

ADVERSE ACTIONS: A COMPILATION OF ARTICLES



A REPORT TO THE PRESIDENT
AND THE CONGRESS OF THE UNITED STATES
BY THE U.S. MERIT SYSTEMS PROTECTION BOARD

DECEMBER 2016

This report was submitted to Congress in 2016. Some aspects of the law may have changed in the intervening years. Readers are strongly encouraged to consult updated statutes, regulations, and case law.



U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419-0001

December 5, 2016

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, *Adverse Actions: A Compilation of Articles*. These articles provide summary descriptions of constitutional provisions, court decisions, statutes, regulations, and agency practices regarding the discipline or removal of Federal employees in the competitive and excepted civil services.

This report differs from other MSPB reports; it does not contain recommendations for legislative or executive action. Instead, the report focuses on providing a foundation to inform debate and decisions about how adverse actions operate in order to aid the legislative and executive branches in their future endeavors.

Each article addresses one aspect of the civil service system. It is our hope that this format will enable readers to locate and easily review relevant information, particularly as Congress prepares to consider laws intended to affect specific elements of the civil service system. The report also describes how each element fits into the larger whole.

As you consider ways to improve the management of the Federal workforce, the Board is ready to assist in any manner that is permitted by our authorizing statutes. We look forward to answering questions you may have, now or in the future.

Respectfully,


Susan Tsui Grundmann

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BY THE U.S. MERIT SYSTEMS PROTECTION BOARD

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A Primer in Pieces

By statute, in addition to its adjudication responsibilities, the U.S. Merit Systems Protection Board (MSPB) is responsible for conducting studies of the civil service “from time to time.” We are expected to use our expertise and judgment to determine what issues are suitable topics in light of our limited resources and the work already being done by others (*e.g.*, Government Accountability Office, academia, non-profit organizations). Every few years, when crafting a new research agenda, we ask stakeholders and the public what they would like to see us study. At the September 2014 Sunshine Act meeting for our last agenda, several speakers asked that we issue an explanation of how the adverse action process works. After considering that input, along with recent Congressional interest in the matter, and with what we felt we could contribute given our statutory responsibilities, the Board approved the inclusion of this project in our published research agenda.

However, once we began assembling the content, it became evident that a brief, single report might not be the best way to present that information. Simply stated, such a report could not be “brief.” There were too many different audiences who would have different uses for the information and presenting the information in a way that could be used by all resulted in the sort of lengthy document that often makes confusing topics even more confusing.

Instead, we decided upon a new approach. Frequently, an MSPB studies report tries to tell each reader an entire story. For this project, we decided to tell many different readers their piece of the story. For instance, a proposing official may find that he or she is more interested in an article describing decisions that proposing officials must make, than in articles about what might happen after the action leaves that official’s control. Conversely, a deciding official may want to focus on articles addressing his or her own responsibilities. Agency leaders, on the other hand, may find particularly helpful the sections that address agency culture, holding managers responsible, or ensuring actions do not result from the commission of prohibited personnel practices (PPPs) (as the statute assigns to leaders the responsibility for the prevention of PPPs). A member of Congress considering new legislation may be interested in articles covering which parts of the disciplinary process are based on constitutional law (and thus are hard to change), which parts of the process come from statute (and thus are most within the power of Congress), which parts of the process are regulatory (and thus are within the power of the Office of Personnel Management), and which parts of the process have been added by agencies (and thus are more likely to respond to agency action than to new legislation). Employees may be especially interested in articles discussing their rights and how to exercise those rights. Finally, academicians, the media, unions, and others each may find different articles more interesting or relevant based on their particular interests.

So, instead of a single, comprehensive report, we have drafted a series of articles. Think of it as an all-you-can-eat buffet that is always open and always free. You can come back to the server any time you like, select which dishes you are in the mood to ingest, and leave as much or as little on the plate as you like. This format will allow you to: (1) print out your own copies to mark up and take notes; (2) bookmark parts you will want to read again; (3) e-mail weblinks to others you think might be interested; (4) send an article to your human resources (HR) advisor with questions or comments connected to a situation you are facing; and (5) focus on specific education modules appropriate for your workforce. The material is designed to be bite-sized and suitable for different tastes, and MSPB encourages you to add your own

seasonings afterward. Read one article, a group of articles, or read them all. Simply put, please use this material in the manner most helpful to you.

Of course, as a quasi-judicial Federal agency, we are compelled to add a bit of fine print. This report addresses the system for the competitive and excepted services. The Senior Executive Service (SES) follows a slightly different process. (For more on the SES system, see our 2015 report, [*What is Due Process in Federal Civil Service Employment*](#)). Additionally, under 5 U.S.C. § 1204(h), we are prohibited from issuing advisory opinions. This means we can tell you, the reader, things that MSPB or a court have already decided, but cannot tell you what we or the courts might do with a set of facts that have not yet been presented for adjudication. These articles are product of MSPB's studies function, they are not adjudication decisions to be directly cited. If a section is relevant to a matter you are facing, please look at the cases and statutes being cited and work directly from those sources. Additionally, these articles are not a substitute for legal advice or advice from your HR staff, but they can help inform those conversations.

Second-Hand News Can be Misleading

It may seem ironic to warn readers – in a series of articles discussing and summarizing cases – that they should be leery of placing too much trust in articles that purport to describe cases. Yet, this article is about precisely that. While journalists and analysts – and MSPB attorneys – writing about employment cases can serve an important function in reaching an audience and drawing their attention to issues, the information is only as reliable as the second-hand author makes it. The best way to know for certain what a case says is to read it yourself. If that is not practical, then get your information from the most reliable source you can and be careful about assuming that a source is reliable. You might be surprised at how often seemingly “reliable” sources at best, get things wrong, and at worst, mischaracterize issues.

For example, recently, Congressional and media attention was given to a case in which the Environmental Protection Agency (EPA) attempted to remove an employee who allegedly was a sex offender who had violated his probation regarding a charge of indecency with a child. The EPA proposed and then implemented the removal action, and the employee subsequently filed an appeal with MSPB. In the initial decision, the administrative judge overturned the action after determining it was necessary in accordance with long-established law. The media was later filled with stories of outrage, including stories of frustration by members of Congress, that MSPB would – *for some inexplicable reason* – think it was appropriate to have child molesters in the civil service. (Hint: when something seems to defy logic, that can be a warning sign that the story may be either wrong or incomplete.)

In the EPA case, the agency’s sole charge for removal was “unauthorized absence” – not abuse of a child, violation of probation, or other criminal conduct.¹ This pivotal fact was not raised in the testimony before Congress, nor did it appear in most media reports about the case. There also did not seem to be any discussion of the fact that, before the removal, the agency sought to indefinitely suspend the employee on the basis of a reasonable belief that the employee committed a crime for which he could be imprisoned. That suspension was also appealed. In both the initial decision, and on review, the Board held that, consistent with established case law, the agency was permitted to place the employee on indefinite suspension until the criminal proceedings were resolved.² What the Board may have done in a review of the initial decision for the removal case – where only absence was charged – cannot be known, because the agency and appellant chose to settle the case before Board review could occur.³

One of the many risks that come with assuming that a second-hand source has the news right – particularly when dealing with civil service laws, rules, and regulations – is that it may affect how agencies and employees view their own rights and options. If all a person were to read was media accounts, he or she might walk away thinking Federal agencies are regularly forced to employ child molesters who violate

¹ *Taylor M. Sharpe v. Environmental Protection Agency*, Docket No. DA-0752-14-0187-I-1, Initial Decision (Sept. 22, 2014).

² *Taylor M. Sharpe v. Environmental Protection Agency*, Docket No. DA-0752-14-0034-I-1 (Feb. 27, 2015). As the Board noted in its decision, the U.S. Court of Appeals for the Federal Circuit has held that any continuation of a suspension after criminal charges are resolved is a separate appealable action. *Id.* at ¶ 8.

³ *Taylor M. Sharpe v. Environmental Protection Agency*, Docket No. DA-0752-14-0187-I-1, Non-Precedential Final Order (Mar. 20, 2015).

probation and the agencies can do nothing about it. We cannot say what might have happened at MSPB if the agency had tried to remove this employee for a probation violation, abuse of a child, or other criminal activity, because – as stated above – the agency did not use any of those charges in the removal action appealed to MSPB and MSPB is only allowed to consider the charges presented to it.⁴ Nevertheless, the Board has an extensive history of sustaining removals for egregious off-duty misconduct, including (but not limited to) sexual abuse of children.⁵ This fact, of course, was not included in the media reports covering this event.

The incomplete story of what happened in the EPA’s case is just one example of misunderstandings about adverse actions that have been circulated in recent years. As part of our 2015 report, *What is Due Process in Federal Employment*, we created a list of misperceptions and corrections about the adverse action system because so many inaccurate statements had been given a gloss of credibility that it could have posed an obstacle to having conversations about what the system really is and why. Understanding this “what” and “why” is crucial to managers and employees being able to use the system and to Congress being able to successfully modify it if Congress deems modifications appropriate.

Throughout our series of articles about adverse actions, it will be necessary for brevity to summarize cases and their holdings. This can be a valuable introduction to subjects and a useful tool for users of the system and others with an interest in it. But, readers should keep the healthy skepticism that is so important when looking at what others say about cases. Focus on *why* a case had a particular outcome. Do not assume how your own set of facts might be viewed based on a few sentences describing one aspect of other cases. These articles are a starting place to help readers form a picture of how the system operates and to identify what pieces they want explore in greater depth on their own. Media articles and conversations with people who have used the system can certainly be helpful in learning about the process, but we encourage you to dig deeper in order to fully understand an issue. If something sounds odd, ask a follow-on question or do some research of your own. Why? Because whether you are a member of Congress, a first-line supervisor in the field, or an employee seeking help, there may be some very inaccurate information reaching you.

⁴ *Dupont v. Department of the Navy*, 33 M.S.P.R. 122, 126 (1987) (explaining that the Board will not consider other or lesser offenses when the agency did not charge the appellant with such offenses). *Cf. Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990) (explaining that the Board cannot “split a single charge of an agency into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original charge. If the agency fails to prove one of the elements of its charge, then the entire charge must fall.”)

⁵ *See, e.g., Graham v. U.S. Postal Service*, 49 M.S.P.R. 364, 367 (1991) (finding that removal was a reasonable penalty for off-duty sexual abuse of a 14-year-old girl); *Allred v. Department of Health and Human Services*, 23 M.S.P.R. 478 (1984) (sustaining a removal for off-duty child molestation), *aff’d*, 786 F.2d 1128 (Fed. Cir. 1986); *Doe v. National Security Agency*, 6 M.S.P.R. 555 (1981) (determining that removal was warranted for off-duty incestuous behavior with a minor child), *aff’d sub nom. Stalans v. National Security Agency*, 678 F.2d 482 (4th Cir. 1982). *Cf. Hayes v. Department of the Navy*, 15 M.S.P.R. 378, 381 (1983) (determining that removal was reasonable for off-duty assault and battery of a 10-year-old child), *aff’d*, 727 F.2d 1535 (Fed. Cir. 1984).

The Adverse Action Process – A Flowchart

When reading about various steps of the adverse action process, it may be helpful to have a picture of where each step falls in relation to the others. Therefore, the flowchart below provides the major steps in the process to take an adverse action under chapter 75 of title 5 (the statute that authorizes an agency to take an action to advance the efficiency of the service).

STEP 1

Agency official will collect evidence (*e.g.*, witness statements, e-mails, copies of customers' complaints, data reports). If appropriate, ask employee for his/her side of the story before proceeding.^a (A one-sided collection of allegations may not provide a full picture of events and even Inspector General investigations can reach erroneous conclusions.)^b Proposing official will consider the evidence (which may be as simple as just his or her own statement of something the official personally observed) and will decide if he/she believes that an adverse action is warranted.^c

STEP 2

Proposing official will sign a written notice of proposed action that includes:

- Notice of the law or regulation under which the action is being taken.^d
- Clear charge(s) and specification(s).^e
- Who the deciding official will be, how to contact him/her, the deadline to submit a written reply, and the deadline to make an appointment for any oral reply.^f
- Notice that the employee can choose to have a representative (such as a private attorney or union representative).^g
- Information on how the employee can obtain a copy of (or access to) the evidence.^h
- Notice of the proposed penalty and the factors the deciding official will consider when determining the appropriate penalty.ⁱ

STEP 3

Deciding official will consider any reply from the employee.^j If the deciding official obtains new information, official will inform the employee of the new information being considered and provide an opportunity to respond.^k The original proposal can be rescinded and a new proposal issued if the agency deems it appropriate (*e.g.*, if the deciding official determines that there are errors in the proposed action or that action is warranted on a different basis).^l

STEP 4

Deciding official will issue a written notice of decision. If the official elects to implement a penalty with appeal or grievance rights, the notice will inform the employee of his/her rights.^m

Step 1: Agency Official

^a 5 U.S.C. § 552a(e)(2). The “specific nature of each case shapes the practical considerations at stake that determine whether an agency has fulfilled its obligation under the Privacy Act to elicit information directly from the subject of the investigation to the greatest extent practicable.” *Cardamone v. Cohen*, 241 F.3d 520, 528 (6th Cir. 2001). The Privacy Act does not require that an agency seek information only from the person being investigated. “The Office of Management and Budget (OMB) Guidelines promulgated with the Privacy Act provide that, ‘when conducting an investigation into a particular person, third-party sources may be contacted first when practical considerations, such as confirming or denying false statements, require this or when the information can only be obtained from third parties.’” *Carton v. Reno*, 310 F.3d 108, 112 (2nd Cir. 2002).

^b See, e.g., *Wallace v. Department of Commerce*, 106 M.S.P.R. 23, ¶¶ 4, 20 (2007) (holding that despite an Office of the Inspector General (OIG) report concluding that Wallace had improper involvement in the hiring of her sister, the witnesses most closely involved in the hiring action testified that Wallace had no involvement). See also Anthony Capaccio, “Inspector General Erred Boasting Hotline Found Raytheon Defect,” *Bloomberg* (Dec. 15, 2015), available at <http://www.bloomberg.com/news/articles/2015-12-30/inspector-general-erred-boasting-hotline-found-raytheon-defect> (explaining that the OIG erroneously claimed a report to its hotline forced the payment of \$10.6 million when the contractor had fixed the issue on its own and at its own expense); Elizabeth Dvoskin, “Revisiting the \$16 Muffin,” *Bloomberg* (Sep. 29, 2011), available at <http://www.bloomberg.com/bw/magazine/revisiting-the-16-muffin-09292011.html> (explaining that the OIG conceded that it erred because it reached a conclusion without being in possession of all the facts).

^c 5 U.S.C. § 7513 (authorizing an agency to impose an adverse action that “will promote the efficiency of the service”). 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); *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).

Step 2: Proposing Official

^d *Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1055 (Fed. Cir. 1985) (holding that the agency cannot later use a law it did not invoke); see *Hanratty v. Federal Aviation Administration*, 780 F.2d 33, 35 (Fed. Cir. 1985) (holding that MSPB cannot re-characterize which law was used).

^e The agency is required to state the reasons for the proposed adverse action in sufficient detail to allow the employee to make an informed reply. *Plath v. Department of Justice*, 12 M.S.P.R. 421, 424 (1982). But, nothing in law or regulation requires that an agency affix a label to a charge of misconduct. If an agency so chooses, it may simply describe actions that constitute misbehavior in a narrative form, and have its discipline sustained if the efficiency of the service suffers because of the misconduct. But, if an agency chooses to label an act of misconduct, then it is bound to prove the elements that make up the legal definition of that charge, if there are any. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997). See, e.g., *Ludlum v. Department of Justice*, 278 F.3d 1280, 1283-84 (Fed. Cir. 2002) (explaining that “[j]ack of candor and falsification are different, although related, forms of misconduct, and the latter is not a necessary element of the former”); *King v. Nazelrod*, 43 F.3d 663, 665 (Fed. Cir. 1994) (explaining that if an agency charges an employee with “theft,” the agency may be required to prove the “intent to permanently deprive the owner of possession and use of the property”); *Phillips v. General Services Administration*, 878 F.2d 370, 373-74 (Fed. Cir. 1989) (explaining that “insubordination by an employee is a willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed” and that when an employee does not refuse to obey but is merely late in obedience, the charge is not supported) (emphasis in original, internal notations and citations omitted). Proposing and deciding officials may find it beneficial to consult with a subject matter expert in the human resources office or an agency attorney regarding the words used in the charge, or any other relevant issue, but such consultation is not a statutory requirement. For more on labeling charges, see our article, [Labels Are Not Required, but if Used They Must be Proven](#).

^f It is crucial that the agency be clear on the deadline for an employee to provide a reply, and whether the reply must be submitted or received by a particular date, because if unclear language regarding the dates leads to the agency’s failure to consider the reply, this lack of consideration may constitute a due process violation. See, e.g., *Massey v. Department of the Army*, 120 M.S.P.R. 226, ¶¶ 8-10 (2013) (reversing the action on due process grounds when the oral reply was never heard because of conflicting interpretations of the agency’s instructions on the deadline for the oral reply, which could have meant either make the reply by that date, or make the appointment by that date).

^g 5 U.S.C. § 7513(b)(3). The employee may be entitled to reimbursement for attorney fees under 5 U.S.C. § 7701(g)(1), but to obtain attorney fees an appellant must show that: (1) he was the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. *Caros v. Department of Homeland Security*, 122 M.S.P.R. 231, ¶ 5 (2015).

^h 5 C.F.R. §§ 752.203(b), 752.404(b). See *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999).

ⁱ *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011).

Step 3: Deciding Official Consideration

^j *Hodges v. U.S. Postal Service*, 118 M.S.P.R. 591, ¶ 6 (2012) (reversing the agency’s action because the deciding official did not consider the employee’s response); *Alford v. Department of Defense*, 118 M.S.P.R. 556, ¶¶ 5-7 (2012) (same). See *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999) (discussing the right to a *meaningful* opportunity to reply).

^k See *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999) (explaining that new information is a due process violation when there is a lack of “notice (both of the charges and of the employer’s evidence) and the opportunity to respond”). But see *Mathis v. Department of State*, 122 M.S.P.R. 507, ¶¶ 9-10 (2015) (explaining that a deciding official does not violate an employee’s right to due process when he considers issues raised by an employee in her response to the proposed adverse action or initiates an *ex parte* communication that only confirms or clarifies information already contained in the record); *Grimes v. Department of Justice*, 122 M.S.P.R. 36, ¶¶ 11-13 (2014) (same).

^l See *Dejoy v. Department of Health and Human Services*, 2 M.S.P.R. 577, 580 (1980) (explaining that an agency may rescind a notice of proposed action and issue a new one without running afoul of double jeopardy).

Step 4: Deciding Official Decision

^m 5 U.S.C. § 7513(b)(4); 5 C.F.R. § 1201.21. See 5 U.S.C. § 7121(g) (instructing that an appellant “may elect not more than one of the remedies” listed in the statute).

Performance-Based Actions under Chapters 43 and 75 of Title 5 – Similarities and Differences

There are two different statutes that authorize an agency to demote or remove an employee for performance-based reasons: (1) 5 U.S.C. § 4303 (which can only be used for failure in a critical performance element); and (2) 5 U.S.C. § 7513 (which can be used for performance or conduct that harms the efficiency of the service).

This choice of chapters may be confusing for laypeople, as chapter 75 is typically thought of in the context of misconduct, since that is the section of the statute for misconduct-based actions. However, agencies are permitted to take a performance-based action under either statute, provided they comply with the process for the chapter they select. It is very important that the agency put the employee on notice of which law is being used – and for which charges – prior to taking the action, as it usually cannot later re-characterize an action into one taken under a different law and MSPB has been told it cannot do so for the agency.¹

As explained in our 2009 report, [Addressing Poor Performers and the Law](#), the decision by management regarding which section of the law to use for a performance-based action tends to vary greatly by agency and by the nature of the work being performed. Some officials may opt for chapter 75 because they prefer not to have a formal performance improvement period (a requirement in chapter 43), while others may opt for chapter 43 because of its lower standard of proof or the ability to impose a penalty that is not subject to outside review once the agency has proven the performance failure. Agencies may also layer their own, internal, requirements on actions under either chapter that may cause that chapter to become a less appealing option for management. For example, at least one agency requires that management offer an informal performance improvement period before implementing a formal performance improvement period.

Below is a table showing where the two chapters share common practices and where they differ.

	Chapter 43	Chapter 75
Critical Element	Agency <i>must</i> prove the performance deficiency is in a critical element. ²	Agency is <i>not</i> required to prove the performance deficiency is in a critical element. ³
Efficiency of the Service	Agency is <i>not</i> required to prove that the adverse action will promote the efficiency of the service. ⁴	Agency must prove that the adverse action will promote the efficiency of the service. ⁵
Burden of Proof	Action must be supported by <i>substantial evidence</i> . This means that a reasonable person might find the evidence supports the agency's finding regarding the poor performance, even though other reasonable persons might disagree. ⁶	Action must be supported by a <i>preponderance of the evidence</i> . This means that a reasonable person would find the evidence makes it more likely than not that the agency's findings regarding the poor performance are correct. ⁷

	Chapter 43	Chapter 75
Establishment of Performance Expectations	When the employee’s performance in one or more critical elements is unacceptable, the employee will: (1) be notified of the deficiency; (2) be offered the agency’s assistance to improve; and (3) be warned that continued poor performance could lead to a change to lower grade or removal. ⁸ (This is commonly referred to as the PIP, an abbreviation for both performance improvement plan and also for performance improvement period.)	The extent to which an employee is on notice of the agency’s expectations is a factor in determining the appropriateness of the penalty. ⁹ Also, an agency cannot require that an employee perform better than the standards that have been communicated to the employee. ¹⁰
Recency of Events	A change to a lower grade or a removal action cannot be based on performance that is more than 1-year old at the time of the issuance of the proposal notice. ¹¹	While there is no requirement that an action be proposed within a particular period of time, unexplained excessive delays can have a negative effect upon the agency’s ability to prove the action is proper and warranted. ¹²
Advance Notice	The agency must provide a notice of proposed action and a reasonable opportunity to reply 30 days before any action can be taken. ¹³	
Content of Advance Notice	The notice must state the specific instances of poor performance that are the basis for the action <i>and also the critical performance element involved</i> . ¹⁴	The notice must state the specific instances of poor performance that are the basis for the action. ¹⁵
Deciding Official	Must be a person higher in the chain of command than the person who proposed the action. ¹⁶	The deciding official does <i>not</i> have to be a person higher in the chain of command than the person who proposed the action. ¹⁷

	Chapter 43	Chapter 75
Agency Decision	Agency must issue a final decision within an additional 30 days of the expiration of the 30 days advance notice period. ¹⁸	Agency is under no particular time constraint, other than there cannot be a delay so extensive that it constitutes an error that harms the employee. ¹⁹
Decline Following Improvement	If the employee’s performance improves during the PIP, and remains acceptable for 1 year, a new PIP is necessary before taking an action <i>under this chapter</i> . ²⁰	There is no obligation to offer a period of improvement at any point. ²¹
Penalty Mitigation	Once the agency meets the requirements to take an action, MSPB <i>cannot</i> reduce the agency’s penalty. ²²	After finding that the agency meets the requirements to take a chapter 75 action, MSPB <i>may</i> reduce the agency’s penalty if that penalty is unreasonable. ²³
<i>Douglas</i> Factors	The <i>Douglas</i> factors are not used. ²⁴	The agency must consider the relevant <i>Douglas</i> factors when reaching a decision on the appropriate penalty. ²⁵
Affirmative Defenses	The agency action will not be sustained if the employee was harmed by the agency’s failure to follow procedures or if the agency decision was reached as a result of the commission of a prohibited personnel practice. ²⁶	
Merit Principles	Merit principles must be adhered to in all performance-based actions. ²⁷	

¹ *Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1055 (Fed. Cir. 1985) (holding that the agency cannot later use a law it did not invoke). See *Hanratty v. Federal Aviation Administration*, 780 F.2d 33, 35 (Fed. Cir. 1985) (holding that MSPB cannot re-characterize which law was used); *Lovshin v. Department of the Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985). *Lovshin* specifically stated that the agency using chapter 43 could use “an alternative” or “additional” charge under chapter 75. The Board does not have any precedential decisions in which an agency proposed a removal simultaneously using both chapters 43 and 75 with one expressed as the alternative to the other. As 5 U.S.C. § 1204(h) prohibits the Board from issuing advisory opinions we will not use this opportunity to resolve that question, only note that *Lovshin* uses both “alternative” and “additional” as words to describe the agency’s options.

² 5 U.S.C. § 4301(3).

³ “Case law does not require that a specific standard of performance be established and identified in advance for the appellant in an action brought under chapter 75; rather, it simply requires that, when an agency takes an action for unacceptable performance under chapter 75, it prove that its measurement of the appellant’s performance was both accurate and reasonable.” *Moore v. Department of the Army*, 59 M.S.P.R. 261, 265 (1993).

⁴ *Lovshin v. Department of the Navy*, 767 F.2d 826, 834 (1985).

⁵ 5 U.S.C. § 7513(a). The action must be taken “only for such cause as will promote the efficiency of the service.”

⁶ 5 U.S.C. § 7701(c)(1)(A). Substantial evidence means “[t]he 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.” 5 C.F.R. § 1201.4(p). When enacting the Civil Service Reform Act of 1978 (CSRA), the conference report indicates this lower burden of proof was used “because of the difficulty of proving that an employee’s performance is unacceptable.” H.R. Conf. Rep. 95-1717, 139.

⁷ 5 U.S.C. § 7701(c)(1)(b). Preponderance of the evidence means “[t]he 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. § 1201.4(q).

⁸ 5 C.F.R. §§ 432.104, 432.105(a).

⁹ *Fairall v. Veterans Administration*, 844 F.2d 775, 776 (1987); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). This means that if the agency did not express a performance expectation to the employee (in performance standards or by other means), the lack of notification would be considered as a mitigating factor when deciding if the agency’s action was appropriate. *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 45-46 (1987).

¹⁰ *Shorey v. Department of the Army*, 77 M.S.P.R. 239, 244 (1998).

¹¹ 5 U.S.C. § 4303(c)(2)(a).

¹² See *Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶ 15 (2008) (reiterating that a charge may be dismissed if an agency’s delay in proposing the adverse action is unreasonable and prejudicial to the appellant). An unexplained delay may create the appearance that the agency did not consider the conduct serious or chose to act for an improper reason. Compare *Brown v. Department of the Treasury*, 61 M.S.P.R. 484, 492 (1994) (holding that it was a mitigating factor when the agency did not propose disciplinary action until 11 months after it learned about the incident) with *Cates v. Department of Agriculture*, 24 M.S.P.R. 468, 471 (1984) (holding that a 1-year delay in proposing the removal action, resulting in the proposal occurring shortly after the appellant filed his grievance, was not proof of retaliation when the agency adequately explained the reasons for the delay), *aff’d*, 776 F.2d 1065 (Fed. Cir. 1985).

¹³ For chapter 75 actions, the agency may effectuate the removal in less than 30 days if there is reasonable cause to believe the employee has committed a crime for which a prison sentence may be imposed. 5 U.S.C. § 7513(b)(1) and (2).

¹⁴ 5 U.S.C. § 4303(b)(1)(a)(i) and (ii).

¹⁵ An agency must give the employee a notice containing the charges as well as an explanation of its evidence and provide the employee an opportunity to respond. A failure to take any of these steps will result in the action being reversed on the basis that it violates the employee’s minimum due process rights. *Greene v. Department of Health and Human Services*, 48 M.S.P.R. 161, 166 (1991); see also *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 680-81 (1991).

¹⁶ 5 U.S.C. § 4303(b)(1)(D)(ii). Technically, for a chapter 43 action, the term is that a higher-level official must “concur” in the action, not that the “deciding” official must be at a higher level. See *Franco v. Department of Health and Human Services*, 32 M.S.P.R. 653, 657 (1987). However, when practitioners speak of this role, the term “deciding official” is often used for both chapter 75 and chapter 43 actions.

¹⁷ The decision will be valid if it has “the knowledge and approval of an official with termination authority.” This power to terminate is derived from the power to appoint. *Vandewall v. Department of Transportation*, 55 M.S.P.R. 561, 564 (1992). In a chapter 75 action, “it is well settled that the proposing and the deciding official may be the same person.” *Davis v. Department of Transportation*, 39 M.S.P.R. 470, 478 (1989). See also *Cross v. Veterans Administration*, 16 M.S.P.R. 429, 431 (1983); *Belanger v. Department of Transportation*, 16 M.S.P.R. 304, 309 (1983).

¹⁸ 5 U.S.C. § 4303. An extension of an additional 30 days is possible for any one of six purposes described at 5 C.F.R. § 432.105(a)(4)(i)(B). An extension for any other purpose must be obtained from the Office of Personnel Management (OPM) under the procedures specified at 5 C.F.R. § 432.105(a)(4)(i)(C).

¹⁹ See 5 U.S.C. § 7701(c)(2)(A); *Day v. Department of Housing and Urban Development*, 50 M.S.P.R. 680, 682 (1991). In *Day*, the appellant claimed the agency action should be invalidated because of a 4-month delay between the issuance of the notice of proposed removal and the removal decision. MSPB held that the appellant failed to show he was harmed by the agency’s delay, and thus the action would not be invalidated on those grounds.

²⁰ 5 C.F.R. § 432.105(a)(2).

²¹ “The requirement of prior notification of deficient performance necessary to a chapter 43 removal is conspicuously and purposely absent from” the criteria to take a chapter 75 action. *Fairall v. Veterans Administration*, 844 F.2d 775, 776 (1987).

²² *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1567-68 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

²³ *Id.*

²⁴ The *Douglas* factors come from a case (*Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981)) that lists what a deciding official should consider when determining the appropriate penalty to address problems with an employee. Because the *Douglas* factors are used to determine if an agency’s penalty should be mitigated, and a chapter 43 penalty cannot be mitigated, the *Douglas* factors are not used for chapter 43 actions. *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1565-66 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

²⁵ See *Cunningham v. U.S. Postal Service*, 112 M.S.P.R. 457, ¶ 6 (2009) (explaining that if an agency imposes a removal action under a zero tolerance policy without giving bona fide consideration to the appropriate *Douglas* factors, its penalty determination is not entitled to deference); *Hilliard v. U.S. Postal Service*, 111 M.S.P.R. 634, ¶ 7 (2009) (holding that an agency’s failure to consider relevant *Douglas* factors of which it was aware warrants an award of attorney fees), *aff’d*, 403 F. App’x 504 (Fed. Cir. 2010); *Halper v. U.S. Postal Service*, 91 M.S.P.R. 170, ¶ 7 (2002) (explaining that a failure to consider all of the relevant *Douglas* factors will result in the adjudicator performing the assessment using the *Douglas* factors and modifying the penalty if necessary).

²⁶ 5 U.S.C. § 7701(c)(2).

²⁷ *Lovshin v. Department of the Navy*, 767 F.2d 826, 840-41 (1985) (explaining that “Congress intended that merit principles must be adhered to by agencies in all performance-based actions” and “Congress itself designed a statutory framework which implements merit principles in connection with chapter 75 actions”).

Different Types of Adverse Actions Use Different Rules

Removals, demotions, and suspensions of Federal employees are “adverse actions.”⁶ A removal action terminates the employment of an individual. A demotion action is also known as a reduction in grade or a reduction in pay.⁷ While removals, demotions, and suspensions can occur under chapter 75 of title 5 of the U.S. Code, removals and reductions in grade may also be implemented under chapter 43.⁸ The agency chooses which law to use for the circumstances before it, and then must comply with the conditions for acting under that particular law. For more on the differences between using chapter 75 versus chapter 43, see our article titled, [Performance-Based Actions under Chapters 43 and 75 of Title 5 – Similarities and Differences](#).

A suspension is the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.⁹ It is important to note that the word “disciplinary” has a broader definition in law than in common use. For example, as explained in the section below discussing indefinite suspensions, a suspension does not have to occur “for the purpose of punishment,” although it does need to have a valid purpose that advances the efficiency of the service.¹⁰ Unlike removals and reductions in grade, a suspension can only be taken under chapter 75 and not chapter 43. There are different types of suspensions and the standards or procedures for each may differ.

Suspensions of 14 days or less:

When an agency seeks to suspend an employee for 14 days or less the employee has certain rights, some of which are provided by statute and some by Office of Personnel Management (OPM) regulation.

1. By statute, the employee is entitled to “an advance written notice stating the specific reasons for the proposed action[.]” OPM’s regulation adds that the employee will also be told of his or her right to review the material that the agency is relying upon.
2. By statute, the employee is entitled to “a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer[.]” OPM’s regulation adds that this period to reply cannot be less than 24 hours.

⁶ A furlough of 30 days or less (which typically occurs for budgetary reasons) is also conducted under the rules for adverse actions. However, a longer furlough, removal due to a reduction in force (RIF), or demotion due to a RIF is not an “adverse action” and is conducted under the rules set forth in 5 C.F.R. part 351. *Salo v. Department of Defense*, 122 M.S.P.R. 417, ¶ 6 (2015) (explaining the difference in rules for furloughs and removals); 5 U.S.C. § 7512 (explaining that a RIF is not considered an adverse action).

⁷ Title 5 of the U.S. Code distinguishes between a reduction in grade and a reduction in pay, while stating that both are adverse actions. *Fouks v. Department of Veterans Affairs*, 122 M.S.P.R. 483, ¶ 7 (2015); see 5 U.S.C. § 7512.

⁸ Compare 5 U.S.C. § 4303(a) (authorizing agencies to impose removals and reductions in grade for unacceptable performance) with 5 U.S.C. § 7502 (authorizing agencies to impose suspensions for 14 days or less) and 5 U.S.C. § 7512 (authorizing agencies to impose removals, suspensions of over 14 days, reductions in grade, and reductions in pay).

⁹ *Tyndall v. Department of the Navy*, 5 M.S.P.R. 194, 196 (1981).

¹⁰ *Thomas v. General Services Administration*, 756 F.2d 86, 88 (Fed. Cir. 1985).

3. By statute, the employee is entitled to “be represented by an attorney or other representative[.]” OPM’s regulation adds that the representative cannot have a conflict of interest or be an employee who is needed for “priority work assignments[.]”
4. By statute, the employee is entitled to “a written decision and the specific reasons therefor at the earliest practicable date.” OPM’s regulation adds that the employee also must be notified of any grievance rights.¹¹

Neither the statute nor OPM regulations specifically state the standard of proof to be used in such suspensions.¹² However, agency policies or collective bargaining agreements (CBAs) may address matters on which the statute and OPM regulations are silent (such as the standard of proof) or add additional employee protections.

Suspensions of more than 14 days:

When an agency seeks to suspend an employee for more than 14 days, the employee again has certain rights, some of which are provided by statute and some by OPM regulation.

1. By statute, the employee is entitled to “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[.]” OPM’s regulation adds that, “under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed will remain in a duty status in his or her regular position during the advance notice period.”¹³
2. By statute, the employee is entitled to 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[.]” OPM’s regulation adds that, if the employee is still working, the “agency must give the employee a reasonable amount of official time to review the material relied on to support its proposed action, to prepare an answer orally and in writing, and to secure affidavits[.]”
3. By statute, as with shorter suspensions, the employee is entitled to “be represented by an attorney or other representative[.]” OPM’s regulation adds that, as with shorter suspensions, the representative cannot have a conflict of interest or be an employee who is needed for “priority work assignments[.]”

¹¹ 5 U.S.C. § 7503; 5 C.F.R. § 752.203. A suspension of 14 days or less is generally not appealable to MSPB, but there are exceptions to this rule. For example, MSPB may have jurisdiction over claims that an otherwise unappealable suspension was taken in retaliation for whistleblowing activity or was a result of the employee’s performance of military service.

¹² 5 U.S.C. § 7503; 5 C.F.R. part 752.

¹³ 5 U.S.C. § 7513; 5 C.F.R. § 752.404(b)(3). If the employee poses a threat to safety, the agency mission, or to Government property, agency options include, but are not limited to, assigning the employee to duties where he or she does not pose the same risk. Administrative leave may also be an option; however, both houses of the U.S. Congress have expressed interest in limiting the use of such leave to 14 days. *See* 114th Congress, S. 2450 and H.R. 4359.

4. By statute, as with shorter suspensions, the employee is entitled to “a written decision and the specific reasons therefor at the earliest practicable date.” Similar to the provision for shorter suspensions, OPM’s regulation adds that the employee also must be notified of any appeal or grievance rights.¹⁴

Indefinite Suspensions

An indefinite suspension means placing an employee in a temporary status without duties and pay for an indeterminate period of time. To sustain an indefinite suspension, the agency must show that: (1) it imposed the suspension for an authorized reason; (2) the suspension has an ascertainable end (an event that will trigger the conclusion of the suspension); (3) the suspension bears a relationship (nexus) to the efficiency of the service; and (4) the penalty is reasonable.¹⁵

The Board, and its reviewing court, have approved the use of indefinite suspensions in three limited circumstances:

1. When the agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment could be imposed – pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process.
2. When the agency has legitimate concerns that an employee’s medical condition makes his continued presence in the workplace dangerous or inappropriate – pending a determination that the employee is fit for duty.
3. When an employee’s access to classified information has been suspended and the employee must have such access to perform his job – pending a final determination on the employee’s access to classified information.¹⁶

For more on suspensions based upon reasonable cause to believe that an employee has committed crime for which he or she may be imprisoned, see our special topic issue, [*Indefinite Suspensions and Potentially Criminal Behavior: Using Reasonable Cause to Act.*](#)

When an indefinite suspension lasts for more than 14 days, it becomes subject to the same procedural requirements as other suspensions of more than 14 days (see above).¹⁷

¹⁴ 5 U.S.C. § 7513; 5 C.F.R. § 752.404.

¹⁵ *Hernandez v. Department of the Navy*, 120 M.S.P.R. 14, ¶ 6 (2013).

¹⁶ *Sanchez v. Department of Energy*, 117 M.S.P.R. 155, ¶ 10 (2011); *Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 13 (2010). In *Gonzalez*, the Board explained that an agency cannot indefinitely suspend an employee merely because there is an administrative investigation into the employee’s conduct. Rather, the agency must establish that one of the three above criteria has been met. *Id.* at ¶¶ 23, 25, 28.

¹⁷ *Harding v. Department of Veterans Affairs*, 115 M.S.P.R. 284, ¶ 13 (2010), *aff’d*, 451 F. App’x 947 (Fed. Cir. 2011); *Harris v. Department of Treasury*, 10 M.S.P.R. 581, 583 (1982).

Constitutional Due Process Issues and Harmful Procedural Errors:

In addition to the protections provided by statute and regulations, Federal employees have constitutional due process rights regarding adverse actions.¹⁸ However, it is difficult to set forth any hard-and-fast rule about the form those rights will take and at what point in the process they must occur because the U.S. Supreme Court has explained that “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.”¹⁹ In other words, what is due depends on the circumstances of the case.

An agency also must comply with its own regulations and procedures.²⁰ As explained in our article, [*Agency Officials’ Substantive and Procedural Errors and How to Fix Them*](#), an error regarding a substantive right (such as the right to respond to a proposed action and have that response considered) results in a cancellation of the action while a less substantive error (such as violation of an agency procedure) would be examined to see if the violation affected the agency’s decision to implement the action.

¹⁸ *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶ 28 (2012) (explaining how the Board analyzed U.S. Supreme Court decisions to conclude that Federal employees have due process rights for suspension actions).

¹⁹ *Gilbert v. Homar*, 520 U.S. 924, 930-31 (1997) (internal punctuation and citations omitted). To determine due process in a suspension action, the Board will weigh three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government’s interest. *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶ 27 (2012) (citing *Gilbert v. Homar*, 520 U.S. 924, 131-32 (1997)). For more on due process, see U.S. Merit Systems Protection Board, [*What is Due Process in Federal Employment?*](#) (2015).

²⁰ *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶ 37 (2012).

Legal Sources for the Right to Notice and a Meaningful Opportunity to Reply

Whether a proposed adverse action is a suspension of 14 days or less, a suspension of more than 14 days, a demotion, or a removal, the regulations issued by the Office of Personnel Management (OPM), the relevant statutes, and the U.S. Constitution each contain guarantees that the employee will have advance notice and a reasonable or meaningful opportunity to reply. But, each guarantee works slightly differently in an overlapping manner.

Statutes are a means by which Congress can: (1) communicate to agencies how they should comply with due process requirements that independently exist in constitutional case law; and (2) communicate the extent to which Congress wishes to provide additional rights not required by the Constitution. But, a statute's omission of a due process requirement in no way limits the Government's obligation to comply with that provision of the U.S. Constitution.

Constitutional Right to a Meaningful Reply Opportunity:

The Supreme Court has held that, if the Government opts to establish that it must have cause to take employment away from an individual, then the employee is entitled to advance notice and a meaningful opportunity to reply and explain – before the action is implemented – why the agency should not act.²¹

Stone v. Federal Deposit Insurance Corporation and *Ward v. U.S. Postal Service* illustrate the point that complying with constitutional due process is a separate issue from complying with the law because both address how agencies consider information and both are founded in constitutional law.

In *Stone*, the agency proposed to remove the employee. The deciding official then received two memoranda (one from the proposing official and one from a different official that may have been submitted separately) recommending the employee's removal. The memoranda were not shared with the employee. This is known in legal parlance as an “*ex parte*” (one party) communication, meaning one side to a controversy was heard by the decision-maker without the other side being provided the opportunity to take part in the discussion.

On appeal to the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”), the court held:

Procedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence and the deciding official considers new and material information. It 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. An employee

²¹ See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (explaining that the opportunity to respond must be “appropriate to the nature of the case”) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (requiring that the reply opportunity be meaningful). For more on due process, see U.S. Merit Systems Protection Board, [What is Due Process in Federal Civil Service Employment](#) (2015).

is entitled to a certain amount of due process rights at each stage and, when these rights are undermined, the employee is entitled to relief regardless of the stage of the proceedings.²²

If the memoranda, which were not shared with the employee, contained new and material information, then the employee's constitutional rights were violated and the action could not stand.²³

In *Ward v. U.S. Postal Service*, the Federal Circuit reiterated this holding, criticizing the Board for limiting *Stone* to situations involving only the charges and not including discussions of the appropriate penalty. The court explained: "There is no constitutionally relevant distinction between *ex parte* communications relating to the underlying charge and those relating to the penalty." In both cases, if the communications introduce new and material information, they "run astray of the due process requirements of notice and an opportunity to be heard."²⁴

Statutory Right to a Reasonable Reply Opportunity:

Chapter 75 (which can be used for both performance- and conduct-based actions), states that the employee is entitled to advance notice explaining the reason for the proposed action and a "reasonable time" to reply orally and in writing. For anything other than suspensions of 14 days or less, this time cannot be less than 7 days.²⁵ Chapter 43, which is only available for performance-based demotions and removals, also guarantees advance notice and "a reasonable time to answer orally and in writing[.]"²⁶ However, these Chapter 75 and 43 rights are layered over the employee's constitutional rights. They are a means by which Congress has explained the procedures agencies should use to give life to an employee's pre-existing rights to notice and response. The right to a meaningful reply period would still exist without them.²⁷

Regulatory Right to a Reasonable Reply Opportunity:

OPM and agency regulations are an additional layer of the process. For example, for suspensions of 14 days or less, the statute only states that the reply period must be reasonable. However, OPM's regulations

²² *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999).

²³ To determine if the information was new and material, the Board was instructed to consider: "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." *Id.* at 1377.

²⁴ *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011). If no substantive (constitutional) rights were violated, then the Board must examine if procedural rights set forth in statute or regulation were violated. As explained in our article, [Agency Officials' Substantive and Procedural Errors and How to Fix Them](#), procedural errors are examined using a different test than substantive errors. However, if an action is cancelled because of the violation of a procedural or substantive right, the agency is free to take the action again, using the correct process.

²⁵ Compare 5 U.S.C. § 7503(b) with 5 U.S.C. § 7513(b).

²⁶ 5 U.S.C. § 4303(b)(1).

²⁷ See *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1375 (Fed. Cir. 1999) (explaining that "§ 7513 and § 4303 [of title 5] do not provide the final limit on the procedures the agency must follow in removing [an employee]").

instruct that it cannot be less than 24 hours. OPM’s regulations for adverse actions taken under chapter 75 also instruct agencies that a notice of proposed action must “inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.”²⁸ This helps give meaning to the constitutional and statutory provisions for the reply period. Agency regulations, policies, and collective bargaining agreements may have further instructions on the period for an employee to reply. However, just as the constitutional rights exist in the absence of statutory layers, the statutory obligations for agencies would exist in the absence of regulations. A regulation can enhance statutory and constitutional rights, but it cannot overrule a statute any more than a statute can overrule a constitutional right.

What this Means for Agencies, OPM, and Congress:

Agency leaders can – and should – consider how to make their own processes best address their agency’s unique needs within the bounds set by the law. In doing so, it is important to understand where the rules come from in order to understand what can – and cannot – be changed. The same holds true for OPM, which has the authority to promulgate regulations to implement chapters 75 and 43. Congress has greater flexibility, as it has the power to change statutes. But, in the end, it too is bound by a higher authority – the U.S. Constitution. Understanding where rules come from – and why – can help Congress (and those seeking to persuade Congress to change the law) to tailor the law to best advance the effectiveness and efficiency of the civil service while comporting with the Constitution.²⁹

²⁸ 5 C.F.R. §§ 752.203(b), 752.404(b).

²⁹ See, e.g., *Respondent’s Brief, Helmann v. Department of Veterans Affairs* (No. 2015-3086) (Jun. 1, 2016), at 35-44 (explaining that the Department of Justice had concluded that a section of a bill intended to streamline certain adverse action cases involving the Senior Executive Service violated the appointments clause of the Constitution and should therefore be declared invalid).

Decision-Maker Must Listen and Have Power to Decide

For adverse actions, the law does not expect the deciding official to come to the case entirely without knowledge or opinions. In fact, in an action taken under chapter 75 of title 5, the proposing and the deciding official may be the same person, although the statute requires that a chapter 43 action have the concurrence of an official at a higher level than the one who proposed it.³⁰ (For more on the differences between chapters 43 and 75, see [Performance-Based Actions under Chapters 43 and 75 of Title 5 – Similarities and Differences](#).)

A deciding official's awareness of background information concerning the appellant, his concurrence in the desire to take an adverse action, or his predisposition to impose a severe penalty does not disqualify him from serving as a deciding official on due process grounds.³¹ Due process requires notifying the employee of what the official will consider, not that the official be a blank slate.³²

However, due process does require that the official: (1) consider the employee's response; and (2) be able to render a decision based upon that response. For example, due process is not met if the official fails to read the written reply.³³ Similarly, to be constitutional, the reply period cannot be an empty formality in which the employee speaks while no one with the power to affect the outcome listens.³⁴ The deciding official must be able to invoke his or her discretion as to whether the proposed penalty is warranted.³⁵ The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."³⁶ Processes that do not offer a meaningful opportunity can run afoul of the Constitution.

³⁰ *Davis v. Department of Transportation*, 39 M.S.P.R. 470, 478 (1989); see also *Cross v. Veterans Administration*, 16 M.S.P.R. 429, 431 (1983); *Belanger v. Department of Transportation*, 16 M.S.P.R. 304, 309 (1983). 5 U.S.C. § 4303(b)(1)(D)(ii).

³¹ *Lange v. Department of Justice*, 119 M.S.P.R. 625, ¶ 9 (2013); see *Diehl v. Department of the Army*, 118 M.S.P.R. 344, ¶¶ 5–14 (2012); *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶¶ 24–33 (2012).

³² *But see Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 13 (2011) (holding that it was a due process violation when the deciding official, who knew the appellant's history from his role in a prior disciplinary action involving her, considered the appellant's past misconduct as an aggravating factor as part of his penalty analysis without informing her that it would be considered and giving her an opportunity to discuss it).

³³ *Hodges v. U.S. Postal Service*, 118 M.S.P.R. 591, ¶ 6 (2012); *Alford v. Department of Defense*, 118 M.S.P.R. 556, ¶¶ 5-7 (2012).

³⁴ See, e.g., *Lange v. Department of Justice*, 119 M.S.P.R. 625, ¶ 23 (2013) (finding unconstitutional an agency decision where the deciding official admitted she lacked the power to cancel or mitigate the action no matter what the employee's response might say).

³⁵ *Buelna v. Department of Homeland Security*, 121 M.S.P.R. 262, ¶¶ 27-28 (2014).

³⁶ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Connecting the Job and the Offense ("Nexus")

To implement a suspension, demotion, or removal for misconduct, the agency must be able to show that the action was “for such cause as will promote the efficiency of the service.”³⁷ This is often referred to as “nexus” – meaning that the agency must show a connection between the employee’s conduct or performance and “the work of the agency, *i.e.*, the agency’s performance of its functions.”³⁸

For some offenses, such as absence without approved leave (AWOL), the nexus is considered self-evident.³⁹ Many offenses that take place in the workplace will have a connection to that workplace and thus the work of the agency performing its functions.⁴⁰ However, nexus can occur with off-duty as well as on-duty behavior.

The Board has recognized three methods by which the agency may meet its burden of establishing a nexus linking an employee’s off-duty misconduct with the efficiency of the service: (1) a rebuttable presumption of nexus may arise in certain egregious circumstances; (2) the agency may show, by a preponderance of the evidence, that the misconduct at issue has adversely affected the employee’s or co-workers’ job performance or the agency’s trust and confidence in the employee’s job performance; and (3) the agency may show, by a preponderance of the evidence, that the misconduct interfered with or adversely affected the agency’s mission.⁴¹

However, agencies must be careful when explaining that the conduct is egregious because what one person might find clearly egregious, another may not. This is particularly true when considering the impact of off-duty conduct on one’s Federal employment status. For example, in *Doe v. Department of Justice*, the agency determined that the employee’s off-duty behavior, videotaping sexual encounters with women without their consent, appeared to have violated state laws and was so egregious that nexus should be presumed. However, the agency erred in its assumptions about legality, as in that particular state, the conduct was not illegal. Nevertheless, the Board initially upheld the removal action, finding there was nexus between the conduct and the efficiency of the service because the conduct in question was “clearly dishonest.”⁴²

On appeal, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) noted its prior holdings that “misconduct that is private in nature and that does not implicate job performance in any direct and

³⁷ 5 U.S.C. §§ 7503; 7513.

³⁸ *Doe v. Department of Justice*, 565 F.3d 1375, 1379 (Fed. Cir. 2009).

³⁹ *Bryant v. National Science Foundation*, 105 F.3d 1414, 1417 (Fed. Cir. 1997) (explaining that “the nexus between the charged offense and the efficiency of the service is automatic when the charged offense is AWOL”).

⁴⁰ See, e.g., *Washington v. Department of Agriculture*, 22 M.S.P.R. 374, 376 (1984) (holding that there is a clear nexus between an employee falsifying his time and attendance record and the efficiency of the service); *Winner v. Department of the Air Force*, 10 M.S.P.R. 177, 178 (1982) (holding that nexus was clear when the charged conduct concerned violation of agency rules).

⁴¹ *Scheffler v. Department of the Army*, 117 M.S.P.R. 499, ¶ 10 (2012), *aff’d*, 522 F. App’x 913 (Fed. Cir. 2013).

⁴² *Doe v. Department of Justice*, 103 M.S.P.R. 135, ¶¶ 6-13 (2006).

obvious way is often insufficient to justify removal from a civil service position.⁴³ Because the employee's conduct was not illegal in the state where it occurred, the conduct could not be presumed to be dishonest. The court therefore remanded the case back to MSPB with the instruction to "articulate and apply a meaningful standard" to establish nexus between the conduct of the employee and the efficiency of the service.⁴⁴

In contrast, the Federal Circuit has repeatedly upheld Board decisions finding that proven sexual abuse of a child was so egregious that it creates a presumption of nexus. For example, in *Williams v. General Services Administration*, the appellant pled guilty to a charge of sexual assault on a child and received a 2-year deferred sentence. The Board found, and the court upheld, that nexus could be presumed based on the nature and gravity of the appellant's criminal misconduct. In *Graybill v. U.S. Postal Service*, the court found that the Board had not erred in finding a presumption of nexus where the appellant had pled guilty to charges of sexual misconduct involving his minor stepdaughter. In *Hayes v. Department of the Navy*, a presumption of nexus was also found where the appellant was convicted of assault and battery of a 10-year old girl.⁴⁵

While egregiousness often speaks for itself, damage to management's trust in the employee resulting from non-egregious conduct will require more explanation by management. For example, in *Beasley v. Department of Defense*, an employee pled guilty to the crimes of aggravated assault and petit larceny. The agency officials explicitly told the Board they could not trust the employee in light of this criminal conduct, because the employee would have opportunities to commit theft at work and there were approximately 200 people who could be injured if the employee became violent at work. The Board found that management's articulated connection between the offenses and their inability to trust the employee in the workplace established the required nexus to support a removal action, even though there was "no showing" that her conduct directly interfered with the agency's mission.⁴⁶

Similarly, in its review of an arbitration case, the Federal Circuit was presented with an employee's removal after conviction for intent to distribute cocaine. The agency asserted that the conviction cast serious doubt on the employee's judgment and trustworthiness in a position where an error could put lives at risk. The court held that because "an agency's reasonable loss of trust and confidence" can establish nexus, and given

⁴³ *Doe v. Department of Justice*, 565 F.3d 1375, 1380 (Fed. Cir. 2009). The court explained that: "Without a predetermined standard – e.g., the legality of the conduct – to clarify when the agency may and may not investigate the personal relationships of its employees, it is conceivable that employees could be removed for any number of 'clearly dishonest' misrepresentations, from those made to preserve the sanctity of a romantic relationship to cheating in a Friday night poker game. The danger here is twofold; federal employees are not on notice as to what off-duty behavior is subject to investigation and the government could use this overly broad standard to legitimize removals made for personal or political reasons. A clear articulation of a standard is therefore essential to the government's ability to reasonably and legitimately remove an agent for off-duty conduct relating to personal relationships." *Id.* at 1381.

⁴⁴ *Id.* MSPB was also instructed to revisit the penalty in light of the lack of criminality in the conduct. *Id.* at 1383.

⁴⁵ *Williams v. General Services Administration*, 22 M.S.P.R. 476 (1984), *aff'd*, 770 F.2d 182 (Fed. Cir. 1985) (Table); *Graybill v. U.S. Postal Service*, 782 F.2d 1567 (Fed. Cir. 1986); *Hayes v. Department of the Navy*, 15 M.S.P.R. 378 (1983), *aff'd*, 727 F.2d 1535 (Fed. Cir. 1984). See *Allred v. Department of Health & Human Services*, 786 F.2d 1128 (Fed. Cir. 1986).

⁴⁶ *Beasley v. Department of Defense*, 52 M.S.P.R. 272, 275 (1992).

the trustworthiness needed for the position, the conviction combined with management's assertions that trust had been lost established the required nexus.⁴⁷

The third method to establish nexus, the conduct's adverse effect on the mission, can be applied to a mission as broad as that of the agency or as narrow as that of the job. For example, in *Masino v. United States*, the court found presumed nexus for a customs officer who used marijuana when off-duty in light of the role of his agency in preventing marijuana from entering the country.⁴⁸ In *Brown v. Department of the Navy*, the off-duty conduct was not criminal. Rather, the employee engaged in an adulterous relationship with the wife of a marine serving abroad. However, the purpose of the employee's job with the Morale, Welfare, and Recreation Department was to plan activities to enhance the morale of military personnel. Because his off-duty conduct was antithetical to the mission of his job, it could be used to justify his removal.⁴⁹

The reason why a particular adverse action will help the civil service operate better will vary by case. But, for the agency to implement an action under chapter 75 of title 5, the connection between the offense and the civil service must be present and agencies should be prepared to explain it.

⁴⁷ *Brook v. Corrado*, 999 F.2d 523, 527 (Fed. Cir. 1993).

⁴⁸ *Masino v. United States*, 589 F.2d 1048, 1056 (Ct. Cl. 1978). See *Gibbs v. Department of the Treasury*, 21 M.S.P.R. 646 (1984) (holding that because there is a clear connection between the Internal Revenue Service's mission and citizens paying their taxes, an IRS employee's failure to pay his taxes met the test for nexus).

⁴⁹ *Brown v. Department of the Navy*, 229 F.3d 1356, 1360-61 (Fed. Cir. 2000).

Labels are Not Required, but if Used They Must be Proven

Nothing in law or regulation requires that an agency attach a label to a charge of misconduct. If it so chooses, the agency may simply describe the actions that constitute misbehavior in a narrative form and have its discipline sustained if the efficiency of the service suffers because of the misconduct.⁵⁰

If, however, the agency chooses to use a label, that label must be proven. The U.S. Court of Appeals for the Federal Circuit has held that an agency must prove every element of a charge, including intent if that is an element. For example, if an agency uses the label of “theft” as its charge, then the agency must prove that the employee “intended to permanently deprive the owner of possession” of the item in question.⁵¹ In contrast, an agency is not required to prove intent as part of a charge of unauthorized possession of the property.⁵² Similarly, “[i]nsubordination by an employee is a willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed.”⁵³ In contrast, a charge of failure to obey orders does not require proof of intent.⁵⁴

Proving elements can become particularly complex if the agency uses a label that has a specific meaning in a statute or is defined in more than one place. Take, for example, the label of “sexual harassment.” Such harassment can be defined in an agency policy as well as policy issued by the Equal Employment Opportunity Commission, and either (or both) of those definitions may vary from what a person drafting or reading the charges may think of as “sexual harassment.” This can result in a situation where an agency that uses the term “sexual harassment” in a charge may be required to prove that the conduct meets a formal definition, regardless of whether that was the drafting official’s intent. For example, in *Booker v. Department of Veterans Affairs*, neither the notice of proposed action nor notice of decision defined the phrase “sexual harassment.” As a result, the agency was required to meet the Title VII definition because of the content of its agency’s policy which referenced Title VII.⁵⁵

However, it is not necessary for the agency to use the term sexual harassment at all. In *Morrison v. National Aeronautics & Space Administration*, the Board affirmed the agency’s penalty of a reassignment and 35-day suspension for loading sexually explicit material on a Government computer and exposing individuals in the work environment to that material. The appellant asserted that the agency had not

⁵⁰ *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997).

⁵¹ *King v. Nazelrod*, 43 F.3d 663, 666-67 (Fed. Cir. 1994).

⁵² *Culley v. Defense Logistics Agency*, 60 M.S.P.R. 204, 212 (1993) (finding that the intent to permanently deprive is not an element of unauthorized possession); *Castro v. Department of Defense*, 51 M.S.P.R. 506, 510 (1991) (explaining that the intent to permanently deprive is not an element of unauthorized removal of property).

⁵³ *Phillips v. General Services Administration*, 878 F.2d 370, 373 (Fed. Cir. 1989) (emphasis and internal notes omitted).

⁵⁴ *Eichner v. U.S. Postal Service*, 83 M.S.P.R. 202, 205 (1999); *Hamilton v. U.S. Postal Service*, 71 M.S.P.R. 547, 555–57 (1996).

⁵⁵ *Booker v. Department of Veterans Affairs*, 110 M.S.P.R. 72, ¶ 5 (2008).

proven that sexual harassment occurred, but the Board held that the conduct did not need to rise to the level of sexual harassment for the Board to sustain the agency's action as the charges that the agency used – loading and displaying the material – were proven.⁵⁶

In *Brim v. U.S. Postal Service*, the agency charged the appellant with sexual harassment, but also charged conduct unbecoming a Postal Service employee based on the same behavior.⁵⁷ A charge of “conduct unbecoming,” much like a charge of “improper conduct,” has no specific elements of proof; it is established by proving that the employee committed the acts alleged in support of the broad label.⁵⁸ The Board found that the Postal Service did not prove sexual harassment, but that because the unbecoming conduct in question – sexually explicit comments within earshot of other employees – was proven and was unacceptable in the workplace, a 30-day suspension was permissible under the second charge.⁵⁹

In *Brim*, the agency opted to have two separate charges. That is something an agency is permitted to do, but also something that the agency must do if it wishes to have more than one charge to be independently examined. MSPB is under clear instructions from the Federal Circuit that it is not permitted to split a charge and then sustain one of the newly created charges. MSPB can only assess what it is given – not make repairs to the underlying case.⁶⁰

This same rule applies to undefined labels used in specifications. For example, in *Thomas v. U.S. Postal Service*, the agency asserted in a specification that the appellant “continually subjected” another employee “to demeaning, sexually derogative comments.” The agency did not describe “continually” and the events later submitted as evidence, while serious, did not occur with the necessary frequency or duration to meet the dictionary's definition of “continual.” Accordingly, while the Board sustained two other specifications related to specific events of inappropriate touching on specific days, it was not able to sustain the specification regarding comments because the agency had opted to use the word “continually” without

⁵⁶ *Morrison v. National Aeronautics & Space Administration*, 65 M.S.P.R. 348, 352, 357-58 (1994). See *Cisneros v. Department of Defense*, 83 M.S.P.R. 390, ¶¶ 5-7, 17-20 (1999) (holding that the agency proved its charge of “conduct unbecoming a Federal employee” when it described the employee's physical acts and statements that had a sexual component), *aff'd*, 243 F.3d 562 (Fed. Cir. 2000). See *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 561-63 (1994) (sustaining the agency's decision to remove an employee for “conduct prejudicial to the Postal Service” when the employee hired a prostitute to pose nude in the workplace, arranged for the photographs to be published in a magazine, and informed others in the workplace of what he had done), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995).

⁵⁷ *Brim v. U.S. Postal Service*, 49 M.S.P.R. 494, 496–99 (1991).

⁵⁸ *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, ¶ 9 (2010).

⁵⁹ *Brim v. U.S. Postal Service*, 49 M.S.P.R. 494, 496–99 (1991).

⁶⁰ *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). However, charges will be merged when proof of either charge is automatically proof of the other charge. *Mann v. Department of Health & Human Services*, 78 M.S.P.R. 1, 7 (1998). The fact that a charge has been merged into another does not mean that the duplicative charge is not sustained or that the appellant's misconduct somehow becomes less serious by virtue of the merger. However, MSPB must examine whether the penalty is reasonable for the merged charge. *Shiflett v. Department of Justice*, 98 M.S.P.R. 289, ¶ 12 (2005).

any details to shed light on what it meant for something to be continual and the evidence did not meet the dictionary's definition of that word.⁶¹

An agency will be required to prove it is more likely than not that the conduct in question occurred, regardless of whether the agency opts for a label for that conduct.⁶² However, if the agency chooses to use a label, it will be required to prove that label as well as the underlying conduct. The more elements there are in that label, the more elements there are for the agency to prove.

⁶¹ *Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶¶ 6-7 (2011). While the sustained charges may have otherwise supported removal, the case was remanded to an MSPB regional office to address whether the agency violated the appellant's constitutional due process rights regarding the process by which it reached its penalty. *Id.* at ¶¶ 9-13.

⁶² 5 U.S.C. § 7701(c)(1)(b); 5 C.F.R. § 1201.4(q).

Determining the Penalty

The rules for determining the penalty, and the ability of MSPB to review that penalty, depend on the statute being used by the agency to authorize the adverse action. As instructed by the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”), MSPB has no role in evaluating an agency’s chosen penalty for a case proven under chapter 43 of title 5 (the chapter for demotions and removals based upon failure in a critical performance element).⁶³

The language of chapter 75 (the chapter for taking actions to protect the efficiency of the service, which can include performance or conduct cases) does not explicitly provide that MSPB will determine if the penalty is reasonable under the circumstances of the case. However, prior to the enactment of the Civil Service Reform Act of 1978 (CSRA), the Board’s adjudicatory functions were performed by the Civil Service Commission (CSC). The CSC reviewed the reasonableness of penalties. After enactment of the CSRA, the Board concluded that it was expected to assess penalties as its predecessor agency had done.⁶⁴

The Board examined past court rulings and CSC decisions regarding penalties and then summarized them into twelve (12) factors that it would look at to determine if a penalty was unreasonable. These factors are collectively known as the *Douglas* factors for the case that articulated them and they are still in use today.⁶⁵ “It is well established that the Board’s jurisdiction [for chapter 75 cases] includes the authority to review the agency’s penalty determination using the factors articulated in *Douglas v. Veterans Administration*.”⁶⁶

The *Douglas* factors are:

- (1) The nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

⁶³ *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1567 (Fed. Cir. 1985). Additionally, the Board cannot review the reasonableness of a penalty that is set by law. See, e.g., *Semans v. Department of the Interior*, 62 M.S.P.R. 502, 508 (1994) (holding that because 31 U.S.C. § 1349(b) requires a suspension of not less than one month for the use of a Government vehicle for other than an official purpose, and the appellant’s actions were closely analogous, it would be “inappropriate” for the Board to scrutinize whether the agency’s penalty of a 30-day suspension was warranted).

⁶⁴ “It cannot be doubted, and no one disputes, that the Civil Service Commission was vested with and exercised authority to mitigate penalties imposed by employing agencies. Nor can it be doubted that the federal courts have regarded that authority as properly within the Commission’s power.” *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 290 (1981).

⁶⁵ *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

⁶⁶ *Archuleta v. Hopper*, 786 F.3d 1340, 1352 (Fed. Cir. 2015). See *U.S. Postal Service v. Gregory*, 534 U.S. 1, 5 (2001) (noting that “the agency bears the burden of proving its charge by a preponderance of the evidence” and that, “[u]nder the Board’s settled procedures, this requires proving not only that the misconduct actually occurred, but also that the penalty assessed was reasonable in relation to it”); *Lachance v. Devall*, 178 F.3d 1246, 1256 (Fed. Cir. 1999) (holding that “the Board inherited mitigation authority in misconduct actions from the old Civil Service Commission”).

- (3) The employee's past disciplinary record;
- (4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- (6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) Consistency of the penalty with any applicable agency table of penalties;
- (8) The notoriety of the offense or its impact upon the reputation of the agency;
- (9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) Potential for the employee's rehabilitation;
- (11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.⁶⁷

When applying these factors, the "determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency. The Board's role is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance."⁶⁸ Instead, the question is whether "managerial judgment has been properly exercised within the tolerable limits of reasonableness."⁶⁹

⁶⁷ *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981).

⁶⁸ *Norris v. Securities and Exchange Commission*, 675 F.3d 1349, 1355 (Fed. Cir. 2012) (internal citations and punctuation omitted).

⁶⁹ *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981).

The Federal Circuit has instructed that:

When the Board sustains all of an agency's charges the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. When the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated either in its final decision or during proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges.⁷⁰

The Federal Circuit, interpreting decisions by the U.S. Supreme Court, has also held that, as a matter of due process, in actions taken under 5 U.S.C. § 7513, the agency must notify the employee of the factors it will consider regarding the penalty and provide the employee with the opportunity to respond.⁷¹ As explained in our article, [*Agency Officials' Substantive and Procedural Errors and How to Fix Them*](#), because this is a matter of constitutional due process rights, an agency's failure to provide notice and a meaningful opportunity to respond regarding the penalty is a violation of the employee's substantive rights. A chapter 75 action with such a violation must be canceled, although the agency will be free to start over and take a constitutionally correct action.⁷²

⁷⁰ *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999); see *Gaines v. Department of the Air Force*, 94 M.S.P.R. 527, ¶ 8 (2003); *Zayer v. Department of Veterans Affairs*, 90 M.S.P.R. 51, ¶ 8 (2001).

⁷¹ *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1282 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999).

⁷² *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (Fed. Cir. 2011); *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999).

How Employees Become Similarly Situated for Purposes of an Adverse Action Penalty

The Board has long held that in order to ensure that penalties are reasonable, same or similar offenses should be treated in a similar manner.⁷³ To establish that penalties are disparate, an appellant must show that the charges and the circumstances surrounding the charged behavior are substantially similar to those of a comparator employee.⁷⁴ Proof that the proffered comparator was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline can help an appellant to make an initial showing that the charges and the circumstances surrounding the charged behavior are substantially similar.⁷⁵ However, these are factors to be considered, not hard-and-fast mathematical calculations.⁷⁶

If an appellant makes an initial showing that there is enough similarity to lead a reasonable person to conclude that the agency treated similarly situated employees differently, then the agency must prove that it had a legitimate reason for the difference in treatment between employees.⁷⁷ Board case law demonstrates how important it is for the agency to be prepared to articulate before MSPB the reasons why the case at issue is different from the comparator cases.⁷⁸

One factor that can weigh heavily is the type of position that is held by the employees being compared. For example, it is well established that law enforcement officers can be held to a higher standard of

⁷³ *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

⁷⁴ *Archuleta v. Department of the Air Force*, 16 M.S.P.R. 404, 407 (1983). A discrimination claim of disparate treatment is an affirmative defense and is a separate matter from an allegation of disparate penalties. *Munoz v. Department of Homeland Security*, 121 M.S.P.R. 483, ¶ 14 (2014). When an appellant asserts an affirmative defense of discrimination or retaliation under 42 U.S.C. § 2000e-16, the adjudicator first will examine whether the appellant has shown by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. Such a showing is sufficient to establish that the agency violated 42 U.S.C. § 2000e-16, thereby committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). If the appellant meets his burden, the adjudicator then will inquire whether the agency has shown by preponderant evidence that the action was not based on the prohibited personnel practice, *i.e.*, that it still would have taken the contested action in the absence of the discriminatory or retaliatory motive. If the adjudicator finds that the agency has made that showing, its violation of 42 U.S.C. § 2000e-16 will not require reversal of the action. *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 51 (2015).

⁷⁵ *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶ 6 (2010).

⁷⁶ For example, while the fact that two employees are supervised by different individuals may sometimes justify different penalties, an agency may be required to explain why differing chains of command would justify different penalties. *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 22 (2012).

⁷⁷ *Ellis v. U.S. Postal Service*, 121 M.S.P.R. 570, ¶ 11 (2014). If the circumstances cited by the agency justify a harsher penalty on the appellant than on the comparator(s), but do not justify the penalty imposed by the agency on the appellant, the Board will mitigate the penalty to the maximum reasonable penalty. *Id.*

⁷⁸ See, *e.g.*, *Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 21 (2013) (explaining that the agency did not offer a sufficient explanation for the significantly harsher penalty given to the appellant versus that given to the comparator); *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 24 (2012) (concluding that the agency failed to offer a persuasive explanation for why penalties should differ between the appellant and a comparator); *Woebecke v. Department of Homeland Security*, 114 M.S.P.R. 100, ¶¶ 21-22 (2010) (holding that the administrative judge acted properly when concluding that the agency failed to prove by preponderant evidence that there was a legitimate reason for a difference in how similar offenses were punished); *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶¶ 16-17 (2010) (discussing the deciding official's testimony regarding how this case was different from a comparator case).

conduct than other federal employees.⁷⁹ Similarly, agencies are entitled to hold supervisors to a higher standard than non-supervisors because they occupy positions of trust and responsibility.⁸⁰ However, even the ability to hold certain positions to higher standards is not always dispositive. Every case will be considered on its own merits.

For example, in *Chavez v. Small Business Administration*, the appellant claimed that his penalty was too harsh because an allegedly comparable employee was not as severely disciplined. However, the Board found that differing penalties were justified because: (1) a two year lapse in time between the impositions of penalties weakened the comparison; (2) the employees were disciplined by different agency officials and worked in separate chains of command within the agency; (3) the employees had different responsibilities; and (4) the appellant was found to have committed additional offenses not committed by the comparator employee.⁸¹

In *Davis v. U.S. Postal Service*, the Board found differing penalties were permissible, in part because an agency is permitted to provide evidence that the penalty previously implemented for a similar offense was too lenient. In *Davis*, a non-supervisory employee made extremely hostile statements to a supervisor. The employee was removed and filed an appeal in which he claimed disparate penalties because a manager who also made hostile remarks in the workplace was not removed. The agency then provided MSPB with evidence that the appellant's unacceptable conduct, unlike that of the manager, placed employees in fear for their safety. Moreover, the agency specified that the appellant's unacceptable conduct violated the agency's zero tolerance policy, unlike that of the manager. The agency also showed that the manager had approximately 29 years of service with the agency, in contrast to the appellant's 6 years of service. Additionally, the deciding official credibly testified that, had he been the official for the comparator case, he would have removed that employee as well. By presenting this evidence to the Board and explaining its reasons, the agency proved that it had a legitimate reason for the difference in treatment between these employees and the Board sustained the removal.⁸²

In contrast, in *Williams v. Social Security Administration*, it appeared that the agency was more lenient with an employee who perpetrated a tax fraud than it was with an employee who, in the words of the court, "merely had participated in it." The employee who committed the lesser offense had "worked for six years since the misconduct and done an excellent job. . . [with] no problems" prior to the agency implementing the penalty. The court explained that, "[w]hile the fact that two employees are supervised under different chains of command may sometimes justify different penalties, in this case" that alone would not be adequate justification for disparate treatment. The court noted that while the Government's counsel later tried to

⁷⁹ *Watson v. Department of Justice*, 64 F.3d 1524, 1530 (Fed. Cir. 1995); *Phillips v. Department of the Interior*, 95 M.S.P.R. 21, ¶ 16 (2003), *aff'd*, 131 F. App'x 709 (Fed. Cir. 2005).

⁸⁰ *Edwards v. U.S. Postal Service*, 116 M.S.P.R. 173, ¶ 14 (2010). See *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).

⁸¹ *Chavez v. Small Business Administration*, 121 M.S.P.R. 168, ¶¶ 21-24 (2014).

⁸² *Davis v. U.S. Postal Service*, 120 M.S.P.R. 457, ¶¶ 2-4, 9, 8-9, 14-16 (2013).

justify the agency's actions, in the "record before the Board, which is the only record we have" the agency did not explain the justification for treating the lesser offense more seriously.⁸³

The Board has set forth a list of 12 factors to be considered when determining a penalty,⁸⁴ and the more these factors differ, the more the situations may not be as similar as they appear at first glance. Decades of case law show that just because two cases have some commonalities does not mean that the agency will be unable to explain why they are different, justifying different penalties. But, if an action is appealed to MSPB, agencies may be required to make those explanations and submit a record showing that when penalties differ, it is because the situations were not similar after all.

Agencies may encounter situations in which officials consistently provided greater leniency in the past than the agency wishes to permit in the future for similar offenses. In such cases, the primary distinction between new offenses and the comparator cases would be a change in agency policy rather than differences in the employees or the offenses. The Board has explained that an agency can implement more stringent penalties in the future than it has in the past, provided that it notifies its employees of the change in policy.⁸⁵ Many agencies also use a table of penalties to explain general ranges of discipline that the agency considers appropriate for various offenses to provide some consistency within the agency. As with other agency policies, tables of penalties can be modified.

Agency officials are not rendered powerless by what other officials have done in the past when the new officials properly communicate with their workforces, explaining any policy changes. Policy changes may not even be required, if the agency finds its actions warranted by the unique conditions of individual cases and officials are prepared to explain why new situations have different circumstances. Whether it is setting forth new policy to the workforce or explaining the reasons why individual circumstances are not similar, agency communications are crucial to addressing differences in penalties.

⁸³ *Williams v. Social Security Administration*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009). The court remanded *Williams* back to the Board to permit further development of the record regarding the agency's actions. However, in general, once the record closes, no additional evidence or argument will be accepted unless it is new and material and the party submitting it shows that, despite due diligence, the evidence or argument was not readily available before the record closed. 5 C.F.R. §§ 1201.114(k), 1201.115(d). It is therefore extremely important that the agency initially develop the record properly. (Decisions of the U.S. Court of Appeals for the Federal Circuit are controlling authority for the Board, whereas other circuit courts' decisions are persuasive, but not controlling, authority. *Fairall v. Veterans Administration*, 33 M.S.P.R. 33, 39, *aff'd*, 844 F.2d 775 (Fed. Cir. 1987)).

⁸⁴ *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

⁸⁵ *Parker v. Department of the Navy*, 50 M.S.P.R. 343, 354-55 (1991); *Tucker v. Veterans Administration*, 11 M.S.P.R. 131, 132-33 (1982). See *Social Security Administration v. Mills*, 73 M.S.P.R. 463, 473 (1996) (holding that the appellants "were notified in advance" of the agency's policy), *aff'd*, 124 F.3d 228 (Fed. Cir. 1997) (Table).

Avoiding Facilitating Prohibited Personnel Practices (PPPs)

Proposing and deciding officials are not permitted to take an action for prohibited reasons, such as retaliation for whistleblowing activity or for discriminatory motives (including not only “traditional” discrimination (*e.g.*, race or sex), but also discrimination based on military service, political party, or off-duty conduct that does not affect the efficiency of the service). Moreover, officials – no matter how pure their own motives – have the responsibility to ensure that the action has not been corrupted by someone else in the process who has a prohibited motive.

The Supreme Court has held, in the context of a statute protecting service members from anti-military animus, that “if a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable[.]”⁸⁶ This is known as the “cat’s paw” approach to liability, so named for a fable in which a cat is tricked by a monkey into sticking the cat’s paw into a flame to seize some food. The cat gets his paw injured while the monkey, who persuaded the cat to act, escapes with all the food and no injuries.⁸⁷ In the employment context, an innocent official can get burned if someone with animus tricks the official into taking a personnel action.

The law instructs the Board that if a decision is based on any PPP, the agency’s decision cannot be sustained.⁸⁸ The Board and its reviewing court have held that the cat’s paw approach applies to this instruction. Even if the official with animus officially recuses himself or herself from preparing the charges or issuing the final decision, if that official is involved in any manner that taints the process, the action cannot be sustained.⁸⁹

The cat’s paw theory for determining if an action is corrupted by the commission of a PPP (or other prohibited purpose such as anti-military animus) is one of many reasons why it is so important for decision-makers to listen carefully to an employee’s reply to the notice of proposed action. Listening to – or reading – an employee’s response to the proposed action is a due process requirement; but, truly paying attention to it is an opportunity for the agency to learn if it has been tricked into sticking a paw into the fire. Whether the deciding official is trying to comply with the Constitution, confirm that the employee is not a scapegoat, avoid the cat’s paw, or some other purpose, there are a lot of different ways in which ensuring that the adverse action response period is meaningful can prevent the agency from getting burned.

⁸⁶ *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011).

⁸⁷ *Id.* at 415, n.1.

⁸⁸ 5 U.S.C. § 7701(c)(2)(B).

⁸⁹ See *Sullivan v. Department of the Navy*, 720 F.2d 1266, 1269, 1276 (Fed. Cir. 1983) (holding that despite the official recusing himself, “his dominant role in the case throughout the proceedings” infused the action with the improper motive, thereby rendering the personnel action unsustainable); *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶¶ 20-21 (2014) (holding that when a supervisor with a retaliatory animus alleges misconduct by an employee but does not serve as the proposing or deciding official, if the agency uses that allegation as the basis for proposing and implementing an adverse action, then the action itself has retaliation as the basis and the agency must prove by clear and convincing evidence that it would have taken the same action in the absence of the animus).

AVOID FACILITATING PROHIBITED PERSONNEL PRACTICES (PPPs)

For a discussion of the meaning of the individual PPPs and the extent to which employees perceive them, see our report, [*Prohibited Personnel Practices: Employee Perceptions*](#).⁹⁰

⁹⁰ U.S. Merit Systems Protection Board, [*Prohibited Personnel Practices: Employee Perceptions*](#) (2011), available at www.mspb.gov/studies. See [*Prohibited Personnel Practices Frequently Asked Questions*](#), available at <http://www.mspb.gov/ppp/ppp.htm#faq>.

Agency Officials' Substantive and Procedural Errors and How to Fix Them

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.⁹¹ 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.⁹² An adverse action that violates a substantive right cannot stand.⁹³

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.⁹⁴ Under this test, once the non-substantive procedural error is found, for the action to be reversed, the appellant must show that 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.⁹⁵ 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.⁹⁶

⁹¹ Compare *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) with 5 U.S.C. § 7513.

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(r)) 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(r).

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.⁹⁷ 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.⁹⁸ An agency can also cancel an adverse action on its own initiative after the action has taken effect.⁹⁹

The Board is not permitted to cure the agency's errors during the adjudication process.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

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).

Identifying Probationers and Their Rights

A probationary period takes place in the competitive service. The term “trial period” is often used to describe a similar period in the excepted service. However, in both cases, the purpose is to provide the agency with the opportunity to assess if the employee will be an asset to the Government prior to the finalization of the appointment.¹⁰³

For individuals in the competitive service outside the Department of Defense, the probationary period is one year. The National Defense Authorization Act of 2016 extended this period to a minimum of 2 years for the Department of Defense.¹⁰⁴ For the excepted service, the trial period can vary, but is often either one or two years.¹⁰⁵ In general, most probationers and individuals in a trial period will have very limited procedural and appeal rights.

Limited Rights of Probationers

The limited rights of probationers in the competitive service are derived from regulations issued by the U.S. Office of Personnel Management (OPM). Because the very nature of the excepted service is that it is excepted from the ordinary rules of the competitive civil service, OPM tends to provide fewer regulations that apply to the excepted service. However, agencies may provide their own regulations and policies governing such employment.¹⁰⁶

When a probationer (in the competitive service) is removed for “conditions arising before appointment,” the individual is entitled to the following:

- (1) “[A]dvance written notice stating the reasons, specifically and in detail, for the proposed action.”¹⁰⁷

¹⁰³ For a discussion of the purpose and use of the probationary and trial periods, see U.S. Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity* (2005), at 34.

¹⁰⁴ 5 C.F.R. § 315.802(a). *But see* 10 U.S.C. § 1599e (stating that for employees of the Department of Defense, “the appointment of a covered employee shall become final only after such employee has served a probationary period of two years. The Secretary concerned may extend a probationary period under this subsection at the discretion of such Secretary. . . [S]ection 7501(1) and section 7511(a)(1)(A) (ii) of title 5 shall be applied to such [an] individual by substituting ‘completed 2 years’ for ‘completed 1 year’ in each instance it appears”).

¹⁰⁵ See, e.g., *Lopez v. Department of the Navy*, 108 M.S.P.R. 384, ¶ 2 (2008) (1-year trial period); *Kursar v. Department of Transportation*, 102 M.S.P.R. 306, ¶ 2 (2006) (1-year trial period); 5 C.F.R. § 362.303(f) (“The duration of the Recent Graduates appointment in the excepted service is a trial period.”)

¹⁰⁶ See *National Treasury Employees Union v. Horner*, 854 F.2d 490, 492 (D.C. Cir. 1988) (explaining that “a variety of more flexible and informal procedures – some established by OPM and others developed by individual agencies – are used to recruit and select new employees into the excepted service”).

¹⁰⁷ 5 C.F.R. § 315.805(a).

(2) “[R]easonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.”¹⁰⁸

(3) Notification “of the agency’s decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the Merit Systems Protection Board (MSPB), and inform him of the time limit within which the appeal must be submitted[.]”¹⁰⁹

These rights do not come directly from a statute. Rather, they can be traced back to regulations promulgated by the Civil Service Commission (CSC) in 1968.¹¹⁰ OPM has chosen to keep these rights in its own regulations.¹¹¹

In contrast, if a probationer is removed for reasons of performance or conduct during the probationary period, the agency “shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action.” There is no right to a notice of proposed termination.¹¹² These procedures can also be traced to the CSC’s 1968 regulations.¹¹³ If the termination is for reasons that arose both before and after the probationary appointment, then the process for “conditions arising before [finalized] appointment” is used.¹¹⁴

A probationer then has, again by regulation, limited appeal rights to MSPB.¹¹⁵ If the probationer was terminated for reasons arising before the probationary appointment, the probationer “may appeal on the ground that his termination was not effected in accordance with the procedural requirements” set forth in 5 C.F.R. § 315.805.¹¹⁶

If the termination occurs for reasons arising either before or after the probationary appointment, and the termination is not required by statute, then the probationer can appeal the action if he or she alleges that it

¹⁰⁸ 5 C.F.R. § 315.805(b).

¹⁰⁹ 5 C.F.R. § 315.805(c).

¹¹⁰ 33 Fed. Reg. 172 at 12402, 12422 (Sep. 4, 1968).

¹¹¹ 5 C.F.R. § 315.805.

¹¹² 5 C.F.R. § 315.804.

¹¹³ 33 Fed. Reg. 172 at 12402, 12422 (Sep. 4, 1968).

¹¹⁴ 5 C.F.R. § 315.805.

¹¹⁵ 5 C.F.R. § 315.806. *See Stokes v. Federal Aviation Administration*, 761 F.2d 682, 684-85 (Fed. Cir. 1985) (explaining that while a probationer has no statutory right of appeal, by regulation MSPB will consider probationer appeals when the probationer alleges the action was the result of partisan politics or marital status discrimination).

¹¹⁶ 5 C.F.R. § 315.806(c).

“was based on partisan political reasons or marital status.”¹¹⁷ In such a case, the appellant must first make an allegation of marital status discrimination supported by factual assertions. If the appellant makes such a facially non-frivolous allegation, the probationer has a right to a hearing at which he or she must support the allegation with a showing of facts which would, if not controverted, require a finding that the agency action was motivated by marital status discrimination. If, and only if, the appellant makes the required showing in support of that allegation, and the agency is unable to successfully controvert that factual showing, MSPB will proceed to determine the merits of the case, *i.e.*, whether the agency has articulated and supported a nondiscriminatory reason for its action, and whether the probationary employee has shown that reason to be mere pretext.¹¹⁸

Probationers and Trial Period Individuals with More Rights

As explained in our 2007 report, *Navigating the Probationary Period After Van Wersch and McCormick*, the U.S. Court of Appeals for the Federal Circuit has held that Congress’s word choices when phrasing 5 U.S.C. § 7511 resulted in certain probationary and trial period individuals having due process, procedural, and appeal rights even though it was unlikely that Congress intended this result.¹¹⁹

If an individual in the competitive service “has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less[.]” then the person may have full procedural and appeal rights even when in a probationary period.¹²⁰ Similarly, if an individual in the excepted service “has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less[.]” then the person may have full procedural and appeal rights while in a trial period.¹²¹ Some individuals may have “preference” as a result of military service, although not everyone with military service has preference.¹²² Individuals eligible for preference will obtain procedural and appeal rights after one year “of current continuous service in the same or similar positions” in the excepted service.¹²³

¹¹⁷ 5 C.F.R. § 315.806(b).

¹¹⁸ *Burton v. Department of the Air Force*, 118 M.S.P.R. 210, ¶ 8 (2012) (summarizing the court’s holding in *Stokes v. Federal Aviation Administration*, 761 F.2d 682, 686-87 (Fed. Cir. 1985)).

¹¹⁹ *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144, 1151 (Fed. Cir. 1999) (holding that while the legislative history supported the Government’s argument regarding what Congress intended the law should achieve, the court was instead required to follow the “language that emerged when Congress actually took pen to paper”). See U.S. Merit Systems Protection Board, [Navigating the Probationary Period After Van Wersch and McCormick](#) (2007), at 12-13.

¹²⁰ 5 U.S.C. § 7511(a)(1)(A).

¹²¹ 5 U.S.C. § 7511(a)(1)(C).

¹²² For more on the complexities of preference based on military service, including preference derived from the service of family members, see U.S. Merit Systems Protection Board, [Veteran Hiring in the Civil Service: Practices and Perceptions](#) (2014), at 7-8. See also, U.S. Office of Personnel Management, *VetGuide*, available at <https://www.opm.gov/policy-data-oversight/veterans-employment-initiative/vet-guide/>.

¹²³ 5 U.S.C. § 7511(a)(1)(B).

IDENTIFYING PROBATIONERS AND THEIR RIGHTS

Our 2005 report, *The Probationary Period: A Critical Assessment Opportunity*, recommended to Congress and OPM changes that they could implement to make the probationary period more meaningful and effective as an assessment opportunity.¹²⁴

¹²⁴ U.S. Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity* (2005), at 34.

The Limited Powers of the U.S. Merit Systems Protection Board

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

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.

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](#).

Why Federal Employees Have the Right to a Hearing

When drafting the current adverse action system, Congress chose to provide employees with the right to a third-party, post-action review process of suspensions of more than 14 days, demotions, or removal actions. The agency responsible for conducting these reviews is the U.S. Merit Systems Protection Board (MSPB).¹⁴⁰ When appearing before MSPB, the agency has the responsibility to prove its case.¹⁴¹ Congress also chose to provide judicial review of MSPB decisions.¹⁴²

By statute, employees are entitled to “a hearing for which a transcript will be kept” and to be represented by an attorney or other chosen representative.¹⁴³ The statute also provides that the Board (the three presidentially appointed, Senate confirmed members), or an employee designated by the Board to hear such cases, “shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing” if the appellant exercises that right.¹⁴⁴

The U.S. Court of Appeals for the Federal Circuit has determined that when Congress granted this right to a hearing, “Congress took its cue from the Supreme Court’s decision in *Arnett v. Kennedy*. . . Congress in the [Civil Service] Reform Act substantially adopted the procedure approved by the Court and charged the Board with the job of protecting the rights of employees.”¹⁴⁵ This process for granting a post-action hearing, as well as the right to judicial review, is also consistent with later decisions by the Supreme Court regarding the due process rights of public sector employees.¹⁴⁶

Thus, these statutory provisions may be an example of language chosen by Congress to provide the Government with instructions on the particular manner in which Congress wants the Government to comply with constitutional requirements that exist independently from the statute itself. After all, the statute gives the right to a hearing only to employees (whose constitutional rights are at stake), but

¹⁴⁰ 5 U.S.C. §§ 7513(d), 4303(e).

¹⁴¹ 5 U.S.C. § 7701(c)(1).

¹⁴² 5 U.S.C. § 7703(a)(1).

¹⁴³ 5 U.S.C. § 7701(a).

¹⁴⁴ 5 U.S.C. § 7701(b)(1).

¹⁴⁵ *Callahan v. Department of the Navy*, 748 F.2d 1556, 1558-59 (Fed. Cir. 1984) (internal citations and punctuation omitted). (*Arnett* was the predecessor case to *Loudermill* in effect at the time the relevant statutes were enacted.)

¹⁴⁶ In *Cleveland Board of Education v. Loudermill*, the Supreme Court explained that the reason why the Court found that due process in that case only required notice and an opportunity to respond before removal rested “in part on the provisions in Ohio law for a full post-termination hearing.” This post-termination hearing included not only “a full administrative” process but also “judicial review.” *Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). For a more in-depth discussion of due process rights, see U.S. Merit Systems Protection Board, [What is Due Process in Federal Civil Service Employment](#) (2015).

is silent concerning the right of agencies to obtain a hearing. The current system may not be the only constitutionally permissible approach, but it is consistent with past decisions by the Supreme Court and is the system that has been accepted by the Supreme Court in multiple decisions.¹⁴⁷

¹⁴⁷ See, e.g., *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2130-31 (2012) (describing the right to appeal an adverse action to MSPB and obtain judicial review of MSPB's decision); *U.S. Postal Service v. Gregory*, 534 U.S. 1, 5-7 (2001) (explaining the roles of MSPB and its reviewing court); *United States v. Fausto*, 484 U.S. 439, 443 (1988) (explaining that the statutory framework for an adverse action offers in "great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review"). Cf. Respondent's Brief, *Helmann v. Department of Veterans Affairs* (No. 2015-3086) (Jun. 1, 2016), at 35-44 (explaining that the Department of Justice had concluded that a section of a bill intended to streamline certain adverse action cases involving the Senior Executive Service violated the appointments clause of the Constitution and should therefore be declared invalid).

How a Hearing is Conducted

The Administrative Judge

When an employee files an appeal with MSPB, the hearing official is usually an administrative judge (AJ), but can be an administrative law judge (ALJ). ALJs are selected for – and removed from – their own positions under a different set of rules than AJs in order to ensure that the ALJs can operate with a greater level of independence.¹⁴⁸ Some types of cases are required, by statute, to use an ALJ.¹⁴⁹ In other cases, a regulation establishes the use of the ALJ because the agency issuing the regulation exercised the discretion given to it by a statute to set forth the rule that an ALJ would be used.¹⁵⁰ Nearly all adverse action cases – whether taken under chapter 43 or 75 of title 5 – are heard by an AJ not an ALJ. For ease of discussion, we will refer to the hearing official as an AJ, even though in some rare cases it may be an ALJ performing the duties. The AJ has the responsibility to create MSPB’s official record of the case, conduct the hearing, and issue a decision.¹⁵¹

Pre-Hearing Activities

The appellant is not required to ask for a hearing in order to have the appeal decided upon by the AJ. When the appellant believes the written record contains all the necessary information, the appellant can waive the right to a hearing and ask for a decision based on that written record.¹⁵²

Prior to the hearing – or issuance of the decision if a hearing is not held – the parties will engage in discovery and the AJ will hold a conference with the parties.¹⁵³ While these activities are performed in accordance with MSPB regulations, they are consistent with the general practices performed in civil litigation. In other words, MSPB has tailored the process to its responsibilities under chapter 77 of title 5 and the constitutional due process requirements for the interests at stake. MSPB’s process bears a strong

¹⁴⁸ See 5 C.F.R. § 930.201-211 (explaining the ALJ employment rules). In contrast, an AJ employed by MSPB is subject to the same regulations and statutes for selection and removal as other MSPB attorneys (such as those who represent MSPB before the courts and those who advise Board members on cases where the Board renders its own decision). Unlike an ALJ, the term “administrative judge” is a job title describing duties, not a separate class of employee.

¹⁴⁹ See, e.g., 5 U.S.C. § 1215(a)(2)(c) (statute granting the employee the right to appear before the Board or an ALJ in a disciplinary action brought by the Office of Special Counsel).

¹⁵⁰ See, e.g., 5 C.F.R. § 1201.13 (MSPB regulation establishing that cases involving MSPB employees will be heard by an ALJ with limited Board review because of the Board’s commitment to reducing its influence in a case where it may inherently have a potential interest in the outcome).

¹⁵¹ 5 C.F.R. § 1201.41.

¹⁵² *Ahlberg v. Department of Health and Human Services*, 804 F.2d 1238, 1243 (Fed. Cir. 1986). An appellant may only waive his right to a hearing by clear, unequivocal, or decisive action. Further, the waiver must be an informed one. An appellant’s waiver of the right to a hearing is informed when he has been fully apprised of the relevant adjudicatory requirements and options in his case. *Campbell v. Department of Defense*, 102 M.S.P.R. 178, ¶ 5 (2006).

¹⁵³ Discovery is the process by which each party requests evidence from the opposing party. If a party refuses to provide information requested in discovery, the other party may ask the AJ to compel the refuser to produce the information. MSPB’s discovery rules and processes are located at 5 C.F.R. § 1201.71-75.

resemblance to the activities that take place under the Federal Rules for Civil Procedure in a Federal district court, but does have distinct differences.¹⁵⁴

During the pre-hearing conference, the AJ will, among other things: (1) explain MSPB's procedures to the parties; (2) facilitate discovery; (3) identify, narrow, and define the issues; (4) obtain stipulations; (5) discuss the possibility of settlement; (6) rule on witnesses; and (7) rule on exhibits.¹⁵⁵

The AJ has wide discretion to exclude witnesses if the AJ determines their testimony would be irrelevant, immaterial, or repetitious.¹⁵⁶ The AJ has similar authority to rule on the admission of exhibits and other evidence.¹⁵⁷ In order to obtain reversal of an initial decision on the ground that the AJ abused his discretion regarding witnesses or the admission of evidence, the petitioning party must show on review that relevant evidence, which could have affected the outcome, was disallowed.¹⁵⁸ For more on the process for reviewing initial decisions, see [Implementing or Challenging Initial Decisions](#).

¹⁵⁴ See *Spezzafarro v. Federal Aviation Administration*, 807 F.2d 169, 172, n.1 (Fed. Cir. 1986) (noting that “MSPB proceedings are not governed by the Federal Rules of Civil Procedure”); *Tinsley v. Office of Personnel Management*, 34 M.S.P.R. 70, 75 (1987) (explaining that the Board regards the Federal Rules of Civil Procedure as instructive, rather than controlling).

¹⁵⁵ An exhibit is a document entered into the record as evidence. Physical objects (such as a weapon or drugs) will typically not be admitted into the record, and instead a description stipulated by the parties will be used. See U.S. Merit Systems Protection Board, [Judge's Handbook](#), Ch. 10 § 14(g).

¹⁵⁶ *Bowen v. Department of the Navy*, 112 M.S.P.R. 607, ¶ 17 (2009), *aff'd*, 402 F. App'x 521 (Fed. Cir. 2010).

¹⁵⁷ See *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337, 353 (1991) (explaining that even if the AJ erred in accepting the appellant's exhibits, the agency has not shown how its substantive rights were prejudiced, and thus there was no need to resolve whether the AJ had, in fact, erred), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992).

¹⁵⁸ *Vaughn v. Department of the Treasury*, 119 M.S.P.R. 605, ¶ 12 (2013); *Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶ 12 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005). See *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (holding that an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

Assessing the Evidence

Regulations and case law grant the hearing official extensive discretion in managing the case.¹⁵⁹ However this discretion is not unlimited.¹⁶⁰ The actions of the AJ cannot be “arbitrary, capricious, not in accordance with the law or in contravention of procedures required by law, rule or regulation.”¹⁶¹

To ensure that the AJ’s decisions are not arbitrary, the AJs must follow certain guidance in assessing the evidence. For example, when assessing the credibility of a witness, the AJ must use the *Hillen* factors, so named for the case in which the Board instructed:

To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors. . . must be considered in making and explaining a credibility determination. These include: (1) the witness’s opportunity and capacity to observe the event or act in question; (2) the witness’s character; (3) any prior inconsistent statement by the witness; (4) a witness’s bias, or lack of bias; (5) the contradiction of the witness’s version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness’s version of events; and (7) the witness’s demeanor.¹⁶²

Once the AJ has applied the *Hillen* factors, great deference is given to the AJ’s conclusions about witness credibility when those conclusions are based on an assessment of witnesses’ demeanor. The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has instructed that, once the Board chooses to use its regulations to delegate the power to conduct the hearing to an AJ, “the MSPB is not free to overturn

¹⁵⁹ Among other things, AJs have the discretion to: grant additional time for discovery; grant a hearing request when the law does not automatically provide for one if the AJ deems it appropriate to resolve the case; determine the location for hearings; determine if the public should have access to the hearing; reject or grant motions to compel for discovery; determine the number of technical advisors that may participate; rule on the presence of any security officers in the hearing room; permit oral or written closing statements; retain withdrawn exhibits; decide if names in the public record should be sanitized to protect personal privacy; seal a file or portion thereof; and request interlocutory appeal decisions from the Board. (When names are sanitized, it is often to protect innocent third parties. For example, if an employee is fired for reasons related to an allegation of molesting a child who is a relative, then naming the offender in the case title has the side effect of also putting the victim’s identity in the public record. Such cases will use the name “Doe” in lieu of the employee’s actual name. The victim’s names in the initial decision may be replaced by initials or other letters or numbers that would protect the person from public identification. Similarly, a portion of a file may be sealed to protect the confidentiality of certain documents. An interlocutory appeal occurs when there is an issue of law (unrelated to the merits of the case) and confirming the AJ correctly interpreted the law will materially advance the further administration of the case. The AJ has discretion to certify the question and situations warranting such certifications are rare.) For more on how AJs perform their duties, see U.S. Merit Systems Protection Board, [Judge’s Handbook](#).

¹⁶⁰ See, e.g., *Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012) (holding “that it is an abuse of discretion to categorically exclude all witnesses offered to testify as to evidence” of a relevant issue); *Chudson v. Environmental Protection Agency*, 17 F.3d 380, 385 (Fed. Cir. 1994) (holding that the AJ abused her discretion by not permitting the appellant to elicit testimony from two individuals with personal knowledge relevant to the issue under appeal and a third witness who had expert testimony to offer).

¹⁶¹ *Tiffany v. Department of the Navy*, 795 F.2d 67, 70 (Fed. Cir. 1986) (citing 5 U.S.C. § 7703).

¹⁶² *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

an administrative judge's demeanor-based credibility findings merely because it disagrees with those findings."¹⁶³ The court held that this limitation on the Board comes "from a fundamental notion of fairness[.]"¹⁶⁴

This does not prevent the Board from correcting findings by the AJ that are incomplete, inconsistent with the weight of the evidence, or do not reflect the record as a whole.¹⁶⁵ Similarly, when a decision is based upon facts and not the demeanor witnessed by the AJ, "the Board is free to re-weigh the evidence and substitute its judgment for that of one of its administrative judges."¹⁶⁶ This authority to re-weigh the evidence and reach a different conclusion applies to all issues in the case, including jurisdiction, charges, and penalties.¹⁶⁷

In order to enable the Board and its reviewing court to review the decision reached by the AJ, the AJ's decision on the case is required to include, among other things: (1) the AJ's findings of fact and conclusions; and (2) the reasons for those findings and conclusions.¹⁶⁸ This document is known as the "initial decision" because it is subject to further review. To learn more about the process for reviewing the initial decision, see [*Implementing or Challenging Initial Decisions*](#).

¹⁶³ *Haebe v. Department of Justice*, 288 F.3d 1288, 1299 (Fed. Cir. 2002). See, e.g., *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1306 (Fed. Cir. 2008) (finding "that the Board failed to give the AJ the deference required by *Haebe* and impermissibly reversed the AJ's credibility determination").

¹⁶⁴ *Cf.*, *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (explaining that to be Constitutional, the exercise of jurisdiction over a party cannot "offend 'traditional notions of fair play and substantial justice.'")

¹⁶⁵ *Faucher v. Department of the Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004). But see 38 U.S.C. § 713 (removing from the Board the authority to review a decision reached by an AJ for a case involving an SES employee in the Department of Veterans Affairs when title 38 is used to take the action).

¹⁶⁶ *Long v. Social Security Administration*, 635 F.3d 526, 530 (Fed. Cir. 2011) (citing *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1304 (Fed. Cir. 2008)).

¹⁶⁷ See *Tierney v. Department of Justice*, 717 F.3d 1374, 1378 (Fed. Cir. 2013) (explaining that, with the exception of credibility determinations, "[t]he Board is generally free to substitute its judgment for that of the AJ").

¹⁶⁸ 5 C.F.R. § 1201.111(b)(1)-(2).

Implementing or Challenging Initial Decisions

An initial decision (ID) issued by an administrative judge (AJ) will state if MSPB has jurisdiction, and if jurisdiction is found, the ID will contain conclusions regarding nexus, charges, and penalties – known as an assessment of the “merits” of the case.¹⁶⁹ Among other possibilities, an ID on the merits can state that some charges were sustained but not others. It can state that a penalty was warranted, but not a penalty as harsh as the agency initially implemented. It can support the agency’s action entirely. It can order the entire action cancelled.

Depending upon what the ID says, the parties each have decisions to make. If both are satisfied with the outcome, then they comply with the orders set forth in the ID (such as the action standing entirely, being mitigated, or being canceled) and the matter is concluded. But, what if one or both parties disagree with the ID in part or whole?

For the appellant, the questions are then: (1) whether to seek further review; (2) if seeking review, for what issues; and (3) if seeking further review, from whom? (An appellant can file a petition for review (PFR) with the Board, or file for judicial review with the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) without first coming to the Board).

For the agency, the questions are: (1) whether to seek further review (with the Board PFR as the only avenue); (2) if seeking review, for what issues; and (3) what to do about the instructions in the ID in the meantime?

Filing for Review with the Board

Either party that disagrees with the ID can file a PFR with the three-member Board.¹⁷⁰ MSPB’s regulations explain the process for the parties to follow.¹⁷¹ Regardless of whether the agency or appellant files the PFR first, the second party will be given the opportunity to respond. If the second party did not prevail on one or more issues below, that party may also file a PFR (called a “cross-PFR”).

As explained in [How a Hearing is Conducted](#), the three-member Board has the authority to re-weigh the evidence and reach a different conclusion regarding nearly every aspect of the case, including jurisdiction, charges, and penalties.¹⁷²

¹⁶⁹ If MSPB lacks jurisdiction, the process ends with that determination and there is no analysis of the merits of the charges, penalty, or nexus. See *Schmittling v. Department of the Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000) (explaining that “without jurisdiction, neither the Board nor this court is empowered to decide the merits of a case”).

¹⁷⁰ The three members of the Board are nominated by the President and confirmed by the Senate. No more than two can adhere to the same political party. It takes two members agreeing with each other to decide a case. If there are less than two members in agreement (which can happen when the Board is not fully staffed), the initial decision stands as the final decision of the U.S. Merit Systems Protection Board.

¹⁷¹ 5 C.F.R. § 1201.114. MSPB’s regulations can be found on its website at <http://www.mspb.gov/appeals/appeals.htm>.

¹⁷² See *Tierney v. Department of Justice*, 717 F.3d 1374, 1378 (Fed. Cir. 2013) (explaining that, with the exception of credibility determinations, “the Board is generally free to substitute its judgment for that of the AJ”).

On PFR, the Board will look at the issues raised by the parties, but can also address other issues in the ID that it identifies on its own. If the parties do not file a PFR, the ID becomes final on a date set forth in the ID. At that time, the Board has the option to reopen the appeal on its own and reexamine any issue in the case. However, the Board typically opts not to exercise this power absent extraordinary circumstances.

Filing for Review with the Federal Circuit

If the agency does not file a PFR, then the appellant has the option to file an appeal directly with the Federal Circuit once the ID becomes final, bypassing the PFR process.¹⁷³ The appellant can also use the PFR process and, if dissatisfied with the PFR result, then proceed to seek judicial review from the Federal Circuit.¹⁷⁴

In contrast, the agency cannot appeal directly to the Federal Circuit at any stage. The only review opportunity available directly to the agency is the PFR to the Board. However, acting for the Government, the Director of the Office of Personnel Management (OPM) (represented by the Department of Justice) may file a petition for judicial review with the Federal Circuit. OPM must first determine, “in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.”¹⁷⁵ If OPM did not intervene in the case before the Board, OPM must first petition the Board to reconsider its decision and obtain a denial of that petition before OPM can proceed to the Federal Circuit.¹⁷⁶

Interim Relief

What happens to an employee pending resolution of the PFR? If the ID upholds the agency’s action, then the action remains in effect. For example, a removed employee remains removed. However, 5 U.S.C. § 7701(b)(2) instructs that if the ID is in the employee’s favor, the employee will obtain the granted relief immediately in most circumstances. This means that if an employee has been removed, the employee will be returned to work. The AJ has the discretion to determine that granting such relief immediately is not appropriate under the circumstances, but the default is that the ID will take effect.¹⁷⁷

¹⁷³ In a few types of adverse action cases, the appeal would go to a different court than the Federal Circuit. Appeals from actions taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 633a(e)); and section 15(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b)) would go to the appropriate U.S. district court. *See* 5 U.S.C. § 7703(b)(2); 5 C.F.R. § 1201.175. Additionally, if the appeal was filed as an individual right of action, and not as an adverse action appeal, the provisions of 5 U.S.C. § 7703(b)(1)(B) would apply.

¹⁷⁴ 5 U.S.C. § 7703(a)(1).

¹⁷⁵ 5 U.S.C. § 7703(d)(1).

¹⁷⁶ *Id.*

¹⁷⁷ *King v. Jerome*, 42 F.3d 1371, 1373-74 (Fed. Cir. 1994); 5 U.S.C. § 7701(b)(2)(A)(i).

This does not mean that an agency is required to place in the work unit an employee that the agency believes would be unduly disruptive while it seeks a review of the case by the Board. If the agency has concerns about the employee, it has an *unreviewable* authority to keep the employee away pending resolution of the PFR. By statute, the agency “must still give [the employee] all pay, benefits, and other terms and conditions of employment” he would have received if he had worked.¹⁷⁸ But, even if the agency acts in bad faith when deciding to prevent the employee’s return to duty during the PFR process, “Congress did not provide for any [MSPB] review of this decision” by the employing agency.¹⁷⁹

¹⁷⁸ *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994).

¹⁷⁹ *Id.*

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**ADVERSE ACTIONS:
A COMPILATION OF ARTICLES**
