MSPB "is a creature of limited authority, enjoying and exercising only the powers vested in it by Congress."[125] Congress has chosen to authorize two courts in particular to review MSPB's actions to ensure MSPB acts within its limitations. These are: (1) The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"); and (2) The U.S. Supreme Court when reviewing decisions reached by the Federal Circuit.[126] When one of these courts tells MSPB what the law intends for MSPB to do, MSPB *must* follow the court's instructions. It is this process of judicial review that ensures MSPB's actions are not arbitrary, capricious, or contrary to law (including the laws that give MSPB its limited authorities). Under limited circumstances, other courts may have authority over a particular case under MSPB's jurisdiction.[127] MSPB cannot disregard an opinion from a court with authority over it any more than it can disregard a clear statute.[128]

Where Congress's words are clear, they must be followed. Where the words are unclear, MSPB must do its best to determine what Congress wished MSPB to do. For example, the statute does not explicitly discuss MSPB's power to mitigate an unreasonable penalty taken by an agency under 5 U.S.C. § 7513 or 5 U.S.C. § 4303. The Federal Circuit has interpreted the legislative history for each section to mean that Congress intended MSPB should do so for actions taken under section 7513 but not section 4303.[129] The will of Congress binds MSPB, and the Federal Circuit can tell MSPB what Congress wills for such actions, because 5 U.S.C. § 7703 places MSPB's adverse action decisions under the jurisdiction of that court.

Every year, the Board and its administrative judges (AJs) issue thousands (and on rare occasions tens of thousands) of adverse action appeal decisions affecting the lives of employees. Most of these cases garner little if any attention beyond those who are a party to the case at hand. But, on occasion, there have been decisions that trigger outrage at the perceived errors of the Board. In truth, the Federal Circuit does tell MSPB every year that it has gotten some cases wrong. But, from FY 2005 to FY 2015, MSPB averaged

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[125] *Singleton v. Merit System Protection Board,* 244 F.3d 1331, 1336 (Fed. Cir. 2001). *See Guardians Ass'n v. Civil Serv. Comm'n of City of New York,* 463 U.S. 582, 614 (1983) ("An administrative agency is itself a creature of statute"); *Thompson v. Merit Systems Protection Board*, 421 F.3d 1336, 1337 (Fed. Cir. 2005) ("The Board's jurisdiction is strictly limited to that provided by statute, rule, or regulation"); *Strausbaugh v. Government Printing Office*, 111 M.S.P.R. 305, ¶ 6 (2009) (explaining that while the Board's statutory authority to hear appeals from probationers is quite limited, the jurisdiction granted by OPM regulation is broader).

[126] 5 U.S.C. § 7703; 28 U.S.C. § 1254.

[127] *See, e.g., Kloeckner v. Solis*, 133 S. Ct. 596, 600 (2012) (holding that if MSPB dismisses, on procedural grounds, an appeal involving allegations of discrimination, the correct court for judicial review is not the Federal Circuit, but rather a district court); 5 U.S.C. § 7703(b)(1)(B) (authorizing, for a limited time, the use of courts of appeal other than the Federal Circuit for judicial review of whistleblowing cases).

[128] *See, e.g., McCormick v. Department of the Air Force*, 98 M.S.P.R. 201,¶¶ 6-22 (2005) (Dissenting and Concurring Opinion of Suzanne T. Marshall) (explaining extensively why she disagreed with the majority opinion issued by the Federal Circuit in *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), but agreeing that because the Board is bound by the precedential holdings of that court, the Federal Circuit's instructions must be obeyed).

[129] *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1566 (Fed. Cir. 1985).

a 92% affirmation rate at the Federal Circuit for adverse action cases – a record of success most baseball players would envy.[130]

Agencies are also frequently successful in appeals before MSPB – albeit not quite as often as MSPB before the Federal Circuit. In that same period, for adverse action cases that were not dismissed,[131] on initial appeal, agencies opted to settle 68% of the cases, and of those cases that were not settled, only 4% were mitigated and 15% were reversed, while more than 80% of agency adverse action decisions were upheld.

Appeal Settlement:

As explained in our report, *Clean Record Settlement Agreements and the Law*, public policy encourages settlement.[132] An agency and an employee may mutually agree to resolve their differences before an appeal is even filed. However, if an appeal is filed with MSPB, before accepting a settlement agreement into the record for enforcement purposes, the AJ must determine if: (1) the agreement is lawful on its face; (2) the parties freely entered into it; (3) the parties understood its terms; (4) the parties intended for it to be enforced; and (5) the subject matter of the appeal is within MSPB's jurisdiction.[133] If these criteria are met, it is not the role of MSPB to object to the parties' mutually acceptable agreement. In fact, parties are free to reach an agreement on their own and have the case dismissed as withdrawn without entering the agreement into MSPB's record for enforcement.[134]

Penalty Mitigation:

As explained in our article, *Determining the Penalty*, the Board has the responsibility to ensure that management has selected a reasonable penalty. There are 12 factors that will be assessed to determine if management has acted within these limits. One of these factors is the consistency of the penalty with those imposed upon other employees for the same or similar offenses.

As explained in our article, *How Employees Become Similarly Situated for Purposes of an Adverse Action Penalty*, agencies can hinder their ability to support their penalty if they: (1) have a pattern of tolerating such conduct and have not announced that it will not be accepted in the future; or (2) fail to explain why

[130] Data is for cases brought under chapters 75 or 43 of title 5 and excludes furlough cases. This affirmation rate is relatively consistent with the rate at which the Federal Circuit affirms Board decisions under all of its combined areas of jurisdiction.

[131] The most common reasons for a case to be dismissed include a lack of MSPB jurisdiction and the appellant filing an untimely appeal.

[132] U.S. Merit Systems Protection Board, *Clean Record Settlement Agreements and the Law* (2013), at 57. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994) (explaining that "public policy wisely encourages settlements"); *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368, 1372 (Fed. Cir. 1999) (stating that "[s]ettlement agreements may serve a useful purpose in terminating disputes without the necessity for further administrative or judicial proceedings").

[133] *Spidel v. Department of Agriculture*, 113 M.S.P.R. 67, ¶ 6 (2010). *See Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1378 (Fed. Cir. 2001) (explaining that if a settlement agreement prohibited the disclosure of a crime, it would be contrary to public policy and unenforceable in most circumstances); *Mansfield v. National Mediation Board*, 103 M.S.P.R. 237, ¶ 21 (2006) (in which the Board declined to accept a settlement agreement in which it was "plain that the parties [were] attempting to misuse [a Government] program for a purpose for which it was not intended" resulting in "a combination of pay and benefits not authorized by law").

[134] *See, e.g., Chapman v. Tennessee Valley Authority*, 67 M.S.P.R. 246 (1995); *Cranfield v. Tennessee Valley Authority*, 44 M.S.P.R. 384, 389 (1990).

two employees who seem to be similar are, in fact, so different that disparate penalties are appropriate. This can result in mitigation of offenses that would not be tolerated elsewhere because the law instructs that actions (including penalties) cannot be arbitrary or capricious.[135] The Federal Circuit has held that the reasonableness of a penalty may be suspect when a lesser offense is treated more harshly than a more serious offense.[136]

Action Reversal:

Sometimes MSPB must instruct agencies to cancel an adverse action entirely, even if the offense seems completely outrageous and the charges may appear true. If an agency's action violated an employee's constitutional rights, then MSPB is required to reverse it, no matter how offensive the underlying conduct.[137] If the agency failed to follow statutory or regulatory procedures, and this failure caused a different outcome, then MSPB is instructed by statute and the Federal Circuit to reverse the action.[138] The Board is also not permitted to sustain any action if the adverse action "decision was based on any prohibited personnel practice described in section 2302(b)" of title 5.[139]

Summary:

MSPB can do only what it has been authorized by law to do. This can result in some cases having outcomes that observers might conclude are undesirable. However, nothing in the statute instructs MSPB that it is empowered to create the most desirable outcome. Rather, MSPB must assemble established constitutional law, statutes, regulations, and case decisions and apply that body of law to the facts presented to it. The Board lacks the power to change the facts given to it (such as the charges and evidence) or the laws that it has been told to apply.

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[135] *Schapansky v. Department of Transportation*, 735 F.2d 477, 486 (Fed. Cir. 1984).

[136] *Williams v. Social Security Administration*, 586 F.3d 1365, 1368 (Fed. Cir. 2009).

[137] *Ward v. U.S. Postal Service*, 634 F.3d 1274 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999). *See, e.g., Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶ 5 (2011) (sustaining the AJ's finding that the appellant inappropriately touched a female employee in her private areas but holding that if the action violated the employee's constitutional rights as explained in *Ward*, it would be necessary to reverse the agency's action and order the agency to restore the appellant until he is afforded a "new constitutionally correct removal procedure").

[138] *Diaz v. Department of the Air Force*, 63 F.3d 1107, 1109 (Fed. Cir. 1995) (citing 5 U.S.C. § 7701(c)(2)(A)).

[139] 5 U.S.C. § 7701(c)(2). For more on substantive and procedural errors, see our article, *Agency Officials' Substantive and Procedural Errors and How to Fix Them.*