Just as it may be unrealistic to expect that most subordinates will never make an accidental misstep in following directions, so too, proposing and deciding officials can err when performing the procedures for implementing adverse actions. However, most procedural mistakes by proposing and deciding officials can be fixed.

Some of the procedures to implement an adverse action come from regulations, some from statutes, and some are the result of court decisions about employees’ constitutional rights. The procedure type can determine the consequences for the agency’s failure to follow instructions. For example, by statute, before removal, an employee is entitled to notice and a period of not less than 7 days to respond. However, notice and a response opportunity is also a right under the Supreme Court’s interpretation of the Due Process Clause of the U.S. Constitution. Because the notice and response rights are “substance” owed to the person by the Government, they are “substantive rights,” even though the substance in question is a specific activity. When a right is “substantive,” the individual is entitled to have it, irrespective of how little influence that right may have exercised on the Government’s decision to act. An adverse action that violates a substantive right cannot stand.

In contrast, a procedural right has to do with a set of processes – it is more about the system than it is about the person using the system. For example, the statute for removing Federal employees states that the action will not take place for 30 days. This waiting period is a “procedural right.” When a procedural right is violated, an adjudicator must perform an additional analysis to determine the remedy. This is known as the harmful error test. Under this test, once the non-substantive procedural error is found, for the action to be reversed, the appellant must show that it is likely that the error caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. For example, in Hawkins v. Department of the Navy, an agency erroneously shortened the statutorily required notice period by 8 days. The Board found that the underlying action could be sustained (with compensation added for the missing 8 days) because the employee was provided his substantive rights (adequate notice and the opportunity to respond) and the procedural error (fewer days of notice than set forth in statute) had no effect on the outcome – the employee would still have been removed 8 days later.

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92 Cleveland Board of Education v. Loudermill, 470 U.S. 532, 544 (1985) (explaining that “the right to a hearing does not depend on a demonstration of certain success”).

93 Stone v. Federal Deposit Insurance Corporation, 179 F.3d 1368, 1377 (Fed. Cir. 1999).

94 The statute (5 U.S.C. § 7701(c)(2)(A)) and MSPB regulations (5 C.F.R. § 1201.4(q)) refer to this as a harmful error. The U.S. Court of Appeals for the Federal Circuit has, at times, called the error lacking such harm as a “harmless error” and the test as the “harmless error test.”

95 5 C.F.R. § 1201.4(q).

96 Hawkins v. Department of the Navy, 49 M.S.P.R. 501, 503-04 (1991). See Diaz v. Department of the Air Force, 63 F.3d 1107, 1109 (Fed. Cir. 1995) (holding that while the agency failed to act within the statutorily mandated period for a performance-based action under chapter 43 of title 5, because the error was procedural and not substantive, the action could stand when the appellant failed to show how the error caused the agency to reach a different conclusion than it would have otherwise reached).
When an agency makes a substantive error or a harmful procedural error, the adverse action cannot, by law, be permitted to stand. If an agency finds that it has erred, it need not wait for an appeal to be filed or for MSPB to rule that the agency erred. Prior to reaching a decision on a proposed adverse action, agencies can rescind the proposal and begin a new, constitutionally and procedurally correct action. An agency can also cancel an adverse action on its own initiative after the action has taken effect.

The Board is not permitted to cure the agency’s errors during the adjudication process. However, if the Board cancels an action for substantive or procedural errors, the agency can fix those errors by starting over. The Board has long held that an agency can renew an adverse action based on charges brought in an earlier proceeding where the adverse action in that proceeding was invalidated on procedural grounds. Similarly, if a substantive right is violated, the agency is free to take the action again, using a constitutionally correct process that respects the employee’s substantive rights.

Most procedural mistakes that agencies make can be fixed if the officials just cancel what they have done and start over, properly following the law: the real mistake is believing that procedural errors cannot be fixed.

97 5 U.S.C. § 7701(c)(2).

98 Gonzalez v. Department of the Air Force, 51 M.S.P.R. 646, 654, n.6 (1991) (observing that the agency was permitted to rescind its notice of proposed action prior to reaching a decision and issue a new one); Dejoy v. Department of Health & Human Services, 2 M.S.P.R. 577, 579-80 (1980) (same). But 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).

99 When an adverse action is unilaterally canceled by an agency, the appellant must be returned as nearly as possible to the status quo ante, the same as when the Board itself orders cancellation of an adverse action. An agency’s failure to completely rescind an appealed action results in a retention of jurisdiction over the underlying action by the Board. King v. U.S. Postal Service, 73 M.S.P.R. 362, 366 (1997).

100 Ward v. U.S. Postal Service, 634 F.3d 1274, 1278 (Fed. Cir. 2011) (explaining that “the Board erred in concluding that it could ‘remedy the error’”).

101 Litton v. Department of Justice, 118 M.S.P.R. 626, ¶ 10-13 (2012) (holding that after MSPB invalidated an adverse action on procedural grounds, the agency’s decision to propose a new disciplinary action did not demonstrate noncompliance with the Board’s orders, bad faith, or retaliation); Steele v. General Services Administration, 6 M.S.P.R. 368, 372 (1981). See Reynolds v. United States, 454 F.2d 1368, 1374 (Ct. Cl. 1972) (“It is not unusual or wrongful for an agency to begin anew an adverse action based on charges which were previously brought when the initial action was invalidated on procedural grounds.”)

102 Stone v. Federal Deposit Insurance Corporation, 179 F.3d 1368, 1377 (Fed. Cir. 1999).