.gov/studies). Today, the answer as to whether a CS or ES individual is an employee often – but not always – revolves around whether the individual has completed a trial or probationary period. As explained in our earlier discussion of the Pendleton Act, Congress desired that there be a period in which an individual must prove himself or herself on the job before an appointment is finalized. Until that has occurred, generally, the individual is not yet an employee with a property right in such employment. *Navigating the Probationary Period After Van Wersch and McCormick* discusses some exceptions to this general rule.

“employee”); and (3) *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144 (Fed. Cir. 1999) (discussing the legal definition of “employee” in the ES).

The DPA, which granted appeal rights to most ES employees, is particularly instructive because of the deliberateness with which it was enacted. In *United States v. Fausto*, 484 U.S. 439 (1988), the question before the Court was what remedies were available to an ES employee who had been suspended wrongly.<sup>127</sup> The Court held that the CSRA had created “a comprehensive system for reviewing personnel action[s] taken against federal employees. Its deliberate exclusion of [ES employees] from the provisions establishing administrative and judicial review for [a 30-day suspension] prevents [a] respondent [in Fausto’s situation] from seeking review in the Claims Court under the Back Pay Act.”<sup>128</sup>

Congress objected to this result, which would have left ES employees without adequate protection from improper adverse actions, and passed the DPA, which was explicitly intended to provide ES employees with the right to challenge adverse actions.<sup>129</sup> The House Post Office and Civil Service Committee described the need for the bill as “urgent” in light of the *Fausto* decision.<sup>130</sup> It also noted that ES veterans had appeal rights to MSPB under the VPA of 1944 (discussed in Chapter One) and that:

Permitting veterans in excepted service positions to appeal to the Merit Systems Protection Board when they face adverse actions has not crippled the ability of agencies excepted from the competitive service to function.

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<sup>127</sup> *Fausto* was removed by his agency. He appealed that action to MSPB, which concluded it lacked jurisdiction over his appeal because he was in the excepted service. He then filed a grievance with his agency, which determined he should not have been removed and mitigated the action to a 30-day suspension. He then filed an appeal of that suspension with the U.S. Court of Claims, which concluded it lacked jurisdiction. He appealed that decision to the Federal Circuit, which held that while MSPB lacked jurisdiction over the case under the CSRA, the Claims Court did have jurisdiction under the Tucker Act. (The Tucker Act grants the Claims Court “jurisdiction to render judgment upon any claim against the United States founded upon the Constitution.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (punctuation modified)). The Claims Court then reached the merits of the case, found the suspension should not have occurred, and ordered back pay. The Government petitioned the Supreme Court for certiorari on the question of the Claims Court’s jurisdiction over an excepted service employee’s Tucker Act claim. *Fausto*, 484 U.S. at 442-43.

<sup>128</sup> *Fausto*, 484 U.S. at 455.

<sup>129</sup> Pub. L. No. 101-376; H.R. Rep. 101-328, at 4 (1990 U.S.C.C.A.N. 695, 698).

<sup>130</sup> H.R. Rep. 101-328, at 4 (1990 U.S.C.C.A.N. 695, 698).

Therefore, the committee see[s] no problem with extending these procedural protections to certain other employees in the excepted service.<sup>131</sup>

Congress determined that ES employees “should have the same right to be free from arbitrary removal as do competitive service employees.”<sup>132</sup> After discussions with the Office of Personnel Management (OPM), the law was crafted to require a longer waiting (trial) period for ES employees to obtain appeal rights in recognition of differences in how they are appointed.<sup>133</sup> President George H.W. Bush, who as a former Director of Central Intelligence was in a unique position to understand the need to balance security concerns and management prerogatives with fair treatment of employees, signed the bill into law on August 17, 1990.<sup>134</sup>

The DPA was intended to reverse the effect of *Fausto* and put ES employees under MSPB’s protection to the same extent as CS employees.<sup>135</sup> However, there are some adverse actions, such as suspensions of 14 days or less, which cannot be appealed to MSPB under ordinary circumstances.<sup>136</sup> The DPA did not address these actions.<sup>137</sup>

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<sup>131</sup> H.R. Rep. 101-328, at 3 (1990 U.S.C.C.A.N. 695, 697).

<sup>132</sup> H.R. Rep. 101-328, at 4 (1990 U.S.C.C.A.N. 695, 698).

<sup>133</sup> *Van Wersch*, 197 F.3d at 1149 (quoting 136 Cong. Rec. 20365, 20366 (1990)). Certain agencies also were explicitly excepted from the provisions of the bill, primarily either because a different law already addressed their specific workforces (e.g., Foreign Service, Central Intelligence Agency, General Accounting Office, and Veterans Health Services and Research Administration); or because their missions were deemed too sensitive to permit a broadening of employees’ appeal rights (e.g., Federal Bureau of Investigation and National Security Agency). See H.R. Rep. 101-328, at 5 (1990 U.S.C.C.A.N. 695, 699) for a more complete list of agencies excepted from the DPA and the reasons for those exceptions.

<sup>134</sup> 136 Cong. Rec. H11769-04 (message from the President), 1990 WL 275299.

<sup>135</sup> H.R. Rep. 101-328, at 3-4 (1990 U.S.C.C.A.N. 695, 697-98).

<sup>136</sup> MSPB may have jurisdiction over whistleblower retaliation claims even if it would not otherwise have jurisdiction over the employee or adverse action in question. See, e.g., *Hupka*, 74 M.S.P.R. at 411 (holding that MSPB has jurisdiction over an appeal of a 5-day and a 4-day suspension where the appellant alleged retaliation for whistleblowing and exhausted his administrative remedies); *O’Brien v. Office of Independent Counsel*, 74 M.S.P.R. 192, 195, 197, 208 (1997) (holding that MSPB has jurisdiction over an appeal from a temporary employee in the excepted service if the individual is a whistleblower who experienced retaliation and has exhausted his administrative remedies). Similarly, USERRA can provide MSPB jurisdiction over suspensions that are too brief to otherwise meet the requirements for MSPB’s adverse action jurisdiction. See, e.g., *Johnson*, 85 M.S.P.R. 1, ¶ 11 (finding USERRA jurisdiction over a 7-day suspension when the appellant alleged that he was denied leave and instead was charged with absence without leave (AWOL) for periods during which he served on military reserve duty, leading to him being suspended for AWOL).

As a result, chapter 75's subchapter I sets forth rules involving the necessary cause and procedures for short suspensions in the competitive service without discussing any such rules for the excepted service.

Unlike the DPA, the changes to the civil service brought about by the Federal Circuit's decisions in *Van Wersch* and *McCormick* appear to be the result of poor statutory construction rather than congressional intent. In both *Van Wersch* and *McCormick*, the Federal Circuit determined that there was a "compelling case" to be made that Congress intended that individuals on new appointments who had previous Federal service would be treated as probationers who do not have finalized appointments and are therefore not entitled to the full panoply of rights given to employees. However, the court concluded that, because of the way in which the law was structured, CS and ES individuals in a probationary or trial period could be entitled to the procedural rights set forth in title 5 chapter 75 if the individuals met certain conditions regarding length of service.<sup>138</sup> In other words, through its possibly unintentional word choices, Congress gave due process rights to individuals whose right to the property – the appointment – had not yet been finalized.<sup>139</sup>

### Agency-Specific Modifications

Post-CSRA agency-specific changes to the civil service rules tend to be most noteworthy for their short duration. Some (but not all) have been enacted only to be repealed by a later Congress. Such actions can have their own complications. An example of this is the 1996 Department of Transportation and Related Agencies

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<sup>137</sup> See Pub. L. No. 101-376.

<sup>138</sup> See *McCormick*, 307 F.3d at 1341-42; *Van Wersch*, 197 F.3d at 1152. Section 7511(a)(1)(A) of title 5 lists who may be considered an employee for purposes of appeal rights and uses the word "or" to separately list two different qualifying criteria. This use of "or" can be found in the original text of the CSRA and is likely a result of an attempt to mimic the regulations of the CSC. However, moving the words out of the surrounding context from the Code of Federal Regulations caused a change in their meaning. The criteria was originally structured as a list of individuals who could not be considered employees with procedural and appeal rights, but the CSRA structured the law as a list of individuals who were covered. In this way, what had once been criteria for excluding an individual from coverage ceased to have that effect. Compare CSRA, Pub.L. No. 95-454, 92 Stat. 1111 with 5 C.F.R. § 752.103 (1978).

<sup>139</sup> Congress has not chosen to enact legislation to overrule the decisions in *Van Wersch* or *McCormick*.



Appropriations Act (“DOT Act”), Pub. L. No. 104–50, 109 Stat. 436 (1995) and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“Ford Act”), Pub. L. No. 106–181, 114 Stat. 61 (2000).<sup>140</sup>

The DOT Act removed the Federal Aviation Administration (FAA) from MSPB jurisdiction and the relevant statutes and rules, and the Ford Act *mostly* put it back. MSPB jurisdiction was restored to what it had been before the DOT Act, but the Ford Act did not address any changes to MSPB’s Government-wide jurisdiction that occurred after the DOT Act and did not specify the rules that the Board was to apply when exercising its reinstated jurisdiction.<sup>141</sup> According to the Federal Circuit, Congress enacted the Ford Act because it was “[d]issatisfied with the DOT Act’s foreclosure of appeal rights to the Board[.]”<sup>142</sup> Employees of the Transportation Security Administration (TSA) also fall under the FAA system.<sup>143</sup> These systems can have some

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<sup>140</sup> Another example of an agency-specific law that was later repealed is the National Security Personnel System (NSPS). NSPS was authorized by Congress for the Department of Defense (DoD) in the National Defense Authorization Act (NDAA) for FY 2004 and repealed in the NDAA for FY 2010. See U.S. Government Accountability Office, *DOD Is Terminating the National Security Personnel System, but Needs a Strategic Plan to Guide Its Design of a New System*, GAO-11-524R, Apr. 28, 2011, at 1-2. This imposition and repeal of a personnel system also created some adverse action issues. See, e.g., *Ellis v. Department of the Navy*, 117 M.S.P.R. 511, ¶¶ 6-8 (2012) (explaining why a cumulative effect of personnel actions gave some employees adverse action appeal rights over the manner in which they were moved from an NSPS pay system back to the GS pay system, while others did not have appeal rights).

<sup>141</sup> See *Roche v. Merit Systems Protection Board*, 596 F.3d 1375, 1378-82 (Fed. Cir. 2010) (explaining the history of the two Acts and the extent to which Board jurisdiction was restored without specifying the rules that the Board was to apply when exercising that jurisdiction); *Belhumeur v. Department of Transportation*, 104 M.S.P.R. 408, ¶¶ 5-12 (2007) (explaining that because the Veterans Employment Opportunity Act (VEOA) was enacted in 1998 and the Ford Act of 2000 reinstated the jurisdiction that the Board had in 1996, the Board lacked VEOA jurisdiction for the FAA). See also *Gonzalez v. Department of Transportation*, 568 F.3d 1369, 1370 (Fed. Cir. 2009) (explaining that the Ford Act did not restore the Back Pay Act for FAA employees).

<sup>142</sup> *Roche*, 596 F.3d at 1378.

<sup>143</sup> *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1332 (Fed. Cir. 2006). Because the FAA is within the Department of Transportation and the TSA is within the Department of Homeland Security, some cases that list either of those departments as a party to a case may follow a different set of rules than other cases within those same departments. TSA screeners are particularly in their own category, with the Board unable to hear appeals from TSA screeners alleging violations of laws such as USERRA, the Whistleblower Protection Act (WPA), VEOA, suitability determinations under 5 C.F.R. part 731, employment practices appeals under 5 C.F.R. part 300, and the Board’s review of agency regulations under 5 C.F.R. part 1203. *Spain v. Department of Homeland Security*, 99 M.S.P.R. 529 (2005), *aff’d sub nom.*, *Spain v. Merit Systems Protection Board*, 177 F. App’x 88 (Fed. Cir. 2006).

seemingly odd quirks when compared to the rest of the civil service because some laws interact with each other, and the Ford Act did not fully return the FAA system to all of the laws related to the civil service. As a result, the employment laws pertaining to FAA and the TSA have some missing bits and pieces.<sup>144</sup>

As noted earlier, one of the main reasons for the enactment “of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action[s], part of the outdated patchwork of statutes and rules built up over almost a century that was the civil service system.”<sup>145</sup> In the 40 years since the CSRA was enacted, the addition of various pieces has made the civil service increasingly complex to manage, as once again, a patchwork of statutes and rules must find a way to work together in concert.<sup>146</sup>

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<sup>144</sup> See *Gonzalez*, 568 F.3d at 1370 (explaining that the Ford Act did not restore the Back Pay Act for FAA employees); *Mitchell v. Department of Homeland Security*, 104 M.S.P.R. 682, ¶ 5 (2007) (explaining that because the TSA Administrator had not modified the FAA personnel system, the Board could not order back pay or interest for the employee); *Belhumeur*, 104 M.S.P.R. 408, ¶¶ 5-12 (explaining that because VEOA was enacted in 1998 and the Ford Act of 2000 put back the jurisdiction that the Board had in 1996, the Board lacked VEOA jurisdiction for the FAA).

<sup>145</sup> *Fausto*, 484 U.S. at 444 (internal punctuations and citations omitted).

<sup>146</sup> See U.S. Merit Systems Protection Board, *Veteran Hiring in the Civil Service: Practices and Perceptions* (2014), available at [www.mspb.gov/studies](http://www.mspb.gov/studies) (discussing the variety of laws enacted to support the hiring of veterans and how complicated a situation can become when they interact with other hiring laws and regulations).

There are good reasons why public employers must ensure that actions are taken to advance the efficiency of the service and not for improper motives. These requirements mean that certain procedural rules must be followed. But, in the words of Supreme Court Justice William Douglas, “[i]t is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.”<sup>147</sup>

Prior to the 1960s, the Federal Government obtained a wealth of experience showing what can happen in the absence of such rules and with the supremacy of capriciousness. As the chapter titled *Development of Federal Employee Rights* illustrated, Congress found the results both unpleasant and unproductive.

It has been said that: “No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.”<sup>148</sup> However, providing an individual with the opportunity to respond does not always prevent improper actions from occurring. Agencies have taken adverse actions that are unsupported by the evidence.<sup>149</sup> Adverse actions for prohibited reasons, such as discrimination or retaliation for whistleblowing activities, still occur.<sup>150</sup>

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<sup>147</sup> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). In that same decision, Justice Felix Frankfurter wrote: “Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one’s private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.” *Id.* at 171 (Frankfurter, J., concurring).

<sup>148</sup> *Id.* at 171-72 (Frankfurter, J., concurring).

<sup>149</sup> See, e.g., *Prouty v. General Services Administration*, 122 M.S.P.R. 117, ¶¶ 35-38 (2014) (explaining that under the current statute, supervisors and executives can be held to high standards for proven charges, but the removal actions at issue could not be sustained because the agency had abandoned its duty to produce evidence in support of its charges); *Kenyon v. Department of the Navy*, 57 M.S.P.R. 258, 261-62 (1993) (holding that the appellant was

## Conclusion

The system remains imperfect, but the current statutes, containing a pre-termination opportunity to respond, coupled with a post-termination review of agency decisions, have enabled the Government to provide the public with a merit-based civil service with due process under the law. Merit-based actions are required for an effective and efficient civil service. Due process is required to ensure that: (1) merit is truly the basis of the system; and (2) the system comports with the requirements of the U.S. Constitution. As with any set of laws, there is likely room for improvement. But, as long as merit is part of the system, due process will remain a required element.

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entitled to attorney fees because the agency deliberately chose not to produce any evidence or argument supporting its removal action or its subsequent decision to cancel the removal after the employee filed an appeal).

<sup>150</sup> See, e.g., *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197, ¶¶ 8-23, 41-42 (2011) (finding that the employee's protected disclosures to members of Congress and an Office of the Inspector General were contributing factors in his removal and ordering that the removal be cancelled); *Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶¶ 40, 42 (2003) (finding that, where misconduct was proven but the penalty was a result of sex-based discrimination, the penalty imposed must be the same as that given to similarly-situated members of the other sex); *Creer v. U.S. Postal Service*, 62 M.S.P.R. 656, 663-64 (1994) (ordering the cancellation of a removal action that was the result of sex-based discrimination); *Johnson v. Defense Logistics Agency*, 61 M.S.P.R. 601, 607-10 (1994) (ordering the cancellation of a removal action where the un rebutted testimony, including that of the agency's deciding official, showed a pattern of racial discrimination). See also U.S. Office of Special Counsel, Annual Report to Congress for Fiscal Year 2013, at 19, available at [www.osc.gov](http://www.osc.gov) (discussing cases in which OSC obtained corrective action for whistleblowers who experienced retaliation).

## Appendix A: Clearing up the Confusion

<b>Perception</b>	<b>Reality</b>
It is impossible to fire a Federal employee.	From FY 2000-2014, over 77,000 full-time, permanent, Federal employees were discharged as a result of performance and/or conduct issues. <sup>151</sup>
There are no legal barriers to firing an employee in the private sector.	Many of the laws that apply to removing employees in the Federal civil service also apply to private sector employment or have a similar counterpart, such as the Civil Rights Act of 1964 (Title VII – Equal Employment Opportunity), and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), both of which permit private sector employees to pursue litigation. <sup>152</sup>
An agency must pay a salary to an employee who has been removed until any appeal has been resolved.	An employee does not continue to receive a salary once removed. If the action is found to have been unwarranted, then reinstatement and back pay may be awarded. But, there is no pay while removed. <sup>153</sup>

<sup>151</sup> Analysis of data from U.S. Office of Personnel Management, Central Personnel Data File (CPDF), FY 2000-FY 2014. Discharge data includes the removal of probationers and those in a trial period for reasons involving conduct and/or performance. It does not include discharges from some agencies that use unique coding, such as the more than 10,000 separation actions that occurred within the TSA in this period, because the coding system does not permit us to determine the reasons for those separations.

<sup>152</sup> See 38 U.S.C. §§ 4301-4333 (USERRA); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, § 706(e)-(g) (authorizing discrimination litigation in Federal courts). Congress has also enacted other laws to protect private sector employees. See, e.g., Family Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, 107 Stat. 6, § 107 (authorizing civil actions and damages); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 748 (authorizing a cause of action for discrimination against whistleblowers); <http://www.whistleblowers.gov/> (explaining that Congress has enacted 22 laws to protect employees from retaliation for reporting occupational safety hazards).

<sup>153</sup> See 5 U.S.C. § 5596 (b)(1)(A). But see 5 U.S.C. § 1214(b)(1) (authorizing the Office of the Special Counsel (OSC) to request that the Board order a stay of a personnel action if there are reasonable grounds to believe the action is the result of a prohibited personnel practice). MSPB records indicate that OSC requests for such stays are very rare. From FY 2004-2014, OSC filed 65 requests for a stay, 86% of which were granted. Appellants also may request a stay under more limited circumstances. See 5 U.S.C. § 1221(c).

Perception	Reality
<p>Agency leaders have no authority to serve as proposing or deciding officials in title 5 adverse actions.</p>	<p>Title 5 empowers the <b>agency</b> to take an adverse action. If agency leadership chooses to delegate the proposal or decision authority to lower levels, then it cannot interfere with the decision-making process of those delegates. But, prior to the assigned decision-maker's involvement in a particular case, current statutes permit delegations to be abandoned or modified by the agency at will.<sup>154</sup></p>
<p>If an employee is suspected of a crime, the agency cannot fire the employee for the same underlying conduct until the criminal matter is resolved.</p>	<p>The agency is permitted to remove the employee without waiting for criminal charges to be filed. If the removal is appealed to MSPB and criminal charges are filed, then MSPB may stay its proceedings until the criminal matter is resolved if, under the facts of the particular case, it is necessary in the interest of justice. However, the individual remains removed without pay during that period.<sup>155</sup></p>

<sup>154</sup> *Goeke v. Department of Justice*, 122 M.S.P.R. 69, ¶ 23 (2015) (explaining that the agency opted to delegate to a non-supervisory career official the authority to propose adverse actions, even though no external law, rule, or regulation required any delegation of the agency's disciplinary power. Such a delegation can be abandoned or modified prospectively by the agency at will; but, once adopted and until modified, it must be enforced); see *Boddie v. Department of the Navy*, 827 F.2d 1578, 1580 (Fed. Cir. 1987) (explaining that a new official can be substituted only if the substitution occurs before the assigned official considers the charges); *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (2011) (prohibiting *ex parte* communications); 5 U.S.C. § 7513 (authorizing an "agency" to impose an adverse action).

<sup>155</sup> *Wallington v. Department of the Treasury*, 42 M.S.P.R. 462, 465 (1989). See, e.g., *Raymond v. Department of Army*, 34 M.S.P.R. 476, 478 (1987) (appellant removed and MSPB appeal dismissed without prejudice to refiling because of investigation by U.S. Attorney); *Green v. U.S. Postal Service*, 16 M.S.P.R. 203, 206 (1983) (staying a removal appeal at MSPB pending completion of the ongoing criminal investigation by the U.S. Attorney's Office). Civil proceedings may be frozen pending the resolution of a criminal prosecution. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1204 (Fed. Cir. 1987). However, the law has specific provisions to make it possible to fire an employee reasonably suspected of a crime for which imprisonment may be imposed *even faster* than an employee whose actions are not likely to result in imprisonment. 5 U.S.C. § 7513(b)(1). Additionally, the Board has held that an employee is not entitled to back pay for any period of an indefinite suspension based on an indictment, regardless of the outcome of the criminal charges, if the indictment was proper when effected. *Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 108 (1990); see *Wiemers v. Merit Systems Protection Board*, 792 F.2d 1113, 1116 (Fed. Cir. 1986) (holding that a reversal of a conviction did not entitle an employee to back pay for a suspension based on alleged criminal activity).



Perception	Reality
<p>The removal of a Senior Executive Service (SES) employee is delayed by the appeals process.</p>	<p>If a career<sup>156</sup> SES employee is removed for “misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function[,]” then the individual may appeal the action to MSPB, but the appeal can be filed only <b><i>after</i></b> the removal has taken effect.<sup>157</sup></p> <p>If the individual is removed for “less than fully successful executive performance[,]” then the individual is entitled to an informal hearing by MSPB. The request for the hearing may be filed before the removal action, but, the law specifically states that the <b><i>removal need not be delayed</i></b> pending a hearing.<sup>158</sup></p> <p>Thus, whether an action is taken for performance or conduct, the appeals process before the Board does not require any delay in the removal of the individual or in the termination of pay and benefits to that individual.</p>
<p>If an agency proposes an action such as a suspension and then learns the situation is more serious than it knew, it cannot propose a more serious action instead.</p>	<p>While an employee cannot be punished twice for the same event,<sup>159</sup> an agency may withdraw a notice of proposed suspension and replace it with a notice of proposed removal.<sup>160</sup></p>

<sup>156</sup> The MSPB appeals process only applies to non-probationary career appointees and those who met the definition of employee prior to placement in the SES. See 5 U.S.C. §§ 7541, 7543.

<sup>157</sup> 5 U.S.C. § 7543. Section 707 of the Veterans Access, Choice, and Accountability Act (VACAA), Pub. L. No. 113-146, 128 Stat 1754, which established a different process for the removal of SES members in the Department of Veterans Affairs (DVA), provided that, “the Secretary determines the performance or misconduct of the individual warrants such removal.” See 38 U.S.C. § 713. However, under both the traditional SES system and the VACCA system, there is no requirement to delay the effective date of the termination and cessation of pay and benefits pending appeal. Rather, under the traditional system, any appeal of an action for “misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function” cannot take place until after the action takes effect, as it is the taking of the action which provides MSPB with its jurisdiction.

<sup>158</sup> 5 U.S.C. § 3592(a). But see 5 U.S.C. §§ 3592(b)(2), 4314(b)(3) (the right to request a hearing under section 3592(a) does not apply to any senior executive removed for receiving unsatisfactory annual appraisals).

<sup>159</sup> *Wigen v. U.S. Postal Service*, 58 M.S.P.R. 381, 383 (1993) (an agency cannot impose disciplinary or adverse action more than once for the same instance of misconduct).

<sup>160</sup> *Brough v. Department of Commerce*, 119 M.S.P.R. 118, ¶¶ 10, 13 (2013). The agency must comply with its own internal rules for issuing notices of proposed action. See *Canary v. U.S. Postal Service*, 119 M.S.P.R. 310, ¶¶ 11-12 (2013) (holding that the substitution of a new deciding official violated the agency’s procedures under the circumstances of the case).

Perception	Reality
<p>If, during the adverse action process, the agency accidentally fails to provide the employee with all of his or her constitutional rights, the agency loses the ability to take an adverse action.</p>	<p>An agency can correct the procedural problem and still take the action. For example, if the deciding official learns <i>ex parte</i> information, then the agency can issue a new notice of proposed action that includes the new information.<sup>161</sup> If an action takes effect before the procedural issue is identified, and the action is reversed by MSPB on constitutional grounds, then the agency is free to take the action again, this time properly following all the rules.<sup>162</sup></p>
<p>Supervisors are rarely punished compared to non-supervisors.</p>	<p>In order to be promoted to higher-level grades – including supervisory positions – employees often must show successful performance and conduct over time. Because past conduct and performance are among the best predictors of future conduct and performance, length of service and grade-level tend to have a relationship to the rate at which individuals experience adverse actions. However, an analysis of appealable adverse action data shows that a supervisor is no less likely to experience an adverse action than a non-supervisor of similar age, seniority and grade.<sup>163</sup> Case law explicitly states that agencies are permitted to hold supervisors to a higher standard than non-supervisory employees.<sup>164</sup></p>

<sup>161</sup> See *Dejoy v. Department of Health & Human Services*, 2 M.S.P.R. 577, 580 (1980) (holding that an agency may cancel a proposed removal and substitute a new notice of proposed removal).

<sup>162</sup> See *Ward*, 634 F.3d 1274, 1279 (2011) (explaining that if there is a due process violation, the appellant “is automatically entitled to an ‘entirely new’ and ‘constitutionally correct’ removal proceeding”); *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 8 (2012) (explaining that the appellant is entitled to a new proceeding).

<sup>163</sup> Analysis of data from CPDF, FY 2005-2013, full-time, permanent employees experiencing a suspension of more than 14 days, change to lower grade, or removal for cause.

<sup>164</sup> See, e.g., *Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶ 21 (2005), *aff’d*, 180 F. App’x 951 (Fed. Cir. 2006) (holding that “[s]upervisors may be held to a higher standard of conduct than non-supervisors because they hold positions of trust and responsibility”); *Myers v. Department of Agriculture*, 88 M.S.P.R. 565, ¶ 34 (2001), *aff’d*, 50 F. App’x 443 (Fed. Cir. 2002) (holding that an “agency has a right to expect a higher standard of conduct from supervisors than from nonsupervisory employees”).



## Appendix B: The Statutory Process Flowcharts

### Suspensions of 14 Days or Less (5 U.S.C. § 7503, 5 C.F.R. § 752)

#### Step One: Analysis

- ✓ Identify issues.
- ✓ Investigate to ascertain facts and collect evidence.

#### Step Two: Action

- ✓ Agency: Propose the personnel action in writing including what action is proposed and why (charges and penalty). Inform the employee of any information that may be considered by the deciding official.
- ✓ Agency: Provide the employee with a reasonable opportunity to respond to proposed action (no less than 24 hours).
- ✓ Optional for Employee: Respond to the notice of proposed action.
- ✓ Agency: Consider the evidence and employee response (if any) before reaching a decision on the charges and penalty.
- ✓ Agency: Notify the employee in writing of the decision, effective date, and any complaint or grievance rights.

#### Step Three: Review

- ✓ Optional for Employee: File a discrimination complaint (EEOC procedures) or grievance (collective bargaining agreement or administrative grievance procedures).
- ✓ Agency: Respond to the complaint or grievance. For example, in an arbitration proceeding, establish that the evidence supports the charges and the penalty was reasonable.
- ✓ Employee: If asserting an affirmative defense, provide evidence to support that defense.

## Removals, Demotions, Suspensions of Over 14 Days and Furloughs for 30 Days or Less (5 U.S.C. § 7513)

### Step One: Analysis

- ✓ Identify issues.
- ✓ Investigate to ascertain facts and collect evidence.

### Step Two: Action

- ✓ Agency: Propose the personnel action in writing including what action is proposed and why (charges and penalty). Inform the employee of any information that may be considered by the deciding official.
- ✓ Agency: Provide the employee with a reasonable opportunity to respond to proposed action (no less than 7 days).
- ✓ Optional for Employee: Respond to the notice of proposed action.
- ✓ Agency: Consider the evidence and employee response (if any) before reaching a decision on the charges and penalty.
- ✓ Agency: Notify the employee in writing of the decision, effective date, and any appeal, grievance, or complaint rights. Action may not take place less than 30 days from proposal date unless there is cause to believe the employee committed a crime for which imprisonment may be imposed.

### Step Three: Review

- ✓ Optional for Employee: File an appeal (MSPB), discrimination complaint (EEOC procedures), or grievance (collective bargaining agreement procedures).
- ✓ Agency: Respond to the appeal, complaint or grievance. For example, in an MSPB proceeding, establish that the evidence supports the charges and the penalty was reasonable.
- ✓ Employee: If asserting an affirmative defense, provide evidence to support that defense.

## Adverse Employment Actions in the Federal Civil Service: The Facts

Perception	Reality
It is impossible to fire a Federal employee.	From FY 2000-2014, over 77,000 full-time, permanent, Federal employees were discharged as a result of performance and/or conduct issues. <sup>1</sup>
There are no legal barriers to firing an employee in the private sector.	Many of the laws that apply to removing employees in the Federal civil service also apply to private sector employment or have a similar counterpart, such as the Civil Rights Act of 1964 (Title VII – Equal Employment Opportunity), and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), both of which permit private sector employees to pursue litigation. <sup>2</sup>
An agency must pay a salary to an employee who has been removed until any appeal has been resolved.	An employee does not continue to receive a salary once removed. If the action is found to have been unwarranted, then reinstatement and back pay may be awarded. But, there is no pay while removed. <sup>3</sup>
Agency leaders have no authority to serve as proposing or deciding officials in title 5 adverse actions.	Title 5 empowers the <i>agency</i> to take an adverse action. If agency leadership chooses to delegate the proposal or decision authority to lower levels, then it cannot interfere with the decision-making process of those delegates. But, prior to the assigned decision-maker's involvement in a particular case, current statutes permit delegations to be abandoned or modified by the agency at will. <sup>4</sup>
If an employee is suspected of a crime, the agency cannot fire the employee for the same underlying conduct until the criminal matter is resolved.	The agency is permitted to remove the employee without waiting for criminal charges to be filed. If the removal is appealed to MSPB and criminal charges are filed, then MSPB may stay its proceedings until the criminal matter is resolved if, under the facts of the particular case, it is necessary in the interest of justice. However, the individual remains removed without pay during that period. <sup>5</sup>
Supervisors are rarely punished compared to non-supervisors.	In order to be promoted to higher-level grades – including supervisory positions – employees often must show successful performance and conduct over time. Because past conduct and performance are among the best predictors of future conduct and performance, length of service and grade-level tend to have a relationship to the rate at which individuals experience adverse actions. However, an analysis of appealable adverse action data shows that a supervisor is no less likely to experience an adverse action than a non-supervisor of similar age, seniority and grade. <sup>6</sup> Case law explicitly states that agencies are permitted to hold supervisors to a higher standard than non-supervisory employees. <sup>7</sup>
If an agency proposes an action such as a suspension and then learns the situation is more serious than it knew, it cannot propose a more serious action instead.	While an employee cannot be punished twice for the same event, <sup>8</sup> an agency may withdraw a notice of proposed suspension and replace it with a notice of proposed removal. <sup>9</sup>
If, during the adverse action process, the agency accidentally fails to provide the employee with all of his or her constitutional rights, the agency loses the ability to take an adverse action.	An agency can correct the procedural problem and still take the action. For example, if the deciding official learns <i>ex parte</i> information, then the agency can issue a new notice of proposed action that includes the new information. <sup>10</sup> If an action takes effect before the procedural issue is identified, and the action is reversed by MSPB on constitutional grounds, then the agency is free to take the action again, this time properly following all the rules. <sup>11</sup>
The removal of a Senior Executive Service (SES) employee is delayed by the appeals process.	<p>If a career<sup>12</sup> SES employee is removed for “misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function[.]” then the individual may appeal the action to MSPB, but the appeal can be filed only <b><i>after</i></b> the removal has taken effect.<sup>13</sup></p> <p>If the individual is removed for “less than fully successful executive performance[.]” then the individual is entitled to an informal hearing by MSPB. The request for the hearing may be filed before the removal action, but, the law specifically states that the <b><i>removal need not be delayed</i></b> pending a hearing.<sup>14</sup></p> <p>Thus, whether an action is taken for performance or conduct, the appeals process before the Board does not require any delay in the removal of the individual or in the termination of pay and benefits to that individual.</p>

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<sup>1</sup> Analysis of data from U.S. Office of Personnel Management, Central Personnel Data File (CPDF), FY 2000-FY 2014. Discharge data includes the removal of probationers and those in a trial period for reasons involving conduct and/or performance. It does not include discharges from some agencies that use unique coding, such as the more than 10,000 separation actions that occurred within the Transportation Security Administration (TSA) in this period, because the coding system does not permit us to determine the reasons for those separations.

<sup>2</sup> See 38 U.S.C. §§ 4301-4333 (USERRA); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, § 706(e)-(g) (authorizing discrimination litigation in Federal courts). Congress has also enacted other laws to protect private sector employees. See, e.g., Family Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, 107 Stat. 6, § 107 (authorizing civil actions and damages); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 748 (authorizing a cause of action for discrimination against whistleblowers); <http://www.whistleblowers.gov/> (explaining that Congress has enacted 22 laws to protect employees from retaliation for reporting occupational safety hazards).

<sup>3</sup> See 5 U.S.C. § 5596 (b)(1)(A). But see 5 U.S.C. § 1214(b)(1) (authorizing the Office of the Special Counsel (OSC) to request that the Board order a stay of a personnel action if there are reasonable grounds to believe the action is the result of a prohibited personnel practice). MSPB records indicate that OSC requests for such stays are very rare. From FY 2004-2014, OSC filed 65 requests for a stay, 86% of which were granted. Appellants also may request a stay under more limited circumstances. See 5 U.S.C. § 1221(c).

<sup>4</sup> *Goeke v. Department of Justice*, 122 M.S.P.R. 69, ¶ 23 (2015) (explaining that the agency opted to delegate to a non-supervisory career official the authority to propose adverse actions, even though no external law, rule, or regulation required any delegation of the agency's disciplinary power. Such a delegation can be abandoned or modified prospectively by the agency at will; but, once adopted and until modified, it must be enforced); see *Boddie v. Department of the Navy*, 827 F.2d 1578, 1580 (Fed. Cir. 1987) (explaining that a new official can be substituted only if the substitution occurs before the assigned official considers the charges); *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (2011) (prohibiting *ex parte* communications); 5 U.S.C. § 7513 (authorizing an "agency" to impose an adverse action).

<sup>5</sup> *Wallington v. Department of Treasury*, 42 M.S.P.R. 462, 465 (1989). See, e.g., *Raymond v. Department of Army*, 34 M.S.P.R. 476, 478 (1987) (appellant removed and MSPB appeal dismissed without prejudice to refile because of investigation by U.S. Attorney); *Green v. U.S. Postal Service*, 16 M.S.P.R. 203, 206 (1983) (staying a removal appeal at MSPB pending completion of the ongoing criminal investigation by the U.S. Attorney's Office). Civil proceedings may be frozen pending the resolution of a criminal prosecution. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1204 (Fed. Cir. 1987). However, the law has specific provisions to make it possible to fire an employee reasonably suspected of a crime for which imprisonment may be imposed *even faster* than an employee whose actions are not likely to result in imprisonment. 5 U.S.C. § 7513(b)(1). Additionally, the Board has held that an employee is not entitled to back pay for any period of an indefinite suspension based on an indictment, regardless of the outcome of the criminal charges, if the indictment was proper when effected. *Jarvis v. Department of Justice*, 45 M.S.P.R. 104, 108 (1990); see *Wiemers v. Merit Systems Protection Board*, 792 F.2d 1113, 1116 (Fed. Cir. 1986) (holding that a reversal of a conviction did not entitle an employee to back pay for a suspension based on alleged criminal activity).

<sup>6</sup> Analysis of data from CPDF, FY 2005-2013, full-time, permanent employees experiencing a suspension of more than 14 days, change to lower grade, or removal for cause.

<sup>7</sup> See, e.g., *Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶ 21 (2005), *aff'd*, 180 F. App'x 951 (Fed. Cir. 2006) (holding that "[s]upervisors may be held to a higher standard of conduct than non-supervisors because they hold positions of trust and responsibility"); *Myers v. Department of Agriculture*, 88 M.S.P.R. 565, ¶ 34 (2001), *aff'd*, 50 F. App'x 443 (Fed. Cir. 2002) (holding that an "agency has a right to expect a higher standard of conduct from supervisors than from nonsupervisory employees").

<sup>8</sup> *Wigen v. U.S. Postal Service*, 58 M.S.P.R. 381, 383 (1993) (an agency cannot impose disciplinary or adverse action more than once for the same instance of misconduct).

<sup>9</sup> *Brough v. Department of Commerce*, 119 M.S.P.R. 118, ¶¶ 10, 13 (2013). The agency must comply with its own internal rules for issuing notices of proposed action. See *Canary v. U.S. Postal Service*, 119 M.S.P.R. 310, ¶¶ 11-12 (2013) (holding that the substitution of a new deciding official violated the agency's procedures under the circumstances of the case).

<sup>10</sup> See *Dejoy v. Department of Health & Human Services*, 2 M.S.P.R. 577, 580 (1980) (holding that an agency may cancel a proposed removal and substitute a new notice of proposed removal).

<sup>11</sup> See *Ward*, 634 F.3d at 1279 (explaining that if there is a due process violation, the appellant "is automatically entitled to an 'entirely new' and 'constitutionally correct' removal proceeding"); *Solis v. Department of Justice*, 117 M.S.P.R. 458, ¶ 8 (2012) (explaining that the appellant is entitled to a new proceeding).

<sup>12</sup> The MSPB appeals process only applies to non-probationary career appointees and those who met the definition of employee prior to placement in the SES. See 5 U.S.C. §§ 7541, 7543.

<sup>13</sup> 5 U.S.C. § 7543. Section 707 of the Veterans Access, Choice, and Accountability Act (VACAA), Pub. L. No. 113-146, 128 Stat 1754, which established a different process for the removal of SES members in the Department of Veterans Affairs (DVA), provided that, "the Secretary determines the performance or misconduct of the individual warrants such removal." See 38 U.S.C. § 713. However, under both the traditional SES system and the VACCA system, there is no requirement to delay the effective date of the termination and cessation of pay and benefits pending appeal. Rather, under the traditional system, any appeal of an action for "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function" cannot take place until after the action takes effect, as it is the taking of the action which provides MSPB with its jurisdiction.

<sup>14</sup> 5 U.S.C. § 3592(a). But see 5 U.S.C. §§ 3592(b)(2), 4314(b)(3) (the right to request a hearing under section 3592(a) does not apply to any senior executive removed for receiving unsatisfactory annual appraisals).

## Suspensions of 14 Days or Less (5 U.S.C. §7503, 5 C.F.R. §752)

### Step One: Analysis

- Identify issues.
- Investigate to ascertain facts and collect evidence.

### Step Two: Action

- Agency: Propose the personnel action in writing including what action is proposed and why (charges and penalty). Inform employee of any information that may be considered by the deciding official.
- Agency: Provide the employee with a reasonable opportunity to respond to proposed action (no less than 24 hours).
- Optional for Employee: Respond to notice of proposed action.
- Agency: Consider the evidence and employee response (if any) before reaching a decision on the charges and penalty.
- Agency: Notify the employee in writing of the decision, effective date, and any complaint or grievance rights.

### Step Three: Review

- Optional for Employee: File a discrimination complaint (EEOC procedures) or grievance (collective bargaining agreement or administrative grievance procedures).
- Agency: Respond to the complaint or grievance. For example, in an arbitration proceeding, establish that the evidence supports the charges and the penalty was reasonable.
- Employee: If asserting an affirmative defense, provide evidence to support that defense.

# Removals, Demotions, Suspensions of Over 14 Days and Furloughs for 30 Days or Less (5 U.S.C. §7513)

## Step One: Analysis

- Identify issues.
- Investigate to ascertain facts and collect evidence.

## Step Two: Action

- Agency: Propose the personnel action in writing including what action is proposed and why (charges and penalty). Inform employee of any information that may be considered by the deciding official.
- Agency: Provide the employee with a reasonable opportunity to respond to proposed action (no less than 7 days).
- Optional for Employee: Respond to notice of proposed action.
- Agency: Consider the evidence and employee response (if any) before reaching a decision on the charges and penalty.
- Agency: Notify employee in writing of the decision, effective date, and any appeal, grievance, or complaint rights. Action may not take place less than 30 days from proposal date unless there is cause to believe the employee committed a crime for which imprisonment may be imposed.

## Step Three: Review

- Optional for Employee: File an appeal (MSPB), discrimination complaint (EEOC procedures), or grievance (collective bargaining agreement procedures).
- Agency: Respond to the appeal, complaint or grievance. For example, in an MSPB proceeding, establish that the evidence supports the charges and the penalty was reasonable.
- Employee: If asserting an affirmative defense, provide evidence to support that defense.



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**What is Due Process in  
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