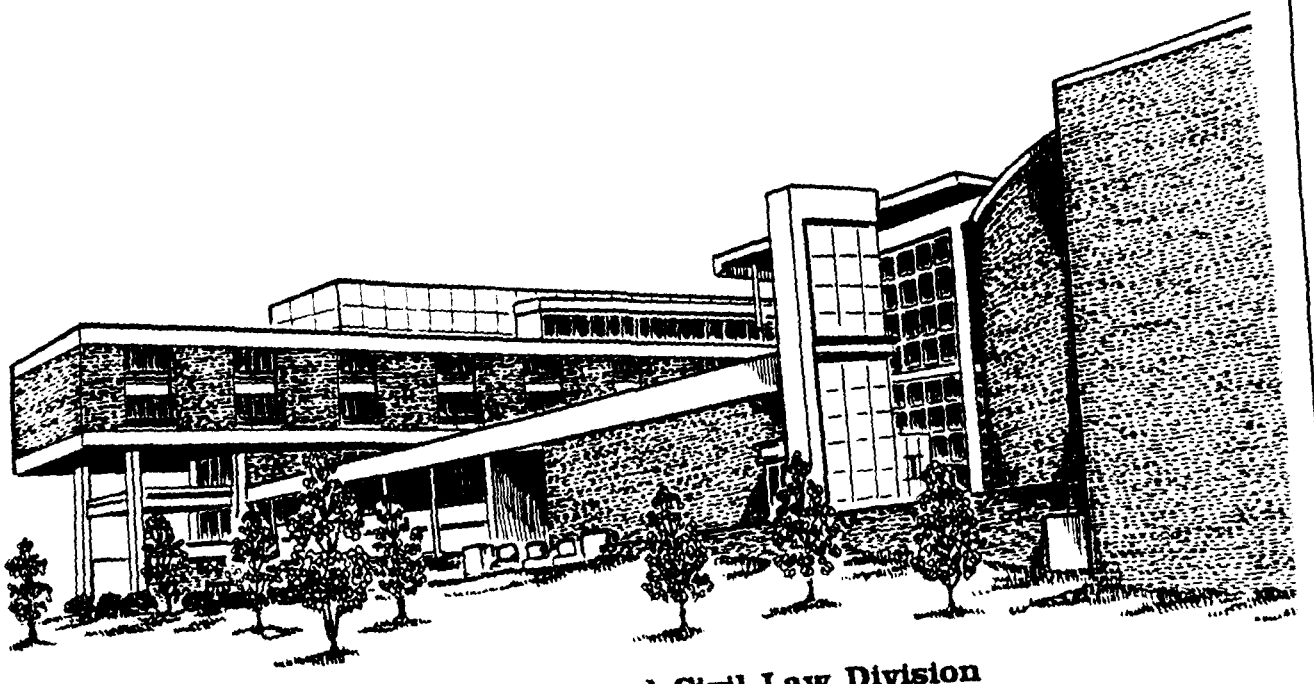
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The Judge Advocate General's School
United States Army
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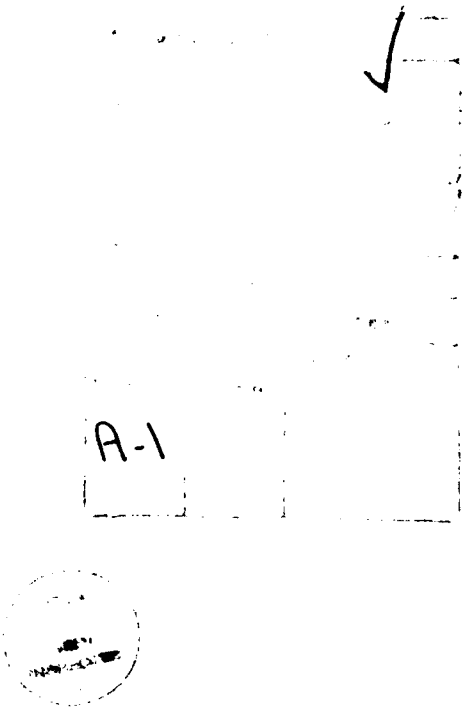
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CASES AND MATERIALS ON THE LAW OF FEDERAL EMPLOYMENT

PREFACE

This student text is a compilation of statutes, regulations, cases and other materials on The Law of Federal Employment. It is designed to provide primary source materials for students in the Graduate Course and other Continuing Legal Education courses in Administrative and Civil Law.

The casebook contains ten chapters organized around major topics in the field of civilian personnel law. The first chapter reviews the legal authorities in the federal civil service area. Chapter 2 reviews the organization and structure of the federal civil service. Chapter 3 outlines various prohibited activities for federal employees: conflict of interest provisions and the prohibitions against partisan political activities and prohibited personnel practices. Chapter 4 describes the agency grievance system. Chapter 5 addresses the procedural and substantive issues involved in federal employee discipline. Chapter 6 reviews the civilian employee performance appraisal system and the performance based personnel actions. Chapter 7 is a review of reduction in force procedures. Chapter 8 reviews the rules for practice before the Merit Systems Protection Board. Chapter 9 surveys the extent of judicial review of federal personnel actions. The last chapter concerns equal employment opportunity in the federal sector, with emphasis on the complaint process.

Each of these chapters includes materials which highlight principal statutory and regulatory guidance in a particular area. The cases provide interpretations of these provisions and also illustrate those situations in which the law is not yet settled. This book is structured to facilitate an understanding of federal civilian personnel law and to serve as a basic reference for civilian personnel problems. In addition, it provides an introduction to the area of federal labor-management relations.

This casebook does not purport to promulgate Department of Army policy or to be in any sense directory. The organization and development of legal materials is the work product of the members of The Judge Advocate General's School faculty and does not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he," "him," and "his" when used in this publication represent both the masculine and the feminine genders unless otherwise specifically stated.

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CHAPTER 1

INTRODUCTION AND LEGAL FRAMEWORK

1-1. General.

The importance of the Army's civilian workforce has increased greatly during the past ten years, as the size of the active uniformed Army has decreased. Today, despite hiring restrictions and strength reductions, the Department of the Army still employs nearly four hundred thousand appropriated fund civilian employees, both in the United States and overseas. Nearly one-third of the Department of Defense workforce consists of civilian employees. These civilian employees do not have the same relationship to their employer that soldiers do to their superiors. For instance, a civilian employee generally is not subject to the Uniform Code of Military Justice and may leave Federal employment at anytime. In addition, the civilian employee may be represented by a labor union. This book is a survey of the law relating to these civilian employees.

Experience in recent years, especially with the increase in the number of labor unions representing Federal employees, has demonstrated the need for judge advocate officers to be versed in civilian personnel law in order to provide essential legal advice on complex civilian personnel matters and labor-management problems. In response to this need for legal advice and expertise, The Judge Advocate General of the Army initiated the Labor Counselor Program in July 1974. Under this program, Army lawyers (military or civilian) are designated at Army installations worldwide to provide legal advice and assistance to the Civilian Personnel Officers and their staffs. These Labor Counselors are expected to be knowledgeable in the policies and procedures applicable to Federal civilian employee personnel actions and to assist the command in promoting healthy labor-management relations. The duties of the Labor Counselor include participating in labor contract negotiations, arbitration sessions, and unfair labor practice proceedings; representing the command in adverse action proceedings and other hearings before the Merit Systems Protection Board; and assisting the command in resolving equal employment opportunity complaints locally and before administrative judges of the Equal Employment Opportunity Commission. The importance of the Labor Counselor's active participation in these varied activities has increased since the Labor Counselor Program was initiated, and The Judge Advocate General

reemphasized the value of the program in 1977, 1982, and again in 1985 in TJAG Policy Letter 85-3. Functions of the Labor Counselor have been formally recognized in Army Regulations 27-1, 27-40, 690-600, and 690-700, Chapter 771.

Civilian Personnel Law can be divided into two principal areas. The first area, which concerns the statutes and regulations governing management of Federal employees and personnel actions in general, can be subsumed under the label, "Law of Federal Employment." This is the subject of this book. The second deals with the role of employee organizations (i.e., unions) in the Federal workforce and can be referred to as "Federal Labor-Management Relations." This subject is covered in another book, JA 211. Both areas, however, are interrelated. A judge advocate officer cannot advise management representatives at a bargaining session without first becoming familiar with civilian personnel law generally, and a disciplinary action against an employee may have to be defended at a grievance session occurring under a collective bargaining agreement. Thus, it is important to have an understanding of both areas in order to be effective in advising commanders or Federal managers on legal problems involving Federal civilian employees.

In 1883 when Congress enacted the Pendleton Act to reform the Federal civil service system, authority for overseeing Federal civilian employment was vested in one executive agency -- the United States Civil Service Commission. For almost a century the Civil Service Commission, a bipartisan three member agency, set policy and established procedures used by all executive agencies in dealing with Federal civilian employees and served an appellate function hearing employee appeals from adverse personnel actions. However, on January 1, 1979, as a result of the Civil Service Reform Act of 1978, the Civil Service Commission was replaced by two new agencies: (1) the Office of Personnel Management (OPM), and (2) the Merit Systems Protection Board (MSPB). Each of these agencies took over a portion of the Civil Service Commission's responsibility. The Office of Personnel Management, composed of a Director, a Deputy Director, and five Associate Directors, assumed the responsibility for promulgating regulations governing personnel matters throughout the Federal Government and for assisting the President in overseeing the Federal workforce generally. The Director, who is appointed by the President with the advice and consent of the Senate for a four-year term, is essentially a political appointee who acts as the arm

of management in promulgating policy and establishing procedures applicable to Federal employee matters.

The other agency, the Merit Systems Protection Board, took over the appellate functions of the Civil Service Commission. The Merit Systems Protection Board is a three-member bipartisan body whose members are appointed by the President for nonrenewable seven-year terms. The members do not serve at the pleasure of the President, but rather, can only be removed from office for inefficiency, neglect of duty, or malfeasance in office. The principal function of the Merit Systems Protection Board is to hear and adjudicate employee appeals. It is also responsible for conducting special studies of the civil service system from time to time and for reviewing the rules and regulations promulgated by the Office of Personnel Management. The Merit Systems Protection Board is organized with regional field offices to hear appeals within its jurisdiction, although overall rules of practice before the board are standardized and quasi-judicial in nature.

On April 10, 1989, President Bush signed the Whistleblower Protection Act of 1989. Under the provisions of this Act, the Office of Special Counsel was removed from the Merit Systems Protection Board and established as an independent agency. The Special Counsel is appointed by the President with the advice and consent of the Senate for a five-year term. The Special Counsel is charged with receiving and investigating allegations of prohibited personnel practices. In the Civil Service Reform Act, Congress enacted for the first time general merit principles applicable to all executive agencies and certain other Federal entities. These merit principles are intended to guide all management personnel decisions. These general principles also form the basis for the prohibited personnel practices set forth in the Civil Service Reform Act. Violation of these prohibited personnel practices, which embody the merit principles, may result not only in reversal of personnel actions based on these prohibited practices, but also in disciplinary action against the offending official. The Special Counsel may file a complaint against any official who commits a prohibited personnel practice, and thereby initiate a disciplinary proceeding before the Merit Systems Protection Board. Although the official has numerous procedural rights in connection with this type of action, the consequences of the action may be serious. The final order of the Board against the official may include removal, reduction in grade, a five-year debarment from Federal employment, a civil penalty up to $1,000, or other less serious penalty.

Thus, current civil service law sets rigorous standards for agencies to follow and establishes three separate agencies to oversee management of the Federal workforce. The Army may not devise its own regulatory scheme for dealing with the civilian workforce, but rather must follow the policies and procedures established by statute and by OPM regulations. The statute provides for checks on how well the Army follows these procedures -- through appeals to the Merit Systems Protection Board, review of certain Army programs by OPM, and through the independent actions of the Special Counsel. As long as the Army complies with the rules and guidelines established by the Office of Personnel Management, it may issue supplemental regulations addressing personnel policies within the Department of the Army.

Note. If the offending official is a member of the uniformed services, the Special Counsel may not initiate a disciplinary proceeding before the Merit Systems Protection Board but, rather, will transmit recommendations for appropriate disciplinary action to the Secretary of the appropriate military department. See U.S.C. § 1215(c).

1.2 Constitutional Authority.

The Constitution gives Congress the authority to provide for and control the civil service below the level of Presidential appointments. United States Constitution, Article II, section 2, provides that:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Congress has by statute delegated broad authority to the President to regulate the employees in the executive branch of Government. Congress has also given broad rule-making authority to the Office of Personnel Management, subject to direction of the President.

The constitutionality of the establishment of the Civil Service Commission (now the Office of Personnel Management) and the granting to it of broad rule-making authority was upheld in Butler v. White, C.C.W. Va. 1897, 83 F. 578, reversed on other grounds, 171 U.S. 379.

1.3 Statutory Authority

a. Delegation to the President. The President's general authority to regulate civil service in the executive branch authorizes him to prescribe regulations for the admission of individuals into the civil service of the executive branch and to determine the fitness of applicants for employment (5 U.S.C. § 3301). His authority also extends to prescribing rules governing the competitive service, including excepting positions from the competitive service (5 U.S.C. § 3302); and, prescribing regulations for the conduct of employees in the executive branch (5 U.S.C. § 7301). Implicit in this authority is the power to remove executive branch employees. All the authority is exercised within the framework of very extensive statutory rules governing civilian employment found throughout Title 5, U.S. Code.

b. Delegation to the Office of Personnel Management. Congress has given OPM broad rule-making authority in the administration of competitive service examinations and in the implementation of the Congressional policy to give preference in many employment matters to military veterans (5 U.S.C. § 1302). Additionally, Congress has authorized the President to delegate to the Director of the Office of Personnel Management the President's authority for personnel management functions. Congress further authorized redelegation of this authority by the Director of OPM to heads of agencies in the executive branch (5 U.S.C. § 1104). For further discussion of the statutory authority of the Office of Personnel Management, see 5 U.S.C. §§ 1101-1105 and §§ 1301-1303.

c. Congressional Control. Despite delegating authority to the President and the Office of Personnel Management, Congress has retained significant authority for itself and has legislated in much detail the terms and conditions of Federal employment. Title 5, Part III, Employees, contains detailed Congressional regulation and control over such things as employment and retention (Subpart B), employee performance, including actions for unacceptable performance (Subpart C), pay and allowances (Subpart D), attendance and leave (Subpart E), and suitability, security, conduct, and

adverse actions (Subpart F). In most instances, however, Congress contemplates implementation of its basic rules by the President, OPM, and each of the employing executive agencies.

1.4 Implementation of Statutory Authority.

a. Presidential. The President has implemented the authority granted him under 5 U.S.C. §§ 3301 and 3302 by Executive Order 10577, as amended, set out as a note under 5 U.S.C. § 3301. This Executive Order established Civil Service Rules which prescribe generally how the civil service is to be organized and managed by the Office of Personnel Management. In addition, the President has issued other executive orders independent of the Civil Service Rules which establish Federal policies or create special programs for Federal employees.

b. Office of Personnel Management.

1. OPM has published regulations at Title 5, Code of Federal Regulations, Chapter I, Subchapter B implementing the general authority granted it under 5 U.S.C. §§ 1101-1105 and 1301-1303, the authority delegated to it by the President pursuant to the President's authority under 5 U.S.C. § 1104, and the various statutory provisions requiring implementation.

2. OPM also publishes the Federal Personnel Manual (FPM) system which is its official medium for issuing to other agencies its personnel regulations and instructions, policy statements, and related materials on Government-wide personnel programs. The FPM system is made up of the basic Federal Personnel Manual, the FPM Supplements, the FPM Letters, and the FPM Bulletins.

(a) The basic FPM and FPM Supplements are used to issue OPM's regulations and continuing instructions, policy statements, and related material on Government-wide personnel programs.

(b) The FPM Letters contain continuing instructions which, because of urgency, are not put into the basic FPM or supplement at time of issue.

(c) The FPM Bulletins contain temporary instructions and notices, not continuing instructions.

All FPM system publications are keyed numerically to the statutory provision to which they relate.

Note. Courts have held that the provisions of the FPM are not mandatory for agencies but, rather, contain guidance only. See Judd v. Billington, 863 F.2d 103, 106 (D.C. Cir. 1988); Day v. OPM, 833 F.2d 1580, 1581-82 (Fed. Cir. 1987).

1.5 Military Regulations

a. Department of Defense. In 1978 the Department of Defense established the Department of Defense Civilian Personnel Manual (DODCPM) system to publish uniform, DOD-wide policies governing civilian personnel management programs supplementing selected chapters of the Federal Personnel Manual. See DOD Directive 1400.25 and DODCPM 1400.25-M for a discussion of this system. The format and numbering system follow that of the Federal Personnel Manual.

b. Department of the Army. The Army's Civilian Personnel Regulations (CPRs) contain the official Army instructions governing civilian personnel administration which supplement the Federal Personnel Manual and DOD Civilian Personnel Manual. The format and numbering system follow that of the Federal Personnel Manual. See Figure 1-1 for an explanation of that numbering system.

The Army is in the process of converting the CPRs to Army Regulations (ARs) in the 690 series. For example, former CPR 400 has become AR 690-400.

1.6 Case Law

a. Merit Systems Protection Board. Through 1984 the decisions of the Merit Systems Protection Board (MSPB) were officially published by the board itself and available from the Superintendent of Documents (cite ____ M.S.P.B. ____). In 1985 official publication of the board decisions was taken over by West Publishing Company in the Merit Systems Protection Board Reporter (cite ____ M.S.P.R. ____). Board decisions are also available through several unofficial sources, such as, Information Handling Services (microfiche) and Labor Relations Press (hard copy). There is a full discussion of MSPB jurisdiction and procedures in Chapter 8 of this book.

b. Equal Employment Opportunity Commission decisions. The decisions of the Equal Employment Opportunity Commission (EEOC) currently are published only by Information Handling Services and are available only on microfiche. A full discussion of the role of the EEOC and the processing of equal employment

opportunity complaints is provided in Chapter 10 of this book.

c. Federal court decisions. Decisions of the MSPB are reviewable directly by the U.S. Court of Appeals for the Federal Circuit. Decisions of the EEOC are reviewable by suit in the U.S. district courts and then by the regional U.S. courts of appeals. A full discussion of judicial review of personnel actions, including equal employment opportunity complaints, is provided in Chapter 9 of this book.

Appendix A.

Numbering System and Structure for Civilian Personnel Regulations

NOTE: The subject matter classification and numbering system for Civilian Personnel Regulations is basically the same as that set forth in Appendix A, Chapter 171 to the basic FPM. As indicated below, there are three categories of CPR, i.e., those which supplement material in the basic FPM, those which supplement material in the FPM Supplements and those which are self-contained.

CPR NUMBER	FPM ISSUANCE SUPPLEMENTED	TITLE OF SUBJECT-MATTER AREA	STRUCTURE	PAGE IDENTIFICATION
CPR which supplement the Basic FPM:				
CPR 100	Chapters in the 100 Series	The Civil Service Commission		
CPR 200	Chapters in the 200 Series	General Personnel Provisions	CPR 500	.....CPR 500
CPR 300	Chapters in the 300 Series	Employment	Chapter 511	511.6
CPR 400	Chapters in the 400 Series	Employee Performance and Utilization	Subchapter 6	
CPR 500	Chapters in the 500 Series	Position Classification, Pay, and Allowances		
CPR 600	Chapters in the 600 Series	Attendance and Leave	Change 1 to CPR 500	.....CPR 500 (C 1)
CPR 700	Chapters in the 700 Series	Personnel Relations and Services (General)	Chapter 571	571.B
CPR 800	Chapters in the 800 Series	Insurance and Annuities	Appendix B	
CPR 900	Chapters in the 900 Series	General and Miscellaneous		
CPR which supplement FPM Supplements:				
PR 296-31	FPM Supplement 296-31	Processing Personnel Actions		
→CPR 305-1	FPM Supplement 305-1	Employment Under the Executive Assignment System←	CPR 296-31	
			Book I	.....CPR 296-31
→CPR 335-1	FPM Supplement 335-1	Evaluation of Employees for Promotion and *Internal Placement*←	Subchapter S1	I.S1
→CPR 532-1	FPM Supplement 532-1	Federal Wage System←		
CPR 752-1	FPM Supplement 752-1	Adverse Actions by Agencies	Change 1 to CPR 296-31	..CPR 296-31 (C 1)
CPR 831-1	FPM Supplement 831-1	Retirement	Appendix A	A.S4
CPR 870-1	FPM Supplement 870-1	Life Insurance	Subchapter S4	
CPR 890-1	FPM Supplement 890-1	Federal Employees Health Benefits		
CPR 990-2	FPM Supplement 990-2	Hours of Duty, Pay and Leave Annotated		
SELF-CONTAINED CPR:				
Separate CPR for each area of civilian personnel administration not covered by an FPM issuance.				
CPR 272	None	Department of the Army Civilian Personnel Policy Formulation and Issuance System		
→CPR 299	None	Records and Procedures←		
→CPR 502	None	Department of the Army Standardized Job Descriptions←	CPR 272	.....CPR 272
			Subchapter 1	272.1
→CPR 592	None	Oversea Allowances and Differentials←		
→CPR 593	None	Subsistence/Quarters/Allowances for Floating Plant Operators←		
→CPR 901	None	US Citizen Civilian Marine Personnel Administration←	Change 1 to CPR 272	.....CPR 272 (C 1)
→CPR 971	None	Department of the Army Facilities Engineer Apprentice Program←	Appendix A	272.A
→CPR 950	None	Career Management series←		

CHAPTER 2

EMPLOYMENT IN THE FEDERAL CIVIL SERVICE

2.1 Types of Civilian Employees.

a. General. The Federal civil service consists of all appointive positions in all three branches of the Federal Government, except those in the uniformed services. 5 U.S.C. § 2101. There are several types of employees in the Federal civil service. These employees may differ in the way they obtain their jobs, in the way in which they are paid, and in the substantive and procedural rights they receive in connection with adverse personnel actions. This chapter will focus on the major categories of Federal civil service employees and generally on the significance of the differences. The materials in this book are intended to help the military lawyer deal with problems involving executive branch employees. Problems involving employees of the judicial and legislative branches are beyond the scope of this text.

The positions in the Federal civil service generally can be divided into three categories: the competitive service, the excepted service, and the senior executive service. All are defined by statute. Problems concerning senior executive service employees are beyond the scope of this text.

b. The competitive service. The competitive service consists of all civil service positions in the Federal Government which are not specifically excepted from the competitive service by statute, by the President, or by the Office of Personnel Management (OPM). 5 U.S.C. § 2102; FPM 212.1. Sometimes these employees are referred to as "classified civil servants" or "classified service" employees. Many acts of Congress use these terms interchangeably. Generally, employees enter the competitive service only after passing a competitive examination.

c. The excepted service. As noted above, positions may be excepted from the competitive service by Congress, the President, or OPM. The majority of excepted service positions are excepted from the competitive service by OPM. Sometimes employees in the excepted service are referred to as "unclassified employees." Excepted service employees generally are not required to pass competitive examinations before being employed by the Federal Government.

There are three categories of excepted service positions each falling within one of three schedules. Schedule A consists of those positions not of a confidential or policy-determining character for which an examination is not practicable. Attorneys, chaplains, Presidential appointees not confirmed by the Senate, White House Fellows, and certain handicapped and low-level summer employees are examples of Schedule A employees.

Schedule B consists of those positions not of a confidential or policy-determining character for which it is not practicable to hold a competitive examination. The OPM may, however, require a noncompetitive examination for Schedule B positions. Some examples of Schedule B positions include many student trainee positions under cooperative education programs, Secret Service positions, and certain specialists in cryptography, systems analysis, and tax accounting.

Schedule C consists of all excepted positions of a confidential or policy-determining character. These positions are the ones which are subject to political patronage. Schedule C positions are found at all levels within the civil service. Included in Schedule C are not only special staff assistants, general counsels, and directors of various programs, but also private secretaries, chauffeurs, and couriers.

d. Significance of status as competitive or excepted service employee. The greatest significance of an employee's status as a competitive service or excepted service employee is that an employee's rights in connection with adverse personnel actions vary depending on which status the employee enjoys. Generally, competitive service employees enjoy significant procedural and substantive rights in connection with adverse personnel actions, while excepted service employees enjoy virtually no protections in connection with adverse actions. See Ralston v. Dep't of Army, 718 F.2d 390 (Fed. Cir. 1983); Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980); Batchelor v. United States, 169 Ct. Cl. 180, cert. denied, 382 U.S. 870 (1965).

There are three exceptions to the general rule just stated. The first concerns an employee who is a preference eligible under the Veterans' Preference Act of 1944, P.L. 78-359, 58 Stat. 387, June 27, 1944. An excepted service employee who is a preference eligible under that Act, usually an employee with some type of veteran status based upon having served on active military duty, is generally given the same rights as a

competitive service employee. See Dreher v. U.S. Postal Service, 711 F.2d 907 (9th Cir. 1983).

The second exception concerns probationary employees. Generally, all employees are required to serve a one-year probationary period. While the specifics of this probationary requirement will be discussed in detail later, generally, a competitive service employee or a preference eligible excepted service employee gets none of the procedural or substantive protections in connection with an adverse personnel action until completing the one-year probationary period. See INS v. FLRA, 709 F.2d 724 (D.C. Cir. 1983); Stern v. Dep't of Army, 699 F.2d 1312 (Fed. Cir. 1983).

The final exception came about as a result of the passage of the Civil Service Due Process Amendments of 1990 (Pub. L. No. 101-376). Effective August 17, 1990, most nonpreference eligible excepted service employees who have completed two years of current continuous service are entitled to the same substantive and procedural protections as nonprobationary competitive service and preference eligible excepted service employees in serious adverse actions.

A more detailed review of employee rights in connection with adverse personnel actions is contained in Chapters 5 and 6 of this casebook.

e. Notes and Discussion.

Note 1. Positions are often changed from the competitive service to the excepted service and vice versa. What happens when a position is changed from the competitive service to the excepted service? Does the incumbent employee forfeit the procedural safeguards? In Roth v. Brownell, 215 F.2d 500 (D.C. Cir.), cert. denied, 348 U.S. 863 (1954), Mr. Roth, a GS-14 trial attorney in the Department of Justice, was summarily removed from his position effective July 31, 1953, by a letter dated June 29, 1953. At the time of his removal, Mr. Roth occupied a Schedule A, excepted service position. He had been transferred into that position in 1947 from a competitive service position which he had held for more than four years. In 1947 the President had issued an executive order transferring all attorney positions to the excepted service. The Department of Justice argued that Mr. Roth had not been removed from his position in 1947 but had merely ceased to be in the competitive service on the date of the executive order. Therefore, in the view of the Department of Justice,

there was no need to comply with the statutory protections applicable to competitive service employees in removing him in 1953 from his position. The court concluded that whether Mr. Roth was technically removed from his position in 1947 or in 1953, there still had been no compliance with the requisite statutory requirements. The court held:

> Neither the formula of "excepting" the kind of position a person holds, nor any other formula, can obviate the requirement of the Lloyd-LaFollette Act that "No person in the classified civil service of the United States shall be removed * * * therefrom" without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear.
>
> It is immaterial here that the President has long been authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof * * *." . . . [5 U.S.C. § 3301]. (Emphasis added.) Complete control over admissions does not obviate the removal requirements of the Lloyd-LaFollette Act.
>
> In our opinion the plaintiff is entitled to a summary judgment that his removal from his position was not in accordance with law and that he should be restored to the position.

The general rule in cases involving transfer of positions from the competitive service to the excepted service is now stated in 5 C.F.R. § 212.401(b). "An employee in the competitive service at the time his position is first listed under Schedules A, B, or C remains in the competitive service while he occupies that position."

Note 2. The Veterans' Preference Act of 1944, codified in various sections of Title 5 of the United States Code, gives veterans and certain other individuals called "preference eligibles" several advantages in securing and retaining Federal employment. See 5 U.S.C. § 2108 for a definition of "preference eligible." Some of the advantages conferred on veterans are the following: (1) authorizing bonus points on competitive examinations, 5 U.S.C. § 3309; (2) waiving

physical qualifications for appointment, 5 U.S.C. § 3312; (3) requiring no passovers without justification of veterans eligible for appointment to Federal positions, 5 U.S.C. § 3318; (4) affording veterans greater tenure in reductions-in-force, 5 U.S.C. § 3502; and (5) specifying additional procedural safeguards for veterans undergoing adverse actions, 5 U.S.C. §§ 7511-13. Veterans get no special consideration in connection with promotions under this statute, but the initial hiring advantage and the retention rights have led to a situation in which veterans occupy a large number of Federal jobs compared to their percentage in the total work force. The statutory advantages bestowed on veterans and preference eligibles in connection with reductions-in-force and adverse actions will be examined in more detail later in this book when those areas are discussed.

Because of the significant benefits provided to veterans by law, the statutory provisions often have been challenged on constitutional grounds in the Federal courts. One such case is Fredrick v. United States, 507 F.2d 1264 (Ct. Cl. 1974). In this case the plaintiff claimed he was entitled to the job retention protection of the Veterans' Preference Act in 5 U.S.C. §§ 3501-3502 in connection with a reduction in force. His challenge was based on the equal protection and due process clauses of the Fifth Amendment. He alleged discrimination because of his service to the Government in a civilian capacity. He had not served in the military, but rather had held a civilian War Service Appointment. The Court of Claims had no difficulty upholding the validity of the veterans' preference provisions. The court found that the classification of "veterans" was not unreasonable or arbitrary and that veterans' preferences had in fact existed in the United States since 1876. Among the justifications discussed by the court are (1) the loss of personal freedom, (2) the rigors of military duty--discipline, possible relocation overseas, and potentially hazardous duty, and (3) the problems of reorienting upon return to the civilian community. The court found a rational basis for differentiating between veterans and those who performed alternative service, and upheld the validity of the statute.

More recently the United States Supreme Court upheld the Massachusetts veterans' preference statute despite an equal protection challenge in the case of Massachusetts v. Feeney, 442 U.S. 256 (1979). The Massachusetts law gives veterans an absolute preference over nonveterans so long as the former pass the state

civil service exam. In upholding the Massachusetts statute, the Supreme Court effectively eliminated future challenges to the Federal preference provisions because the Federal preference is less onerous on nonveterans than the Massachusetts law. It is unlikely that future litigants would have any success invalidating the Federal veterans' preference law.

2.2 Becoming a Federal Civil Service Employee.

Individuals obtain certain rights upon attaining the status of employee of the Federal Government, and obtain additional rights upon having had the status for a designated length of time. For example, individuals accumulate time creditable toward civil service retirement upon becoming an employee, and they begin serving their probationary period immediately upon becoming an employee. Therefore, understanding the legal requirements for attaining employee status is important to determine whether and when an individual has become an employee.

a. Statutory requirements generally. For a person to attain the status of employee of the Federal Government, the three requirements of 5 U.S.C. § 2105 must be met. Section 2105 requires that the individual be appointed in the civil service by one of several designated officials, that the individual be engaged in a Federal function, and that the individual be supervised while engaged in the performance of his duties by one of several designated officials. All three requirements must be satisfied for the individual to become an employee. Of the three requirements, the appointment requirement is the one which has generated the most controversy and litigation.

b. The appointment requirement. The appointment of a Federal civilian employee generally requires the execution of a Standard Form 52, "Request for Personnel Action," an OPM form used throughout the Federal Government. However, an appointment can also be evidenced by a completed Standard Form 50, "Notification of Personnel Action." While both forms are normally used in connection with an appointment, either form, if signed by the approval authority (appointing authority), will result in an appointment of the individual to a particular position in the civil service. Normally the Civilian Personnel Officer is the appointing/approval authority. See FPM 296 and FPM Supp 296-33 for the details of the appointment process. The indispensability of a properly completed SF 52 or SF 50 to an appointment is demonstrated by the two cases which

follow, one involving an employee's attempt to obtain additional retirement credit, and the other involving the running of a probationary period. See also Horner v. Acosta, 803 F.2d 687 (Fed. Cir. 1986) (Contract employees hired by Navy to perform intelligence functions were not appointed and were therefore not employees entitled to retirement credit.).

Costner v. United States, 665 F.2d 1016 (Ct. Cl. 1981)

In this civilian pay case, before us on cross-motions for summary judgment, plaintiff, James R. Costner, claims entitlement to credit toward his civil service annuity for the period December 15, 1949, through June 23, 1963, during which time, he asserts, he was an employee of the Federal Government. Defendant answers that plaintiff was in fact Contract Technical Service Personnel, that is, an employee of RCA Service Company (RCA) which had contracted with defendant to provide technical personnel.

. . . .

The issue to be decided is whether, during the contested period, Costner was a Federal employee within the meaning of 5 U.S.C. § 2105(a). We hold that he was not.

. . . .

In 1949, plaintiff had had considerable experience in the electronics field. During and immediately after the Second World War he had held several civilian and military Federal jobs, working in electronics at military installations in North Carolina, Hawaii, and elsewhere. In 1946 he had returned to the continental United States and had begun to work for a private firm. In late 1949, he answered an advertisement, placed by RCA, in an Atlanta newspaper, for a person with his qualifications. Plaintiff responded with his resume and was given an examination in Atlanta by RCA to determine whether he possessed their minimum qualifications.

RCA assigned plaintiff to Wright-Patterson AFB, Ohio. Before going to Ohio from Georgia, however, he stopped at an RCA

office in Gloucester, New Jersey, where he was informed that his employment by RCA was contingent on approval by military personnel. At the base he was interviewed as to his qualifications by a First Lieutenant Johnson, who found plaintiff acceptable for the job. As this interview assumes great importance in plaintiff's argument, we quote Johnson's recollection of it.

> On or about 15 December 1949, I accepted Mr. J. R. Costner as an RCA contractor technician to perform services in teletype maintenance for the United States Air Force. Mr. Costner's services were more than satisfactory and a laudatory letter was sent to his company supervisor in RCA.

Costner was subsequently transferred three times to different air bases. Plaintiff described the process as the Air Force informing RCA of vacancies and RCA asking him specifically to fill them. He would subsequently be issued orders of the type normally given to regular military personnel.

In 1953, when plaintiff was transferred to Andrews AFB, he was again interviewed and accepted by a military officer. He was not accepted at first, but after contacting his former military commander at Wright-Patterson he was. RCA did not participate in plaintiff's maneuvering to obtain acceptance, but it was informed of the actions taken. The officer who accepted him described their interview this way:

> In approximately December 1953 I interviewed Mr. Robert J. Costner [sic], an applicant on the RCA contract, and accepted him as an engineer on my staff. He worked directly under my supervision in the Receiver Engineering division. . . .

Throughout the period of employment as Contract Technical Service Personnel, his direct supervision came primarily from military personnel. He was periodically evaluated by RCA, but these evaluations were based on comments from military supervisors. It is agreed that his employment could have been terminated had the Air Force found him

unacceptable. He was granted post exchange and officers' club privileges; however, he admitted that this was discretionary with the base commander and could point to no uniform Air Force policy on the subject. He received his pay (regular, overtime, and raises) and paychecks from RCA; RCA kept his personal file; he was always listed as an RCA employee; he contributed to the RCA annuity plan and presently receives benefits under it; he did not contribute to the civil service plan; and he named RCA as his employer on his income tax returns. He received various RCA internal reports and documents. In fact, at one point, plaintiff was responsible for submitting his group's time sheets to RCA and informally evaluating other contract personnel for RCA.

This situation continued until 1963, when he was offered a permanent civil service position. He resigned from RCA, effective June 23, 1963, and began his civil service appointment on June 24, 1963. This job was advertised through usual Civil Service Commission procedures, and plaintiff applied for it in the standard way, with Standard Form 52. He served the 1-year probationary period required of all new Government employees. While he apparently took on new supervisory tasks upon being appointed to the civil service, his actual duties did not change substantially.

At the time of his appointment in 1963, Costner did not protest a starting date for annuity purposes of some time in 1957, which accounted for his Federal employment in the early 1940's but not for his 1949-63 service. It was not until 1973 that plaintiff began his administrative endeavor to receive credit for his RCA contract work. Plaintiff retired in 1976 and receives civil service annuity payments on the basis of the 1957 date established in 1963.

III.

There is no dispute as to the applicable statutory provision. "Employee" is defined in the United States Code as a person who is

(1) appointed in the civil service by one of the following acting in an official capacity --

. . . . .

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

. . . . .

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

It is obvious from the statutory language that there are three elements to the definition -- appointment by an authorized Federal employee or officer, performance of a Federal function, and supervision by a Federal employee or officer -- and that they are cumulative. A person must satisfy each requirement.

There is no dispute that plaintiff performed a Federal function or that he was supervised by a Federal officer or employee; defendant has never challenged this. The narrow issue, then, is whether plaintiff was appointed within the meaning of section 2105(a)(1).

. . . .

[The court rejected a] "totality of the circumstances" approach. An abundance of Federal function and supervision will not make up for the lack of an appointment.

. . . .

Plaintiff's reliance on the common law master-servant relationship and the so-called Pellerzi Elements is . . . misplaced. The Pellerzi Elements "relate primarily to the [supervision] statutory criteri[on]," which is essentially the common law test for the master-servant relationship. It is elementary that the common law does not control Federal relationships, especially where, as here, the Federal statute expressly goes beyond the common law and requires more than just the supervisory relationship.

. . . .

The sole issue in this case being whether plaintiff was in fact "appointed to [his] position by a person authorized to make the appointment," the case is controlled by Baker and Goutos and

accordingly we examine the facts bearing on that issue.

IV.

Recognizing the need for an actual appointment, plaintiff's precise factual contention must be, as plaintiff stated at oral argument, that "Costner was accepted into the military[29] by . . . an individual specifically provided for in the statute." The question is whether Lieutenant Johnson's interview with plaintiff constituted such an appointment.

At the outset, it might be noted that the force of this claim is diminished by the fact that a virtually identical interview took place in 1953 with Captain Coward. Logically, then, plaintiff must be claiming that Coward rehired him, and that he was rehired yet again in 1963 through more normal channels. This is simply not borne out by the facts. The documentation of all of this hiring (and presumably termination) activity are transfer lists, listing plaintiff as an RCA employee, and a single Form 52 executed in 1963. Not only is it unlikely that Federal hiring and termination in 1949 and 1953 would be undocumented, but this court has held that a Form 52 is "the sine qua non to [an] appointment." The clear inference is that plaintiff was appointed once, within the meaning of section 2105, in 1963.

The statutory language requiring that the appointing official be "acting in an official capacity" must mean that the official was "a person authorized to make the appointment." There is no indication in the record that Lieutenant Johnson or Captain Coward was so authorized. Certainly their statements do not reflect this. In fact, the indications are all to the contrary: every document cited by plaintiff refers to contract personnel as just that.

The language of the statements of the putative hiring officers is equally unhelpful to plaintiff. Neither claim that

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[29] This is in itself unlikely. There is no showing that plaintiff was a member of the Armed Forces. Counsel later qualified this by stating that plaintiff was in the civil service employ of the military.

they "hired" plaintiff, to say nothing of "appointing" him. Johnson said that he "accepted Mr. J. R. Costner as an RCA contractor technician" and that he sent a laudatory letter "to his company supervisor in RCA." Coward described plaintiff as "as applicant on the RCA contract" and his own actions as "accept[ance]." These statements, the only direct evidence plaintiff produces in support of his precise factual contention, and the lack of any evidence that he took an oath of office, in fact rebut his claim.

Finally, the fact that plaintiff was on the payroll of RCA, received his checks and raises from RCA, and participated in the RCA annuity plan, obviate any claim that he was a Government employee. Plaintiff recognized this on his income tax forms and in his contemporary acceptance of the denial of retirement credit. The fact that the Government is ultimately paying an individual's salary does not make him a Federal employee. In Baker, the plaintiff, like Costner, knew that the Federal Government was ultimately paying his salary, but this court held that this was not enough without an appointment.

In sum, the facts do not support plaintiff's arguments that he received "absolutely" no direction from RCA and that, with the sole exception of his paycheck, RCA had absolutely no responsibility for or control over him. There is substantial evidence to support the board's decision that plaintiff was never appointed to a Federal position during the period in dispute. That decision is in accord with prior rulings of this court, and we affirm it. In view of the result, we have no occasion to consider the other defenses raised by defendant.

V.

Plaintiff's motion for summary judgment is therefore denied on the merits, defendant's cross-motion is granted, and the petition is dismissed.

Skalafuris v. United States
683 F.2d 383 (Ct. Cl. 1982).

Plaintiff's case is the most recent in a series of cases which have called upon the court to define what constitutes Federal employment. The dispute here concerns the date on which plaintiff commenced employment with the Government. Upon that determination depend the procedural rights to which he was entitled upon termination. The Government contends that the date entered on various personnel action forms controls; plaintiff argues that he was appointed and commenced work at least a month earlier. It is not disputed that, if he was no longer a probationary employee at the time of his termination, plaintiff was not accorded all of the procedural rights to which a nonprobationary employee is entitled. The Civil Service Commission decided that plaintiff was a probationary employee at the time of his termination. We hold that, as a matter of law, this was correct.

I.

On October 29, 1973, the Naval Research Laboratory (NRL) advertised an opening for the GS-15 position of Head, Mathematics Research Center (MRC). Plaintiff applied for the job in November 1973 and was interviewed at NRL in December. He was selected as the best candidate in January 1974 by Dr. Paul Richards. Dr. Richards then sent a memorandum, with attached routing slip, to Dr. Herbert Rabin and Dr. Alan Berman, making this recommendation and asking for their approval. The memorandum was dated January 22, 1974, and Drs. Rabin and Berman signified their approval by initialing the routing slip on January 29 and 30, 1974, respectively. Plaintiff had been informed of his selection by telephone in mid-January, and a Standard Form 52 (SF-52), Request for Personnel Action, was prepared for him, as well as a request for Civil Service certification.

Plaintiff arrived at NRL immediately after approval of his selection. On January 31, 1974, he received a temporary identification badge. The record plainly shows that plaintiff was actively engaged in

his new duties throughout February. On February 22 and March 7, 1974, he was paid by voucher for this work.

On March 4, 1974, plaintiff executed an Appointed Affidavit (the oath of office), and on March 5, 1974, a Standard Form 50 (SF-50), Notification of Personnel Action, was executed. Both of these documents, as well as the SF-52 completed earlier, give the effective date of plaintiff's appointment as March 5, 1974. The March 5th date is the one which the Government contends is the correct date of appointment.

On January 20, 1975, after nearly a year at NRL, plaintiff received a supervisor's evaluation from Dr. Richards which recommended his retention because he was performing well. However, on February 24, 1975, plaintiff received a memorandum from Dr. Berman stating that he would be terminated on March 3, 1975, for inadequate performance. The SF-50 which accompanied the termination notice was later superseded by another which gave no reason for termination.

Plaintiff appealed his removal unsuccessfully for several years. Upon receiving a final denial of reconsideration of his case on June 5, 1980, plaintiff filed in this court on August 18, 1980, for back pay and reinstatement to his original grade.

II.

This court set out the law governing plaintiff's status as a Federal employee in Costner v. United States:

> There is no dispute as to the applicable statutory provision. "Employee" is defined in the United States Code as a person who is
>
> (1) appointed in the civil service by one of the following acting in an official capacity --
>
> . . . . .
>
> (C) a member of a uniformed service;
>
> (D) an individual who is an employee under this section;
>
> . . . . .
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and

> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

It is obvious from the statutory language that there are three elements to the definition -- appointment by an authorized Federal employee or officer, performance of a Federal function, and supervision by a Federal employee or officer -- and that they are cumulative. A person must satisfy each requirement.

. . . .

We grant that plaintiff, from late January 1974, was performing a Federal function and was supervised by a Federal employee. But as the court said in Baker v. United States, which considered this problem:

> If [plaintiff] did not have a Federal appointment, it will not be necessary to consider the other two requirements, as it is well settled that all three tests must be met by an individual before he can be a Federal employee.

Thus, the work plaintiff did at NRL between late January 1974 and March 5, 1974, and the fact that he was represented to others as the head of MRC, while important to an overall case for Federal employment, do not bear directly on the question of appointment. We turn then to the facts bearing on the existence and date of plaintiff's appointment.

III.

The standard to be applied here is whether plaintiff was "appointed to [his] position by a person authorized to make the appointment." At the outset, it is conceded that the persons who selected and approved the selection of plaintiff were persons "authorized to make the appointment." Therefore, the question before us is only whether plaintiff was in fact appointed.

Recognizing that appointment is a single, discrete act, plaintiff argues that he was appointed by the action of Dr. Rabin's initialing the routing slip on January 29, 1974. We cannot agree, however, that Dr. Rabin's act had that effect.

> The documents effecting plaintiff's appointment all specify March 5, 1974, as plaintiff's date of appointment. The SF-52 gives "3-5-74" as the effective date for the requested action, which is described as "C[areer] C[onditional] Appt" (emphasis supplied]. It is hardly coincidental that the next personnel action documents were not executed until on or about March 5, 1974. On the Appointment Affidavit, signed on March 4th, the space for "(Date of appointment)" is filled in with "3/5/74." Finally, the actual notification form, the SF-50, gives "03/05/74" as the effective date of plaintiff's "CAREER CONDITIONAL APPOINTMENT." Furthermore, the SF-50 notes that the appointment is "subject to completion of 1 year probationary (or trial) period commencing "03/05/74." We have in the past cases emphasized the importance of the SF-52, SF-50, and oath of office in determining the date or existence of an appointment,[15] and in this case they unequivocally set the date of appointment at March 5, 1974.
>
> . . . .
>
> We may therefore conclude, on the basis of all of the Government documents which purport to describe plaintiff's status, that the plaintiff was appointed on March 5, 1974, and that his probationary period ended on March 5, 1975, two days after he was terminated.
>
> We have only left to discuss plaintiff's direct evidence for an earlier appointment date, the routing slip. The first key point is that the memorandum being approved on the slip does not recommend the appointment of

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[15] Goutos, 212 Ct. Cl. at 98, 552 F.2d at 924 (SF-52, in facts of that case, is "the sine qua non to [an] appointment"); Shaw v. United States, 223 Ct. Cl. 532, 546, 622 F.2d 520, 528, cert. denied, 449 U.S. 881, 101 S. Ct. 231, 66 L.ED.2d 105 (1980) (in determining date of end of probationary period, the Civil Service Commission properly looked to "the date of his appointment evidenced in Standard Form 50"); Costner v. United States, 229 Ct. Cl. at __, 665 F.2d at 1023 (importance of oath of office). See also Vukonich v. Civil Serv. Comm'n, 589 F.2d 494, 496 (10th Cir. 1978) (completion of an SF-50 necessary to appointment).

plaintiff. Rather, it recommends "that Dr. Skalafuris be offered the GS-15 position of Head of the Mathematics Research Center" (emphasis supplied). While we have no doubt that in approving this recommendation Drs. Rabin and Berman expected and intended that plaintiff would eventually be appointed, the fact is that the process had not progressed to the appointment state at that point. Plaintiff still had to be notified of the offer, had to accept it, NRL needed to request the appointment, the Civil Service Commission had to certify plaintiff, and plaintiff had to take his oath of office. It is hard to believe that Drs. Rabin and Berman thought they were appointing plaintiff, even if they had had the power to do so at that point. This can hardly be characterized as the "last act" defined in Marbury v. Madison.

Furthermore, it would seem to us very odd that the Government appointive process should be consummated by initials on a routing slip. We emphasize, as we noted in Goutos v. United States, the chaotic effect on the Government of a vague or informal procedure for Government hiring. Plaintiff cannot base his appointment on the initialed approval of a memorandum recommending that he be given an offer.

. . . .

We therefore conclude, after careful consideration of the brief and after hearing oral argument, that the Civil Service Commission was correct as a matter of law in finding that plaintiff was not appointed to his position until March 5, 1974, and that consequently he was still in his probationary period when he was terminated on March 3, 1975. Because of this disposition of the case, we do not address the other defenses raised by the Government. There being no genuine issue as to any material fact, defendant's cross-motion for summary judgment is granted; plaintiff's motion for summary judgment is denied; and the petition is dismissed.

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c. Federal function and supervision. The other two requirements of 5 U.S.C. § 2105 have generated very little litigation. They were considered, however, in McCarley v. MSPB, 757 F.2d 278 (Fed. Cir. 1985) wherein the court reaffirmed that all three requirements of 5 U.S.C. § 2105 must be met for an individual to attain "employee" status. The court determined that McCarley was not an employee even though he had been appointed, because he had not yet started work and thus had not performed a Federal function and also had not been supervised while performing his duties by a Federal employee. Because McCarley was merely an appointee, and not an employee, when management canceled his appointment, he was not entitled to the procedural protections established by law for employees.

d. Notes and discussion.

Note 1. While a completed SF 50, SF 52, or oath of office has been determined by the courts to be the sine qua non of a valid appointment into the Federal civil service, the presence of such documentation does not necessarily control an individual's status. See Grigsby v. Department of Commerce, 729 F.2d 772 (Fed. Cir. 1984) wherein the Department of Commerce was permitted to demonstrate with independent evidence that the information on the forms was erroneous. In Grigsby the employee was aware that the information on the SF 50 and SF 52, which reflected that he had been hired by transfer and that his probationary period was completed, was wrong. The court suggested that the result might have been different if the employee had been unaware of the error and had relied to his detriment on the erroneous information.

Note 2. While a proper appointment is normally necessary to become an employee, the MSPB has acknowledged the existence of a limited exception. If an appointment is found to be improper or erroneous under law, rule or regulation after an individual has been appointed to a position, has entered on duty, and the other criteria of 5 U.S.C. § 2105 have been met, the individual is an employee unless the appointment violates an absolute statutory prohibition on appointment into the civil service. See Travaglini v. Department of Education, 23 M.S.P.R. 417 (1984). Absent such an absolute statutory prohibition on appointment, corrective action adversely affecting the individual may be taken only after providing the individual all the rights that an employee similarly situated would receive. See Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983) wherein the court determined that this

rule applies even if the individual allegedly obtained the appointment through material misrepresentation.

The foregoing discussion demonstrates the importance of becoming an employee. Beyond that, being a competitive service employee is also important because of the additional rights and protections that this type employee gets. However, an individual hired into a competitive service position undergoes a series of status changes which affect the rights of that individual. Therefore, it is important to understand these status changes and their significance.

2.3 Employee Status Upon Appointment in the Competitive Service.

a. Probationary period. An individual appointed to a competitive service position ordinarily must serve a one-year probationary period before attaining full competitive status. See 5 C.F.R. §§ 315.801-802. Competitive status refers to "an individual's basic eligibility for noncompetitive assignment to a competitive position." 5 C.F.R. § 212.301. This allows an employee to be transferred, promoted, reassigned, or demoted without open competitive examination. The employee automatically attains competitive status at the end of the one-year probationary period.

This probationary period is an extension of the hiring process, and is an opportunity for management to evaluate on the job the employee's fitness for the position. During this period, if the employee by conduct or performance fails to demonstrate fitness for the position, management should terminate the employee. During this period management has virtual summary removal authority unconstrained by the detailed procedural requirements that apply to nonprobationary, competitive service employees. Probationary employee rights in connection with adverse personnel actions will be reviewed later in this book in the discussion of personnel actions and procedural requirements.

Under some circumstances an employee may have to serve more than one probationary period while moving from one job to another within Federal employment. The case which follows describes the circumstances when that may occur and the potential impact on an employee.

Marcus v. United States, 473 F.2d 896 (Ct. Cl. 1973)

[After plaintiff was discharged for inefficiency from HEW, he sued alleging that he was denied the procedural safeguards guaranteed him by the Veterans' Preference Act and therefore was entitled to back pay. Plaintiff had been employed by IRS in a position which entitled him to the protection of that Act, and the issue was whether this status moved with him when he was appointed from a Civil Service Register to a new position at HEW. IRS described the move as a "Separation--Transfer," which would have entitled him as a transferee to the Act's protections. HEW, however, contended that since the plaintiff was in fact appointed from a register of eligibles, he had to serve a probationary period. Because the protections of the Veterans' Preference Act do not apply to probationers, if the plaintiff was in fact a probationer, his dismissal was proper. The court analyzes the general rule concerning appointment from a Civil Service Register and then discusses two pertinent exceptions.]

. . . .

As noted by this court in Tierney v. United States, 168 Ct. Cl. 77 (1964), the power of appointment is an executive function. For this court to determine whether plaintiff should have been appointed or transferred would be a usurpation of an administrative function. The agency had the discretion to choose whether it would transfer plaintiff or not and unless that choice is arbitrary or capricious it cannot be overturned. In this case, the fact that plaintiff was unable to perform his duties at HEW adequately, indicates by hindsight that the decision to appoint him from the Civil Service Register was a reasonable one. 5 C.F.R. § 315.801 prescribes that plaintiff had to serve a one year probationary period, having been chosen from the Civil Service Register.

Plaintiff argues that even if he was chosen from the Civil Service Register his prior Government service should be counted towards his probationary period at HEW. The

pertinent Manual provision and the case law on the subject do not support plaintiff's contention.

The Manual, Chapter 315, Subchapter 8, Para. 8-2, states:

> * * * An eligible given a career-conditional or career appointment by selection from a certificate of eligibles is required to serve a probationary period of one year. This applies not only to the first appointment of this kind, but to any subsequent career or career-conditional appointment by selection from a certificate of eligibles, regardless of whether the appointee had previously completed a probationary period. * * *

There are two pertinent exceptions to this general rule. One involves the case where an employee is transferred rather than appointed from the Civil Service Register. As the foregoing section of our opinion indicates, plaintiff was not one of those. The second exception involves cases where prior service can be counted in determining the completion of the probationary period. As stated in the Manual, Chapter 315, Appendix A, prior service can be counted only if "It was in the same line of work and in the same agency as the position for which the action is taken." Since plaintiff's prior service was not in the same line of work as his service at the time of his dismissal it cannot count towards his probationary period.

. . . .

Note 1. How similar must the two positions be for the employee to avoid serving a new probationary period? In Dargo v. United States, 176 Ct. Cl. 1193 (1966), prior service of the employee as a confidential assistant to a Commissioner of the Foreign Claims Settlement Commission was held not to be the same line of work as that of her new position as a personnel assistant. Even though she had previously performed some of the duties of the new position, a new probationary period was required.

Note 2. The regulatory provisions cited in Marcus v. United States continue substantially unchanged.

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b. Probationary Period for Newly-Appointed Supervisors. In addition to probationary periods for new appointees to Federal positions, Federal law also requires newly-appointed supervisors and managers to serve a probationary period. The purpose of this probationary period is to test the managerial and supervisory skills of the employee and to prevent the occurrence of the "Peter Principle" in the Federal service. Under 5 C.F.R. § 315.905, each agency is entitled to determine an appropriate length for this probationary period, and it may vary among different occupations. The Army has chosen to use a one-year period in all cases unless a special exception is granted. See AR 690-300, ch. 315.9.

An employee who fails to complete satisfactorily the probationary period is entitled to be reassigned to a position no lower in grade than the lower of the supervisory position currently occupied or the position occupied prior to taking the supervisory position. See 5 C.F.R. § 315.907.

An employee who is reassigned under this section has virtually no right to challenge the decision. There is generally no appeal right. See 5 C.F.R. § 315.908. Additionally, this type reassignment is not grievable under the Army's grievance procedure. See AR 690-700, Chapter 771.

c. Tenure upon appointment: career-conditional status. Immediately upon appointment to a competitive service position an employee is a probationary employee, but also has another status, that of career-conditional employee. The employee automatically becomes a career employee upon completion of the service requirement established by OPM. The Office of Personnel Management requires generally a three-year period of substantially continuous creditable service to become a career employee. See FPM 315.2 for a discussion of what service is creditable and what is substantially continuous.

The significance of this status is that a career employee has higher retention standing in a reduction-in-force. In a reduction-in-force a career employee should always be retained over a career conditional employee in the same type job. A detailed discussion of

the reduction-in-force process is provided later in this book.

d. Summary of employee status in the competitive service. Immediately upon appointment to a competitive service position an employee is usually a probationary, career-conditional employee. After one year, the employee is a nonprobationary career-conditional employee. Finally, after three years, the employee is a nonprobationary, career employee.

2.4 Pay Systems for Federal Employees. Federal civil service employees are categorized not only by their status as competitive or excepted service employees, but also by the way in which their pay is determined. This section will review the principal categories of employees by pay systems and focus on how pay is determined for each category of employee.

a. General Schedule employees. The General Schedule consists of the Government's white collar workers. The pay levels and timing of pay increases for Federal General Schedule (GS) employees are prescribed by statute. See 5 U.S.C. Chapter 53, subchapter III. The General Schedule consists of eighteen pay grades (GS-1 through GS-18) with ten steps per pay grade. Employees progress through the ten steps per pay grade after completion of specified waiting periods and performing at an acceptable level of competence.

Positions at the GS-16 through GS-18 levels of the General Schedule are in the Senior Executive Service (SES). SES employees are governed by separate statutory provisions and are beyond the scope of this book. See 5 U.S.C. Chapter 31, subchapter II and Chapter 53, subchapter VIII.

(1) General schedule pay.

Except for General Schedule employees who are supervisors and managers in pay grades GS-13 through GS-15 who are subject to the performance management and recognition system, and who have been redesignated as GM-13 to GM-15 employees, General Schedule employees are compensated on the basis of the General Schedule at 5 U.S.C. § 5332. Generally, there is no consideration of local rates of pay for their type of work in the civilian sector in the geographic area in which they are employed. However, under the Federal Employees Pay Comparability Act of 1990, beginning in fiscal year (FY) 1994, a locality comparability payment for GS employees will be phased in over a nine-year period. The locality

payment will be based on Bureau of Labor Standards geographic area surveys of non-Federal employers. The Federal Employees Pay Comparability Act of 1990 also included several important provisions to narrow the pay gap between private sector and public sector employee salaries. Beginning in FY 1992, GS pay raises will be based on the annual rate of increase in employment costs for the U.S. labor force. This index is called the Employment Cost Index (ECI). The ECI is tied to labor costs and not cost of living increases. Under the Act, the President may limit the annual raise to 5% if the ECI exceeds 5%. In addition, if there is a state of war or if severe economic conditions exist, the President may cancel or limit GS pay raises. See 5 U.S.C. §§ 5301-5307.

The General Schedule closely resembles the pay tables familiar to military personnel. There are 15 possible grades within the General Schedule (exclusive of the Senior Executive Service) and within each grade there are steps for pay increases based on longevity. There are two significant distinctions, however, between the Military Pay Schedule and the General Schedule. First, a civilian employee's grade depends upon the position in fact occupied, and is not a personal attribute of the employee, as is the case with military personnel. For example, a Captain will be paid a Captain's salary regardless of the duties performed. A civilian employee, on the other hand, has no personal right to the grade assigned to the position occupied. The grade belongs to the position rather than the individual. Illustratively, if a civilian attorney working in a judge advocate office in Germany is in a GS-13 position, but returns to the United States where the only opening available is a GS-12 position, the employee will, in effect, be demoted to a GS-12 rating and will not retain the GS-13 rating. The second distinction between the Military Pay Schedule and the General Schedule is that a civilian employee is not necessarily guaranteed a within-grade longevity increase, commonly referred to as a step increase, merely because of completion of the appropriate waiting period. The statutory standard requires an employee to perform at an "acceptable level of competence" to be entitled to a within grade increase. See 5 U.S.C. § 5335(a). Supervisors may take administrative steps to withhold these increases from employees who have not performed in an acceptable manner. These procedures to deny an employee a within-grade step increase will be discussed later in this book.

(2) Performance Management and Recognition System employees.

The Civil Service Reform Act of 1978 established the Merit Pay System, codified at 5 U.S.C. Chapter 54. The Merit Pay System was replaced by the Performance Management and Recognition System (PMRS) created by Title II of the Civil Service Retirement Spouse Equity Act of 1984 (Pub. L. 98-615) (also codified at 5 U.S.C. Chapter 54). Rules implementing this program are published by OPM in 5 C.F.R. Part 540. This system applies to supervisors and managers in pay grades GS-13 through GS-15, designated GM-13 through GM-15, and ties their pay in part to their performance. It allows employees to obtain faster salary increases than their counterpart GS employees, if their performance is good. It also results in GM employees earning less than their GS counterparts, if their performance is not good. While a GM employee can earn money faster, a GM employee cannot earn more than the maximum rate for the equivalent GS grade. For example, a GM-13 can never earn more than the rate for a GS-13, step 10. A GM employee can, however, earn less than the minimum rate for the equivalent GS grade. For example, it is possible in time for a GM-13 whose performance has been poor to earn less than a GS-13, step 1.

Under the PMRS there are five performance summary rating levels with two levels above and two levels below Fully Successful. PMRS employees rated Fully Successful or higher will receive the full general comparability pay increase announced for GS employees. For example, if the General Schedule pay is increased 5%, then the pay of a PMRS employee rated Fully Successful or higher will also increase 5%. In addition, PMRS employees receive all or part of a merit increase depending on their level of performance. A merit pay increase is an amount equal to the dollar value of a within-grade step increase in the General Schedule. Finally, agencies must give a performance award to employees rated Exceptional, and should give a performance award to employees rated Highly Successful. The performance award is a percentage of base pay and the OPM regulations provide specific numerical guides. In March 1991, Congress extended the PMRS through September 30, 1993.

b. Prevailing rate employees. Prevailing rate employees are the blue collar workers in the civil service. The definition of prevailing rate employee is at 5 U.S.C. § 5342(a)(2). Included are employees in recognized trades or crafts or other skilled mechanical

crafts, or in unskilled, skilled, or semi-skilled manual labor occupations, including supervisors and foremen. The Office of Personnel Management and Department of the Army have separate regulations applicable to prevailing rate employees, although they generally have rights and obligations similar to those of general schedule employees. The distinguishing characteristic of prevailing rate employees, sometimes referred to as "wage board" or "wage grade" employees, is the manner in which their compensation is calculated. Their pay is based on the prevailing rate of pay for their particular occupation within the private civilian sector in the geographic area where they are employed. The United States is divided into 139 wage board areas for purposes of computing prevailing rates. The Office of Personnel Management has overall responsibility for supervising the manner in which these prevailing rates are computed, but it has delegated its authority to a "lead agency" for each of the areas. 5 U.S.C. § 5343. Thus, although there may be several Federal agencies represented in a given wage board area, only one of them will have been designated by the Office of Personnel Management as the lead agency. The lead agency must conduct an annual survey of the rates of compensation within its area and promulgate pay schedules in accordance with the survey. The schedules so derived are binding on all Federal agencies within that particular area. In conducting the annual survey, the lead agency will appoint an agency wage committee consisting in part of representatives of management and employees or their unions. This committee is entitled to call upon the Department of Labor's Bureau of Labor Statistics for professional advice and logistical support in conducting the annual survey.

Like the GS employees, prevailing rate employees also receive periodic step increases based on completion of designated waiting periods and satisfactory performance. For detailed information on the prevailing rate system, see FPM Supplement 532-1.

c. Other civilian employees. Not all civilians working at Army installations are legally employees of the United States. Many of them are not covered by the rules and regulations promulgated by the Office of Personnel Management. For example, employees of nonappropriated fund instrumentalities, such as the post exchange, the Army and Air Force Motion Picture Service, and the Officer or NCO clubs are not covered by the Federal personnel regulations of the Office of Personnel Management. See 5 U.S.C. § 2105(c). Although a nonappropriated fund instrumentality may, for some

purposes, be an instrumentality of the United States, for most purposes its employees are not considered to be employees of the United States, but rather of the particular nonappropriated fund instrumentality which hires them. Nonetheless, AR 215-3 provides that employees of nonappropriated fund instrumentalities should be given treatment as nearly equal as possible with that given the civil service employees. Additionally, numerous employees of independent organizations are found on military installations. These employees are neither Department of the Army employees nor nonappropriated fund employees. Examples of such individuals are those employed by the Red Cross, the United Service Organizations, Inc. (USO), the local credit union, or a PX concessionaire.

2.5 Classification of Positions

a. General. Because the pay that a Federal civilian employee receives depends on the grade of the position which the employee occupies, it is important to understand how positions are classified, what employees can do to get their positions reclassified, and the extent to which courts will get involved in classification issues.

Under the Classification Act of 1949, the Office of Personnel Management is responsible for analyzing various positions in the Federal civil service and grouping them according to their relative responsibility, difficulty and qualification requirements. The purpose of the Classification Act is to insure that all employees in the Federal Government, regardless of which agency employs them, receive equal pay for equal work. See 5 U.S.C. § 5101 for Congress' statement of policy on classification.

To accomplish this purpose, Congress directed OPM to prepare classification standards for use in analyzing and grouping positions. The required content of these standards and the method for classifying positions are described in 5 U.S.C. §§ 5105-5112.

b. The classification process. The Office of Personnel Management must establish standards for placing positions in appropriate classes and grades. 5 U.S.C. § 5105. The standards for grading positions within all classes of jobs must be consistent with the broad guidelines for grading in 5 U.S.C. § 5104 which define in general terms the level of responsibility associated with each grade.

Using the standards established by OPM, individual agencies then place each of their positions into the proper class and grade. To insure proper classification of positions under the OPM standards, OPM conducts periodic audits of agency classification actions.

c. Employee appeals. Because employees are paid based upon the grade at which their positions are classified, they often seek to challenge the classification of their positions, particularly if their positions have been downgraded. Employees may, at any time, appeal the classification of their positions within their agency and/or to OPM. A classification appeal may address only the appropriateness of the grade for the position or whether the position has been placed within the proper wage system, the General Schedule or the prevailing wage system. Employees may not challenge the accuracy of their job description, nor OPM's classification standards.

Although employees may initiate a classification appeal at any time, relief is usually only prospective. An appeal decision favorable to the employee will result in retroactive relief only in cases involving a downgrading or other action resulting in reduction in pay, and then only if the appeal is initiated within 15 days of the effective date of the adverse agency decision. Otherwise, even this relief is prospective only. See 5 C.F.R. § 511.703. The appeal decision made by OPM is final and binding on appropriate Government officials.

d. Judicial review of classification decisions. Once the administrative appeal to OPM is exhausted, an employee may try to obtain judicial review of the classification decision. A request for judicial review of the decision raises several interesting legal questions: (1) when, if ever, can the OPM reconsider its "final" decision; (2) in which court and on what theory should the aggrieved employee sue; and (3) can a court award back pay as a remedy for an improper classification. Consider these questions as you read the Bookman and Testan cases which follow.

Bookman v. United States, 453 F.2d 1263 (Ct. Cl. 1972)

DURFEE, Senior Judge.

Plaintiffs were employed as Supervisory Quality Control Specialists, GS-1903-13, at Defense Personnel Support Center, Defense Supply Agency, Philadelphia, Pa. During

their course of employment, plaintiffs duly requested that their positions be upgraded to the GS-14 level. On November 13, 1969, the Director, Office of Civilian Personnel, Defense Supply Agency, issued a written denial of plaintiffs' request. Plaintiffs appealed this decision to the U.S. Civil Service Commission, Philadelphia Region (hereinafter Commission). After consideration of all pertinent information supplied by plaintiffs and the Defense Supply Center, the Commission determined on February 6, 1970, that the proper classification for plaintiffs' positions was at the level of GS-14. Thus, plaintiffs' appeal was sustained.

On February 20, 1970, the Commission received a written request from the Defense Supply Agency, Headquarters, to reconsider its decision. The agency stated it would present full documentation of additional material facts not previously presented, nor considered by the Commission. Upon further examination and reconsideration of its February 6 decision, the Commission issued an amended decision on May 28, 1970, reversing its original decision to upgrade plaintiffs' positions from GS-13 to GS-14.

On June 11, 1970, plaintiffs filed the instant petition alleging that the Commission's first decision of February 6 was final and binding on all administrative, certifying, payroll, disbursing and accounting officials of the Government. Plaintiffs' prayer is for back-pay reflecting the difference between the base pay of a grade GS-13 and GS-14 from Feb. 6, 1970 to date of judgment.

The parties, by their briefs and oral argument, have framed two issues for our consideration: (1) whether the Commission had the power to reconsider its original decision of Feb. 6; and (2) if reconsideration was proper, whether the Commission's revised decision of Feb. 20 was arbitrary, capricious or unsupported by substantial evidence.

We must first address the question whether the Commission's reconsideration of its initial decision of Feb. 6 was proper. Plaintiffs' contention that the Feb. 6 decision was final, conclusive and binding,

is based on 5 C.F.R. § 511.610 (1971) which states:

> An appeal decision made by the Commission is final. There is no further right to appeal. The appeal decision shall constitute a certificate which is mandatory and binding on all administrative, certifying, payroll, disbursing, and accounting officials of the Government.

Plaintiffs contend further that the Commission's reconsideration pursuant to agency request is precluded by 5 C.F.R. § 511.611 (1971) which charges the Commission's Bureau of Inspections with the discretionary authority to reopen and reconsider any appeal decision made by a Commission regional office. Defendant, on the other hand, argues that it is the inherent right of every tribunal to reconsider its own decision within a reasonably short period of time, absent legislation to the contrary.

Any inquiry into the reconsideration powers of an administrative agency must take full cognizance of the broad policy considerations succinctly defined by Mr. Chief Justice Warren in Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 321, 81 S. Ct. 1611, 1617, 6 L. Ed. 2d 869 (1961):

> Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what ultimately, appears to be the right result on the other.
>
> . . . .
>
> [The court evaluates each of the opposing policies.]
>
> . . . [I]t is the general rule that "[e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or order." 2 Davis, supra, at 606.

Congressional recognition of this principle has led to the establishment of a

number of statutes which specifically grant the administrative agency the power to reconsider its own decisions, on its own initiative, as long as proper notice is given and the right is exercised within a reasonable time period. See, e.g., 15 U.S.C. § 717r(a) (1970) (Federal Power Commission); 49 U.S.C. § 17(5) (1970) (Interstate Commerce Commission); 15 U.S.C. § 45(b) (1970) (Federal Trade Commission); 29 U.S.C. § 160(d) (1970) (National Labor Relations Board).

In past years, we have been called upon to consider this important question of reconsideration in situations where there are no statutory or administrative guidelines. Quite consistently, we have held that absent contrary legislative intent or other affirmative evidence, this court will sustain the reconsidered decision of an agency, as long as the administrative action is conducted within a short and reasonable time period. Biddle v. United States, 186 Ct. Cl. 87 (1968); Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184 (1966); Dayley v. United States, 169 Ct. Cl. 305 (1965).

Although none of the above cited decisions deal specifically with the Civil Service Commission, we find their common principle to be entirely consistent and applicable to the facts of the instant suit. Consequently, with respect to plaintiffs' claim herein, we hold that the Commission's Philadelphia Regional Office possessed and properly exercised its inherent power to reconsider its own decision within a reasonable time period.

Having held that reconsideration was proper under the circumstances, it remains to evaluate plaintiffs' contention that the Commission's amended decision was arbitrary, capricious and not supported by substantial evidence.

. . . .

[*The court then reviewed the factual basis on which the classification decision was made.*]

The function of a reviewing court in a civil service case such as this is not to "undertake to pass on qualifications of an employee for any given post," Barger v.

United States, 170 Ct. Cl. 207, 214 (1965), nor to determine the proper functions and responsibilities of a particular Government position. Congress has granted the Civil Service Commission broad authority in regard to the classification of Government employees. 5 U.S.C. § 5112 (1970) specifically authorizes the Commission to:

(1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position;
(2) place in an appropriate class and grade a newly created position or a position coming initially under this chapter;
(3) decide whether a position is in its appropriate class and grade; and
(4) change a position from one class or grade to another class or grade when the facts warrant.

These are functions which, by their very nature, require discretionary judgments as to the level of difficulty or complexity of work, and the degree of attendant responsibility. In Albert v. United States, 194 Ct. Cl. 95, 437 F.2d 976 (1971), the court considered the classification-demotions of eight civilian employees of the Army Pictorial Center. We categorized that controversy as follows:

> * * * The dispute really is that management considers the positions to be less demanding than the employees do. A judgment of this type necessarily invokes discretion and expertise--a weighing of varied factors, tangible and intangible * * *. Albert, supra, at 101, 437 F.2d, at 979.

As was true in Albert, plaintiffs must bear the burden of showing arbitrariness in, and lack of support for, the administrative determinations. Albert, supra, at 100, 437 F.2d 976. We are convinced, after careful review of the record, that plaintiffs have failed to substantiate any abuse of discretion or absence of support for the Commission's findings. Clearly, there has been a distinct failure of proof.

. . . .

Note. The Bookman case is frequently cited as authority for the position that an agency may reconsider one of its decisions. The role of the Civil Service Commission discussed in Bookman is now performed by OPM.

United States v. Testan, 424 U.S. 392 (1976)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This is a suit for reclassification of Federal civil service positions and for backpay. It presents a substantial issue concerning the jurisdiction of the Court of Claims and the relief available in that tribunal.

I

The plaintiff-respondents, Herman R. Testan and Francis L. Zarrilli, are trial attorneys employed in the Office of Counsel, Defense Personnel Support Center, Defense Supply Agency, in Philadelphia. They represent the Government in certain matters that come before the Armed Services Board of Contract Appeals of the Department of Defense. Their positions are subject to the Classification Act, 5 U.S.C. § 5101 et seq., and they are presently classified at civil service grade GS-13.

In December 1969 respondents, through their Chief Attorney, requested their employing agency to reclassify their positions to grade GS-14. The asserted ground was that their duties and responsibilities met the requirements for the higher grade under standards promulgated by the Civil Service Commission in General Attorney Series GS-905-0. In addition, they contended that their duties were identical to those of other trial attorneys in positions classified as GS-14 in the Contract Appeals Division, Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Dayton, Ohio, and that under the principle of "equal pay for substantially equal work," prescribed in § 5101(1)(A), they were entitled to the higher classification.

The agency, after an audit by a position classification specialist, concluded that

the respondents' assigned duties were properly classified at the GS-13 level under the Commission's classification standards. On appeal, the Commission reached the same conclusion and denied reclassification. The Commission also ruled that comparison of the positions held by the respondents with those of attorneys employed by the referenced Logistics Command was not a proper method of classification.

The two respondents then instituted this suit in the Court of Claims. Each sought an order directing reclassification of his position as of the date (May 8, 1970) of the first administrative denial of his request, and backpay, computed at the difference between his salary and grade GS-14 (and the claimed appropriate within-grade step), from that date. The trial judge, in a long opinion, App. 43-117, concluded that the respondents were not entitled to backpay due to their allegedly wrongful classification. Id., at 57. But he also concluded that the Commission's refusal to reclassify respondents to GS-14 was arbitrary, discriminatory, and not supported by substantial evidence, ibid., and that as a matter of law the respondents were entitled to an order remanding the case to the Commission with directions so to reclassify the respondents. Id., at 58, 117.

The Court of Claims considered the case en banc and divided 4-3. The majority disapproved the trial judge's recommendation that the court was empowered to direct the reclassification of respondents to GS-14, for the Court of Claims is not authorized to create an entitlement to a governmental position. "If entitlement depends on the exercise of discretion by someone else we cannot substitute our own discretion." 205 Ct. Cl. 330, 332, 499 F.2d 690, 691 (1974). The majority felt, however, that if the Commission were to determine that it had made an erroneous classification, that determination "could create a legal right which we could then enforce by a money judgment." Id., at 333, 499 F.2d, at 691.

The majority agreed with the trial judge that the Commission's failure to compare respondents' positions with those of the Logistics Command attorneys was arbitrary

and capricious. Id., at 331, 499 F.2d, at 691. The court observed: "Ordinarily . . . it is not arbitrary and capricious to refuse to consider the grade of employees other than the ones complaining." But it went on to say: "This case is peculiar in its facts," for the employees "all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees are specifically pointed out by the complaining employees." Id., at 332, 499 F.2d, at 691. The court ruled that it had the power under the remand statute, 86 Stat. 652, now codified as part of 28 U.S.C. § 1491 (1970 ed., Supp. IV), to order the Commission to reconsider its classification decision "under proper directions." Accordingly, and pursuant to its Rule 149(b), the court remanded the case to the Commission to make the comparison and to report the result to the court.

The dissent argued that the jurisdiction of the Court of Claims is limited to money judgments and, since none had been or could be ordered in this case, the court was without jurisdiction even to remand the case to the Civil Service Commission. In addition, the respondents had not stated a claim upon which relief could be granted, for they were asking for positions, and pay, to which they had never been appointed. The dissent further argued that there is no constitutional right to a governmental position to which one has not been appointed; that the salary of a Government job is payable only to the person appointed to that position; and that the court has no authority to take over the appointing power that the Constitution Art. II, § 2, has placed in the Executive Department. It asserted that the decision of the majority was but a declaratory judgment, a legal function not within the court's jurisdiction. Finally, the dissent argued that the classification decision of the Commission was neither arbitrary nor capricious and was supported by substantial evidence. 205 Ct. Cl., at 334-338, 499 F.2d, at 692-694.

We granted certiorari because of the importance of the issue in the measure of

the Court of Claims' statutory jurisdiction, and because of the significance of the court's decision upon the Commission's administration of the civil service classification system. 420 U.S. 923 (1975).

II

We turn to the respective statutes that are advanced as support for the action taken by the Court of Claims.

A. The Tucker Act.

. . . .

[The Court concludes that the Tucker Act merely confers jurisdiction on the Court of Claims in certain cases but does not create a substantive right to recover money damages from the U.S. for a period of wrongful classification.]

B. The Classification Act. Inasmuch as the trial judge proposed, App. 57, that the respondents were not entitled to backpay under the Back Pay Act, 5 U.S.C. § 5596, and the Court of Claims held that there was no need for it to reach and construe that Act, . . . it is implicit in the court's decision in favor of respondents that a violation of the Classification Act gives rise to a claim for money damages for pay lost by reason of the allegedly wrongful classifications.

. . . .

[The Court discusses sovereign immunity, stating that a waiver of sovereign immunity must be unequivocal. Absent such a waiver, the Court of Claims has no jurisdiction to hear a suit against the U.S.]

We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the "purpose" section of the Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was "to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed." And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified.

In answer to this fact, the respondents and the amici make two observations. They first argue that the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a Federal statute or regulation, and makes available any and all generally accepted and important forms of redress, including money damages. It is said that the Government has confused two very different issues, namely, whether there has been a waiver of sovereignty, and whether a substantive right has been created, and it is claimed that where there has been a violation of a substantive right, the Tucker Act waives sovereign immunity as to all measures necessary to redress that violation.

The argument does not persuade us. As stated above, the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. . . . In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument of amici that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation.

. . . .

The respondents and the amici next argue that the violation of any statute or regulation relating to Federal employment automatically creates a cause of action against the United States for money damages because, if this were not so, the employee would then have a right without a remedy, inasmuch as he is denied access to the one forum where he may seek redress.

Here again we are not persuaded. Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the Federal claim--whether it be the Constitution, a statute, or a regulation--does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Eastport S. S. Corp.

v. United States, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009. We see nothing akin to this in the Classification Act or in the context of a suit seeking reclassification.

The present action, of course, is not one concerning a wrongful discharge or a wrongful suspension. In that situation, at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified. United States v. Wickersham, 201 U.S. 390 (1906). There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. United States v. McLean, 95 U.S. 750 (1878); Ganse v. United States, 180 Ct. Cl. 183, 186, 376 F.2d 900, 902 (1967). The Classification Act does not purport by its terms to change that rule, and we see no suggestion in it or in its legislative history that Congress intended to alter it.

. . . .

The situation, as we see it, is not that Congress has left the respondents remediless, as they assert, for their allegedly wrongful civil service classification, but that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification. There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other. See Edelman v. Jordan, 415 U.S. 651 (1974). Respondents, of course, have an administrative avenue of prospective relief available to them under the elaborate and structured provisions of the Classification Act. . . . Among the Act's provisions along this line are those requiring the Civil Service Commission to engage in supervisory review of an agency's classifications, and, where necessary, to review and reclassify individual positions, 5 U.S.C. § 5110; allowing the Commission to reclassify, § 5112; and allowing the

Commission even to revoke or suspend the agency's authority to classify its own positions, § 5111. Indeed, as the amici describe it: "[T]he Act is not merely a hortatory catalogue of high principles." Brief for Amici Curiae 15. The built-in avenue of administrative relief is one response to these statutory requirements. Review and reclassification may be brought into play at the request of an employee. 5 U.S.C. § 5112(b). And respondents, as has been noted, did just that. A second possible avenue of relief--and it, too, seemingly, is only prospective--is by way of mandamus, under 28 U.S.C. § 1361, in a proper Federal district court. In this way, also, the respondents have asserted their claims. See n. 5, supra.

The respondents, thus, are not entirely without remedy. They are without the remedies in the Court of Claims of retroactive classification and money damages to which they assert they are entitled. Additional remedies of this kind are for the Congress to provide and not for the courts to construct.

Finally, we note that if the respondents were correct in their claims to retroactive classification and money damages, many of the Federal statutes--such as the Back Pay Act--that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.

The Court of Claims, in the present case, sought to avoid all this by its remand to the Civil Service Commission for further proceedings. . . . The remand statute, Pub. L. 92-415, 86 Stat. 652, now codified as part of 28 U.S.C. § 1491 (1970 ed., Supp. IV), authorizes the Court of Claims to "issue orders directing restoration to . . . position, placement in appropriate duty . . . status, and correction of applicable records" in order to complement the relief afforded by a money judgment, and also to "remand appropriate matters to any administrative . . . body" in a case within its jurisdiction." The remand statute, thus, applies only to cases already within the court's jurisdiction. The present litigation is not such a case.

. . . .

C. The Back Pay Act. This statute, which the Court of Claims found unnecessary to evaluate in arriving at its decision, does not apply, in our view, to wrongful-classification claims. The Act does authorize retroactive recovery of wages whenever a Federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of" the compensation to which the employee is otherwise entitled. 5 U.S.C. § 5596(b). The statute's language was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and "other unwarranted or unjustified actions affecting pay or allowances [that] could occur in the course of reassignments and change from full-time to part-time work." S. Rep. No. 1062, 89th Cong., 2d Sess., 3 (1966). The Commission consistently has so construed the Back Pay Act. See 5 C.F.R. § 550.803(e) (1975). So has the Court of Claims. See Desmond v. United States, 201 Ct. Cl. 507, 527 (1973).

For many years Federal personnel actions were viewed as entirely discretionary and therefore not subject to any judicial review, and in the absence of a statute eliminating that discretion, courts refused to intervene where an employee claimed that he had been wrongfully discharged. . . . Relief was invariably denied where the claim was that the employee had been denied a promotion on improper grounds. See Keim v. United States, 177 U.S., at 296; United States v. McLean, 95 U.S., at 753.

Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U.S.C. § 7501, for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay. But Federal agencies continue to have discretion in determining most matters relating to the terms and conditions of Federal employment. One continuing aspect of this is the rule, mentioned above, that the Federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have

performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from it, with its enactment of the Back Pay Act. It could easily have so provided had that been its intention.

. . . .

III

We therefore conclude that neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications. This makes it unnecessary for us to consider the additional argument advanced by the United States that the Classification Act does not require that positions held by employees of one agency be compared with those of employees in another agency.

The Court of Claims was in error when it remanded the case to the Civil Service Commission for further proceedings. . . .

Note 1. The role of the Civil Service Commission discussed in Testan is now performed by OPM.

Note 2. Whether OPM decisions on classification appeals are judicially reviewable is still not a settled question. Compare Burroughs v. OPM, 764 F.2d 1300 (9th Cir. 1985) (reviewable) with Barnhart v. Devine, 771 F.2d 1515 (D.C. Cir. 1985) (not reviewable).

2.6 Promotion of Federal Employees.

a. Statutory Requirements. Unlike employees of civilian enterprises who may be promoted by receiving more pay and increased responsibility within the same position that they already occupy, Federal employees normally must change positions in order to be promoted. Because a Federal position is classified at a certain fixed level under the Classification Act, the incumbent of that position cannot move to a higher grade level while occupying that position. It is the position, not the status or experience of the employee, which determines the grade and pay level. Only if the duties and responsibilities of the position change, can the position be reclassified and possibly upgraded.

Because the Federal civil service is based on merit principles, a competitive service employee may have to take a competitive examination to qualify for promotion, unless he or she is exempt from the examination requirement. See 5 U.S.C. § 3361.

b. Regulatory Implementation. The major exemption under this provision is for Federal employees who have competitive status. Competitive status is acquired by completion of a probationary period under a career-conditional or career appointment. An individual with competitive status may be promoted without open competitive examination, subject to conditions prescribed by civil service rules and regulations. See 5 C.F.R. § 212.301.

The major condition prescribed by OPM for such promotions is that agencies may promote employees without a competitive examination only to positions covered by a clearly defined merit promotion plan. See 5 C.F.R. § 335.103.

The result of this regulatory provision has been the adoption by all Federal agencies of merit promotion plans. Chapter 335 of the Federal Personnel Manual prescribes the minimum requirements for these plans, including such things as the types of positions covered, the use of minimum qualification standards, the methods for locating candidates, the requirements for training programs, and the maintenance of records. The plans must also define an area of consideration within which eligible candidates will be sought for job vacancies. Each plan must contain a method for evaluating eligible candidates to identify those "highly qualified" for the position. This is generally accomplished by comparing the qualifications of the eligible candidates to the requirements of the job. After the highly qualified candidates are identified, they must be further evaluated to determine which of them are "best qualified" for the position. Up to ten of those best qualified for the position are then certified to the selecting official, who decides which, if any, candidate will fill the vacant position. Department of the Army implementation of FPM 335 is at AR 690-300, Chapters 335 and 335-1.

Such a promotion system rewards eligible employees already employed by an agency by insuring their consideration for job vacancies in that agency. In addition, the merit promotion plans make certain that promotions within agencies are based on merit principles rather than favoritism, nepotism or some other nonmerit

factor. Finally, however, the merit promotion plans also provide agency flexibility by enabling supervisors to fill vacancies without going through the cumbersome competitive procedures using registers.

c. Judicial Review of Promotion Decisions. Federal courts have often been asked to review agency promotion decisions by nonselected candidates. A variety of reasons why the promotion was improper have been alleged: improper notice of vacancy, lack of detail concerning qualifications, use of improper procedures, consideration of ineligible employees, or discrimination.

Historically Federal courts have reviewed such claims. See Latimer v. Department of Air Force, 657 F.2d 235 (8th Cir. 1981); Estes v. Spence, 338 F. Supp. 319 (D.D.C. 1972). However, more recently the Court of Appeals for the D.C. Circuit has refused to review such nonconstitutional claims. See Williams v. Internal Revenue Service, 745 F.2d 702 (D.C. Cir. 1984); Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983). The D.C. Circuit reasoned in its decisions that because the Civil Service Reform Act of 1978 established a comprehensive scheme of administrative and judicial review of certain designated personnel actions, no judicial review is available for other personnel actions absent a constitutional claim.

Note. In addition to limited judicial review, absent an allegation of discrimination, there is no administrative appeal procedure for individuals not selected for promotion. Also, an employee may not file a grievance concerning a promotion action unless he or she alleges that the agency followed improper procedures. 5 C.F.R. § 771.108 dealing with agency grievance coverage specifically excludes "[n]onselection for promotion from a group of properly ranked and certified candidates" from grievance coverage.

2.7 Incentive Awards.

Employees not covered by the performance management and recognition system (PMRS) and the related cash award program may be eligible for incentive awards under 5 U.S.C. Chapter 45. This chapter provides the authority for paying employees cash awards up to $25,000 for suggestions, inventions, superior accomplishments or other meritorious efforts deserving recognition. An award may either be an agency award or (in exceptional circumstances) a Presidential award.

The Office of Personnel Management regulations in 5 C.F.R. Part 451 provide a broad framework within which Federal agencies may design and operate their own incentive award programs. Agency plans must, however, be reviewed by OPM for compliance with the regulatory requirements. See 5 C.F.R. § 451.106.

Army Regulation 672-20 provides for a variety of awards: suggestion awards, invention awards, special act or service awards, sustained superior performance awards, public service awards, length of service recognition, and other honorary awards and recognition devices. Portions of this regulation are also applicable to military personnel; however, the principal purpose of this regulation is to implement the statutory provisions for incentive awards for Federal civilian employees. The regulation contains all of the criteria concerning eligibility and approval authority for each of the various types of awards.

Decisions, both positive and negative, regarding performance awards, honorary awards, and employee suggestions and inventions are management decisions and are not grievable under the Army's grievance procedures. AR 690-700, ch. 771, para. 1-7b(7).

CHAPTER 3

RESTRICTIONS ON EMPLOYEE CONDUCT

3.1 General.

Because of their unique status as public servants, Federal employees have traditionally been prohibited from engaging in certain activities, both on and off the job. Some activities of Federal employees which would otherwise be permissible in the private sector, e.g., striking (5 U.S.C. § 7311), soliciting and receiving certain gifts (5 U.S.C. § 7321 et seq.) are prohibited by statute. Numerous Federal statutes also prohibit job-related misconduct by Federal employees and create criminal and civil penalties for these actions. Thus, the disclosure of confidential information (18 U.S.C. § 1905), the misuse of the franking privilege (18 U.S.C. § 1719), the making of false entries or reports in connection with official matters (18 U.S.C. § 2073) all carry criminal penalties, and the commission of prohibited personnel practices against applicants or employees (5 U.S.C. § 2302) carries civil penalties.

There are two principal purposes for these restrictions. First, they ensure that the executive branch of the Government can operate effectively without undue pressures from various financial and political interests. Second, they help retain the integrity of the Government so that the citizenry will continue to have faith and confidence in its operation. Without these statutorily imposed limitations on Federal employee activities, it is possible that the individuals with political power and large financial interests would control the operation of the Federal agencies to a very large extent.

3.2 Ethical Standards of Conduct for Federal Employees.

a. Presidential Standards. Congress, in 5 U.S.C. § 7301, provided that the "President may prescribe regulations for the conduct of employees in the executive branch." Various Presidents have exercised this authority. See Executive Order 11222 (May 8, 1965); Executive Order 12565 (September 25, 1986); Executive Order 12674 (April 12, 1989). Most recently President Bush prescribed ethical standards for Federal employees in Executive Order 12731, dated October 17, 1990. This executive order sets out specific prohibitions and requirements for Federal employees and delegates to the Office of Government Ethics (OGE), in consultation with

the Attorney General and OPM, authority to establish a single, comprehensive set of standards of conduct applicable to all executive branch employees. In addition, each agency head is directed to supplement the OGE regulations with regulations tailored to the agency's particular functions and activities. Moreover, the executive order contains a requirement for annual training in ethics and standards of conduct for agency employees.

Executive Order 12731 of October 17, 1990
PRINCIPLES OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

By virtue of the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish fair and exacting standards of ethical conduct for all executive branch employees, it is hereby ordered that Executive Order 12674 of April 12, 1989, is henceforth modified to read as follows:

"EXECUTIVE ORDER

"_____

"PRINCIPLES OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

"By virtue of the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish fair and exacting standards of ethical conduct for all executive branch employees, it is hereby ordered as follows:

"Part I--Principles of Ethical Conduct

"Section 101. Principles of Ethical Conduct. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each Federal employee shall respect and adhere to the fundamental principles of ethical service as implemented in regulations promulgated under sections 201 and 301 of this order:

"(a) Public service is a public trust, requiring employees to place loyalty to the

Constitution, the laws, and ethical principles above the private gain.

"(b) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

"(c) employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

"(d) An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

"(e) Employees shall put forth honest effort in the performance of their duties.

"(f) Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government.

"(g) Employees shall not use public office for private gain.

"(h) Employees shall act impartially and not give preferential treatment to any private organization or individual.

"(i) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

"(j) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

"(k) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

"(l) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

"(m) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

"(n) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.

"Sec. 102. Limitations on Outside Earned Income.

"(a) No employee who is appointed by the President to a full-time noncareer position in the executive branch (including full-time noncareer employees in the White House, the Office of Policy Development, and the Office of Cabinet Affairs), shall receive any earned income for any outside employment or activity performed during that Presidential appointment.

"(b) The prohibition set forth in subsection (a) shall not apply to any full-time noncareer employees employed pursuant to 3 U.S.C. 105 and 3 U.S.C. 107(a) at salaries below the minimum rate of basic pay then paid for GS-9 of the General Schedule. Any outside employment must comply with relevant agency standards of conduct, including any requirements for approval of outside employment.

"Part II--Office of Government Ethics Authority

"Sec. 201. The Office of Government Ethics. The Office of Government Ethics shall be responsible for administering this order by:

"(a) Promulgating, in consultation with the Attorney General and the Office of Personnel Management, regulations that establish a single, comprehensive, and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable.

"(b) Developing, disseminating, and periodically updating an ethics manual for employees of the executive branch describing the applicable statutes, rules, decisions, and policies.

"(c) Promulgating, with the concurrence of the Attorney General, regulations interpreting the provisions of the post-employment statute, section 207 of title 18, United States Code; the general conflict-of-

interest statute, section 208 of title 18, United States Code; and the statute prohibiting supplementation of salaries, section 209 of title 18, United States Code.

"(d) Promulgating, in consultation with the Attorney General and the Office of Personnel Management, regulations establishing a system of nonpublic (confidential) financial disclosure by executive branch employees to complement the system of public disclosure under the Ethics in Government Act of 1978. Such regulations shall include criteria to guide agencies in determining which employees shall submit these reports.

"(e) Ensuring that any implementing regulations issued by agencies under this order are consistent with and promulgated in accordance with this order.

"**Sec. 202.** Executive Office of the President. In that the agencies within the Executive Office of the President (EOP) currently exercise functions that are not distinct and separate from each other within the meaning and for the purposes of section 207(e) of title 18, United States Code, those agencies shall be treated as one agency under section 207(c) of title 18, United States Code.

"Part III--Agency Responsibilities

"**Sec. 301.** Agency Responsibilities. Each agency head is directed to:

"(a) Supplement, as necessary and appropriate, the comprehensive executive branch-wide regulations of the Office of Government Ethics, with regulations of special applicability to the particular functions and activities of that agency. Any supplementary agency regulations shall be prepared as addenda to the branch-wide regulations and promulgated jointly with the Office of Government Ethics, at the agency's expense, for inclusion in Title 5 of the Code of Federal Regulations.

"(b) Ensure the review by all employees of this order and regulations promulgated pursuant to the order.

"(c) Coordinate with the Office of Government Ethics in developing annual

agency ethics training plans. Such training shall include mandatory annual briefings on ethics and standards of conduct for all employees appointed by the President, all employees in the Executive Office of the President, all officials required to file public or nonpublic financial disclosure reports, all employees who are contracting officers and procurement officials, and any other employees designated by the agency head.

"(d) Where practicable, consult formally or informally with the Office of Government Ethics prior to granting any exemption under section 208 of title 18, United States Code, and provide the Director of the Office of Government Ethics a copy of any exemption granted.

"(e) Ensure that the rank, responsibilities, authority, staffing, and resources of the Designated Agency Ethics Official are sufficient to ensure the effectiveness of the agency ethics program. Support should include the provision of a separate budget line item for ethics activities, where practicable.

"Part IV--Delegations of Authority

"Sec. 401. Delegations to Agency Heads. Except in the case of the head of an agency, the authority of the President under sections 203(d), 205(e), and 208(b) of title 18, United States Code, to grant exemptions or approvals to individuals, is delegated to the head of the agency in which an individual requiring an exemption or approval is employed or to which the individual (or the committee, commission, board, or similar group employing the individual) is attached for purposes of administration.

"Sec. 402. Delegations to the Counsel to the President.

"(a) Except as provided in section 401, the authority of the President under sections 203(d, 205(e), and 208(b) of title 18, United States Code, to grant exemptions or approvals for Presidential appointees to committees, commissions, boards, or similar

groups established by the President is delegated to the Counsel to the President.

"(b) The authority of the President under sections 203(d), 205(e), and 208(b) of title 18, United States Code, to grant exemptions or approvals for individuals appointed pursuant to 3 U.S.C. 105 and 3 U.S.C. 107(a), is delegated to the counsel to the President.

"Sec. 403. Delegation Regarding Civil Service. The Office of Personnel Management and the Office of Government Ethics, as appropriate, are delegated the authority vested in the President by 5 U.S.C. 7301 to establish general regulations for the implementation of this executive order.

. . . .

[Reprinted from 3 C.F.R., 1991, pp. 306-310]

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b. Regulatory Guidance. As of the updating of this publication, OGE had not issued the Government-wide standards of conduct regulations referenced in Executive Order 12731. Until such regulations are issued, current regulations issued by OPM and individual agencies remain effective. See Executive Order 12731, sec. 502. The principal regulations currently in effect Government-wide are promulgated by OPM and are codified in 5 C.F.R. Part 735, Employee Responsibilities and Conduct. These regulations impose on each Federal agency the duty to prepare its own regulations prescribing ethical standards of conduct. All agency regulations must be approved by the Office of Personnel Management before they can become effective. Once approved, OPM requires the agency to (1) publish them in the Federal Register, (2) furnish a copy to each existing employee and each new employee, and (3) bring the regulations to the attention of each employee annually. 5 C.F.R. § 735.104.

In addition to directing the preparation of agency regulations, the OPM regulations (in Subpart B of Part 735) contain substantive standards of ethical conduct which elaborate on the broad standards in the executive orders. Specifically addressed in the OPM regulations are the following prohibited acts:

1. Solicitation or acceptance of gifts, entertainment or favors from persons conducting operations or contracting with the agency. [§ 735.202(a)]

2. Solicitation of other employees for contributions for other than nominal gifts to superiors. [§ 735.202(d)]

3. Acceptance of gifts and decorations from foreign governments. [§ 735.202(e)]

4. Engaging in outside employment incompatible with official duties. [§ 735.203]

5. Retention of financial interests conflicting or appearing to conflict with official duties or responsibilities. [§ 735.204]

6. Diversion of Government property for other than official use. [§ 735.205]

7. Use of official information to further a private interest. [§ 735.206]

8. Failure to pay just financial obligations. [§ 735.207]

9. Gambling on Government property or while on duty. [§ 735.208]

Further elaboration of these prohibited activities is contained in FPM Chapter 735.

Within the Department of Defense, there is regulatory guidance promulgated by both DoD and the individual military departments under the authority of the executive orders and 5 C.F.R. Part 735. DoD Directive 5500.7, "Standards of Conduct," codified in 32 C.F.R. Part 40, establishes ethical standards applicable to all DoD civilian employees and active duty military personnel. Each of the individual services has further implemented this directive with its own regulations and instructions, e.g., AR 600-50 contains the Army requirements and SecNavInst. 5370.2E contains the Navy requirements.

In addition to the specifically prohibited acts enumerated in 5 C.F.R. Part 735 noted above, 5 C.F.R. § 735.210 requires each employee to acquaint himself or herself with each statute that relates to his or her particular job. This section provides a handy listing

of major statutes containing prohibitions affecting Federal employees.

c. Ethics in Government Act. Congressional concern over the ethical standards applicable to Federal employees led to the enactment of the Ethics in Government Act of 1978, Public Law No. 95-521 (26 Oct 78), as amended by Public Law No. 96-19 (3 Jun 79) and Public Law No. 96-28 (22 Jun 79). This law, which was designed to "preserve and promote the integrity of public officials and institutions," created the Office of Government Ethics (OGE) within the Office of Personnel Management. On October 1, 1989, pursuant to Public Law No. 100-598, OGE became a separate executive agency. OGE is responsible for developing regulations and recommending policies to OPM concerning conflict of interest and ethics in the executive branch. In addition, OGE has a formal advisory opinion service to assist Federal agencies in interpreting statutes and regulations dealing with ethical standards for Federal employees. Regulations have been published by OGE and have been incorporated in 5 C.F.R. Chapter XVI (Parts 2600-2638).

In addition to creating OGE, the Ethics in Government Act also amended and expanded the post-employment conflict of interest prohibitions in 18 U.S.C. § 207 and established detailed financial disclosure requirements for all three branches of the Federal Government. As a result of the Act, § 207 now contains three categories of prohibited acts: permanent prohibitions, two year prohibitions, and one year prohibitions. These prohibitions generally restrict former officers and employees from knowingly participating as agent, attorney or representative for another person before certain Federal agencies in connection with proceedings in which the employee was somehow involved as a Federal employee. The prohibitions vary depending upon the nature of the representation undertaken, the former grade or rank of the employee, and the degree of the former employee's responsibility over the specific activity or matter. Violation of these prohibitions could result in criminal penalties.

The financial disclosure provisions of the Act require all civilians holding positions at GS-16 or above and all military personnel at grade 0-7 or above to file annual financial reports. The Act also requires other types of reports upon nomination for certain positions and upon termination from a covered position. These reports require detailed listings of various types

of financial holdings and earnings (if they exceed certain dollar amounts), such as outside income and honoraria, gifts, reimbursements, interests in property, debts and other liabilities, and transactions in property and securities. These reports, which also must include financial information on the income and holdings of the employee's spouse and dependent children, are reviewed for potential conflicts of interest and made available to the public for six years. Falsification of required information or a failure to file can result in a civil penalty up to $5000.

d. Ethics Reform Act. On November 30, 1989, the Ethics Reform Act of 1989, Public Law No. 101-194, was signed into law by President Bush. The legislation contained numerous reforms designed to strengthen Federal ethical standards. Key reforms in the Act--some of which were effective upon passage of the Act, while others took effect on January 1, 1990, and still others on January 1, 1991--include: the extension of post-employment and other restrictions to the legislative branch; a controversial ban on receipt of honoraria by Federal employees; limits on outside earned income for higher-salaried, noncareer employees in all three branches of Government; increased financial disclosure requirements; and limitations on gifts to superiors and travel. OGE has promulgated regulations implementing the Act's provisions. See 5 C.F.R. Part 2634 (financial disclosure requirements); 5 C.F.R. Part 2635 (limitations on outside employment and honoraria ban); 5 C.F.R. Parts 2637 and 2641 (post-employment restrictions); 5 C.F.R. Part 2638 (agency ethics program responsibilities).

3.3 Political Activity.

a. Generally. Federal statutes restrict partisan and other political activities of Federal employees. Some of these statutes, such as 5 U.S.C. §§ 7321, 7322, and 7323, are remnants of the original civil service reform acts of 1876 and 1883. The others, those which specifically prohibit partisan political activities, i.e., 5 U.S.C. §§ 7324-7327, were enacted in 1940 and are known as the Hatch Act.

Nearly all Federal employees in the executive branch are subject to the provisions of the Hatch Act, regardless of whether they are in the competitive or excepted service or whether they are full-time or part-time employees. Even experts and consultants employed by the Federal Government on an intermittent basis are covered by the Act's restrictions on the days that they

are employed by the Government. A Federal employee does not escape the prohibitions of the Hatch Act during nonworking hours; and even when the employee is on leave or furlough, the prohibitions of the Act apply.

b. The Statutory Restrictions. The Hatch Act clearly proscribes certain conduct and mandates removal as the usual penalty for violation of its restrictions. All of the statutory provisions which restrict the political activities of Federal employees are printed below. The Hatch Act begins with § 7324.

5 U.S.C. § 7321. Political contributions and services.

> The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that an employee in an Executive agency or in the competitive service is not obliged, by reason of that employment, to contribute to a political fund or to render political service, and that he may not be removed or otherwise prejudiced for refusal to do so.

5 U.S.C. § 7322. Political use of authority or influence; prohibition.

> The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that an employee in an Executive agency or in the competitive service may not use his official authority or influence to coerce the political action of a person or body.

5 U.S.C. § 7323. Political contributions; prohibition.

> An employee in an Executive agency (except one appointed by the President, by and with the advice and consent of the Senate) may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a thing of value for political purposes. An employee who violates this section shall be removed from the service.

5 U.S.C. § 7324. Influencing elections; taking part in political campaigns; prohibitions; exceptions.

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not--

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

(d) Subsection (a)(2) of this section does not apply to--

(1) an employee paid from the appropriation for the office of the President;

(2) the head or the assistant head of an Executive department or military department;

(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

(4) the Mayor of the District of Columbia, the members of the Council of the District of Columbia, or the Chairman of the Council of the District of Columbia, as established by the District of Columbia Self-Government and Government Reorganization Act; or

(5) the Recorder of Deeds of the District of Columbia.

5 U.S.C. § 7325. Penalties.

An employee or individual who violates section 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board.

5 U.S.C. § 7326. Nonpartisan political activity permitted.

Section 7324(a)(2) of this title does not prohibit political activity in connection with--

(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

5 U.S.C. § 7327. Political activity permitted; employees residing in certain municipalities.

The Office of Personnel Management may prescribe regulations permitting employees and individuals to whom section 7324 of this title applies to take an active part in political management and political campaigns involving the municipality or other political subdivision in which they reside, to the extent the Office considers it to be in their domestic interest, when--

(1) the municipality or political subdivision is in Maryland or Virginia and in the immediate vicinity of the District of Columbia, or is a municipality in which the majority of voters are employed by the Government of the United States; and

(2) the Office determines that because of special or unusual circumstances which exist in the municipality or political subdivision it is in the domestic interest of the employees and individuals to permit that political participation.

Legislation which would significantly ease the Hatch Act restrictions on political activities of civilian employees has been introduced in the last several congresses. Most recently, the 101st Congress failed to override President Bush's June 15, 1990, veto of a bill which would have permitted civilian employees to engage in partisan politicking on the employee's own time except running for partisan office and soliciting political contributions from the general public.

c. Regulations Governing Political Activity. The Hatch Act delegates certain rule-making authority to the Civil Service Commission, now the Office of Personnel Management, in 5 U.S.C. § 7324(a), and OPM has exercised this authority in its regulations at 5 C.F.R. Part 733. The regulations in Part 733 list those activities which are permissible and those which are prohibited under the Act. Examples of permissible activities listed in 5 C.F.R. § 733.111 include displaying a political picture, sticker or badge; expressing a personal opinion privately or publicly on a political convention; and making a financial contribution to a political party or organization. Examples of prohibited acts are listed in 5 C.F.R. § 733.122, for example: soliciting votes for

a candidate for public office in a partisan election; soliciting funds for partisan political purposes; acting as a poll watcher on behalf of a partisan candidate or political party; and serving as a delegate to a political party convention.

The key to whether particular conduct is prohibited by the Hatch Act is determining if it involves partisan political activity or falls within an exemption. 5 C.F.R. § 733.124 exempts two types of elections: (1) nonpartisan elections, and (2) elections in certain designated municipalities when it is in the interest of the community to permit Federal employee participation. Obviously, if the activity is nonpartisan in nature, for example, on behalf of a constitutional amendment, the Hatch Act does not apply. Under the second part of the exemption, the Office of Personnel Management has designated a number of political subdivisions in Maryland, Virginia, the District of Columbia, and a handful of other communities as exempt communities. An employee who resides in one of these communities may participate in a partisan election or campaign for local offices in that community so long as the participation is as or on behalf of an independent candidate and does not interfere with the performance of the employee's duties.

If a violation of the Hatch Act is suspected, the regulations prescribe a procedure for investigating the incident. Violations by competitive service employees are investigated by the Office of Special Counsel; those by excepted service employees are investigated by the employing agency. The procedures are similar to those for adverse actions and include a hearing unless waived by the employee. See 5 C.F.R. § 733.201 and 5 C.F.R. Part 1201, Subpart D.

d. Merit Systems Protection Board Review. When the investigation indicates that disciplinary action is warranted, a complaint may be filed by the Special Counsel with the MSPB. 5 U.S.C § 1216(a)(1); 5 C.F.R. § 1201.123(a)(3).

If the Board finds a violation of 5 U.S.C. § 7324, it must order the employee's removal unless it finds by unanimous vote that removal is not warranted. In this case it must impose a suspension without pay of not less than 30 days. 5 C.F.R. 1201.126(f).

Special Counsel v. Dukes
81 F.M.S.R. 5520 (1981)

(This is a summary of the Board's decision. The full text of the opinion maybe found at 8 M.S.P.R. 549 (1981).)

This case was originally brought before the Board on a complaint brought by the MSPB Special Counsel charging the respondent with taking an active part in a political campaign in violation of the Hatch Act. 5 U.S.C. 7324. The Board's Administrative Law Judge (ALJ) recommended that the Board accept a settlement agreement reached by the parties. The agreement included a stipulation of fact reflecting that a violation of the Hatch Act occurred, and called for a penalty of suspension for 15 days. 5 U.S.C. 7325 provides the following with regard penalties for Hatch Act violations: "An employee or individual who violates section 7324 of this title shall be removed from his position, and funds appropriated for the position from which removed thereafter may not be used to pay the employee or individual. However, if the Merit Systems Protection Board finds by unanimous vote that the violation does not warrant removal, a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board." The minimum penalty of a 30-day suspension has been in effect since 1962. Prior to that, a 90-day minimum was in effect for approximately 10 years, and, before that, removal was the only penalty recognized. During the Board's start-up phase, it erroneously adopted 5 C.F.R. 1201.126 (1979) into its regulations which permitted a full panoply of penalty opinions without regard to the statutory minimum imposed by section 7325. However, on 08/11/81, the Board notified the public of a proposed amendment to 5 C.F.R. 1201.126, which acknowledges the continuing validity of the statutory minimum penalty imposed by the Hatch Act [44 Fed. Reg. 40,702 (1981)]. Nonetheless, the Special Counsel argued that the Board has the discretion to order a penalty of less than 30 days when it has been agreed to by the parties. The Special Counsel contended

that such a finding by the Board would serve public policy by conserving scarce Special Counsel resources, increased deterrence against Hatch Act violations, and responsiveness to mitigating circumstances. The Special Counsel, in arguing that the Board may ignore the Congressionally imposed minimum penalty, relied on cases in which courts have sustained settlement agreements between Government prosecutors and private parties which were approved by lower courts and later challenged by one of the private parties. The Board agreed with the general rule applied by the courts in upholding the settlement agreements, that, absent statutory constraints, prosecutors have extremely broad authority to enter into settlements which the courts may approve. Further, the Board stated that it did not necessarily dispute the Special Counsel's authority to settle a case on terms different than those of the statute prior to bringing the case to the Board. However, the Board found that in the cases relied on by the Special Counsel, the courts were not bound by any statutory minimum sanction. The Board concluded that it could not order a penalty not permitted by the Hatch Act, and remanded the case for further proceedings consistent with its opinion.

e. Judicial Interpretation of the Hatch Act. The U.S. Supreme Court has considered the constitutionality of the Hatch Act in two cases. Compare the Court's view of the Act and the theories upon which the plaintiffs based their actions in the cases that follow.

United Public Workers of America v. Mitchell
330 U.S. 75 (1946)

MR. JUSTICE REED delivered the opinion of the Court.

. . . .

The present appellants sought an injunction before a statutory three-judge district court of the District of Columbia against appellees, members of the United States Civil Service Commission to prohibit them from enforcing against appellants the provisions of the second sentence of § 9(a) of the Hatch Act for the reason that the sentence is repugnant to the Constitution of

the United States. A declaratory judgment of the unconstitutionality of the sentence was also sought. The sentence referred to reads, "No officer or employee in the executive branch of the Federal Government . . . shall take any active part in political management or in political campaigns."

Various individual employees of the Federal executive civil service and the United Public Workers of America, a labor union with these and other executive employees as members, as a representative of all its members, joined in the suit. It is alleged that the individuals desire to engage in acts of political management and in political campaigns. Their purposes are as stated in the excerpt from the complaint set out in the margin. From the affidavit it is plain, and we so assume, that these activities will be carried on completely outside of the hours of employment. Appellants challenge the second sentence § 9(a) as unconstitutional for various reasons. They are set out below in the language of the complaint.

None of the appellants, except George P. Poole, has violated the provisions of the Hatch Act.

. . . .

At the threshold of consideration, we are called upon to decide whether the complaint states a controversy cognizable in this Court. . . [The Court concludes that the appellants, except for George P. Poole, have not presented a justiciable controversy. The other appellants had alleged only a general threat of future enforcement of the law, rather than a direct threat of punishment.]

The appellant Poole does present by the complaint and affidavit matters appropriate for judicial determination. The affidavits filed by appellees confirm that Poole has been charged by the Commission with political activity and a proposed order for his removal from his position adopted subject to his right under Commission procedure to reply to the charges and to present further evidence in refutation. We proceed to consider the controversy over

constitutional power at issue between Poole and the Commission as defined by the charge and preliminary finding upon one side and the admissions of Poole's affidavit upon the other. . . .

This brings us to consider the narrow but important point involved in Poole's situation. Poole's stated offense is taking an "active part in political management or in political campaigns." He was a ward executive committeeman of a political party and was politically active on election day as a worker at the polls and a paymaster for the services of other party workers. The issue for decision and the only one we decide is whether such a breach of the Hatch Act and Rule 1 of the Commission can, without violating the Constitution, be made the basis for disciplinary action.

When the issue is thus narrowed, the interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel. Only while the employee is politically active, in the sense of Rule 1, must he withhold expression of opinion on public subjects. See Note 6. We assume that Mr. Poole would be expected to comment publicly as committeeman on political matters, so that indirectly there is an attenuated interference. We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment. Appellants' objections under the Amendments are basically the same.

We do not find persuasion in appellants' argument that such activities during free time are not subject to regulation even though admittedly political activities cannot be indulged in during working hours.

The influence of political activity by Government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours. . . .

. . . .

As pointed out hereinbefore in this opinion, the practice of excluding classified employees from party offices and personal political activity at the polls has been in effect for several decades. Some incidents similar to those that are under examination here have been before this Court and the prohibition against certain types of political activity by office holders has been upheld. The leading case was decided in 1882. Ex parte Curtis, 106 U.S. 371. . . . The decisive principle was the power of Congress, within reasonable limits, to regulate, so far as it might deem necessary, the political conduct of its employees. . . .

The right to contribute money through fellow employees to advance the contributor's political theories was held not to be protected by any Constitutional provision. It was held subject to regulation. A dissent by Mr. Justice Bradley emphasized the broad basis of the Court's opinion. He contended that a citizen's right to promote his political views could not be so restricted merely because he was an official of Government.

No other member of the Court joined in this dissent. The conclusion of the Court, that there was no constitutional bar to regulation of such financial contributions of public servants as distinguished from the exercise of political privileges such as the ballot, has found acceptance in the subsequent practice of Congress and the growth of the principle of required political neutrality for classified public servants as a sound element for efficiency. The conviction that an actively partisan governmental personnel threatens good administration has deepened since Ex parte Curtis. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections.

. . . .

The provisions of § 9 of the Hatch Act and the Civil Service Rule 1 are not dissimilar in purpose from the statutes against political contributions of money. The prohibitions now under discussion are directed as political contributions of energy by Government employees.

These contributions, too, have a long background of disapproval. Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.

Another Congress may determine that, on the whole, limitations on active political management by Federal personnel are unwise. The teaching of experience has evidently led Congress to enact the Hatch Act provisions. To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system. Congress is not politically naive or regardless of public welfare or that of the employees. It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of Federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the Act.

The argument that political neutrality is not indispensable to a merit system for Federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible. Modern American politics involves organized political parties. Many classifications of Government employees have been accustomed to work in politics--national, state and local--as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of Federal employees so as to avoid a tendency toward a one-party system.

It may have considered that parties would be more truly devoted to the public welfare if public servants were not over active politically.

. . . .

It is urged, however, that Congress has gone further than necessary in prohibiting political activity to all types of classified employees. It is pointed out by appellants "that the impartiality of many of these is a matter of complete indifference to the effective performance" of their duties. Mr. Poole would appear to be a good illustration for appellants' argument. The complaint states that he is a roller in the Mint. We take it this is a job calling for the qualities of a skilled mechanic and that it does not involve contact with the public. Nevertheless, if in free time he is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors. Congress may have thought that Government employees are handy elements for leaders in political policy to use in building a political machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. There are hundreds of thousands of United States employees with positions no more influential upon policy determination than that of Mr. Poole. Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation.

There is a suggestion that administrative workers may be barred, constitutionally, from political management and political campaigns while the industrial workers may not be barred, constitutionally, without an act "narrowly and selectively drawn to define and punish the specific conduct." A ready answer, it seems to us, lies in the fact that the prohibition of § 9(a) of the Hatch Act "applies without discrimination to all employees whether industrial or administrative" and that the

Civil Service Rules, by § 15 made a part of the Hatch Act, makes clear that industrial workers are covered in the prohibition against political activity. Congress has determined that the presence of Government employees, whether industrial or administrative, in the ranks of political party workers is bad. Whatever differences there may be between administrative employees of the Government and industrial workers in its employ are differences in detail so far as the constitutional power under review is concerned. Whether there are such differences and what weight to attach to them, are all matters of detail for Congress. We do not know whether the number of Federal employees will expand or contract; whether the need for regulation of their political activities will increase or diminish. The use of the constitutional power or regulation is for Congress, not for the courts.

We have said that Congress may regulate the political conduct of Government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. . . . Where actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

Section 15 of the Hatch Act, note 3 above, defines an active part in political management or political campaigns as the same activities that the United States Civil Service Commission has determined to be prohibited to classified civil service employees by the provisions of the Civil Service rules when § 15 took effect July 19, 1940. 54 Stat. 767, c 640, 18 USCA § 61a, 7 FCA title 18, § 61a. The activities of Mr. Poole, as ward executive committeeman and a worker at the polls, obviously fall within the prohibitions of § 9 of Hatch Act

taking an active part in political management and political campaigns. They are also covered by the prior determinations of the Commission. We need to examine no further at this time into the validity of the definition of political activity and § 15.

The judgment of the District Court is accordingly affirmed.

. . . .

United States Civil Service Commission
v.
National Association of Letter Carriers
413 U.S. 548 (1973)

MR. JUSTICE WHITE delivered the opinion of the Court.

On December 11, 1972, we noted probable jurisdiction of this appeal, 409 U.S. 1058, based on a jurisdictional statement presenting the single question whether the prohibition in § 9(a) of the Hatch Act, now codified in 5 U.S.C. § 7324(a)(2), against Federal employees taking "an active part in political management or in political campaigns," is unconstitutional on its face.

. . . .

A divided three-judge court sitting in the District of Columbia had held the section unconstitutional. 346 F. Supp. 578 (1972). We reverse the judgment of the District Court.

I

The case began when the National Association of Letter Carriers, six individual Federal employees and certain local Democratic and Republican political committees filed a complaint, asserting on behalf of themselves and all Federal employees that 5 U.S.C. § 7324(a)(2) was unconstitutional on its face and seeking an injunction against its enforcement.

Each of the plaintiffs alleged that the Civil Service Commission was enforcing, or threatening to enforce, the Hatch Act's prohibition against active participation in political management or political campaigns with respect to certain defined activity in which that plaintiff desired to engage. The

Union, for example, stated among other things that its members desired to campaign for candidates for public office. The Democratic and Republican Committees complained of not being able to get Federal employees to run for state and local offices. Plaintiff Hummel stated that he was aware of the provision of the Hatch Act and that the activities he desired to engage in would violate that Act as, for example, his participating as a delegate in a party convention or holding office in a political club.

A three-judge court was convened, and the case was tried on both stipulated evidence and oral testimony. The District Court then ruled that § 7324(a)(2) was unconstitutional on its face and enjoined its enforcement. The court recognized the "well-established governmental interest in restricting political activities by Federal employees which [had been] asserted long before enactment of the Hatch Act," 346 F. Supp., at 579, as well as the fact that the "appropriateness of this governmental objective was recognized by the Supreme Court of the United States when it endorsed the objective of the Hatch Act. United Public Workers v. Mitchell, 330 U.S. 75 . . . (1947). . . ." Id., at 580. The District Court ruled, however, that United Public Workers v. Mitchell, 330 U.S. 75 (1947), left open the constitutionality of the statutory definition of "political activity," . . . and proceeded to hold that definition to be both vague and overbroad, and therefore unconstitutional and unenforceable against the plaintiffs in any respect. The District Court also added, id., at 585, that even if the Supreme Court in Mitchell could be said to have upheld the definitional section in its entirety, later decisions had so eroded the holding that it could no longer be considered binding on the District Court.

. . . .

We unhesitatingly reaffirm the Mitchell holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls, and acting as party paymaster for other party workers. An Act of Congress

going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party, becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by Federal employees.

A.

Such decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that Federal service should depend upon meritorious performance rather than political service, and that the political influence of Federal employees on others and on the electoral process should be limited. That this judgment eventuated is indisputable, and the major steps in reaching it may be simply and briefly set down.

Early in our history, Thomas Jefferson was disturbed by the political activities by some of those in the Executive Branch of the Government. See 10 J. Richardson, Messages and Papers of the Presidents 98 (1899). The heads of the executive departments, in response to his directive, issued an order stating in part that '[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take part in the business of electioneering, that being deemed inconsistent with the spirit of

the Constitution and his duties to it." Id., at 98-99.

There were other voices raised in the 19th century against the mixing of partisan politics and routine Federal service. But until after the Civil War, the spoils system under which Federal employees came and went depending upon party service and changing administrations, rather than meritorious performance, was much the vogue and the prevalent basis for governmental employment and advancement. 1 Report of Commission on Political Activity of Government Personnel, Findings and Recommendations 7-8 (1968). That system did not survive. Congress authorized the President to prescribe regulations for the creation of a civil service of Federal employees in 1871, 16 Stat. 514; but it was the Civil Service Act of 1883, c. 27, 22 Stat. 403, known as the Pendleton Act, H. Kaplan, The Law of Civil Service 9-10 (1958), that declared that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service" and that "no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." 22 Stat. 404. That Act authorized the President to promulgate rules to carry the Act into effect and created the Civil Service Commission as the agency or administrator of the Act under the rules of the President.

. . . .

Civil Service Rule I covered only the classified service. The experience of the intervening years, particularly that of the 1936 and 1938 political campaigns, convinced a majority in Congress that the prohibition against taking an active part in political management and political campaigns should be extended to the entire Federal service. 84 Cong. Rec. 4304, 9595, 9604, and 9610. A bill introduced for this purpose, S. 1871, "to prevent pernicious political activities," easily passed the Senate, 84 Cong. Rec. 4191-4192; but both the constitutionality and the advisability of purporting to restrict the political activities of employees were heatedly

debated in the House. Id., at 9594-9639. The bill was enacted, however, 53 Stat. 1147. This was the so-called Hatch Act, named after the Senator who was its chief proponent. In its initial provisions, §§ 1 and 2, it forbade anyone from coercing or interfering with the vote of another person and prohibited Federal employees from using their official positions to influence or interfere with or affect the election or nomination of certain Federal officials. Sections 3 and 4 of the Act prohibited the promise of, or threat of termination of, employment or compensation for the purpose of influencing or securing political activity, or support or opposition for any candidate.

Section 9(a), which provided the prohibition against political activity now found in 5 U.S.C. § 7324(a)(2), with which we are concerned in this case, essentially restated Civil Service Rule I, with an important exception. It made it

> "unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee of the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects."

Excepted from the restriction were the President, Vice President, and specified officials in policy-making positions. Section 9(b) required immediate removal for violators and forbade the use of appropriated funds thereafter to pay compensation to such persons.

Section 9 differed from Civil Service Rule I in important respects. It applied to all persons employed by the Federal Government, with limited exceptions; it made dismissal from office mandatory upon an

adjudication of a violation; and, whereas Civil Service Rule I had stated that persons retained the right to express their private opinions on all political subjects, the statute omitted the word "private" and simply privileged all employees "to express their opinions on all political subjects."

. . . .

In 1950, § 9(b), of the Act, requiring removal from office for violating the Act, was amended by providing that the Commission by unanimous vote could, impose a lesser penalty, but in no case less than 90 days' suspension without pay. 64 Stat. 475. The minimum sanction was reduced to 30 days' suspension without pay in 1962. 76 Stat. 750.

In 1966, Congress determined to review the restrictions of the Hatch Act on the partisan political activities of public employees. For this purpose, the Commission on Political Activity of Government Personnel was created. 80 Stat. 868. The Commission reported in 1968, recommending some liberalization of the political-activity restrictions on Federal employees, but not abandoning the fundamental decision that partisan political activities by Government employees must be limited in major respects. 1 Report of Commission on Political Activity of Government Personnel, supra. Since that time, various bills have been introduced in Congress, some following the Commission's recommendations and some proposing much more substantial revisions of the Hatch Act. In 1972, hearings were held on some proposed legislation; but no new legislation has resulted.

This account of the efforts by the Federal Government to limit partisan political activities by those covered by the Hatch Act should not obscure the equally relevant fact that all 50 States have restricted the political activities of their own employees.

. . . .

But as the Court held in Pickering v. Board of Education, 391 U.S. 563, 568 (1968), the Government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with

regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [Government], as an employer, in promoting the efficiency of the public services it performs through its employees." Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.

It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government--the impartial execution of the laws--it is essential that Federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective Government. . . .

There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Another major concern of the restriction against partisan activities by Federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not

be employed to build a powerful, invincible and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power--or the party out of power, for that matter--using the thousands or hundreds of thousands of Federal employees, paid for a public expense, to man its political structure and political campaigns. E.g., 84 Cong. Rec. 9595, 9598, 9604, 9610.

A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time t. make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. . . . It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of Federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another. . . .

Neither the right to associate nor the right to participate in political activities is absolute in any event. See, e.g., Rosario v. Rockerfeller, 410 U.S. 752 (1973); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Bullock v. Carter, 405 U.S. 134, 140-141 (1972); Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Nor are the management, financing, and conduct of political campaigns wholly free from governmental regulation. We agree with the basic holding of Mitchell that plainly identifiable acts of political management and political campaigning on the part of Federal employees may constitutionally be prohibited. Until now this has been the judgment of the lower Federal courts, and we do not understand the District Court in this case to have questioned the constitutionality of a law

that was specifically limited to prohibiting the conduct in which Mr. Poole in the Mitchell case admittedly engaged.

III

But however constitutional the proscription of identifiable partisan conduct in understandable language may be, the District Court's judgment was that § 7324(a)(2) was both unconstitutionally vague and fatally overbroad. Appellees make the same contentions here, but we cannot agree that the section is unconstitutional on its face for either reason.

. . . .

. . . The principal issue with respect to this statutory scheme is what Congress intended when it purported to define "an active part in political management or in political campaigns," as meaning the prior interpretations by the Civil Service Commission under Civil Service Rule I which contained the identical prohibition.

. . . .

. . . As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations. With this in mind and having examined with some care the proceedings surrounding the passage of the 1940 Act and adoption of the substitute for § 15, we think it appears plainly enough that Congress intended to deprive the Civil Service Commission of rulemaking power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate the prohibition against taking an active part in political management or political campaigns. But it is equally plain, we think, that Congress accepted the fact that the Commission had been performing its investigative and adjudicative role under Civil Service Rule I since 1907 and the Commission had, on a case-by-case basis, fleshed out the meaning of Rule I and so developed a body of law with respect to what partisan conduct by Federal employees was forbidden by the rule. 86 Cong. Rec. 2342, 2353. It is also apparent, in our view, that the rules that had evolved over the years from repeated

adjudications were subject to sufficiently clear and summary statement for the guidance of the classified service. Many times during the debate on the floor of the Senate, Senator Hatch and others referred to a summary list of such prohibitions . . . the Senator's ultimate reference being to Civil Service Form No. 1236 of September 1939, the pertinent portion of which he placed in the Record, id., at 2938-2940, and which was the Commission's then-current effort to restate the prevailing prohibitions of Civil Service Rule I, as spelled out in its adjudications to that date. It was this administrative restatement of Civil Service Rule I law, modified to the extent necessary to reflect the provisions of the 1939 and 1940 Acts themselves, that, in our view, Congress intended to serve as its definition of the general proscription against partisan activities. It was within the limits of these rules that the Civil Service Commission was to proceed to perform its role under the statute.

Not only did Congress expect the Commission to continue its accustomed role with respect to Federal employees, but also in § 12(b) of the 1940 Act Congress expressly assigned the Commission the enforcement task with respect to state employees now covered by the Act. The Commission was to issue notice, hold hearings, adjudicate and enforce. This process, inevitably and predictably, would entail further development of the law within the bounds of, and necessarily no more severe than, the 1940 rules and would be productive of a more refined definition of what conduct would or would not violate the statutory prohibition of taking an active part in political management and political campaigns.

It is thus not surprising that there were later editions of Form 1236, or that in 1970 the Commission again purported to restate the law of forbidden political activity and, informed by years of intervening adjudications, against sought to define those acts which are forbidden and those which are permitted by the Hatch Act. These regulations, 5 C.F.R. pt. 733, are

wholly legitimate descendants of the 1940 restatement adopted by Congress and were arrived at by a process that Congress necessarily anticipated would occur down through the years. We accept them as the current and, in most respects, the longstanding interpretations of the statute by the agency charged with its interpretation and enforcement. It is to these regulations purporting to construe § 7324 as actually applied in practice, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad. . . .

Whatever might be the difficulty with a provision against taking "active part in political management or in political campaigns," the Act specifically provides that the employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates. The Act exempts research and educational activities supported by the District of Columbia or by religious, philanthropic, or cultural organizations, 5 U.S.C. § 7324(c); and § 7326 exempts nonpartisan political activity: questions, that is, that are not identified with national or state political parties are not covered by the Act, including issues with respect to constitutional amendments, referendums, approval of municipal ordinances and the like. Moreover, the plain import of the 1940 amendment to the Hatch Act is that the proscription against taking an active part in the proscribed activities is not open-ended but is limited to those rules and proscriptions that had been developed under Civil Service Rule I up to the date of the passage of the 1940 Act. Those rules, as refined by further adjudications within the outer limits of the 1940 rules, were restated by the Commission in 1970 in the form of regulations specifying the conduct that would be prohibited or permitted by § 7324 and its companion sections.

We have set out these regulations in the margin. We see nothing impermissibly vague in 5 C.F.R. § 733.122, which specifies in separate paragraphs the various activities

deemed to be prohibited by § 7324(a)(2). There might be quibbles about the meaning of taking an "active part in managing" or about "actively participating in . . . fund-raising" or about the meaning of becoming a "partisan" candidate for office; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. "[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms, . . . [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." United States v. Harris, 347 U.S. 612, 618 (1954). Surely, there seemed to be little question in the minds of the plaintiffs who brought this lawsuit as to the meaning of the law, or as to whether or not the conduct in which they desire to engage was or was not prohibited by the Act.

The Act permits the individual employee to "express his opinion on political subjects and candidates," 5 U.S.C. § 7324(b); and the corresponding regulation, 5 C.F.R. § 733.111(a)(2), privileges the employee to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." The section of the regulations which purports to state the partisan acts that are proscribed, id., § 733.122, forbids in subparagraph (a)(10) the endorsement of "a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material," and in subparagraph (a)(12), prohibits "[a]ddressing a convention, caucus, rally or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office." Arguably, there are problems in meshing § 733.111(a)(2) with §§ 733.122(a)(10) and (12), but we think the latter prohibitions

sufficiently clearly carve out the prohibited political conduct from the expressive activity permitted by the prior section to survive any attack on the ground of vagueness or in the name of any of those policies that doctrine may be deemed to further.

It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.

Neither do we discern anything fatally overbroad about the statute when it is considered of its terms represented by the 1970 regulations we now have before us. The major difficulties in this respect again relate to the prohibition in § 733.122(a)(10) and (12) on endorsements in advertisements, broadcasts, and literature and on speaking at political party meetings in support of partisan candidates for public or party office. But these restrictions are clearly stated, they are political acts normally performed only in the context of partisan campaigns by one taking an active role in them, and they are sustainable for the same reasons that the other acts of political campaigning are constitutionally proscribable. They do not, therefore, render the remainder of the statute vulnerable by reason of overbreadth.

Even if the provisions forbidding partisan campaign endorsements and speechmaking were to be considered in some respects unconstitutionally overbroad, we would not invalidate the entire statute as the District Court did. The remainder of the statute, as we have said, covers a whole range of easily identifiable and constitutionally proscribable partisan conduct on the part of Federal employees, and the extent to which pure expression is impermissibly threatened, if at all, by § 733.122(a)(10) and (12), does not in our view make the statute substantially overbroad and so invalid on its face. . . .

For the foregoing reasons, the judgment of the District Court is reversed.
So ordered.
. . . .

3.4 Merit Principles and Prohibited Personnel Practices.

a. Generally. The 1978 Civil Service Reform Act established merit principles to provide guidance and framework to executive branch agencies for effective personnel management. The Act further established prohibited personnel practices, related to the merit principles, commission of which requires corrective action.

5 U.S.C. § 2301. Merit System Principles.

. . . .

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be--

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302. Prohibited Personnel Practices.

. . . .

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(1) discriminate for or against any employee or applicant for employment--

(A) on the basis of race, color, religion, sex, or national

origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of--

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the

head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of--

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

b. Enforcement.

(1) Statutory and Regulatory Provisions.

(a) The Special Counsel receives allegations of prohibited personnel practices and investigates them. 5 U.S.C. § 1214. If, after initially investigating the allegation, the Special Counsel determines there are reasonable grounds to believe a prohibited personnel practice was or is going to be taken the Special Counsel may request the MSPB to stay the personnel action and subsequently seek corrective action. 5 U.S.C. §§ 1214(b). Aside from affecting the validity of a personnel action taken based on a prohibited personnel practice, the Special Counsel may also file a complaint with the MSPB against the offending employee. 5 U.S.C. § 1215(a).

(b) If the MSPB decides that an employee has committed a prohibited personnel practice, it may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or a civil penalty not to exceed $1,000. 5 U.S.C. § 1215(a)(3). The MSPB has construed the statute to require that penalties be imposed alternatively rather than collectively. Special Counsel v. Doyle, 45 M.S.P.R. 43 (1990).

(2) The Whistleblower Protection Act of 1989 allows whistleblowers (i.e., employees alleging a violation of 5 U.S.C. § 2302(b)(8)) to take their own cases to the Merit Systems Protection Board, if the Special Counsel fails to act within 120 days. 5 U.S.C. § 1221.

(3) MSPB Decisions. Following are two reported cases of the Special Counsel seeking disciplinary action against an employee based on alleged commission of prohibited personnel practices.

Special Counsel v. Sullivan
81 F.M.S.R. 7947 (1981)

(This is a summary of the Board's decision. The full text of the opinion may be found at M.S.P.R. 357 (1981).)

> The Acting Special Counsel (petitioner) charged the respondent, a former Executive Director of the Democratic National Committee who served as Associate Deputy

Administrator for Support Service for the agency, with flagrant political abuse of the Federal civil service merit systems. The charges grew out of the respondent's role in implementing a periodic rotation policy for agency district directors which resulted in the agency's ordering transfers of 17 district directors, 15 of whom were members of the Republican Party. The petitioner asserted that the respondent recommended the rotation of the district directors for political reasons and that he considered the politically motivated recommendations of others. The petitioner also asserted that the respondent recommended a member of the Democratic party for rotation in order to create a vacancy in the directorship at that location for the purpose of allowing a former Democratic mayor an opportunity to obtain the position. The Board found the evidence to be unpersuasive that the rotation policy was a sham or that there was a nexus between the adoption of the policy and the respondent. The petitioner based part of her charges on notes of a staff meeting called by the respondent regarding implementation of the rotation policy, which indicated that the respondent's discussion included the names and political affiliations of district directors who were candidates for rotation. The respondent testified, however, that in order to assure that the rotation system was not used for partisan political purposes by the regional administrators or others, he asked the regional administrators which district directors they might consider candidates for rotation and, once the names were proffered, what the directors' political backgrounds were. He also testified that in order to defend the rotation policy as a sound management practice which was not being used for partisan political reasons, he had to identify likely sources of the political pressure it would generate. The Board found the respondent's explanation for the notes from the staff meeting plausible in light of his testimony, which was corroborated by the regional administrators, that he inquired about the director's political affiliations only after they were mentioned by the regional administrators as possible

transferees. The Board also credited the regional administrators' testimony that they made their recommendations for possible transfer for valid management reasons and that they were not influenced or pressured by the respondent. With regard to the Democratic district director who was recommended for rotation, the Board stated proof was lacking that the respondent caused him to be selected for rotation in order to give the former Democratic mayor an opportunity to obtain the position, and that there was little evidence to indicate that any agency official sought to help him achieve his specific goal of obtaining that position. The respondent argued that he had none of the personnel authorities set forth in 5 U.S.C. 2302(b), that is, "[t]o take, direct others to take, recommend, or approve any personnel action. . ." and therefore, he could not have, as a matter of law, violated that statute. The Board found, however, that the respondent's key coordinating role in the implementation of the agency's rotation policy provided him ample opportunity to influence its outcome in terms of individual reassignments. The Board held that in wording the statute "to reach authority to recommend or approve personnel actions, Congress obviously mandated that purely formalistic considerations should not be permitted to be invoked as a shield against accountability." The Board stated that the Special Counsel bears the burden of proving by a preponderance of the evidence any allegations brought under a 5 U.S.C. 1207 disciplinary proceeding. The Board found that the petitioner's case failed as it was based primarily on circumstantial evidence, stating that the law does not allow findings of fact which are based upon circumstances which are not persuasive, but, at best, only suggestive. The Board concluded that the petitioner failed to prove that the respondent used his personnel authority to discriminate on the basis of political affiliation as prohibited by 5 U.S.C. 2302(b)(1) and (b)(11), or that he violated Civil Service Rule IV, 5 C.F.R. 4.2 or the First and Fifth Amendments to the Constitution. The charges were dismissed.

Special Counsel v. Owens
82 F.M.S.R. 5178 (1982)

(This is a summary of the Board's decision. The full text of the opinion may be found at 11 M.S.P.R. 128 (1982).)

The Special Counsel filed complaints requesting disciplinary action against the three respondents in these consolidated cases pursuant to 5 U.S.C. 1206(g). He alleged that one of the respondents, who was the Head of the Civilian Personnel Office at the agency facility, committed a prohibited personnel practice in removing an employee, an Insulator and union shop steward, in violation of 5 U.S.C. 2302(b)(8), (9), and (11). Specifically, it was alleged that this respondent took action to remove the employee because the employee filed numerous reports and grievances relating to the presence of harmful asbestos fibers at work sites and the alleged failure of management to provide proper safety equipment, and also because the employee filed other grievances with respect to disciplinary actions taken against him. However, the Board's Administrative Law Judge (ALJ) found that the removal action was properly based on the charges of AWOL and unauthorized entry to the facility, and that prior disciplinary actions against the employee were [not] considered in the removal action. Although this first respondent was aware of the employee's filing of grievances and reports, there was no evidence that the removal action was taken for any reason other than the employee's misconduct. In the case of the second respondent, who was the Head of the Maintenance Department, the Special Counsel alleged that he actually proposed the removal action to the Commanding Officer in violation of the same provisions of law as those allegedly violated by the first respondent and on the same basis. The respondent moved to dismiss the complaint against him as he was no longer an "employee" and had not been an "employee" as of 09/19/80, the date of the filing of the complaint, because he voluntarily retired from Federal service on 08/29/80. The ALJ notes that 5 U.S.C. 1206 provides that the

Special Counsel may file a complaint such as this one against an "employee." No one but an "employee" is mentioned as a possible subject of such a complaint in either section 1206 or 1207. The ALJ found that the definition of "employee" at 5 U.S.C. 2105 is applicable to sections 1206 and 1207, and that as of the date the complaint was filed in this case, the second respondent did not come within that definition. He recommended to the Board that it dismiss the complaint against the second respondent, and the Board adopted that recommendation. The Special Counsel alleged that the third respondent, a Foreman in the Insulator Shop, gave the employee in question an unfavorable performance rating on 06/27/79, because of the same "protected activities" on the employee's part as those which allegedly motivated the first two respondents to effect his removal nine months later. The ALJ noted that prior to the Civil Service Reform Act (the "Act"), "performance ratings" were rendered which had relatively little impact on an employee's continued employment. The Act changed the name of the evaluation process to "performance appraisal," and provided that specific written performance standards were to be established. Further, it provided that an agency would be able to reduce in grade or remove an employee for unacceptable performance. The provisions at 5 U.S.C. Chapter 43 were to replace the "performance rating" system. However, "performance appraisals" under the new system were not to be made until sometime in 1981 when agencies were to have the new system in place. Under 5 C.F.R. 430.302, "[t]he requirement for and the system of assigning summary adjective performance ratings which were in effect prior to 01/10/79 [the Act took effect on 01/11/79] shall continue in effect until the agency implements an appraisal system which conforms to the provisions of this part." (Emphasis added.) For purposes of 5 U.S.C. 2302 prohibited personnel practices, a 5 U.S.C. Chapter 43 performance evaluation is a covered "personnel action." 5 U.S.C. 2302(a)(2)(viii). The "new" Chapter 43 provisions became effective at the same time

as section 2302, therefore, the ALJ found that the performance evaluations which might be the basis for a "prohibited personnel practice" charge could only be those prepared under the "new" Chapter 43, and not the "old" performance rating provisions. He concluded that the respondent's performance rating of the employee was not made subject to the Act, and recommended that the complaint be dismissed. The Board adopted that recommendation.

CHAPTER 4

EMPLOYEE GRIEVANCES UNDER AGENCY GRIEVANCE PROCEDURES

4.1 Purpose of Agency Grievance Procedure.

Civil service regulations require each Federal agency (including the executive agencies and military departments) to establish and maintain an agency grievance procedure in accordance with 5 C.F.R. Part 771. These grievance procedures serve a variety of purposes. First, they provide a legitimate outlet for an employee to complain about management practices. They insure that a disgruntled employee has an avenue to obtain relief which is formalized and readily available. Second, the grievance procedures are frequently used to obtain review of personnel actions for which there is no statutory appeal right. An employee who receives a letter of reprimand or a 3-day suspension has no right to appeal the agency action to the Merit Systems Protection Board. The employee may, however, file a grievance to obtain limited review of the action. Third, the grievance procedure may provide a method for an employee to challenge any aspect of his or her working conditions, relationships or employee status, which is not covered by some other statutory or regulatory procedure. The agency grievance procedures serve as a means of encouraging orderly consideration and prompt resolution of employee concerns and dissatisfactions. An employee is always entitled to initiate a grievance to present his or her views, and management must give each grievance fair, equitable and prompt consideration.

4.2 Regulatory Requirements.

Each Federal agency must establish a grievance system for its employees which meets the requirements of 5 C.F.R. Part 771. As you read the regulatory requirements, notice the scope of the grievance coverage and the general procedural requirements.

5 C.F.R. Part 771 -- Agency Administrative Grievance System.

Subpart A--[Reserved]

Subpart B--General

Sec.
771.201 Purpose.
771.202 Definitions.

771.203 Agency coverage.
771.204 Employee coverage.
771.205 Grievance coverage.
771.206 Exclusions.

Subpart C--Establishment of Agency Administrative Grievance System

771.301 Establishment and publication.
771.302 Criteria.
771.303 Obligation of the grievant.
771.304 Review by the Office of Personnel Management.

Subpart A--[Reserved]

Subpart B--General

§ 771.201. Purpose.

This part sets forth the regulations under which each agency shall establish an agency administrative grievance system.

§ 771.202. Definitions.

In this part:

"Bargaining unit employee" means an employee included in an appropriate exclusive bargaining unit as determined by the Federal Labor Relations Authority for which a labor organization has been granted exclusive recognition.

"Employee" includes a former employee of an agency for whom a remedy can be provided.

"Grievance", except as provided in § 771.206 of this part, means a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction relating to the employment of the employee(s) which is subject to the control of agency management.

"Grievance file" means a separate file which contains all documents related to the grievance, including but not limited to any statements of witnesses, records or copies thereof, the report of the hearing when one

is held, statements made by the parties to the grievance, and the decision.

"Personal relief" means a specific remedy directly benefiting the grievant(s) and may not include a request for disciplinary or other action affecting another employee.

§ 771.203. Agency coverage.

Except as provided in § 771.206(a), this part applies to the executive agencies and military departments as defined by sections 102 and 105 of title 5, United States Code, and to those organizational units of the legislative and judicial branches having positions in the competitive service.

§ 771.204. Employee coverage.

(a) Required coverage. Except as provided in § 771.206(b), this part shall cover all nonbargaining unit employees of the agency.

(b) Discretionary coverage. An agency may extend the coverage of this part to bargaining unit employees consistent with the provisions of 5 U.S.C. 7121, or to applicants for employment with the agency.

§ 771.205. Grievance coverage.

Except as provided in § 771.206(c), this part applies to any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management, including any matter on which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her.

§ 771.206. Exclusions.

(a) Agencies excluded. This part does not apply to the Central Intelligence Agency, the Federal Bureau of Investigation, the Defense Intelligence Agency, the National Security Agency, the Nuclear Regulatory Commission, the Tennessee Valley Authority, the Postal Rate Commission, and the U.S. Postal Service.

(b) Employees excluded. This part does not apply to:

(1) A noncitizen appointed under Civil Service Rule VIII, § 8.3 of this title;

(2) An alien appointed under section 1471(5) of title 22, United States Code;

(3) An individual paid from funds as defined in section 2105(c) of title 5 or section 4202(5) of title 38, United States Code;

(4) A physician, dentist, nurse, or other employee appointed under Chapter 73 of title 38, United States Code;

(5) A member of the Foreign Service of the United States covered under the Foreign Service Grievance System as defined in Part J of Title VI of the Foreign Service Act of 1946, as amended; or

(6) An employee otherwise included under § 771.204(a) of this subpart when he or she is a member of a class of employees excluded from coverage by the Office on the recommendation of the head of the agency concerned.

(c) Matters excluded. (1) This part does not apply to:

(i) The content of published agency regulations and policy;

(ii) A decision which is appealable to the Merit Systems Protection Board or subject to final administrative review by the Office of Personnel Management or the Equal Employment Opportunity Commission under law or regulations of the Office or the Commission.

(iii) Nonselection for promotion from a group of properly ranked and certified candidates;

(iv) A preliminary warning notice of an action which, if effected, would be covered under the grievance system or excluded from coverage by paragraph (c)(1)(ii) of this section;

(v) A return of an officer or employee from the Senior Executive Service to the General Schedule during the one year period of probation or for less than fully successful executive performance under section 3592 of title 5, United States Code;

(vi) An action which terminates a temporary promotion within a maximum period of two years and returns the employees to the position from which the employee was temporarily promoted, or reassigns or demotes the employee to a different position that is not at a lower grade or pay than the position from which the employee was temporarily promoted;

(vii) An action which terminates a term promotion at the completion of the project or specified period, or at the end of a rotational assignment in excess of two years but not more than five years, and returns the employee to the position from which promoted or to a different position of equivalent grade and pay in accordance with § 335.102(g).

(viii) The substance of the critical elements and performance standards of an employee's position which have been established in accordance with the requirements of subchapter I of Chapter 43 of title 5, United States Code, and Part 430 of this title;

(ix) The granting of or failure to grant an employee performance award or the adoption of or failure to adopt an employee suggestion or invention under sections 4503-4505, or the granting of or failure to grant an award of the rank of meritorious or distinguished executive under section 4507 of title 5, United States Code;

(x) The receipt of or failure to receive a performance award under section 5384 of title 5, United States Code, or a quality salary increase under section 5336 of title 5, United States Code;

(xi) A merit pay determination or a merit pay increase or the lack of a merit pay increase under the Merit Pay System, or a decision on the granting of or failure to grant cash or honorary recognition under Chapter 54 of title 5, United States Code, and Part 540 of this title;

(xii) The termination under Subpart H of Part 315 of this title of a probationer for unsatisfactory performance;

(xiii) A performance evaluation under subchapter II of Chapter 43 of title 5, United States Code.

(2) This part does not apply to the following actions unless the agency extends the coverage to any aspect of them:

(i) A return of an employee from an initial appointment as a supervisor or manager to a nonsupervisory or nonmanagerial position for failure to satisfactorily complete the probationary period under section 3321(a)(2) of title 5, United States Code, and Subpart I of Part 315 of this title; and

(ii) A separation action not excluded by paragraph (c)(1) of this section.

Subpart C--Establishment of Agency Administrative Grievance System

§ 771.301. Establishment and publication.

(a) Establishment. Each agency covered by this part shall establish and administer an agency grievance system in accordance with the criteria in § 771.302 of this subpart.

(b) Publication. Each agency shall publish and make available to employees copies of its administrative grievance procedures.

§ 771.302. Criteria.

The following criteria shall govern the establishment and administration of an agency administrative grievance system:

(a) Prompt consideration of each grievance, including reasonable time limits for processing the grievance.

(b) Procedures appropriate for the matter being grieved which provide the employee a reasonable opportunity to present a grievance and receive fair consideration of the matter being grieved. The procedures shall provide for fact-finding, when appropriate, which shall include a hearing when one is suitable to ascertain the circumstances concerning the grievance. Fact-finding procedures shall be carried out by a person(s) who has not been involved in the matter being grieved and who does not occupy a position subordinate to any official who recommended, advised, made a

decision on, or who otherwise is or was involved in, the matter being grieved.

(c) Assurance to the grievant of:

(1) Freedom from restraint, interference, coercion, discrimination or reprisal in presenting a grievance;

(2) The right to be accompanied, represented, and advised by a representative of his or her own choosing, except that an agency may disallow the choice of an individual as a representative which would result in a conflict of interest or position, which would conflict with the priority needs of the agency, or which would give rise to unreasonable costs to the Government;

(3) A reasonable amount of official time to present the grievance if the employee is otherwise in a duty status; and

(4) The right to communicate with the servicing personnel office or a counselor of the agency.

(d) Assurance to the employee's representative of:

(1) Freedom from restraint, interference, coercion, discrimination or reprisal; and

(2) A reasonable amount of official time to present the grievance if the representative is an employee of the agency and is otherwise in a duty status;

(e) When fact-finding is utilized, establishment of a grievance file which is made available to the grievant and his or her representative for review and comment;

(f) At any time an employee places a grievance in writing, a written decision, which includes a report of findings and reasons for the determination, made by:

(1) An official at a higher level than any employee involved in any phase of the grievance, except when the head of the agency has been involved, or

(2) The official(s) designated to determine the disputed facts.

§ 771.303. Obligation of the grievant.

An employee in exercising the entitlement to present a grievance under this part shall:

(a) Comply with appropriate time limits established by the agency;

(b) Furnish sufficient detail to clearly identify the matter being grieved; and

(c) Specify the personal relief being requested.

§ 771.304. Review by the Office of Personnel Management.

The Office of Personnel Management shall review from time to time each agency administrative grievance system developed under this part to determine whether the administrative grievance system meets the requirements of this part. The Office shall require corrective action to bring a system which fails to meet the requirements into conformity. The Office does not act on a request by an employee to review the processing of, or the decision on, an individual grievance.

Note. Establishment of time limits in grievance procedures is within the discretion of OPM and the agency and, therefore, the time limits established are not subject to judicial review. Campbell v. Department of Air Force, 755 F. Supp. 902 (E.D. Cal. 1991).

4.3 The Army Grievance System.

a. General. The Army Grievance System meets the requirements of 5 C.F.R. Part 771 and is contained in AR 690-700, Chapter 771. In addition to the exclusions and coverage based on § 771.206, supra, the Army System also excludes complaints or appeals from applicants for employment and matters not personal to the employee or the employee's personal well being or career. For example, complaints or allegations against third parties or on behalf of another employee are excluded.

b. Procedure. The Army system is a three-step system. The first two steps are known as the informal stage and the third step as the formal stage. Generally, use of the informal stage is mandatory for all grievances. However, those complaints involving matters such as letters of reprimand, suspensions for 14 days or less, serious adverse actions against nonpreference eligible excepted service employees,

reductions in force, and management directed reassignments need not be initiated using the informal stage first.

At the informal stage, the grievant may present the complaint orally to the first line supervisor unless the complaint involves that supervisor, in which case the complaint is made to the second line supervisor. The supervisor is responsible for discussing the matter with the grievant and his or her representative within 10 days, and resolving the matter if possible. If the grievance cannot be resolved, the supervisor must advise the grievant of his/her right to proceed to the second step. The second step involves a meeting between the employee (and his/her representative) and the management officer above the immediate supervisor who has authority to decide the issue involved in the grievance. A memorandum of that meeting is prepared and distributed to the interested parties.

If the grievance is not resolved during this process, the employee may file a formal grievance, in writing, with the official designated by the commander to consider it. If it cannot be resolved by this official, the grievance is forwarded to the United States Civilian Appellate Review Agency (USACARA) for investigation. USACARA provides findings and recommendations to the commander. If the commander adopts the findings and recommendations of USACARA, the decision is final. If the commander rejects USACARA's findings and recommendations, the case is forwarded to the major commander for final decision.

CHAPTER 5

EMPLOYEE DISCIPLINE

SECTION I: Authority and Procedure

5.1 Introduction. A significant management goal in connection with civilian employee misconduct is to take proper and effective disciplinary action, and to have that action sustained, if challenged. The ability to take effective disciplinary action is critical to maintaining a well-disciplined work force. To attain this goal we must understand what disciplinary tools are available, what procedures must be followed to impose the various types of disciplinary actions, and what circumstances permit us to legally impose discipline. This section will examine the various types of disciplinary actions that Federal supervisors can use, and the procedures that must be used to impose each of these actions. It will also review the employee rights in connection with these disciplinary actions: those rights enjoyed in the process leading to the imposition of discipline and those rights to challenge the disciplinary action once imposed.

Because most of this area is covered in detail in sections of Title 5, U.S. Code and implementing regulations of OPM and Department of the Army, this section will concentrate on these statutory and regulatory provisions and the cases interpreting them. However, this section will also examine some constitutional issues impacting on procedures required in connection with employee discipline.

5.2 Types of Disciplinary Action.

a. General. Disciplinary tools available to Federal managers range from counseling to removal. The Army's regulation on civilian employee discipline, AR 690-700, Chapter 751, establishes two categories of disciplinary actions. The first category, informal disciplinary actions, includes oral admonishments and written warnings. The second category, formal disciplinary actions, includes letters of reprimand, suspensions, reductions in grade or pay, and removals. Informal action is encouraged as a first step in constructive discipline for behavioral offenses. However, formal disciplinary action may be imposed for a first infraction, if appropriate. See AR 690-700, Chapter 751, paragraph 1-3.

b. Informal disciplinary actions. Oral admonishments or counselings and warning letters are usually actions taken by the first or second line supervisor. Even though some of these informal actions are oral, they should be documented on the Standard Form 7-B (Employee Record Card). AR 690-700, Chapter 751, paragraph 1-3b. For general instructions on use of the SF-7B, see CPR 200, Chapter 295.7.

c. Formal disciplinary actions. Formal disciplinary actions are initiated by the supervisor, but they must be coordinated with the servicing civilian personnel office (CPO) and the Labor Counselor.

(1) Written reprimands. Written reprimands may be imposed by a supervisor and are included in the employee's official personnel file (OPF) for a period of not more than three years. The supervisor imposing the discipline decides how long the reprimand will remain in the employee's OPF.

(2) Suspensions. Suspensions are divided into two categories based on their length: suspensions for fourteen days or less, and suspensions for more than fourteen days. The procedural rights an employee enjoys in connection with a suspension depend on the length of the suspension. The length of a suspension is measured in calendar days, not workdays. For employees working a normal tour of duty, Monday through Friday, a 14-day suspension amounts to a 10-workday suspension. See Klimek v. Department of Army, 3 M.S.P.R. 139 (1980).

There is no specific limit on the length of a suspension. However, a suspension cannot be indefinite. See Tigner-Kier v. Department of Energy, 20 M.S.P.R. 552 (1984).

A type of "indefinite" suspension has been recognized and accepted by the courts, that is, an indefinite suspension pending disposition of criminal changes. Such a suspension is not truly indefinite because a specific expected event will end it. This type action is discussed fully in paragraph 5.12 of this chapter.

Suspensions, regardless of their length, result in the employee not reporting to work and not being paid for the period of suspension.

(3) Reductions in grade or pay. While reductions in grade or pay are more frequently used in connection with performance problems, they may be appropriate for some misconduct problems. Most

frequently, this type action is used for disciplinary purposes to reduce someone from a supervisory to a nonsupervisory position because of misconduct impacting on the special trust and confidence required of management personnel.

(4) Removals. The most serious disciplinary action is the removal - firing the employee.

5.3 Procedural requirements for imposing formal disciplinary actions. The procedures required to impose formal disciplinary action vary depending on the type action. As expected, the more serious the action, the more extensive the procedural protections are for the employee being disciplined.

a. Written reprimand. This is the least severe of the formal disciplinary actions and it is the easiest to impose. If a supervisor, after obtaining all reasonably available relevant information, determines that a letter of reprimand is warranted he or she may issue the letter. Prior coordination with the CPO and Labor Counselor is required. Prior to deciding whether to impose this type discipline the supervisor may, but does not have to, interview the employee involved. Supervisors should be aware that although the employee generally has no right to counsel at such an interview, if the employee is part of a collective bargaining unit, the employee may be entitled to union representation at the interview because of 5 U.S.C. § 7114(a)(2)(B). See AR 690-700, Chapter 751, paragraph 3-2 for more detailed guidance, to include the guidance on the content of a letter of reprimand.

b. Suspensions for 14 days or less. The basis for this disciplinary action is 5 U.S.C. §§ 7501-7504. These statutory provisions and implementing regulations contain significant procedural requirements for imposing this type suspension. However, these requirements apply only to this type suspension if imposed against a nonprobationary, competitive service employee. Excepted service employees, even those who are preference eligibles or have two or more years current, continuous service, may be summarily suspended for 14 days or less. See Bredehorst v. United States, 677 F.2d 87 (Ct. Cl. 1982) (at the time of the disciplinary action in Bredehorst, the critical length for suspensions was 30 days instead of the current 14 days).

Nonprobationary, competitive service employees are entitled to the following procedural protections in connection with a suspension for 14 days or less:

1. advance written notice specifying the reasons for the proposed action;

2. the right to review all the material and information relied upon by management in support of the proposed action;

3. the right to reply, orally and in writing, to the charges;

4. the right to representation during this process; and

5. the right to a final written decision, specifying the reasons for the action, prior to the effective date of the action.

See 5 U.S.C. § 7503.

The right to review all the information relied upon by management in proposing this action does not include the right, at this predecisional stage, to have the agency make its officials available for questioning by the employee. Such a right exists only during the appeals process to the Merit Systems Protection Board for those actions appealable to the board. See paragraph 5.4 for a discussion of these appellate rights, and Chapter 8 for a discussion of employee rights during the appellate process.

c. True adverse actions. Suspensions for more than 14 days, reductions in grade or pay, and removals are often referred to as true adverse actions. The procedures leading to the imposition of true adverse actions are very similar to those required for suspensions for 14 days or less. The differences lie in the types of employees who receive the procedural protections and in the amount of time given to the employee to exercise his or her rights.

Nonprobationary, competitive service employees and preference eligible excepted service employees who have completed a one-year period equivalent to the probationary period, and, following the passage of the Civil Service Due Process Amendments of 1990, most nonpreference eligible excepted service employees with two or more years of current, continuous service receive the procedural protections in connection with the true adverse actions. The addition of certain excepted service employees to the list of protected employees for true adverse actions flows from the definition of

employee in 5 U.S.C. § 7511 which is broader than the definition of employee for the lesser suspensions found at 5 U.S.C. § 7501.

Despite these protections applying to a larger group of employees, agencies still have virtual summary disciplinary authority over nonpreference eligible excepted service employees with less than two years current, continuous service and probationary competitive service employees. See Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980) and Shaw v. United States, 622 F.2d 520 (Ct. Cl.), cert. denied, 449 U.S. 881, reh'g denied, 449 U.S. 987 (1980).

The only significant difference in the actual procedures leading to the imposition of a true adverse action compared to a suspension for 14 days or less is in the amount of time given for advance notice and opportunity to reply to the proposed action. More time is given in connection with a true adverse action. This additional time requirement has caused concerns over the timing of the advance notice and the duty status of the employee during the notice period. Usually the employee must be given 30 days advance notice prior to imposition of a true adverse action. See 5 U.S.C. § 7513(b)(1). However, if the agency has reasonable cause to believe the employee has committed a crime for which imprisonment may be imposed, the notice period may be reduced to 7 days. See 5 U.S.C. § 7513(b)(1) and 5 C.F.R. § 752.404(a)(1). Regardless of the length of the notice period, the employee is normally in a full duty status during the notice period. See 5 C.F.R. § 752.404(b)(3) for alternatives to normal duty status during the notice period, including placing the employee in a paid nonduty status for the whole period.

Title 5, U.S. Code, section 7513(c) provides for an optional predecisional hearing in connection with a true adverse action. However, the Army has elected not to provide a predecisional hearing.

5.4 **Appeal and grievance rights**. While the procedures leading to the imposition of disciplinary action vary somewhat depending on the type of disciplinary action involved, of greater significance are the rights to challenge a disciplinary action through a grievance or appeal. An employee's right to grieve or appeal a disciplinary action depends on three factors: whether the employee is covered by a collective bargaining agreement, the type disciplinary action, and the employee's individual status.

a. Without a collective bargaining agreement.

(1) True adverse actions. If the employee is not covered by a collective bargaining agreement between management and a labor organization, he or she can appeal a true adverse action to the Merit Systems Protection Board (MSPB) if in the proper individual status. See 5 U.S.C. §§ 7513(d). In this appeal the employee gets a full administrative hearing before an administrative judge of the MSPB at which the agency has the burden of proving the propriety of the disciplinary action. See 5 U.S.C. § 7701. Details of MSPB procedures are provided in Chapter 8 of this book.

(2) Other disciplinary actions. For other disciplinary actions, employees generally have a right to grieve the action under the Army grievance procedure. See AR 690-700, Chapter 771. Under this grievance procedure there is no entitlement to a hearing, and of greatest significance to the employee, there is no review outside the Army. The final decision on the grievance is made within Army channels. Details of the Army grievance procedure are provided in Chapter 4 of this book.

Because of the significant differences between a 14-day and 15-day suspension in terms of appeal rights, courts frown on attempts to split suspensions of more than 14 days into two or more lesser suspensions to limit the employee's appeal rights. Such splitting of punishment for the same offense will not defeat the employee's appeal rights. See Lyles v. U.S. Postal Service, 709 F.2d 358 (5th Cir. 1983).

b. With a collective bargaining agreement. Every collective bargaining agreement between management and the exclusive representation of a group of employees must contain a grievance procedure which provides for binding arbitration of disputes which cannot be resolved under the grievance procedure. See 5 U.S.C. § 7121. Arbitration under this process provides the employee and the union a full administrative hearing outside the agency, and the arbitrator's decision in the case binds the parties in the same way as a decision by the MSPB. For a detailed discussion of the negotiated grievance process, see The Judge Advocate General's School, U.S. Army, JA 211, Law of Federal Labor-Management Relations.

(1) True adverse actions. If an employee is covered by a collective bargaining agreement, he or she can appeal a true adverse action to the MSPB or grieve the action under the negotiated grievance procedure. The

employee must make an election; he or she cannot use both procedures. See 5 U.S.C. § 7121(e)(1) for the rule regarding when the employee is held to have made an election.

It is important to realize that the employee who elects to grieve under the negotiated grievance procedure instead of appealing to the MSPB risks not being heard outside the agency. Under the negotiated grievance procedure an employee may file a grievance which will be considered at various steps by agency officials. However, the employee cannot invoke arbitration. Only the union can do that. If the union elects not to invoke arbitration, the employee's grievance and appeal rights end. See Billops v. Department of the Air Force, 725 F.2d 1160 (8th Cir. 1984) for an example of such an aggrieved employee.

(2) Other disciplinary actions. If there is a collective bargaining agreement, the lesser disciplinary actions are grievable and arbitrable under the negotiated grievance procedure. This is a significant benefit to the employee because without a collective bargaining agreement the employee cannot grieve this type disciplinary action outside the agency.

c. Employee status. In addition to the type disciplinary action at issue and the existence or absence of a collective bargaining agreement, the status of an employee is also a factor that can determine what, if any, appeal rights the employee has in connection with a disciplinary action.

Generally, a probationary employee cannot appeal a disciplinary action to the MSPB. See Stern v. Department of Army, 699 F.2d 1312 (Fed. Cir. 1983). Additionally, probationary employees normally cannot arbitrate a disciplinary action. See INS v. FLRA, 709 F.2d 724 (D.C. Cir. 1983).

Prior to the passage of the Civil Service Due Process Amendments of 1990, excepted service employees who were not preference eligible could not appeal a disciplinary action to the MSPB. United States v. Fausto, 484 U.S. 439 (1988). Relying on the reasoning of Fausto, courts and the Federal Labor Relations Authority (FLRA) held such employees were similarly barred from challenging true adverse actions through negotiated grievance procedures. See Department of Health and Human Services v. FLRA, 894 F.2d 333 (9th Cir. 1990); Department of Treasury v. FLRA, 873 F.2d 1467 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990);

Department of Health and Human Services v. FLRA, 858 F.2d 1278 (7th Cir. 1988); NLRB and NLRB Professional Association, 35 F.L.R.A. No. 123 (1990). Effective August 17, 1990, most Schedule A and Schedule B excepted service employees with two or more years of current, continuous service acquired MSPB appeal rights in connection with true adverse actions.

5.5 Procedural rights for probationary and excepted service employees in disciplinary actions. While the discussion above correctly notes generally the significant rights that probationary and some excepted service employees do not enjoy, these employees do have some rights in connection with disciplinary actions.

a. Probationary employee rights. The rights these employees enjoy depend initially on the basis for the disciplinary actions.

(1) Predecisional rights. If the probationary employee is fired because of alleged unsatisfactory conduct or performance during the probationary period, the agency need only give the employee written notice stating the reasons and the effective date of the separation. See 5 C.F.R. § 315.804. However, if the probationary employee is fired, in whole or in part, because of conditions arising before appointment, the agency must provide the employee advance written notice, an opportunity to respond in writing, and a final written decision. See 5 C.F.R. § 315.805.

(2) Appeal right to MSPB. By OPM regulation, probationary employees can appeal a firing to the MSPB, if the firing is allegedly based on partisan political reasons or marital status. These two extremely narrow grounds have been interpreted very strictly by the MSPB and the courts.

Partisan political reasons have been found to relate solely to recognized political parties, candidates for office, and political campaign activities. See Poorsina v. MSPB, 726 F.2d 507 (9th Cir. 1984). It does not relate to an employee's affiliation with a labor organization. See Masticano v. FAA, 714 F.2d 1152 (Fed. Cir. 1983).

Marital status is not the same as sexual discrimination. See Hurst v. GSA, 2 M.S.P.R. 497 (1980). Employees have been unsuccessful in attempts to obtain an expansive interpretation of "marital status" discrimination. See, e.g., Yakupzack v. Department of

Agriculture, 10 M.S.P.R. 180 (1982) and Shah v. GSA, 7 M.S.P.R. 626 (1981).

Probationary employees fired for preemployment matters have an additional basis for appeal to the MSPB. They may appeal to the Board, if the limited procedures required by 5 C.F.R. § 315.805 described above have allegedly not been followed. In this appeal, however, there is no substantive review of the propriety of the employee's firing, only a review of the procedural requirements. See Hibbard v. Department of Interior, 6 M.S.P.R. 181 (1981).

If a probationary employee appeals to the MSPB based on a nonfrivolous allegation of partisan political or marital status discrimination, or that proper procedures were not followed for a firing allegedly based on preemployment matters, then the employee may also raise additional allegations of discrimination based on sex, race, religion, color, national origin, age, or handicapping condition. See 5 C.F.R. § 315.806. Allegations of discrimination because of race, religion, color, sex, national origin, age, or handicapping condition do not, standing alone, give a probationary employee an appeal right to the MSPB. A remedy under those circumstances is only through equal employment opportunity channels discussed in Chapter 10 of this book. The MSPB will examine closely any allegation forming the basis for its jurisdiction, to assure that it is nonfrivolous, before considering the merits of any other discrimination claims. See Bates v. Department of Navy, 6 M.S.P.R. 327 (1981).

(3) Special Counsel action. In addition to other rights just mentioned, a probationary employee may complain to the Office of Special Counsel, if the firing allegedly constitutes a prohibited personnel practice as defined in 5 U.S.C. § 2302(b). A discussion of prohibited personnel practices appears in Chapter 3 of this book. It should be noted here, however, that the Special Counsel may, at his discretion, seek corrective action, if a personnel action appears to have been taken for improper reasons, and may administratively prosecute the agency official responsible for the prohibited personnel practice. These cases may be brought by the Special Counsel to the MSPB. In addition, the Special Counsel may request the MSPB to stay any personnel action when the Special Counsel finds reasonable grounds to believe the personnel action constitutes or would constitute a prohibited personnel practice. However, the stay of a probationary employee's firing on application of the Special Counsel does not change the individual's

status to nonprobationary, if the stay extends beyond the one-year probationary period. The stay merely preserves the status quo. See Special Counsel v. Department of Veterans Affairs, 45 M.S.P.R. 486 (1990); Special Counsel v. Department of Commerce, 23 M.S.P.R. 469 (1984).

The possible existence of a prohibited personnel practice generally does not give the probationary employee an independent appeal right to the MSPB. That employee may complain to the Special Counsel, and the Special Counsel has discretion in pursuing the matter. See Borrell v. U.S. International Communications Agency, 682 F.2d 981 (D.C. Cir. 1982) and Gwen v. MSPB, 681 F.2d 867 (D.C. Cir. 1982). However, if the probationary employee alleges that the prohibited personnel practice comes under the provisions of the Whistleblower Protection Act of 1989, i.e., falls under 5 U.S.C. § 2302(b)(8), the whistleblower may take his own case to the MSPB, if the Special Counsel fails to act within 120 days. 5 U.S.C. § 1221.

(4) Army grievance procedure. The final possible avenue for challenge of a firing by a probationary employee is to grieve under the agency's grievance procedure. Every agency has to have a grievance procedure for its employees. See 5 C.F.R. § 771.301. The Army's procedure is at AR 690-700, Chapter 771. Under OPM regulations (5 C.F.R. Part 771) probationary employees do not have a right to grieve a firing. The Office of Personnel Management does, however, permit agencies to extend their grievance procedures to probationary employees for firings based on misconduct. See 5 C.F.R. § 771.206(c)(2). However, the Army does not extend its grievance procedures to allow such a grievance by a probationary employee. See AR 690-700, Chapter 771, paragraph 1-7(b)(9).

b. Excepted service employee rights. The rights these employees enjoy in a disciplinary action depend mostly on whether they are preference eligible employees or, after August 17, 1990, fall in the coverage of the Civil Service Due Process Amendments of 1990. In many instances these employees, if not preference eligibles or covered by the Civil Service Due Process Amendments of 1990, get even fewer rights than probationary employees.

(1) Predecisional rights. If the employee is not a preference eligible or is not covered by the Civil Service Due Process Amendments of 1990, the employee gets no predecisional rights in connection with a disciplinary action. If the employee is a preference eligible beyond

the first year of employment or has two or more years of current, continuous service under the Civil Service Due Process Amendments of 1990, then he or she gets the same predecisional rights as a nonprobationary competitive service employee for true adverse actions. See 5 U.S.C. § 7511. However, the employee still has no predecisional rights for suspensions of 14 days or less. See 5 U.S.C. §§ 7501-7503.

(2) Appeal rights to MSPB. Only preference eligible, excepted service employees and employees covered by the Civil Service Due Process Amendments of 1990 have appeal rights to the MSPB. Other excepted service employees have no MSPB appeal rights, even if an action is allegedly taken because of partisan political reasons or marital status. The Office of Personnel Management has not extended an MSPB appeal right to these employees as it has for probationary employees.

(3) Special Counsel action. Excepted service employees have the same rights as probationers and all other employees to complain to the Special Counsel, if a personnel action is allegedly based on a prohibited personnel practice.

(4) Army grievance procedure. Excepted service employees who have completed a one-year period of employment, equivalent to the one-year probationary period, may grieve their disciplinary actions, including removals, under the Army grievance procedure. See AR 690-700, Chapter 771, paragraph 1-7(b)(9).

5.6 Constitutional right to due process. The rights of probationary and "disfavored" excepted service employees just discussed are based on statute and regulation. They are the only rights these employees have in connection with a disciplinary action, unless they can demonstrate, on an individual case basis, that they have a constitutional right to a hearing based upon the implication of a property right or a liberty interest.

a. Property right. An expectancy in continued Federal employment in the absence of cause has been found to create a property right protected by the due process clause of the fifth amendment to the U.S. Constitution. See Arnett v. Kennedy, 416 U.S. 134 (1974). When a property right is implicated, the person to be adversely affected is entitled to "some kind of prior hearing." See Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

(1) Statutory right. A property right has been created by statute for nonprobationary competitive service employees and "favored" excepted service employees. This property right is created by language in 5 U.S.C. § 7501 which says that these employees may only be removed "for such cause as will promote the efficiency of the service." The Court in Arnett v. Kennedy found that the language in Section 7501 created an expectancy in continued Federal employment absent cause. The Court in Arnett v. Kennedy also determined that the procedural protections provided to these employees, similar to what is currently provided, satisfied due process requirements. The Court reaffirmed that aspect of Arnett v. Kennedy in Cleveland School Board v. Loudermill, 470 U.S. 532 (1985). See also Bush v. Lucas, 462 U.S. 367, 368 n. 14 (1983) (statutory protections are "clearly constitutionally adequate").

(2) Other property right. The U.S. Supreme Court in Board of Regents v. Roth, 408 U.S. 564 (1972) indicated that a property right could be created by something other than a statutory provision. The Court suggested that any rules or understandings between an agency and its employees which created an expectancy in continued employment absent cause created a property right in employment. See Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979) and Paige v. Harris, 584 F.2d 178 (7th Cir. 1978) wherein courts found property rights created by language in agency handbooks suggesting that employment would not be terminated except for cause. However, see Fiorentino v. United States, 607 F.2d 963 (Ct. Cl. 1979) wherein the court found no property right created by the same handbook provision examined in Paige v. Harris. The courts in Ashton and Paige found that the employees were entitled to a hearing in connection with their termination even though statute and implementing OPM and agency regulations provided them no such right. While the implication of a property right may trigger a right to a hearing, that hearing does not necessarily have to be a formal trial-type hearing, and absent a statutory change that hearing is not one before the MSPB.

Note. For a discussion of Cleveland School Board v. Loudermill, and the possible expansion of due process property rights for Federal employees, see St. Amand, Probationary and Excepted Service Employee Rights in Disciplinary Acts in the Wake of Cleveland School Board v. Loudermill, The Army Lawyer, July 1985, at 1, and Garrow v. Gramm, 856 F.2d 203 (D.C. Cir 1988).

b. Liberty interest. A second way to assert some right to procedural due process protection is to establish that a "liberty interest" is at stake.

(1) Nature of the interest. A liberty interest is a right not to have stigmatizing information about you disseminated without an opportunity to respond. See Board of Regents v. Roth, 408 U.S. at 572-575. Stigmatizing information in an employment context refers to a person's general character, reputation, or misconduct which could adversely affect the individual's ability to take advantage of other employment opportunities.

To be actionable in an employment context, the stigmatizing information must be associated with the loss of a job and it must be disseminated. See Siegert v. Gilley, 111 S. Ct. 1789 (1991); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693, 706-709 (1976); Lyons v. Barrett, 851 F.2d 406 (D.C. Cir. 1988).

The 10th Circuit Court of Appeals has found a liberty interest implicated when the Air Force fired a probationary employee for falsifying a preappointment document. Reference to a person being a liar was viewed as the type of information that could, if disseminated, adversely affect the individual's ability to take advantage of other employment opportunities. Additionally, the court found dissemination in the Air Force's disclosing the reasons for the termination to the Oklahoma Employment Security Commission for use in determining the individual's entitlement to unemployment benefits. Walker v. United States, 744 F.2d 67 (10th Cir. 1984). In response to Walker, OPM amended the Federal Personnel Manual to provide that where an employee is not entitled to procedural protections which would satisfy due process requirements, agencies will not state the basis for the adverse action in agency documents. See FPM Supp. 296-33, §§ S31-4c and 4d.

(2) Nature of the remedy. Courts have consistently held that if only a liberty interest is at stake, not a property right, the employee is only entitled to a hearing to clear his or her name, not on the question of reinstatement. See Codd v. Velger, 429 U.S. 624 (1977). Therefore, the right to a hearing exists only if the individual asserts that the information is false. There is no right to a hearing to argue that the information at issue provides insufficient justification for the adverse action which the individual has just experienced.

SECTION II: SUBSTANTIVE REQUIREMENTS FOR DISCIPLINARY ACTIONS

5.7 **Introduction.** The preceding section focused exclusively on the procedural aspects of disciplinary actions. This section will focus on the substantive aspects by examining the proof requirements to sustain a disciplinary action whether challenged in an appeal to the MSPB or in a grievance and subsequent hearing before an arbitrator. Because the substantive aspect of discipline lends itself more to conceptual analysis than to mathematical application of rules, this section will include summaries of some leading cases, in addition to the textual discussion of the legal development flowing from these cases.

In every disciplinary action the agency must:

a. Prove by a preponderance of the evidence that the employee committed the act of misconduct forming the basis for the discipline;

b. Prove by a preponderance of the evidence that the discipline is for "such cause as will promote the efficiency of the service" (5 U.S.C. §§ 7503(a) and 7513(a));

c. Prove the appropriateness of the penalty choice; and

d. Follow proper procedures.

5.8 **Proving the Employee's Act of Misconduct.** This proof requirement seems elementary on the surface. However, there are several issues related to proving the employee's act of misconduct that deserve examination.

a. General. Proving the act of misconduct in a hearing before an MSPB administrative judge or an arbitrator is no different than doing it in any other administrative forum. Formal rules of evidence do not apply at MSPB hearings. See Debose v. Department of Agriculture, 700 F.2d 1262 (9th Cir. 1983). Administrative judges can admit any category of evidence. See Arterberry v. Department of Air Force, 25 M.S.P.R. 582 (1985). Any evidence which is relevant, material, and not unduly repetitious will be admitted. See 5 C.F.R. § 1201.62. Therefore hearsay is admissible and even standing alone may be sufficient proof. See Campbell v. Department of Transportation, FAA, 735 F.2d 497 (Fed. Cir. 1984). However, hearsay alone will usually not be sufficient when contradicted by sworn

nonhearsay testimony. See Bonner v. Department of Navy, 18 M.S.P.R. 659 (1984). For a detailed discussion of the use of hearsay in MSPB proceedings, see Borninkhof v. Department of Justice, 11 M.S.P.R. 177 (1982) and 5 M.S.P.R. 77 (1981); and Behensky v. Department of Transportation, 19 M.S.P.R. 341 (1984).

b. Evidence of conviction. Agency counsel will encounter cases in which they do not have independent evidence of the employee's misconduct. Disciplinary action will have been initiated based on evidence that the employee was convicted in state or Federal court. Generally, if the agency disciplines an employee for the employee's misconduct which formed the basis for a Federal or state conviction, the agency may meet its obligation to prove the misconduct by introducing proof of the conviction. The employee does not have a right to relitigate before the MSPB what has already been decided against him or her in the criminal trial.

The MSPB's adoption of such administrative collateral estoppel or issue preclusion has been supported explicitly in Otherson v. Department of Justice, 711 F.2d 267 (D.C. Cir. 1983) and Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir. 1981), and has received tacit approval by the U.S. Court of Appeals for the Federal Circuit in Crofoot v. Government Printing Office, 761 F.2d 661 (Fed. Cir. 1985). The court's opinion in Otherson, set out in part below, contains an excellent discussion of collateral estoppel (issue preclusion).

Otherson v. Department of Justice, 711 F.2d 267 (D.C. Cir. 1983).

McGOWAN, Senior Circuit Judge:

> Jeffrey Otherson formerly worked as a border patrol agent for the Immigration and Naturalization Service (INS). INS discharged him after he and a co-worker received criminal convictions for physically abusing aliens according to a prearranged scheme they carried out during working hours with apparent zest. When Otherson appealed his discharge, the Merit Systems Protection Board (MSPB) held that the doctrine of issue preclusion, also known as collateral estoppel, forbade him from relitigating the facts established at the criminal trial. It

also found discharge appropriate given the nature of Otherson's misconduct.

On review of this order, we are asked to resolve three questions: (1) whether issues determined at prior criminal trials may ever be preclusively established at later MSPB adverse action hearings; (2) whether the MSPB properly found preclusion appropriate in the particular circumstances of this case; and (3) whether discharge was an appropriate sanction for Otherson's misconduct. . . .

I.

. . . .

On January 29, 1980, the Government filed a two-count superseding information charging Otherson and another agent with misdemeanor Federal offenses. It alleged that they had deprived aliens of Federal rights in violation of 18 U.S.C. § 242 (1976), and had conspired to effect his deprivation in violation of 18 U.S.C. § 371 (1976). The offending conduct involved several instances of on-duty physical assault against aliens according to a prearranged scheme. . . .

On March 17, 1980, the trial judge found both defendants guilty on both counts. He fined Otherson $1,000 for one count, and suspended sentence on the other, placing Otherson on three years' probation and ordering him to perform 750 hours of community service. . . .

On June 2, 1980, INS removed Otherson from his job effective June 13, 1980, having notified him of its proposal to do so on February 28. INS cited Otherson's mistreatment of aliens as the reasons for removal and specified the same acts of misconduct contained in the superseding information on which Otherson had been convicted. Otherson appealed his removal to the MSPB. At a hearing before a presiding official, the INS bore the burden of proving beyond a preponderance of the evidence, 5 U.S.C. § 7701(C)(1)(B) (Supp. V 1981), that Otherson's removal would "promote the

efficiency of the [Federal] service." id. § 7513(a). INS relied on Otherson's-criminal conviction to prove that he had in fact committed the specified misconduct. In addition, it offered the testimony of the INS official who removed Otherson. The official testified that he reviewed the record of the criminal proceedings and that the seriousness of Otherson's criminal acts made removal appropriate.

The presiding official affirmed Otherson's removal. First, she rejected Otherson's contention that prior judicial determinations could never preclusively establish issues in MSPB hearings, citing the Board's decision in Chisholm v. Defense Logistics Agency, 3 MSPB 273 (1980), aff'd, 656 F.2d 42 (3d Cir. 1981). Second, after reviewing the entire record of the criminal trials, she found that the factual issues of misconduct in the adverse action hearing were identical to those in the criminal proceeding, and that they had been actually litigated and necessarily determined at the criminal trial. Accordingly, she found preclusion appropriate for those issues and refused to consider Otherson's attempts to deny he had in fact mistreated aliens. . . . Otherson then sought review of the presiding official's decision by the full MSPB. The Board denied the petition, stating that the MSPB "is entitled to rely on the doctrine of collateral estoppel, and finds that the doctrine was properly applied by the presiding official in [this] case[ ]."

Finally, Otherson sought review of the MSPB's final decision in this court. He presses before us the . . . contentions he raised before the presiding official. First, he argues that an employee's statutory right to a hearing in appeals to the MSPB makes issue preclusion inappropriate. Second, he argues that the doctrine of issue preclusion, even if applicable in MSPB hearings, does not bar relitigation given the particular *circumstances of the criminal conviction.* . . .

II.

Courts have often held that issues determined in connection with a criminal conviction may be taken as preclusively established for the purposes of later civil trials. See Emich Motors Corp. v. General Motors Corp., 840 U.S. 558 (1951); McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981). Courts have less frequently addressed, however, the effect of criminal convictions or other judicial determinations in later administrative proceedings. Otherson claims that the judicial doctrine of issue preclusion has no place in MSPB hearings. Squarely against his contention, however, is a recent holding of the Third Circuit in Chisholm v. Defense Logistics Agency, 565 F.2d 42 (3d Cir. 1981). We find the Chisholm court's reasoning persuasive and thus hold that issues determined in a criminal conviction may be accorded preclusive effect at a later MSPB adverse action hearing if the normal standards for preclusion are satisfied.

Congress established the MSPB as "a quasi-judicial body." S.Rep. No. 969, 95th Cong., 2d Sess. 24 (1978). U.S. Code Cong. & Admin. News 1978, 2723. As the Third Circuit held,

> the same policy reasons which underlie use of collateral estoppel in judicial proceedings are equally applicable when the administrative board acts as an adjudicatory body. It is well established that the doctrine of collateral estoppel contributes to efficient judicial administration, serving the public interest in judicial economy as well as the parties' interests in finality, certainty of affairs and avoidance of unnecessary relitigation.

Chisholm, 656 F.2d at 46. It should be remembered also that issue preclusion is appropriate in only certain circumstances and is subject to important exceptions to

prevent unfairness. Indeed, even as the Third Circuit held the principles of preclusion appropriate in MSPB hearings, it remanded the Chisholm case for the MSPB to inquire more carefully into the prior criminal conviction to determine the precise issues "in fact litigated and necessarily decided adversely" to the defendant. Given the care with which courts have elaborated the doctrine of preclusion, we see no reason why the MSPB may not apply the doctrine in its own hearings as circumstances permit.

The heart of Otherson's contention that issue preclusion is always inappropriate is that an employee has a right to a hearing in adverse action appeals to the MSPB, 5 U.S.C. § 7701(a)(1) (Supp. V 1981). . . .

The fact that Congress guaranteed employees one full opportunity to be heard, however, does not mean that Congress intended them to have more than one. Issue preclusion is only appropriate when a party had a full and fair opportunity to present his case at a prior hearing, . . . and the employee may always argue in his hearing before the MSPB that the prior proceeding failed to meet this standard. Just as application of issue preclusion in civil trials does not unlawfully deprive litigants of their day in court, neither does application of issue preclusion in MSPB hearings deprive employees of their statutory hearing rights. Moreover, only those issues determined against the employee at the earlier proceeding may not be contested again. Employees whose misconduct is established preclusively will thus still have an undiminished opportunity to press other arguments before the Board, such as whether removal would promote the efficiency of the service.

. . . .

III.

Otherson's next attack is on the appropriateness of giving preclusive effect to facts underlying this particular criminal conviction. Because his attack is on

several fronts--some at which he fights more fiercely than others--it will be wise to set out in brief form the elements of issue preclusion, also known as collateral estoppel. Along with the doctrine of claim preclusion or res judicata, issue preclusion aims to avert needless relitigation and disturbance of repose, without inadvertently inducing extra litigation or unfairly sacrificing a person's day in court. As the Supreme Court has explained,

> "a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

Issue preclusion establishes in a later trial on a different claim identical issues resolved in an earlier trial, if certain conditions are met. First, the issue must have been actually litigated, that is, contested by the parties and submitted for determination by the court. See Cromwell v. County of Sac, 94 U.S. 351, 353 (1877) ("only as to those matters in issue or points controverted"); Stebbins v. Keystone Insurance Co., 481 F.2d 501, 508 (D.C. Cir. 1973). Second, the issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial. Montana v. United States, 440 U.S. 147, 153 (1979) (citing draft version of what became RESTATEMENT (SECOND) OF JUDGMENTS § 27). See also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979) ("necessary to the outcome of the first action"); accord Association of Bituminous Contractors Inc. v. Andrus, 581 F.2d 853,

859-60 (D.C. Cir. 1978). Third, preclusion in the second trial must not work an unfairness. Preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes of the second trial. See Blonder-Tongue Laboratories, 402 U.S. at 333 (in connection with preclusion against plaintiff in second action who lost as plaintiff in first action against a different defendant); see also Parklane Hosiery, 439 U.S. at 330 (heightened concern for potential unfairness from preclusion against defendant in second action brought by plaintiff not a party to the first suit). We now consider each factor with respect to preclusion at Otherson's MSPB hearing.

A. Necessarily Determined in the First Action

We can dispose of one element without much difficulty: whether the criminal trial necessarily determined the facts the Government sought to establish preclusively at the MSPB hearing. Otherson notes that each count against him and his co-defendant included either conspiracy, 18 U.S.C. § 371 (1976), or aiding and abetting, id § 2, as a source of liability. He also notes that the judge rendered no special findings of fact. Perhaps, he argues, the judge's general verdict did not decide in the Government's favor on every fact the Government alleged and to which the Government's witnesses testified. Perhaps the court found Otherson's own involvement to be less direct and substantial than alleged, illegal only on grounds of conspiracy or aiding and abetting.

We find this argument unconvincing. Otherson has not shown that "'a rational [factfinder] could have grounded its verdict upon an issue other than that which the [party] seeks to foreclose from consideration.'" Ashe v. Swenson 397 U.S. 436, 444 (1970) (effect of prior acquittal). As Emich Motors Corp. v. General Motors Corp, 340 U.S. 558, 569 (1951), required, the MSPB presiding official examined the record of the prior trial in detail to see

if the judge might have disbelieved some aspects of the acts charged. The MSPB examination was not to be "hypertechnical," but to be conducted "with realism and rationality." Ashe, 397 U.S. at 444. The only grounds the judge at the criminal trial had for doubting the Government's version of events was Otherson's cross-examination, which made general attacks on the witnesses' credibility. The MSPB official concluded that the judge must have found the Government's witnesses credible, and thus that "it was necessary and essential for the court to find that the defendants did commit the acts listed in the pleadings." We find this conclusion to be perfectly reasonable and thus reject Otherson's contention that the general verdict at the criminal trial did not necessarily determine against him the facts preclusively established at the MSPB hearing.

B. Actually Litigated

Otherson next contends that, because the criminal trial was conducted on the basis of a stipulated record, the issues were not actually litigated. His contention, however, misconstrues the sort of stipulations that bring issues outside the actual litigation requirement. Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been "actually litigated" and thus is not a proper candidate for issue preclusion. See Sekaquaptewa v. MacDonald, 575 F.2d 239, 247 (9th Cir. 1978); Anderson, Clayton & Co. v. United States, 562 F.2d 972, 992 (5th Cir. 1977), cert. denied, 436 U.S. 944 (1978); Red Lake Band v. United States, 607 F.2d 930, 934 (Ct. Cl. 1979) (alternative holding); cf. United States v. International Building Co., 345 U.S. 502 (1953) (consent judgment); Tutt v. Doby, 459 F.2d 119, 1199-200 (D.C. Cir. 1972) (default judgment). The reasoning behind this rule is apparent from the Restatement's articulation of the actual litigation requirement:

> The interests of conserving judicial resources, of maintaining

> consistency, and of avoiding oppression or harassment of the adverse party, are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action could be narrowed by stipulation and thus to intensify litigation.

Otherson, however, did not stipulate to the truth of the Government's allegations. He simply stipulated that the Government's witnesses would testify in the second trial as they had at the first. When a stipulation merely helps to shape the record a factfinder will use to determine the truth of a fact, rather than to establish the truth of the fact itself, that fact may be preclusively established in a later trial if the other requirements for issue preclusion are met. See Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622 (4th Cir.), cert. denied, 350 U.S. 838 (1955). Otherson contested the allegations against him through his attorney's cross-examination, and the parties left it to the trial judge to evaluate the witnesses' testimony and determine whether the Government established its allegations beyond a reasonable doubt. Therefore, the factual basis of the charges was actually litigated and those facts are appropriate for issue preclusion at later proceedings.

C. Incentive to Litigate

Fears that a party might have litigated less than fully because the stakes in the first action were low in relation to those in the second inhere in the justification for not preclusively establishing issues not actually litigated. See Tutt v. Doby, 459 F.2d 1195, 1200 (D.C. Cir. 1972) (incentive--to-litigate problems in default judgments); Red Lake Band v. United States, 607 F.2d 930, 934-35 (Ct. Cl. 1979) (lack of incentive to litigate a factor in affording

no preclusive effect to issues resolved by stipulation); . . . . Courts, however, have considered potential unfairness from a lack of incentive to litigate even when some litigation actually took place in the first trial. See Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 540 (2d Cir. 1965) (among other considerations), cert. denied, 382 U.S. 983 (1966); Spiker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951) (same). In the Restatement's formulation, lack of incentive to litigate is one consideration for possible exception from preclusion even in cases where the other requirements for preclusion are met. See RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c).

We now consider and reject two arguments that Otherson's lack of incentive to litigate fully in the first trial makes preclusion inappropriate even though the facts were contested and submitted for judicial determination. The first argument is that the stakes in the first trial were quite low in relation to the stakes at the MSPB hearing. Otherson was fined $1,000 and was at risk for only six months in jail, see App. 15. This is arguably much less than the stakes of a proceeding concerning a discharge from employment. Indeed, one circuit that has found preclusion generally appropriate for issues determined by verdicts entered upon guilty pleas has suggested that facts inhering in a guilty plea to a misdemeanor may not similarly be established preclusively in later trials. In re Raiford, 695 F.2d 521, 524 (11th Cir. 1983). Yet Otherson's case is one good example of a defendant who took the first trial quite seriously even though he was at risk for only a small amount. See Zdanok v. Glidden Co. 327 F.2d 944, 956 (2d Cir.) (defended first action with vigor, so preclusion appropriate in second action for much higher stakes); cert. denied, 377 U.S. 934 (1964). Although he did withhold some of his evidence, he obviously thought the charge a serious one, for he pursued his appeal on the legality of his conviction all the way to the Supreme Court. Therefore, preclusion is much more appropriate here

than in a case where a defendant put up no resistance at all because the misdemeanor was too trivial to worry about.

A second argument for an exception to preclusion is that the bargain with the prosecution created an actual disincentive to litigate these particular issues, above and beyond the fact that Otherson was at risk for only a misdemeanor. Had Otherson insisted on presenting his full factual defenses to the allegations, he presumably would have faced felony charges rather than misdemeanors. In this respect Otherson's plight resembles that of the party sought to be bound in Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966).

Although this contention merits serious consideration, we nonetheless find preclusion appropriate under the circumstances. We note first that preclusion is sought here by Otherson's adversary in the first trial, the Federal Government. According to the Restatement's formulation, when preclusion is sought by a former adversary, and the other requirements for preclusion are met, courts should refuse to give the first judgment preclusive effect on grounds that the party lacked adequate incentive to litigate in the first proceeding only upon a "compelling showing of unfairness." RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment j. Even the fact that the first determination was "patently erroneous" is not alone sufficient. . . . The apparent justification for this formulation is that relitigation between the same two adversaries is more strikingly wasteful than relitigation between two different parties and that parties can most readily foresee, and expect to be subject to issue preclusion in future suits involving a present adversary.

Under the circumstances we think there is no great unfairness in holding Otherson to the determinations from his prior criminal conviction. Even without the full evidentiary presentation Otherson made at

> the felony trial, the misdemeanor conviction does provide an extra margin of reliability that dispels some of the worries about using the conviction at the MSPB hearing. The court found Otherson guilty beyond a reasonable doubt. It did so after considering the testimony of witnesses subjected to full cross examination. Given that the Government must prove misconduct at the MSPB hearing by a mere preponderance of the evidence, it is not likely that preclusive use of the conviction will work an unfairness at the later hearing.
>
> . . . .
>
> For the foregoing reasons, we deny Otherson's petition for review.

Note 1. One of the requirements for use of collateral estoppel mentioned by the courts in Otherson is actual litigation over the issue in dispute. This requirement raises a serious question about the propriety of using collateral estoppel based on a nolo contendere plea or what has become known as an Alford plea of guilty. An Alford plea of guilty is a guilty plea wherein the individual does not admit the underlying facts and the court does not make a finding as to the underlying facts. See North Carolina v. Alford, 400 U.S. 25 (1970). To view how the MSPB and the Court of Appeals for the Federal Circuit have analyzed the difficult questions presented by an Alford or nolo contendere plea, see Crofoot v. GPO, 823 F.2d 495 (Fed. Cir. 1987); Graybill v. USPS, 782 F.2d 1597 (Fed. Cir. 1986); Loveland v. Air Force, 34 M.S.P.R. 484 (1987); and Crofoot v. GPO, 31 M.S.P.R. 442 (1986).

Note 2. Even if collateral estoppel cannot be used based on an Alford plea, the Court of Appeals for the Federal Circuit in Crofoot sanctioned disciplinary action for "notoriously disgraceful conduct" based on a conviction resulting from an Alford plea. Of course the agency had to demonstrate how the conviction in that case amounted to notoriously disgraceful conduct. It did so by showing that Crofoot's conviction was known throughout the agency and was considered particularly disgraceful because the nature of the offense was closely related to the work Crofoot performed for the agency.

Note 3. The Board may, even if collateral estoppel is inappropriate, rely upon a documentary

record from the criminal proceedings to establish the fact of misconduct. See Payer v. Department of Army, 19 M.S.P.R. 534 (1984).

Note 4. If collateral estoppel is available it clearly satisfies the agency's proof. However, if the agency has independent evidence to prove the misconduct, it is wise to use that evidence to preclude the case later being lost if the criminal case is later reversed on appeal. See Robinson v. Department of Army, 21 M.S.P.R. 270 (1984).

c. Evidence of indictment. Occasionally, an agency wants to discipline an employee but lacks the independent proof and the individual has not been convicted. However, the individual has been indicted and is awaiting trial. It has long been established that an indictment is not evidence or proof of the underlying misconduct. See Brown v. Department of Justice, 715 F.2d 662, 667 (D.C. Cir. 1983). However, the agency is not without remedy in this situation.

Agencies may take disciplinary action when they have reasonable cause to believe that an employee has committed a crime for which imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Evidence of indictment provides this reasonable cause. See Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976). Evidence that the employee was arrested or that the employee is under investigation does not provide the necessary reasonable cause. See Larson v. Department of Navy, 22 M.S.P.R. 260 (1984); Martin v. Department of Treasury, 16 M.S.P.R. 292 (1982). But see Dunnington v. Department of Justice and OPM, 45 M.S.P.R. 305 (1990) (arrest based on arrest warrant issued by neutral magistrate based on a finding of probable cause sufficient).

Typically the discipline imposed in this situation is an indefinite suspension pending resolution of the criminal charges. This type disciplinary action will be examined in detail in paragraph 5.12 of this chapter.

5.9 Proving the Connection Between the Misconduct and the Efficiency of the Service. Proving that the employee did something wrong, even criminal, is not sufficient to justify disciplinary action. Serious disciplinary actions may only be taken "for such cause as will promote the efficiency of the service." 5 U.S.C. §§ 7503(a), 7513(a). This requirement to prove

the impact on the efficiency of the service has become known as the "nexus" requirement.

a. The nexus requirement: the general rule. The nexus requirement is not something new created by the Civil Service Reform Act of 1978. It has existed since the passage of the Lloyd-LaFollette Act in 1912 and it has been the subject of much judicial interpretation by the various U.S. courts of appeals. The MSPB first examined in detail this nexus requirement in Merritt v. Department of Justice, 6 M.S.P.R. 585 (1981). The Board in Merritt examined judicial precedent to date and established the foundation for all subsequent Board decisions in this area. This lead case is set forth in part below.

Merritt v. Department of Justice
6 M.S.P.R. 585 (1981)

[Footnotes and selected portions deleted].

OPINION AND ORDER

This appeal raises the issue of when off-duty misconduct may justify the removal of a non-probationary competitive service employee, an issue not previously addressed by this Board. The issue involves the historically perplexing question of how such misconduct must relate to "the efficiency of the service" before action may be warranted under Chapter 75 of Title 5, U.S. Code. It also involves the impact on that standard of a statutory provision newly enacted by the Civil Service Reform Act of 1978 (the Reform Act), which now makes it a prohibited personnel practice to take a personnel action discriminating "on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others." 5 U.S.C. 2302(b)(10).

I. FACTUAL BACKGROUND

The appellant had been employed with the agency for eighteen months when his removal was effected based on . . . possessing and using marijuana . . . the presiding official sustained the . . . charge based on appellant's own admission.

Appellant contended that his removal on the . . . sustained charge did not promote the efficiency of the service, especially in light of his acceptable and improving performance record. The agency asserted that his disregard of the law in possessing marijuana destroyed the trust that the agency must have in his vigorous enforcement of the contraband regulations of the institution, particularly those prohibiting the possession and use of marijuana in the facility. Additionally, the agency argued that appellant could be subject to "pressures and blackmail" by inmates who might learn of his offense.

II. EFFICIENCY OF THE SERVICE STANDARD

The removal of a Federal employee for misconduct is governed by 5 U.S.C. Chapter 75. Section 7513(a) of that Chapter, as amended by the Reform Act, provides that:

> Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service. [Emphasis supplied]

Regulations to implement section 7513(a) have been issued by the Office of Personnel Management (OPM) in 5 C.F.R. Part 752, but those regulations do not attempt to define or elaborate upon the statutory "efficiency of the service" standard.

While no directly applicable regulatory interpretation of the standard is available, the statutory language echoes that of predecessor statutes dating back to the Lloyd-LaFollette Act in 1912. Prior to the enactment of the Reform Act, the "efficiency of the service" standard was codified in 5 U.S.C. 7501(a) and 7512(a). The courts have thus had many years in which to interpret that standard in the context of charges relating to off-duty misconduct. Therefore, to determine what the standard requires, we commence by examining the pertinent judicial decisions in order to ascertain the state of

the case law on this subject at the time Congress in 1978 re-enacted the standard while simultaneously enacting 5 U.S.C. 2302(b)(10).

A. Judicial Treatment of the Standard

Any casual review of the many Federal court decisions on this subject is bound to suggest a widespread lack of judicial consensus as to the requirements of the statutory standard, with results that sometimes appear clearly inconsistent under circumstances that seem distinguishable only by the most fanatical hair-splitter.

. . . .

However, the clearly discernible trend over the past decade or so has been toward closer judicial examination of agency claims that an employee's off-duty behavior relates sufficiently to the efficiency of the service to justify firing the employee for the behavior. . . .

The trend toward closer judicial scrutiny of off-duty misconduct as allegedly related to service efficiency received its initial impetus from the 1969 decision of the D.C. Circuit in Norton v. Macy, 417 F.2d 1161. Observing that "[t]he Due Process Clause may . . . cut deeper into the Government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is . . . a foundation of several specific constitutional protections," id. at 1164, the court reversed the removal of a NASA budget analyst on alleged grounds of "immoral conduct" and of possessing personality traits which rendered him "unsuitable for Government employment." The court found that the employee's homosexual advance toward a stranger while off-duty had been proved as alleged by the agency, but concluded that the discharge was unlawful because the record established no "reasonable connection" between the evidence against him and the efficiency of the service. The Norton court reasoned that:

> . . . the notion that it could be an appropriate function of the Federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity. And whatever we may think of the Government's qualifications to act in loco parentis in this way, the statute precludes it from discharging protected employees except for a reason related to the efficiency of the service.

Id. at 1165.

The only justification for removal mentioned by the agency in Norton was the possibility of embarrassment to the agency. The agency failed to establish and the court could not discern any "reasonably foreseeable, specific connection between [the] employee's potentially embarrassing conduct and the efficiency of the service." Id. at 1167. Insisting that the employing agency "must demonstrate some 'rational basis' for its conclusion that a discharge 'will promote the efficiency of the service,'" the court held that the sufficiency of the charges "must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do." Id. at 1164, 1166.

Following Morton, private sexual conduct involving only consenting adults was similarly found unrelated to service efficiency in Mindel v. U.S. Civil Service Commission, 312 F. Supp. 485, 488 (N.D. Cal. 1970), in which a district court reversed the removal of a postal clerk for cohabitating with a woman to whom he was not married, finding that there was no "rational nexus" between such conduct and the duties of a postal clerk. Also, in Major v. Hampton, 413 F. Supp. 66, 71 (E.D. La. 1976), a district court reversed the removal of an Internal Revenue Service return examiner for maintaining an apartment for

discreet off-duty extramarital affairs, again finding a lack of nexus. The Major court noted:

> The examiner and the Appeals Review Board appear to have assumed that a person's moral character is homogeneous: those who behave improperly in one regard are likely to transgress in others. But this is both a logical nonsequitur and a psychological error. . . .
>
> A person may have impeccable sexual standards--or indeed be celibate--and yet steal. On the other hand, thieves may be faithful to their wives and attend religious services regularly.

413 F. Supp. at 71 n. 4.

In Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974), a differently constituted panel of the D.C. Circuit signaled a partial retreat from any implication in Norton that there must always be evidence directly substantiating the linkage of an employee's off-duty conduct to the efficiency of the service. Considering the removal of a postal foreman based upon his conviction for manslaughter, the court concluded that conviction of such a serious crime supplies the requisite nexus even without a showing of an explicit deleterious effect on the efficiency of the service. Finding that "it is clear that manslaughter, the unlawful taking of a human life, falls in the area where the nexus is strong and secure," the court nevertheless cautioned:

> We readily recognize that the nexus may become attenuated if an agency attempts to invoke the regulation for activities of a minor nature, such as a traffic citation. We leave the difficult task of drawing a line of demarcation for a future time.

510 F.2d at 1226.

The court also emphasized in Gueory that the presumption of nexus for such a serious crime is not "irrebuttable," and that "mere incantation by an agency of the interpretive regulation involving less serious criminal conduct might necessitate a different result." 510 F.2d at 1227.

The nexus requirement was given further elaboration by the D.C. Circuit in Doe v. Hampton, 566 F.2d 265 (1977), involving the dismissal of a clerk-typist on grounds of mental disability. The case did not concern off-duty misconduct, but the court's statement of the nexus requirement related generally to all adverse personnel actions:

> In law as well as logic, there must be a clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate Government interest promoting the "efficiency of the service."

Id. at 272. The rationale for that requirement was explained as follows:

> The nexus requirement serves the salutary end of helping to ensure against abuse of personnel regulations by mandating that an adverse action be taken only for reasons that are directly related to a legitimate governmental interest, such as job performance. As a corollary, it also serves to minimize unjustified governmental intrusions into the private activities of Federal employees.
>
> The nature of the particular job as much as the conduct allegedly justifying the action has a bearing on whether the necessary relationship obtains. The question thus becomes whether the asserted grounds for the adverse action, if found supported by evidence, would

> directly relate either to the employee's ability to perform approved tasks or to the agency's ability to fulfill its assigned mission.

Id. at 272 n. 20

Shortly after Doe v. Hampton, the Seventh Circuit addressed the question of whether a nexus determination requires explicit evidence in its widely-quoted decision in Young v. Hampton, 568 F.2d 1253 (1977). As we read that opinion, virtually all of the more recent cases, and Morton and Gueory as well, can fit within the analytical frame laid down in Young. The court there reversed the removal of a product inspector by the Department of the Army based upon a conviction for off-duty possession of marijuana and other controlled substances (amphetamines, barbiturates, etc.) in his home. Federal regulations at 5 C.F.R. 731.202(b)(2) permit suitability removals of an employee for "criminal, dishonest, infamous, or notoriously disgraceful conduct," the court noted, but, as under the statutory standard for disciplinary adverse actions, a removal on such grounds is permitted only if such action will promote the efficiency of the service. In an opinion which thoroughly reviewed the existing case law, the Young court established these criteria for determining whether there is a rational basis for concluding that an employee's removal for off-duty misconduct will promote the efficiency of the service:

> The agency may base this determination . . . on [1] evidence adduced at the employee's hearing which tends to connect the employee's misconduct with the efficiency of the service; or [2], in [a] certain egregious circumstances, where the adverse effect of retention on the efficiency of the service could, in light of the nature of the misconduct, reasonably be deemed substantial, and [b] where the

> employee can introduce no evidence showing an absence of effect on the efficiency of the service, the nature of the misconduct may "speak for itself".

Id. at 1257.

The agency in Young had failed to introduce a scintilla of evidence relating to the nexus question, while the employee presented testimony by his supervisor and foreman to the effect that the employee continued to do good work following his conviction. The court held, therefore, that the "vital nexus" had not been established. In so concluding, the Young court distinguished two earlier cases upholding removals based on drug charges, on the ground that evidence in those cases linked the charges with the employees' capacity to perform their jobs reliably.

It is important to observe that the test established by Young v. Hampton, while permitting the requisite nexus to be inferred in some cases without an explicit evidentiary demonstration by the agency, does so only when two conditions are both met. The first is that the particular misconduct must be egregious and of such a nature that the adverse effect of the employee's retention on the efficiency of the service can reasonably be deemed substantial. The second condition is that no evidence shows an absence of adverse effect on the efficiency of the service. This second condition is equivalent to Gueory's holding that the presumption of nexus arising from a serious criminal act is not an irrebuttable one. When either condition is not met, the nexus determination must be based on evidence connecting the employee's misconduct with the efficiency of the service.

The Court of Claims agreed with the Young analysis of the nexus problem in Masino v. United States, 589 F.2d 1048 (1978). Applying the Young criteria to the removal of a customs inspector for personal use and transportation of a small quantity

of marijuana from New York to Arizona, the Court found, with "some reluctance, and agreeing that the issue is close," id. at 1049, that both of the conditions for determining nexus without explicit linking evidence were satisfied. Emphasizing that the employee had transported and used the very contraband which as a customs inspector he was sworn to interdict, the court concluded that his conduct was so egregious that the adverse effect of retention on the efficiency of the service could reasonably be deemed "substantial." The employee having presented no evidence to show an absence of effect on the efficiency of the service, the removal action was sustained.

Two very recent decisions also seem consistent with the Young analysis. In Cooper v. United States, 639 F.2d 727 (Ct. Cl. 1980), the Court of Claims, while remanding for further factual findings in a discharged Navy employee's action for reinstatement, had no difficulty concluding that the employee's alleged sexual abuse of a five-year-old girl, if proven, would adversely affect the efficiency of the service. The particular conduct alleged was of a nature that would clearly be deemed abhorrent to any normal person, and the employee presented no evidence on his own behalf.

The D.C. Circuit, in Yacovone v. Bolger, No. 79-2043 (Slip op., Feb. 20, 1981), reversing 470 F. Supp. 777 (D.D.C. 1979), upheld the removal of a postmaster for a shoplifting conviction, based on evidence that the offense had become notorious in the local community with a significant effect on his reputation for honesty and integrity, and that he occupied a position of authority with fiduciary responsibilities including accountability for local postal revenues. Under these circumstances the court found that even though the appellant's conduct might be attributed to a mental illness of which he had since been cured, and in consequence of which he had since received a gubernatorial pardon, the nexus determination did not require evidence that the appellant's future conduct would

interfere with the efficiency of the postal service.

. . . .

This was the current state of the law when Congress, while re-enacting the "efficiency of the service" standard in the Reform Act, also enacted 5 U.S.C. 2302(b)(10).

B. The Effect of Section 2302(b)(10)

The Reform Act, at 5 U.S.C. 2302(b)(10), makes it a prohibited personnel practice for any employee who has authority to take, direct others to take, recommend, or approve any personnel action, to:

> discriminate for or against an employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States. . . .

The question that necessarily then arises is whether Section 2302(b)(10) adds anything to the requirement of Sections 7503(a) and 7513(a) that Chapter 75 adverse actions be taken only "for such cause as will promote the efficiency of the service."

The Department of Justice and OPM assert that the only effect of Section 2302(b)(10) is to extend the protection of the nexus requirement to all the categories of employees and actions listed in 5 U.S.C. 2302(a)(2), and to make available to persons covered by Chapter 75 as well as to others the protective authority of the Special Counsel in situations of alleged discrimination for nonservice-related conduct through personnel actions not

subject to Chapter 75. Clearly, Section 2302(b)(10) does at least that much on its face.

. . . . We find that in enacting Section 2302(b)(10), Congress intended to make clear that in applying the efficiency of the service standard under Chapter 75 as well as in considering the alleged prohibited personnel practice, a nexus determination is essential and the law requires the Board and the courts to assure that such requirement is properly satisfied. Section 2302(b)(10) reflects Congressional approval of the trend in judicial interpretation of the efficiency of the service standard, already apparent in mid-1978 but then still much disputed among the Federal courts, toward closer scrutiny of nexus determinations made by agencies.

. . . .

We conclude that the requirement of Section 2302(b)(10) and the efficiency of the service standard are consistent with the Morton-Gueory-Young mode of analysis. Accordingly, we adopt the criteria for nexus determinations established by those cases, as more particularly described in our discussion of Young v. Hampton, ante at 19-20. The effect of the two conditions specified in Young is that a nexus determination must be based on evidence linking the employee's off-duty misconduct with the efficiency of the service or, in "certain egregious circumstances," on a presumption of nexus which may arise from the nature and gravity of the misconduct. In the latter situation, the presumption may be overcome by evidence showing an absence of adverse effect on service efficiency, in which case the agency may no longer rely solely on the presumption but must present evidence to carry its burden of proving nexus. The quantity and quality of the evidence which the agency need present in that circumstance would clearly then depend upon the nature and gravity of the particular misconduct as well as upon the strength of the showing made by the

appellant in overcoming the otherwise applicable presumption.

. . . .

III. THE NEXUS ISSUE IN THIS APPEAL

. . . .

Appellant's misconduct in his home was not of an egregious character or gravity from which impairment of service efficiency can be presumed. Young v. Hampton, supra, 568 F.2d at 1258, 1260-61, 1264, 1265-66. It was, therefore, the agency's burden to present evidence tending to prove that appellant's off-duty conduct affected the efficiency of the service. This the agency failed to do. The fact that appellant's conduct may have been unlawful did not relieve the agency of its burden to establish the requisite nexus, particularly in view of limitations upon the power of the Government to intrude unnecessarily upon the discreet conduct of citizens, including Federal employees, in the privacy of their homes.

Moreover, to the extent that the criminality of appellant's conduct warrants any inference of doubt about his reliability or trustworthiness, such inference was rebutted by appellant's evidence that during the five months following the marijuana incident his job performance improved and he was recommended for a promotion. The agency offered no evidence in response to this showing by appellant, and none to support its post-hearing argument of possible "pressures and blackmail" against appellant.

Under these circumstances, we find that the agency's nexus allegation is not supported by the preponderance of the evidence. See 5 U.S.C. 7701(c)(1)(B). . . .

CONCLUSION

Accordingly, the initial decision is hereby REVERSED, and the agency is ORDERED to cancel its removal action against the appellant. . . .

Merritt has been interpreted to require that agencies introduce evidence of the nexus between the misconduct and the efficiency of the service; mere assertion or argument is insufficient. This nexus must be proved by a preponderance of the evidence.

Note. The nexus requirement flows from the cause standard found at 5 U.S.C. §§ 7503 and 7513. However, both of those sections apply only to certain designated employees, i.e., nonprobationary competitive service employees and "favored" excepted service employees. While the MSPB generally may only hear appeals from this type of employee, to what extent can this cause standard apply to disciplinary actions taken against other employees? The Board in Merritt briefly examined 5 U.S.C. § 2302(b)(10) which makes it a prohibited personnel practice to take a personnel action against an employee for conduct that does not adversely affect his or her performance, or the performance of others. The board concluded that, in part, section 2302(b)(10) extended the cause standard from 5 U.S.C. §§ 7503 and 7513 to virtually all personnel actions against all employees. The agency may, therefore, face the nexus requirement even in lesser adverse actions and those taken against employees other than nonprobationary competitive service and "favored" excepted service employees. It is unlikely that this additional concern will arise in an MSPB proceeding, because of the limit on the Board's jurisdiction. However, it could arise in an arbitration hearing or another administrative proceeding. See St. Amand, Probationary and Excepted Service Employee Rights in Disciplinary Actions in the Wake of Cleveland School Board v. Loudermill, The Army Lawyer, July 1985, at 1, for discussion of possible expansion of employee hearing rights due in part to 5 U.S.C. § 2302(b)(10).

b. Presenting evidence of nexus. In August 1984 the MSPB rendered several decisions in the nexus area which together provide helpful guidance and appear to make the agency's burden more reasonable. See particularly the following cases: Jaworski v. Department of the Army, 22 M.S.P.R. 499 (1984); Honeycutt v. Department of Labor, 22 M.S.P.R. 491 (1984); Backus v. Office of Personnel Management, 22 M.S.P.R. 457 (1984); Franks v. Department of Air Force, 22 M.S.P.R. 502 (1984); and Abrams v. Department of Navy, 22 M.S.P.R. 480 (1984).

These nexus cases, like most nexus cases, are fairly fact specific while continuing to apply the guidance initially set out in Merritt v. Department of Justice. However, together these cases help to categorize somewhat the types of evidence that the Board will accept as adequate proof of the required nexus. The best evidence is that which demonstrates direct impact, which has already occurred, on the job site, e.g., fellow employees afraid to work with the offending employer. See Backus v. Office of Personnel Management. In many cases that type of evidence is not available. The second type of evidence to look for is that which reflects reasonable cause to fear impact in the future, e.g., the nature of the offense and the nature of the employee's duties lead the supervisor to lose confidence in the employee's ability to continue to perform satisfactorily. See Honeycutt v. Department of Labor and Jaworski v. Department of Army. If that type evidence is not available, the final type to look for is evidence that the misconduct impacts on the organization in a broader sense, e.g., bad publicity or the need to use agency resources to deal with the misconduct. See Franks v. Department of Air Force.

Note. A troublesome area concerning nexus has been the employee's absence from work during incarceration. In an early case, dealing with this issue, Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977), the Army argued that the employee's absence from work because of being in jail pursuant to conviction for his or her misconduct is evidence of nexus relating to the underlying misconduct. The court in Young ruled, however, that the agency could not use incarceration as evidence of nexus for the underlying offense. The MSPB in Abrams v. Department of Navy reaffirmed the holding in Young. However, in doing so the Board sanctioned another approach which virtually accomplishes the same end. The Board upheld the Navy's charging an employee with AWOL during the period of incarceration, and its subsequent removal of the employee, in part for excessive AWOL. See also Bradley v. USPS, 32 M.S.P.R. 255 (1987).

c. Exception: the presumption of nexus.

(1) Application of the presumption. The MSPB in Merritt v. Department of Justice clearly establishes the general rule that requires agencies to present evidence in every case to prove nexus by a preponderance of the evidence. The Board also recognized in Merritt that in "certain egregious circumstances" nexus could be presumed from the nature and seriousness of the

misconduct. In doing so, the Board suggested that it was adopting an approach taken by the courts in Masino v. United States, 589 F.2d 1048 (Ct. Cl. 1978) and Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974).

After the Board's decision in Merritt, two U.S. Courts of Appeals rejected the presumption of nexus under any circumstances. See D.E. v. Department of Navy, 707 F.2d 1049 (9th Cir. 1983) (opinion withdrawn) and Bonet v. U.S. Postal Service, 661 F.2d 1071 (5th Cir. 1981). The court of appeals for the 3d Circuit in Abrams v. Department of Navy, 714 F.2d 1219 (3d Cir. 1983), approved of the presumption of nexus in egregious circumstances. The differences in the circuits caused confusion in the area until the issue was addressed by the U.S. Court of Appeals for the Federal Circuit in Hayes v. Department of Navy, 727 F.2d 1535 (Fed. Cir. 1984). The court in Hayes specifically held that nexus may be presumed in egregious circumstances, and upheld the MSPB's decision presuming nexus in that case based on the employee's conviction for assault and battery on a 10-year-old female. The importance of the Hayes decision is that because virtually all appeals from MSPB decisions must go to the Court of Appeals for the Federal Circuit, see Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, the MSPB considers Federal Circuit decisions "controlling" on the Board, while decisions by other circuits are only "persuasive" authority. See Fairall v. VA, 33 M.S.P.R. 33 (1987).

While this presumption helps the agency, it applies only in egregious circumstances. What constitutes egregious circumstances will have to be determined on a case by case basis. See Hayes at 1539, n.3 for a list of cases in which the presumption was applied.

(2) Employee rebuttal of presumption. The presumption is a rebuttable one. The employee may present evidence which will rebut the presumption and force the employing agency to present evidence of nexus. The limited case law in this area indicates that the employee's burden is a heavy one. To rebut the presumption the employee has to present evidence to demonstrate that the misconduct has no adverse impact on his or her performance, no adverse impact on the performance of other employees, and no adverse impact on the organization. See Abrams v. Department of Navy, 714 F.2d 1219 (3d Cir. 1983); Abrams v. Department of Navy, 22 M.S.P.R. 480 (1984); Johnson v. HHS, 22 M.S.P.R. 521 (1984); Williams v. GSA, 22 M.S.P.R. 476 (1984).

If the agency is able to prove that the employee committed an act of misconduct and that the misconduct adversely affects the efficiency of the service, it has justified taking disciplinary action. However, to sustain the specific action taken, the agency also has to demonstrate the appropriateness of the specific discipline imposed.

5.10 Demonstrating the Appropriateness of the Penalty Choice. Early in the MSPB's existence it was confronted with a question concerning its authority to mitigate an agency's penalty choice. In Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), the Board issued its lead decision in this area concluding that it had the authority to mitigate the agency's penalty. The Board in Douglas provided detailed guidance concerning the scope of its review and the relevant factors it would consider in assessing penalties. This case continues to be the most important case in the area and is set forth in part below.

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

OPINION AND ORDER

> Under 5 U.S.C. 1205(a)(1), as enacted by the Civil Service Reform Act of 1978 ("the Reform Act"), this Board is authorized and directed to "take final action" on any matter within its jurisdiction. These cases present the question of whether that statutory power includes authority to modify or reduce a penalty imposed on an employee by an agency's adverse action, and if so, by what standards that authority should be exercised. For the reasons set out hereafter, we conclude that the Board does have authority to mitigate penalties when the Board determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. We also conclude that this authority may be exercised by the Board's presiding officials, subject to our review under 5 U.S.C. 7701(e)(1).

The appellants in these cases, career employees in the competitive service, were each removed by their agencies upon charges of job-related misconduct under 5 U.S.C. 7513. In all but one case, they alleged in their appeals before this Board that the penalty imposed by the agency was too severe. The Board's presiding officials sustained the agency decisions, finding that selection of an appropriate penalty is a matter essentially committed to agency discretion and not subject to proof. The Board thereupon reopened the initial decisions to consider these issues. . . .

I. THE BOARD'S AUTHORITY TO MITIGATE PENALTIES

The Office of Personnel Management (OPM), most of the agencies, and AFGE urge that the Board lacks authority to mitigate an agency-selected penalty. They acknowledge that an agency's choice of penalty may be so disproportionate to an offense or otherwise improper as to constitute an abuse of discretion warranting reversal by the Board. However, they assert that in such cases the Board may not itself reduce or modify the penalty but must instead remand the appeal to the employing agency for selection and imposition by the agency of a substitute penalty, subject to further appeal to the Board from the agency's substituted penalty. For the Board itself to modify or reduce a penalty, they contend, would intrude upon the employing agency's managerial functions. The proponents of this position cite various Federal court decisions referring to selection of penalties as a matter within "agency" discretion; OPM also emphasizes the purpose of the Reform Act to separate managerial from adjudicatory functions in the civil service system.

The other Federal employee unions and the Acting Special Counsel, on the other hand, point to the authority previously reposed in the former Civil Service Commission to mitigate or lessen agency-imposed penalties. The Commission delegated that authority to its Federal Employee

Appeals Authority (FEAA) and Appeals Review Board (ARB) for certain categories of cases, otherwise reserving such authority to the Commissioners themselves. Under Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act, it is contended, this Board as the successor agency to the Commission is vested with the same power to mitigate or lessen penalties imposed by agencies. These participants also urge that such authority is inherent in the Board's adjudicative function and is necessary to the proper exercise of the Board's statutory role as a strong, independent protector of merit system principles, including particularly the principle of "fair and equitable treatment in all aspects of personnel management. . . .

These provisions have now been succeeded by new Section 1205(a) of title 5, as enacted by the Reform Act, sec. 202(a), 92 Stat. 1122, which provides:

> (a) The Merit Systems Protection Board shall--
>
> (1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title . . . or any other law, rule or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;
>
> (2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order. . . .

Thus, unless "inconsistent with any provision in" the Reform Act, the functions specified as remaining with the Board under Section 202 of Reorganization Plan No. 2 of 1978, including the former Commissioner's mitigation authority, remain vested in the Board through 5 U.S.C. 1205(a).

II. STANDARDS GOVERNING EXERCISE OF THE BOARD'S MITIGATION AUTHORITY

A. Scope of Review

Since the agency's actions in these cases were taken under Chapter 75 of Title 5, the respective agency decisions to take those actions may be sustained only if supported by a preponderance of the evidence before the Board. 5 U.S.C. 7701(c)(1)(B). We must therefore consider whether the preponderance standard applies only to an agency's burden in proving the actual occurrence of the alleged employee conduct or "cause" (5 U.S.C. 7513) which led the agency to take disciplinary action, or whether that standard applies as well to an agency's selection of the particular disciplinary sanction.

We have no doubt that insofar as an agency's decision to impose the particular sanction rests upon considerations of fact, those facts must be established under the preponderance standard and the burden is on the agency to so establish them. This is so whether the facts relate to aggravating circumstances in the individual case, the employee's past work record, nature of the employee's responsibilities, specific effects of the employee's conduct on the agency's mission or reputation, consistency with other agency actions and with agency rules, or similar factual considerations which may be deemed relevant by the agency to justify the particular punishment. Section 7701(c)(1) admits of no ambiguity in this regard, since an agency's adverse action "decision" necessarily includes selection of the particular penalty as well as the determination that some sanction was warranted. The statute clearly requires that all facts on which such agency decision rests must be supported by the standard of proof set out therein.

It is also clear, however, that the appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual

determination. Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgment and discretion." Kulkin v. Bergland, 626 F.2d 181, 185 (1st Cir. 1980). It is well established that "assessment of penalties by the administrative agency is not a factual finding but the exercise of a discretionary grant of power." Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Thus, an adverse action may be adequately supported by evidence of record but still be arbitrary and capricious, for instance if there is no rational connection between the grounds charged and the interest assertedly served by the sanction. . . .

The evidentiary standards of 5 U.S.C. 7701(c) specify the quantity of evidence required to establish a controverted fact. As procedural devices for allocating the risk of erroneous factual findings those standards are inapposite to evaluating the rationality of non-factual determinations reached through the exercise of judgment and discretion. For such determinations, the characteristic standard of review is the arbitrary-or-capricious, or abuse-of-discretion, standard. . . .

By the standard, the Commission reviewed agency penalties to determine whether they were "clearly excessive" or were "arbitrary, capricious, or unreasonable. . . ."

In focusing not merely on whether a penalty was too harsh or otherwise arbitrary but also on whether it was "unreasonable," the Commission's standard appears considerably broader than that generally employed by the Federal courts. Both the Court of Claims and the Courts of Appeals have characteristically reviewed Commission--approved penalties only to determine whether they were so disproportionate to the offense as to amount to an abuse of discretion or whether they exceeded the range of sanctions permitted by statute, regulation, or an applicable table of penalties. The Commission's broad standard of "unreasonableness," encompassing greater

latitude of review than is typically employed by the appellate courts in appeals from Commission or Board decisions, accords a measure of scope to the Commission's and now this Board's independent discretionary authority which the courts have recognized.

The Board's marginally greater latitude of review compared to that of the appellate courts does not, of course, mean that the Board is free simply to substitute its judgment for that of the employing agencies. Management of the Federal work force and maintenance of discipline among its members is not the Board's function. Any margin of discretion available to the Board in reviewing penalties must be exercised with appropriate deference to the primary discretion which has been entrusted to agency management, not to the Board. Our role in this area, as in others, is principally to assure that managerial discretion has been legitimately invoked and properly exercised.

At all events the Board must exercise a scope of review adequate to produce results which will not be found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" when reviewed by appellate courts under Section 7703(c). This is the identical standard (prescribed) by Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. 706(2)(A) (1964 ed., Supp. V). To assure that its decisions meet that standard under Section 7703(c), the Board must, in addition to determining that procedural requirements have been observed, review the agency's penalty selection to be satisfied (1) that on the charges sustained by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty "was based on a consideration of the relevant factors and [that] . . . there has [not] been a clear error of judgment." . . .

Therefore, in reviewing an agency-imposed penalty, the Board must at a minimum assure that the Overton Park criteria for measuring arbitrariness or capriciousness

have been satisfied. In addition, with greater latitude than the appellate courts are free to exercise, the Board like its predecessor Commission will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. In making such determination the Board must give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.

Before turning to matters which may be pertinent in determining whether the agency's selection of a penalty was based on consideration of the relevant factors, it seems advisable to address one further point which has been a source of much semantic muddle. The appropriateness of a particular penalty is a separate and distinct question from that of whether there is an adequate relationship or "nexus" between the grounds for adverse action and "the efficiency of the service." The establishment of such a relationship between the employee's conduct and the efficiency of the service, while adequate to satisfy the general requirement of Section 7513(a) that no action covered by Subchapter II of Chapter 75 may otherwise be taken, "is not sufficient to meet the statutory requirement that removal for cause promote the efficiency of the service." . . . The appropriateness of a particular Subchapter II penalty, once the alleged conduct and its requisite general relationship to the efficiency of the service have been established, is "yet a third distinct determination." Young v. Hampton, 568 F.2d 1253, 1264 (7th Cir. 1977). . . .

Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of

the factors relevant to promotion of service efficiency in the individual case. Thus, while the efficiency of the service is the ultimate criterion for determining both whether any disciplinary action is warranted and whether the particular sanction may be sustained, those determinations are quite distinct and must be separately considered.

B. Relevant Factors In Assessing Penalties

A well developed body of regulatory and case law provides guidance to agencies, and to the Board, on the considerations pertinent to selection for an appropriate disciplinary sanction. Much of that guidance is directed to the fundamental requirement that agencies exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation. OPM's rules on this subject, like those of the Commission before it, emphasize to agencies that in considering available disciplinary actions, "There is no substitute for judgment in selecting among them." Further, OPM specifically counseled agencies that:

> Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; this is particularly true of an employee who has a previous record of completely satisfactory service. An adverse action, such as suspension, should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate.
>
> . . .
>
> . . . Agencies should give considerations to all factors involved when deciding what penalty is appropriate, including not only the gravity of the offense but such

other matters as mitigating circumstances, the frequency of the offense, and whether the action accords with justice in the particular situation.

Section 7513(b)(4) of Title 5 requires that written agency decisions taking adverse actions must include "the specific reasons therefor." While neither this provision nor OPM's implementing regulation, 5 C.F.R. 752.404(f), requires the decision notice to contain information demonstrating that the agency has considered all mitigating factors and has reached a responsible judgment that a lesser penalty is inadequate, a decision notice which does demonstrate such reasoned consideration may be entitled to greater deference from the Board as well as from the courts. Moreover, aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the agency's deciding official, and the decision notice should explain what weight was given to those factors in reaching the agency's final decision.

Court decisions and OPM and Civil Service Commission issuances have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Without purporting to be exhaustive, those generally recognized as relevant include the following:

(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;

(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.

Not all of the factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances. Selection of an

appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case. The Board's role in this process 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; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the Board's review of any agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

In considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanistically by any preordained formula. For example, the principle of "like penalties for like offenses" does not require mathematical rigidity or perfect consistency regardless of violations in circumstances or changes in prevailing regulations, standards, or mores. This consideration is redolent of equal protection concepts, also reflected in the merit system principle calling for "fair and equitable treatment" of employees and applicants in all aspects of personnel management. As such, this principle must be applied with practical realism, eschewing insistence upon rigid formalism so long as the substance of equity in relation to genuinely similar cases is preserved. OPM has required that agencies "should be as consistent as possible" when deciding on disciplinary actions, but has also cautioned that "surface consistency should be avoided" in order to allow for consideration of all relevant factors including "whether the action accords with justice in the

particular situation." Similarly, agency tables of penalties should not be applied so inflexibly as to impair consideration of other factors relevant to the individual case.

Lastly, it should be clear that the ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed. This follows from the fact that selection of the penalty is necessarily an element of the agency's "decision" which can be sustained under Section 7701(c)(1) only if the agency establishes the facts on which that decision rests by the requisite standard of proof. The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision. The selection of an appropriate penalty is a distinct element of the agency's decision, and therefore properly within its burden of persuasion, just as its burden includes proof that the alleged misconduct actually occurred and that such misconduct affects the efficiency of the service. . . .

In many cases the penalty, as distinct from underlying conduct alleged by the agency, will go unchallenged and need not require more than prima facie justification. An agency may establish a prima facie case supporting the appropriateness of its penalty by presenting to the Board evidence of the facts on which selection of the penalty was based, a concise statement of its reasoning from those facts or information otherwise sufficient to show that its reasoning is not on its face inherently irrational, and by showing that the penalty conforms with applicable law and regulation. When no issue has been raised concerning the penalty, such a prima facie case will normally suffice to meet also the agency's burden of persuasion on the appropriateness of the penalty. However, when the appellant challenges the severity

> of the penalty, or when the Board's presiding official perceives genuine issues of justice or equity casting doubt on the appropriateness of the penalty selected by the agency, the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge or to satisfy the presiding official.
>
> Whenever the agency's action is based on multiple charges some of which are not sustained, the presiding official should consider carefully whether the sustained charges merited the penalty imposed by the agency. In all cases in which the appropriateness of the penalty has been placed in issue, the initial decision should contain a reasoned explanation of the presiding official's decision to sustain or modify the penalty, adequate to demonstrate that the Board itself has properly considered all relevant factors and has exercised its judgment responsibility.
>
> III. APPLICATION TO APPELLANTS
>
> [Board discusses facts of 5 cases.]

This is the final order of the MSPB in these appeals.

The Board in Douglas noted that the choice of penalty will largely be left to agency discretion, but that it will review the agency's choice to assure consistency with law, rule, regulation, agency table of penalties, and to assure consideration of other relevant factors.

The other relevant factors set out in Douglas have become known as the "Douglas factors."

Note 1. The Board explicitly stated in Douglas that its list of relevant factors was not exhaustive and that the agency need not address the listed factors mechanically. This approach was approved by the Court of Appeals for the Federal Circuit in Nagel v. Department of Health and Human Services, 707 F.2d 1384 (Fed. Cir. 1983).

Note 2. Because the appropriateness of the agency's penalty choice is part of the agency's burden

of proof, the agency must present evidence concerning its penalty choice even in the absence of an employer challenge to the penalty. See Parsons v. Department of Air Force, 707 F.2d 1406 (D.C. Cir. 1983).

Note 3. What has developed into the most important "Douglas factor" is consistency of the penalty with the agency's table of penalties. The Army's current table of penalties is published in Change 5 to AR 690-700, Chapter 751 (15 September 1989). The MSPB and the courts have addressed some important issues concerning tables of penalties since Douglas.

a. One of these issues concerned the choice of penalty when the offense committed is not listed on the table of penalties. Most tables suggest that in such a case the supervisor should look to an offense found on the table that is of similar seriousness. This approach was sanctioned in McLeod v. Department of Army, 714 F.2d 918 (9th Cir. 1983). However, McLeod demonstrates that the MSPB or the courts may disagree with the agency on what is an offense of similar seriousness. In McLeod the court found removal of an employee for first offense possession of marijuana, an offense not then listed on the Army's table of penalties, excessive because another offense of similar seriousness provided only for a 1 to 3-day suspension for a first offense. This does not necessarily mean that we cannot remove an employee for possession of marijuana. It means that we must seriously consider our table of penalties and the other "Douglas factors." See Bradley v. Department of Navy, 21 M.S.P.R. 334, aff'd, 758 F.2d 667 (1984), in which the Navy successfully fired an employee for possession of one joint of marijuana.

b. Is a supervisor limited to a penalty within the range set out in the table of penalties? Most agencies establish their tables as guides which are not mandatory. The ability to impose a penalty in excess of that on the table of penalties was recognized in Weston v. Department of Housing and Urban Development, 724 F.2d 943 (Fed. Cir. 1983). However, to impose such a penalty the agency has the burden to justify why the recommended penalty in the table of penalties is inadequate.

c. Most tables of penalties provide recommended penalties for various offenses depending on whether the misconduct is the first, second, or third offense. For purposes of determining if the misconduct is the first or later offense, all prior misconduct, not just offenses of the same type, may be considered. See Villela v. Department of Air Force, 727 F.2d 1574 (Fed.

Cir. 1984). Whether the employee may challenge the previous disciplinary action now being used to enhance the punishment, depends on the circumstances surrounding the agency's handling of that earlier action. If the employee had been informed of the previous disciplinary action in writing, had an opportunity for a substantive review of the action by a higher authority than the one who took the action, and if the action had been made a matter of record, then the agency can use that prior disciplinary action to enhance the punishment for the correct misconduct, and the employee may not relitigate the prior action. See Ballew v. Department of Army,36 M.S.P.R. 400 (1988); Bolling v. Department of Air Force, 9 M.S.P.R. 335 (1981). Failure to meet these three requirements with respect to the prior disciplinary action does not preclude the agency's use; it merely allows the employee to challenge the merits of the prior action during the current action. See Parsons v. Department of the Air Force, 21 M.S.P.R. 438 (1984).

If the agency successfully proves that the employee committed the act of misconduct, that discipline is for just and proper cause, and that the penalty imposed is appropriate, then the adverse action should be sustained. The only remaining hurdle that could cause reversal of the action is the agency's failure to follow proper procedures.

5.11 **Following Proper Procedures**. The procedural requirements for disciplinary actions were discussed in Section I of this chapter. Procedures are mandated by statute and implementing regulations of OPM and the employing agency. Failure to follow these procedures may, but does not necessarily, result in reversal of the adverse disciplinary action. Only harmful error warrants reversal of the adverse action. See 5 U.S.C.§ 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3).

The Court of Appeals for the Federal Circuit has determined that there is no per se harmful error with respect to any procedural error, even for procedures mandated by statute. See Handy v. U.S. Postal Service, 754 F.2d 335 (Fed. Cir. 1985) (employee allowed written but no oral reply); Baracco v. Department of Transportation, 735 F.2d 488 (Fed. Cir. 1984) (employee given 6 instead of 7 days advance notice); Stephen v. Department of Air Force, ___ M.S.P.R. ___ (MSPB, April 26, 1991) (No. BN315H8710028). The employee must show that the error would possibly have affected the agency's decision.

Section II of this chapter to this point has discussed the substantive proof requirements associated with disciplinary action. In connection with the discussion on proving that the employee committed the act of misconduct, reference was made to a special type of disciplinary action, an indefinite suspension pending disposition of criminal charges. Because of the increased use of this type action and the unique nature of the action, a detailed discussion of it follows.

5.12 Indefinite Suspension Pending Disposition of Criminal Charges.

a. General. The ability of a Federal agency to indefinitely suspend an employee pending disposition of criminal charges has been recognized by the MSPB and the Federal courts. See Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976); Martin v. Department of Treasury, 12 M.S.P.R. 12 (1982). An excellent discussion of the basis for this adverse disciplinary action is found in Martin v. Department of Treasury which is set forth in part below.

Martin v. Department of Treasury
12 M.S.P.R. 12 (1982)

[Footnotes and other selected portions omitted]

OPINION AND ORDER

Appellant was indefinitely suspended from his position by his employing agency. The indefinite suspension . . . taken pursuant to the shortened notice period provided for by 5 U.S.C. § 7513(b)(1) where ". . . there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, . . ."

I. STATEMENT OF FACTS

Appellant Martin was indefinitely suspended from his position as Supervisory Customs Patrol Officer by the United States Customs Service, Mobile, Alabama. Three reasons, all based upon the same occurrence, were given for the action: (1) unauthorized interception of oral communications; (2) conduct prejudicial to the best interest

of the service; and (3) interfering with the rights of another.

. . . .

The agency based its action on the search warrants and the preliminary report, and also cited its need for further investigation into appellant's involvement. The preliminary report also states that the matter had been referred to the U.S. Attorney's Office for possible action. The presiding official sustained the action, and Martin has petitioned for review.

. . . .

II. ISSUES

By order dated March 2, 1981, the Board identified issues as pertinent to th[is] appeal, . . . under what circumstances is an indefinite suspension initially valid; under what circumstances does an initially valid suspension become invalid; the manner in which an employee can obtain termination of an indefinite suspension if warranted; and, related sub-issues.

. . . .

III. DISCUSSION

It would be helpful, at the outset, to examine the definition of the term "suspension" which is set forth at 5 U.S.C. § 7501(2). That provision defines a suspension, for the first time statutorily, as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." According to the legislative history of the Civil Service Reform Act, (C.S.R.A.), Congress' intent in enacting this provision was to adopt, rather than change, the definition of "suspension" utilized by the former Civil Service Commission (C.S.C.). The former C.S.C. had defined a suspension as "an action placing an employee in a temporary nonduty and nonpay status for disciplinary reasons or for other reasons pending inquiry." Former

FPM Supp. 752-1, S1-6(a). (Emphasis supplied.)

The most essential criterion of an action, if it is to meet the definition of "suspension" set forth at 5 U.S.C. § 7501(2), is that it be "temporary." Accordingly, while the exact duration of an indefinite suspension *may not be* ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension. Although the time duration of the action may not be determinable, an indefinite suspension continuing beyond the given point of termination would be improper. See Erdwein v. United States, 215 Ct. Cl. 54, at 65, n.8 (1977). Such an action imposed with no ascertainable end in sight is not sustainable as a suspension, because of failure to meet the criterion of temporariness.

. . .

Cuellar v. United States Postal Service, MSPB Order No. SF075299045 at 6 (November 13, 1981), "[i]n passing the Reform Act, Congress maintained the 'crime exception' now contained in 5 U.S.C. § 7513(b)(1) as the only instance in which an agency's need to protect its employees, property, and/or reputation could outweigh the employee's right to 30 days' notice [of an adverse action]." Courts have examined, and given approval to, suspension actions taken on shortened notice and based on examinations into charged criminal conduct. See Coleman v. United States Postal Service, No. 79-4751 (S.D. N.Y. May 21, 1980), (approving, "[a]s a practical matter," an indefinite suspension based upon an arrest on a serious charge and an arraignment on the basis of a felony complaint); Jankowitz v. United States, 533 F.2d 538 at 543 (Ct. Cl. 1976), (holding "eminently fair" an indefinite suspension based upon an indictment because "[r]ecognizing that he might well have been acquitted, the agency even-handedly rejected the 'knee-jerk' approach, giving plaintiff a chance to save his job if exonerated.")

Another reason courts have approved of indefinite suspensions based upon examinations into criminal charges was set forth in Polcover v. Department of the Treasury, 477 F.2d 1223, 1231-1232 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973). Quoting from Silver v. McCamey, 221 F.2d 873, 874-875 (D.C. Cir. 1955), the court specifically warned of the dangers of subjecting an employee to an administrative hearing while criminal action is pending:

> [we] agree . . . that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.

See also Peden v. United States, 512 F.2d 1099, 1103 (Ct. Cl. 1975).

As has been stated, indefinite suspensions are based upon "reasonable cause." "[R]easonable cause" is virtually synonymous with the "probable cause" which is necessary to support a grand jury indictment.

An indefinite suspension based on reasonable cause to believe that a crime has been committed for which imprisonment may be imposed must meet the "efficiency of the service" standard of 5 U.S.C. § 7511(a). Thus, there must be a nexus between the crime the employee is reasonably believed to have committed and his position.

. . . .

Another element of the agency's proof is the reasonableness of its penalty. Douglas v. Veterans Administration, MSPB Docket Number AT075299006 (April 10, 1981). Thus, agencies must show that a lesser penalty

would be ineffective under the circumstances of the particular cases.

Indefinite suspensions are not based upon provable misconduct but upon the examination into that misconduct. Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976). Therefore, an indefinite suspension may be found to have been reasonable when imposed, although facts later developed may cause the Board to find that an agency acted unreasonably in failing or refusing to vacate the action. In this regard, however, the Board notes that before an agency or before the Board, the bare fact of a subsequent acquittal does not demonstrate that an indefinite suspension had been unjustified. An acquittal because a jury or judge was not convinced beyond and to the exclusion of all "reasonable doubt," Speiser v. Randall, 157 U.S. 513 (1978), is not binding on an administrative agency, Alsbury v. United States Postal Service, 192 F. Supp. 71 (C.D. Calif. 1975), aff'd, 530 F.2d 852 (9th Cir. 1976), because the standard of proof before the Board is the "preponderance of the evidence." The Board concludes that where, after a full review of the attendant facts and circumstances, an indefinite suspension is found to have been reasonably imposed and maintained, the Board will sustain the action.

Because a suspension is by definition temporary, an indefinite suspension must have a determinable condition subsequent which will bring the action to an end. Accordingly, the Board's order sustaining the action would explicitly or implicitly mandate that the agency move expeditiously, and that the suspension terminate upon the occurrence of the condition subsequent. Noncompliance with these terms of the order could be brought to the Board's attention via 5 C.F.R. § 1201.181, which provides:

> Any party may petition the Board for enforcement of a final decision issued under the Board's appellate jurisdiction. Submission of this petition shall be made to the field office which rendered the initial

> decision. The petition shall specifically set forth the reasons why the petitioning party believes there is non-compliance.

The Board agrees that this provision gives an appellant the procedural opportunity to argue that conditions have occurred which should have brought about a termination of his suspension.

Having set forth the principles which the Board must use to determine the validity of indefinite suspensions, we will now apply them to the specific cases before us.

IV. APPLICATION

Appellant Martin was indefinitely suspended . . . upon charges of unauthorized interception of oral communications, conduct prejudicial to the best interest of the service, and interfering with the rights of another. The agency took the position that the action was appropriate in view of Martin's role as supervisory law enforcement official in an agency (Customs Service) which has a mission of law enforcement.

The record indicates that the agency had received only a preliminary investigative report and that further investigation, or further analysis of the information and materials obtained was ongoing. The Board finds that this continuing investigation, taken together with the search warrants, the actual evidence obtained, and the fact that the matter was referred to the U.S. Attorney for investigation and possible action, provides sufficient basis for "reasonable cause." While an investigation should not per se form the basis for an indefinite suspension, it may provide such a basis where, as is the case herein, it is accompanied by evidence which is sufficient to afford "reasonable cause to believe. . . ." Further, the ongoing agency investigative process and the referral to the U.S. Attorney support the "temporary" nature of the suspension. Finally, the Board finds the suspension action reasonable, Douglas, supra, and also

concludes that the action was taken for such cause as will promote the efficiency of the service, in view of appellant's position as a law enforcement officer. Accordingly, the indefinite suspension action taken against Martin is sustained.

Note 1. An indefinite suspension pending disposition of criminal charges must be based on reasonable cause to believe that the employee committed a crime for which imprisonment can be imposed. See 5 U.S.C. § 7513(b)(1). This section of Title 5 is the same one relied upon to shorten the normal 30-day notice period to 7 days.

Note 2. Most cases rely upon an indictment to establish the requisite reasonable cause. See Jankowitz. See also Johnson v. Department of Health and Human Services, 22 M.S.P.R. 521 (1984). An indictment is not, however, the only evidence providing the necessary reasonable cause. While an arrest or an investigation standing alone is insufficient (see Martin and Larson v. Department of Navy, 22 M.S.P.R. 260 (1984)), a combination of circumstances including an arrest or investigation may suffice. See Gonzales v. Department of the Treasury, 37 M.S.P.R. 589 (1988); Rampado v. U.S. Customs Service, 28 M.S.P.R. 189 (1985); Martin; Honeycutt v. Department of Labor, 22 M.S.P.R. 491 (1984); Backus v. Office of Personnel Management, 22 M.S.P.R. 457 (1984). See also Dunnington v. Department of Justice and OPM, 45 M.S.P.R. 305 (1990) (arrest based on arrest warrant issued by neutral magistrate based on finding of probable cause sufficient).

b. Nature of the action. This indefinite suspension is a temporary action and requires that there be a determinable condition subsequent which will terminate the action. Therefore, if the suspension is imposed pending disposition of criminal charges, the agency must promptly terminate the suspension when the charges are resolved. See Martin; Drake v. Veterans Administration, 26 M.S.P.R. 34 (1985).

Additionally, this type of suspension is viewed as a suspension for more than 14 days and thus is treated as a true adverse action for all procedural and substantive purposes. See Martin. This requires that the agency prove the nexus between the indictment and the efficiency of the service; demonstrate the appropriateness of this penalty choice; and follow the

procedures for imposing a true adverse action. Because 5 U.S.C. § 7513(b)(1) is the basis for this type suspension and for reducing the notice period from 30 to 7 days, only a 7-day notice should be required in these actions.

c. Action upon resolution of criminal charges. The agency may not continue the suspension after the employee is acquitted, the charges are dismissed, or the employee is convicted. The agency must promptly decide then to reinstate the employee and/or to institute adverse action procedures. See Covarrubias v. Department of Treasury, 23 M.S.P.R. 458 (1984).

Acquittal or dismissal of the charges does not necessarily entitle the employee to reinstatement because the agency may be able to prove the underlying misconduct by the lower administrative standard - preponderance of the evidence. See Rodriqnez-Ortiz v. Department of Army, 46 M.S.P.R. 546 (1991); Covarrubias; Eilertson v. Department of Navy, 23 M.S.P.R. 152 (1984). The Supreme Court has reaffirmed the propriety of this type administrative action following unsuccessful criminal action in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

d. Effect of reinstatement on the original suspension. The critical issue arising upon reinstatement of an employee after acquittal or dismissal of charges, concerns the employee's entitlement to back pay for the period of suspension.

The Court of Claims in Jankowitz held that the employee's acquittal and subsequent reinstatement did not entitle the employer to back pay, unless it could be demonstrated that the suspension had been unjustified or unwarranted when it was imposed or during the period it was in effect. This decision was based on the Back Pay Act, codified at 5 U.S.C. § 5596, which permits back pay only if the employee had been subjected to an unwarranted or unjustified personnel action.

The D.C. Circuit Court of Appeals in Brown took a different approach. It determined that an agency's failure to initiate adverse action proceedings based on the underlying conduct, after an employee's acquittal, rendered the earlier suspension unjustified and entitled the employee to back pay for the period of suspension.

The Court of Appeals for the Federal Circuit addressed the issue in Wiemers v. Merit Systems Protection Board, 792 F.2d 1113 (1986). On the issue of

a back pay claim for the period of suspension based on an indictment, when an employee is subsequently acquitted of the criminal charges, the Federal Circuit stated that Jankowitz, and not Brown, was the controlling precedent. Namely, the reversal of the employee's conviction did not entitle him to back pay for any part of the period of suspension. See also Torres v. USPS, 35 M.S.P.R. 655 (1987) and Shafter v. DLA, 35 M.S.P.R. 664 (1987) (applying Wiemers rule).

5.13 **Constitutional Considerations**. The focus of this section has been on the statutory and regulatory provisions governing employee discipline. However, just as there were constitutional concerns in the procedural aspect of discipline (discussed in paragraph 5.6), there are significant constitutional concerns in the substantive aspects of discipline. This paragraph will address several important questions of constitutional dimension.

a. Fifth Amendment. Federal employees have the same fifth amendment rights, including the rights against self-incrimination, as all other persons in the United States. Two general consequences flow from that right. First, an employee may not be disciplined for properly invoking his or her privilege against self-incrimination. Second, later criminal prosecution cannot constitutionally use statements coerced from an employee in an earlier disciplinary investigation by threat of discipline for failure to answer questions. See Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973); Peden v. United States, 512 F.2d 1099 (Ct. Cl. 1974); Weston v. Department of Housing and Urban Development, 724 F.2d 943 (Fed. Cir. 1983).

These courts, while recognizing the employees' constitutional rights, mapped out a clear course describing how to discipline an employee in this situation. If an employee properly invokes the fifth amendment privilege in refusing to answer a work-related question by the employer, the employer should advise the employee first that he or she is subject to disciplinary action for refusal, and second, that the reply, and its fruits, cannot be used against him or her in a criminal proceeding. Following this court-suggested course of action results in use immunity by operation of law.

While the course of action will legally enable the agency to discipline the employee, prior to taking this course of action the agency should coordinate with appropriate civil authorities to assure that the relative interests of the criminal and employment

actions are considered prior to possibly foreclosing one or the other.

It should be recognized that these steps are necessary only if the employee asserts a proper fifth amendment privilege. The employee's refusal to answer the employer's question for fear of disciplinary action, not criminal action, is not a proper fifth amendment invocation. See Devine v. Goodstein, 680 F.2d 13 (D.C. Cir. 1983).

b. First Amendment. When an employee alleges that he or she has been disciplined for exercising a first amendment free speech right, there are two issues that have to be examined. First, is the speech at issue constitutionally protected? Second, if the speech is constitutionally protected and it is a substantive part of the reason for the disciplinary action, is reversal of the disciplinary action required?

(1) Constitutionally protected speech. The Supreme Court in Pickering v. Board of Education of Township High School, 391 U.S. 563 (1968) established the framework for deciding what speech is constitutionally protected in a public employment context. That landmark decision continues to be the starting point for any first amendment analysis in connection with free speech and public employment. The decision is set out in part below.

Pickering v. Board of Education of Township High School 391 U.S. 563 (1968)

> MR. JUSTICE MARSHALL delivered the opinion of the Court.
>
> Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools

of the district" and hence, under the relevant Illinois statute, Ill. Rev. Stat., c. 122, § 10-22.4 (1963), that "interests of the school require[d] [his dismissal]."

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. 36 Ill. 2d 568, 225 N.E.2d 1 (1967). We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments. 389 U.S. 925 (1967). For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor . . . that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the

Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was "detrimental to the best interests of the schools." Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection. In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E.g., Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385

U.S. 589 (1967). "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, supra, at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . . false or with reckless disregard of whether [they were] . . . false or not," New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in

the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)-(4) of appellant's letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone

but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as

conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV

The public interest in having free and unhindered debate on matters of public importance--the core value of the Free Speech Clause of the First Amendment--is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); St. Amant v. Thompson, 390 U.S. 727 (1968). Compare Linn v. United Plant Guard Workers, 383 U.S. 53 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a "matter of public interest" is involved. Time, Inc. v. Hill, 385 U.S. 374 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times.

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375 (1962). In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent

means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

. . . .

Note 1. The Supreme Court, in Connick v. Myers, 461 U.S. 138 (1983), reexamined Pickering in a Federal employment context. The Court reemphasized that determining if speech is constitutionally protected requires balancing the employee's right, as a citizen, to comment on matters of public concern, against the Government's interest, as an employer, to promote the efficiency of the service. Connick noted, however, that before getting into the balancing test, a threshold determination must be made that the speech is on a matter of public concern and not on a purely employment matter. If the speech is not on a matter of public concern, there is generally no first amendment protection. See Henry v. Department of Navy, 902 F.2d 949 (Fed. Cir. 1990); Barnes v. Small, 840 F.2d 972 (D.C. Cir. 1988); Mings v. Department of Justice, 813 F.2d 384 (Fed. Cir. 1987).

Note 2. The most recent public employee first amendment decision by the Supreme Court is Rankin v. McPherson, 483 U.S. 378 (1987), in which the court reversed the firing of a clerk who had remarked to a co-worker, upon learning of the assassination attempt on President Reagan, "if they go for him again, I hope they get him." The court found that the statement was a matter of public concern and that, given the context of the statements, the employee's interest in expression outweighed the potential harm to Government interests.

Note 3. A major free speech case arising out of the much publicized Federal air traffic controller strike is Brown v. Federal Aviation Administration, 735 F.2d 543 (Fed. Cir. 1984).

In Brown, an FAA supervisor addressed a group of his striking air traffic controllers at the union hall, and advised them that if they stayed together, they would win. These remarks were videotaped and later broadcast nationally on television. Brown also told a reporter that he supported some of the strike demands. The court reviewed Brown's firing, which had been upheld by the MSPB, and considered whether his remarks were constitutionally protected. The court recognized that the strike was a matter of public concern, but determined that Brown's remarks were only tangentially related to that concern. Applying the balancing test from Pickering, the court found that the timing of the remarks, at the beginning of the strike, and Brown's position as a supervisor, from whom management should reasonably expect loyalty, justified disciplinary action. The court did, however, direct the MSPB to mitigate the penalty based on the Douglas criteria.

(2) Impact of first amendment violation. If, using the balancing test of Pickering and Connick, the court concludes that the speech at issue is constitutionally protected, does that alone require reversal of the disciplinary action? The short answer is "no." The employee has the additional burden of showing that his or her protected speech was a substantial or motivating factor in the employer's decision to discipline.

Even if the employee can demonstrate the connection, the Supreme Court's controversial decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), allows the agency employer to defeat the employee's claim, if it can prove by a preponderance of the evidence that it

would have taken the same action even absent the employee's protected speech.

The Mt. Healthy decision has had a tremendous impact not only in first amendment cases but several other areas as well, e.g., in Special Counsel actions and in the equal employment opportunity area. Because of its significant impact in all of these areas, the decision is set out in part below.

Mt. Healthy City School District Board of Education v. Doyle
429 U.S. 274 (1977)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution.

. . . .

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of

both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum--on a subject which he apparently understood was to be settled by joint teacher-administration action--was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board.

Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by references to the radio station incident and to the obscene-gesture incident.

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. . . . The Court of Appeals affirmed in a brief per curiam opinion. 529 F.2d 524.

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, Board of Regents v. Roth, 408 U.S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. Perry v. Sindermann, 408 U.S. 593 (1972).

That question of whether speech of a Government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to

Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

. . . .

Clearly the Board legally could have dismissed respondent had the radio station incident never come to its attention. . . . We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But the same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes

the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

. . . .

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

So ordered.

The key to Mt. Healthy, and its significance in areas other than first amendment, is the Court's unwillingness to put an employee in a better position after the speech than the employee would have been in otherwise. Engaging in free speech should not immunize an employee from otherwise proper disciplinary action.

Congress, in the Whistleblower Protection Act of 1989, modified the Mt. Healthy standard in cases where the employee's speech constitutes whistleblowing under

5 U.S.C. § 2302(b)(8). In a whistleblowing case, initially the employee need only demonstrate that reprisal for whistleblowing was a contributing factor in the decision to take adverse action against the employee. If the employee satisfies this initial burden, then the agency must demonstrate by clear and convincing evidence that it would have taken the same action in any event. See 5 U.S.C. § 1214(b)(4). See also McDaid v. Department of Housing and Urban Development, 46 M.S.P.R. 416 (1990).

c. Fourth Amendment. Searches and seizures by Government employers or supervisors of private property of their employees are subject to restraints of the Fourth Amendment. See O'Connor v. Ortega, 480 U.S. 709 (1987). In O'Connor, the Supreme Court ruled that a public employer's intrusion on an employee's constitutionally protected privacy interest is valid when justified at its inception by a work-related need or reasonable suspicion, and when it is reasonable in scope. See also Schowengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987); McGregor v. Greer, 748 F. Supp. 881 (D.D.C. 1990).

Compulsory drug testing by urinalysis of certain civilian employees mandated by Executive Order 12564 (September 15, 1987) also implicates the fourth amendment. The Supreme Court has held, however, that the need to detect and deter drug use by public employees performing certain law enforcement and safety-sensitive functions warrants warrantless--even suspicionless--drug testing. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). Applying Von Raab and Skinner, lower courts have upheld random testing of Army civilian employees occupying aviation, law enforcement, nuclear and chemical surety, and alcohol and drug control positions. See NFFE v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989). See also Mulholland v. Department of the Army, 660 F. Supp. 1565 (E.D. Va. 1987) (aviation mechanics).

CHAPTER 6

EMPLOYEE PERFORMANCE

6.1 Employee Performance Appraisal System.

a. General.

One of the major changes made by the 1978 Civil Service Reform Act was the creation of a new performance appraisal system. Now, actions against civilian employees for unacceptable performance can be taken under different statutory and regulatory procedures than actions for misconduct.

b. Statutory Provisions.

Under the Civil Service Reform Act of 1978, all Federal agencies are required to adopt a performance appraisal system. The requirements for each agency's plan are set out in the statute and are reproduced below.

5 U.S.C. Chapter 43 -- Performance Appraisal.

§ 4301. Definitions.

For the purpose of this subchapter--
(1) "agency" means--
(A) an Executive agency;
(B) the Administrative Office of the United States Courts; and
(C) the Government Printing Office;
but does not include--
(i) a Government corporation;
(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or
(iii) The General Accounting Office;
(2) "employee" means an individual employed in or under an agency, but does not include--
(A) an employee outside the United States who is paid in accordance with local

native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under Chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

§ 4302. Establishment of performance appraisal systems.

(a) Each agency shall develop one or more performance appraisal systems which--

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

c. Regulatory Provisions.

(1) OPM Regulations. Regulations published by the Office of Personnel Management implement the statutory requirement of Title 5, Chapter 43.

5 C.F.R. § 430.203. Definitions.

In this subpart, terms are defined as follows--

"Appraisal" means the act or process of reviewing and evaluating the performance of an employee against the described performance standard(s).

"Appraisal period" means the period of time established by an appraisal system for which an employee's performance will be reviewed.

"Appraisal system" means a performance appraisal system established by an agency or component of an agency under subchapter I of Chapter 43 of title 5, U.S.C. and this subpart which provides for identification of critical and non-critical elements, establishment of performance standards, communication of elements and standards to employees, establishment of methods and procedures to appraise performance against established standards, and appropriate use of appraisal information in making personnel decisions.

"Critical element" means a component of a position consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that unacceptable performance on the element would result in unacceptable performance in the position.

"Non-critical element" means a component of an employee's position which does not meet the definition of a critical element, but is of sufficient importance to warrant written appraisal. Non-critical elements are optional and may be used at agency discretion.

"Performance" means an employee's accomplishment of assigned work as specified in the critical and non-critical elements of the employee's position.

"Performance Appraisal System": see Appraisal system.

"Performance Management Plan" means the description of the agency's methods which integrate performance, pay, and awards systems with its basic management functions for the purpose of improving individual and organizational effectiveness in the accomplishment of agency mission and goals. The Performance Management Plan, which includes the performance appraisal plan, must be submitted to OPM for review and approval as required by Subpart A of this part.

"Performance plan" means the aggregation of all of an employee's written critical and non-critical elements and performance standard(s).

"Performance standard" means a statement of the expectations or requirements established by management for a critical or non-critical element at a particular rating level. A performance standard may include, but is not limited to, factors such as quality, quantity, timeliness, and manner of performance.

"Progress review" means a review of the employee's progress toward achieving the performance standards and is not in itself a rating.

"Rating": see Summary rating.

"Rating of record" means the summary rating required at the time specified in the

Performance Management Plan or at such other times as the Plan specifies for special circumstances.

"Summary rating" means the written record of the appraisal of each critical and non-critical element and the assignment of a summary rating level (as specified in § 430.204(g) and (h) of this subpart).

5 C.F.R. § 430.204. Agency performance appraisal systems.

(a) Each agency shall develop one or more performance appraisal systems for employees covered by this subpart.

(b) Under each appraisal system, critical elements must be included and non-critical elements may be included in individual performance plans. An employee must be appraised on each critical and non-critical element in the employee's performance plan, unless the employee has had insufficient opportunity to demonstrate performance on the element. A summary rating level, as specified in paragraph (h) of this section, must be assigned.

(c) Each appraisal system shall encourage employee participation in establishing performance plans. This may be accomplished by means including, but not limited to, the following:

(1) Employee and supervisor discuss and develop performance plan together;

(2) Employee provides to supervisor a draft performance plan;

(3) Employee comments on draft performance plan prepared by supervisor; and

(4) Performance plan is prepared by a group of employees occupying similar positions, with supervisor's approval.

Final authority for establishing such plans rests with the supervising officials.

(d) (1) Each appraisal system shall provide for establishing performance elements and standards based on the requirements of the employee's positions, providing written performance plans to employees at the beginning of each appraisal period (normally within 30 days), and appraising employees based on a comparison

of performance with the standards established for the appraisal period.

(2) Accomplishment of organizational objectives should, when appropriate, be included in performance plans by incorporating objectives, goals, program plans, work plans, or by other similar means that account for program results.

(e) Each appraisal system shall provide for a minimum of three rating levels for each critical element. Performance standards must be written at the "Fully Successful" level for all critical and non-critical elements and may be written at other levels. The absence of a written standard at a given rating level shall not preclude the assignment of a rating at that level.

(f) Each appraisal system shall provide that performance plans shall be in writing and shall be reviewed and approved at the beginning of the appraisal period by a person at a higher level in the organization than that of the appraising official. Agencies may describe exceptions to higher level review and approval of performance plans in their Performance Management Plans.

(g) Each appraisal system shall include a method for deriving a summary rating level from performance appraisals of critical elements and, at agency discretion, appraisals of non-critical elements. If appraisals of non-critical elements are considered in deriving summary rating levels, the derivation method must show that more weight will be given to critical elements than non-critical elements.

(h) Each appraisal system shall provide for five summary rating levels. The rating levels must include an "Unacceptable" level, a level between "Unacceptable: and "Fully Successful", a "Fully Successful" level, and two levels which are above "Fully Successful." For purposes of this part, "Unacceptable" is referred to as level 1, the level between "Unacceptable" and "Fully Successful" is level 2, "Fully Successful" is level 3, the level one level above "Fully Successful" is level 4, and the level two levels above "Fully Successful" is level 5.

(i) Each appraisal system shall provide for assisting employees in improving performance rated at a level below the "Fully Successful" level. Such assistance may include but is not limited to formal training, on-the-job training, counseling, and closer supervision.

(j) Except with respect to employees occupying positions in Schedule C as authorized by § 213.3301 of this chapter--

(1) Each appraisal system shall provide for reassigning, reducing in grade, or removing any employee whose performance is "Unacceptable", but only after affording the employee a reasonable opportunity to demonstrate acceptable performance, as required by 5 U.S.C. 4302(b)(6).

(2) At the time that an agency identifies the critical element(s) for which performance is "Unacceptable", the employee must be informed of the performance standards that must be reached in order to be retained.

(3) If, at the conclusion of the opportunity period referred to in paragraph (j)(1) of this section, the employee's performance continues to be "Unacceptable", the agency must initiate reassignment, reduction in grade, or removal, subject to the provisions of 5 U.S.C. 4303.

(k) When an employee's position under any Federal pay system is converted to a pay system covered by this subpart, and when there is no change of duties and responsibilities, the employee's rating of record will be considered to have been derived under 5 U.S.C. 4302 and from the position which the employee now occupies.

5 C.F.R. § 430.205. *Appraisal of performance.*

(a) Appraisal period. Each agency appraisal system shall establish an official appraisal period for which a rating of record shall be prepared. Employees shall generally be given a rating of record on an annual basis. Agencies may provide for longer appraisals periods when duties and responsibilities of a position or the tour of duty of a position so warrant. Systems shall provide for preparing a summary rating when an employee changes positions during

the appraisal period, if the employee has served for the minimum appraisal period in the position from which he/she has changed; agency Performance Management Plans must describe how these ratings and any other ratings given throughout the appraisal period will be taken into consideration in deriving the next rating of record.

(b) Minimum appraisal period. Agency appraisal systems shall establish a minimum appraisal period of at least 90 days but not more than 120 days.

(c) Appraisal of each element. An employee must be appraised on each critical and non-critical element in the employee's performance plan, unless the employee has had insufficient opportunity to demonstrate performance on the element.

(d) Appraisal of performance on details.

(1) When employees are detailed or temporarily promoted within the same agency, and the detail or temporary promotion is expected to last 120 days or longer, agencies shall provide written critical elements and performance standards to employees as soon as possible but no later than 30 calendar days after the beginning of a detail or temporary promotion. Ratings on critical elements must be prepared for these details and temporary promotions and must be considered in deriving an employee's next rating of record.

(2) When employees are detailed outside of the agency, the employing agency must make a reasonable effort to obtain appraisal information from the outside organization, which shall be considered in deriving the employee's next rating of record.

(i) If an employee has served in the employing agency for the minimum appraisal period, the employee must be rated. The rating shall take into consideration appraisal information obtained from the borrowing organization.

(ii) If an employee has not served in the agency for the established minimum appraisal period, but has served for the minimum appraisal period outside the employing agency, the employing agency must make a reasonable effort to prepare a rating

based on a performance plan obtained from the borrowing organization.

(e) Progress review. A progress review shall be held for each employee at least once during the appraisal period. At a minimum, employees shall be informed of their level of performance by comparison with the performance elements and standards established for their positions.

(f) Appraising disabled veterans. The performance appraisal and resulting rating of a disabled veteran may not be lowered because the veteran has been absent from work to seek medical treatment as provided in Executive Order 5396.

5 C.F.R. § 430.206. Ratings.

(a) Written rating. A written rating of record must be given to each employee as soon as practicable after the end of the appraisal period.

(b) Appraisal of each critical and non-critical element. Employees must be appraised on each critical element and non-critical element of the performance plan(s) on which the employee has had a chance to perform.

(c) Higher level review. Ratings of record and performance-based personnel actions shall be reviewed and approved by a person(s) at a higher level in the organization than that of the appraising official. Ratings of record may not be communicated to employees prior to approval by the final reviewer. This does not preclude communication about appraisal of performance between a supervisor and an employee prior to the determination of the rating of record. Ratings of record must be approved by the official with the responsibility for managing the performance awards budget within the agency. Agencies may describe exceptions to higher level approval of ratings of record and performance-based personnel actions in their Performance Management Plans.

(d) Forced distribution. An agency may not prescribe a distribution of levels of ratings for employees covered by this subpart. However, agencies must establish procedures, such as reviews of standards and

ratings for difficulty and strictness of application, to ensure that only those employees whose performance exceeds normal expectations are rated at levels above "Fully Successful". These procedures must be described in the agency's Performance Management Plan.

(e) Inability to rate. When an agency cannot prepared a rating of record at the time specified in the plan, the appraisal period shall be extended for the amount of time necessary to meet the minimum appraisal period at which time a rating of record shall be prepared.

(f) Transfer of rating. If an employee moves to a new agency or new organization in the employing agency at any time during the appraisal period, the current performance ratings of record must be transferred, as required by § 293.405(a) of this chapter. A summary rating must be prepared as required by § 430.205(a) of this subpart, which must be taken into consideration by the gaining agency when deriving the next rating of record.

5 C.F.R. § 430.208. Training and evaluation.

To assure that agency performance appraisal systems will be effectively implemented, agencies must provide appropriate training and information to supervisors and employees on the appraisal process, and must establish methods and procedures to evaluate periodically the effectiveness of the system(s) and to implement improvements as needed.

5 C.F.R. § 430.209. OPM review of performance appraisal systems.

(a) OPM will review performance appraisal systems to determine conformance to requirements of law, OPM regulations, and OPM performance management policy.

(b) If OPM determines that an appraisal systems does not meet the requirements and intent of subchapter I of Chapter 43 of title 5, United States Code, or of this subpart, it shall direct the agency to implement an appropriate system or to

correct operations under the system. The agency shall take any action so required.

5 C.F.R. § 430.210. Performance appraisal plans.

Agencies must submit proposed performance plans to OPM for approval as part of Performance Management Plans in accordance with Subpart A of this part and provisions of this subpart.

(2) Army Implementation. The Army implements these OPM regulations in AR 690-400, Chapter 430.

Note. As the foregoing OPM regulations reflect, all agency performance plans must be approved by OPM. If an employee appeals an adverse action for unacceptable performance, the agency must prove that its performance system has been approved. See Griffin v. Department of Army, 23 M.S.P.R. 657 (1984). The MSPB has held that OPM approval can be proved by submitting agency regulations which state that approval has been obtained. See Chennault v. Department of Army, 796 F.2d 465 (Fed. Cir. 1986). AR 690-400, Chapter 430, contains a copy of the letter from OPM approving the Army's plan. Introducing this letter also satisfies the proof requirement.

6.2 Actions for Unacceptable Performance.

a. General. Title 5, U.S.C. Section 4303 establishes a separate system for actions based on unacceptable performance. Adverse actions based on unacceptable performance may be initiated under this section, if an appropriate appraisal system has been established under 5 U.S.C. § 4302. An agency may also take action against an employee for unacceptable performance under 5 U.S.C. Chapter 75 (see Chapter 5, Section I). Lovshin v. Department of Navy, 767 F.2d 826 (Fed. Cir. 1985), cert. denied, 475 U.S. 1111 (1986).

b. Statutory Requirements.

§ 4303. Actions based on unacceptable performance.

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b) (1) An employee whose reduction in grade or removal is proposed under this section is entitled to--

(A) 30 days' advance written notice of the proposed action which identifies--

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which--

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee--

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee--

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is--

(1) a preference eligible;

(2) in the competitive service; or

(3) in the excepted service and covered by subchapter II of Chapter 75,

and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under Section 7701.

(f) This section does not apply to--

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

Note. 5 U.S.C. § 4303(e) was amended by the Civil Service Due Process Amendments of 1990. Subsection (e)(3) refers to most nonpreference eligible excepted service employees who have completed 2 years of current, continuous service in the same or similar positions. This amendment was effective August 17, 1990.

c. Regulatory Requirements.

(1) OPM Regulations.

5 C.F.R. Part 432--Performance Based Reduction in Grade and Removal Actions

§ 432.101. Statutory authority.

This part applies to reduction in grade and removal of employees covered by the Performance Management and Recognition System (PMRS) based solely on performance below the fully successful level and the reduction in grade and removal of other employees covered by the provisions of this part based solely on performance at the unacceptable level. 5 U.S.C. 4305 authorizes the Office of Personnel Management to prescribe regulations to carry out the purposes of title 5, Chapter 43, including 5 U.S.C. 4303, which covers agency actions to reduce in grade or remove employees for unacceptable performance and 5 U.S.C. 4302a(b) which covers actions to reduce in grade or remove employees covered by the Performance Management and Recognition Systems for performance below the fully successful level. (The provisions of 5 U.S.C. 7501 et. seq., may also be used to reduce in grade or remove employees. See part 752 of this chapter.)

§ 432.102. Coverage.

(a) Actions covered. This part covers reduction in grade and removal of:

(1) Employees, covered by the PMRS, based on performance below the fully successful level; and

(2) Employees, not covered by the PMRS, based on unacceptable performance.

(b) Actions excluded. This part does not apply to:

(1) The reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321(a)(2) if such a reduction is based on supervisory or managerial performance and the reduction is to the grade held immediately before becoming a supervisor or manager in accordance with 5 U.S.C. 3321(b);

(2) The reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment;

(3) The reduction in grade or removal of an employee in the competitive service serving in an appointment that requires no probationary or trial period who has not completed 1 year of current continuous employment in the same or similar position under other than a temporary appointment limited to 1 year or less;

(4) The reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions;

(5) An action imposed by the Merit Systems Protection Board under the authority of 5 U.S.C. 1206;

(6) An action taken under 5 U.S.C. 7521 against an administrative law judge;

(7) An action taken under 5 U.S.C. 7532 in the interest of national security;

(8) An action taken under a provision of statute, other than one codified in title 5 of the U.S. Code, which excepts the action from the provisions of title 5 of the U.S. Code;

(9) A removal from the Senior Executive Service to a civil service position outside the Senior Executive Service under Part 359 of this chapter;

(10) A reduction-in-force governed by Part 351 of this chapter;

(11) A voluntary action by the employee;

(12) A performance-based action taken under Part 752 of this chapter;

(13) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent grade and pay if the agency informed the employee that it was to be of limited duration;

(14) A termination in accordance with terms specified as conditions of employment at the time the appointment was made; and

(15) An involuntary retirement because of disability under Part 831 of this chapter.

(c) Agencies covered. This part applies to:

(1) The executive departments listed at 5 U.S.C. 101;

(2) The military departments listed at 5 U.S.C. 102;

(3) Independent establishments in the executive branch as described at 5 U.S.C. 104, except for a Government corporation;

(4) The Administrative Office of the U.S. Courts; and

(5) The Government Printing Office.

(d) Agencies excluded. This part does not apply to:

(1) A Government corporation;

(2) The Central Intelligence Agency;

(3) The Defense Intelligence Agency;

(4) The National Security Agency;

(5) Any executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities;

(6) The General Accounting Office;

(7) The U.S. Postal Service; and

(8) The Postal Rate Commission.

(e) Employees covered. This part applies to individuals employed in or under a covered agency as specified at § 432.102(c) except as listed in § 432.102(f).

(f) Employees excluded. This part does not apply to:

(1) An employee in the competitive service who is serving a probationary or trial period under an initial appointment;

(2) An employee in the competitive service serving in an appointment that requires no probationary or trial period, who has not completed 1 year of current continuous employment in the same or similar positions under other thana temporary appointment limited to 1 year or less;

(3) An employee in the excepted service who has not completed 1 year of

current continuous employment in the same or similar positions;

(4) An employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(5) An individual in the Foreign Service of the United States;

(6) A physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Department of Veterans Affairs, whose pay is fixed under Chapter 73 of title 38, U.S. Code, except persons appointed under 38 U.S.C. 4104(3);

(7) An administrative law judge appointed under 5 U.S.C. 3105;

(8) An individual in the Senior Executive Service;

(9) An individual appointed by the President;

(10) An employee occupying a position in Schedule C as authorized under Part 213 of this chapter;

(11) A reemployed annuitant;

(12) A National Guard technician;

(13) An individual occupying a position in the excepted service for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12 month period;

(14) An individual occupying a position filled by Noncareer Executive Assignment under Part 305 of this chapter; and

(15) A manager or supervisor returned to his or her previously held grade pursuant to 5 U.S.C. 3321(a)(2) and (b).

§ 432.103. Definitions.

For the purpose of this part--

(a) "Acceptable performance" means performance that meets an employee's performance requirement(s) or standard(s) at a level of performance above "unacceptable" in the critical element(s) at issue where the employee is not covered by the Performance Management and Recognition System (PMRS). For those employees covered by the PMRS, acceptable performance is performance determined to be at the fully

successful level or above in the critical element(s) at issue.

(b) "Critical element" means a component of a position consisting of one or more duties and responsibilities that contributes toward accomplishing organizational goals and objectives and that is of such importance that unacceptable performance on the element would result in unacceptable performance in the position.

(c) "Current continuous employment" means a period of employment or service immediately preceding an action under this part in the same or similar positions without a break in Federal civilian employment of a workday.

(d) "Opportunity to demonstrate acceptable performance" means a reasonable chance for the employee whose performance has been determined to be unacceptable in one or more critical elements to demonstrate acceptable performance in the critical element(s) at issue.

(e) "Performance improvement plan" means the plan agencies are required to provide to a PMRS employee whose performance in one or more critical elements has been determined to be below the fully successful level. As part of the plan, agencies shall notify the employee of the critical element(s) in which he or she is performing below the fully successful level; describe the types of improvements that the employee must demonstrate to attain fully successful performance in his or her position; offer assistance to the employee in attaining fully successful performance; and provide the employee with a reasonable period of time, commensurate with the duties and responsibilities of the employee's position, to demonstrate fully successful performance. The agency may include, as part of the performance improvement plan, other information and matters that the agency considers appropriate.

(f) "Reduction in grade" means the involuntary assignment of an employee to a position at a lower classification or job grading level.

(g) "Removal" means the involuntary separation of an employee from employment with an agency.

(h) "Similar positions" mean positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbents could be interchanged without significant training or undue interruption to the work.

(i) "Unacceptable performance" means performance of an employee that fails to meet established performance standards in one or more critical elements of such employee's position.

§ 432.104. Addressing unacceptable performance by non-PMRS employees.

At any time during the performance appraisal cycle that a non-PMRS employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency may also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

§ 432.105. Addressing below fully successful performance by non-PMRS employees.

At any time during the performance appraisal cycle that a PMRS employee's performance is determined to be below fully successful in one or more critical elements, the agency shall afford the employee an

opportunity to improve through a performance improvement plan. As part of the plan, the agency shall notify the employee of the critical element(s) in which he or she is performing below the fully successful level; describe the types of improvements that the employee must demonstrate to attain fully successful performance in his or her position; offer assistance to the employee in attaining fully successful performance; and provide the employee with a reasonable period of time, commensurate with the duties and responsibilities of the employee's position, to demonstrate fully successful performance. The agency may include, as part of the performance improvement plan, other information and matters that the agency considers appropriate. The agency may also inform the employee that, unless his or her performance in the critical element(s) improves to and is sustained at a fully successful level, the employee may be reduced in grade or removed.

§ 432.106. Proposing and taking action based on unacceptable performance for non-PMRS employees.

(a) Proposing action based on unacceptable performance. (1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in 1 or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance.

(2) If an employee has performed acceptably for 1 year from the beginning of an opportunity to demonstrate acceptable performance (in the critical element(s) for which the employee was afforded an opportunity to demonstrate acceptable performance), and the employee's performance again becomes unacceptable, the agency shall afford the employee an additional opportunity to demonstrate acceptable performance before determining whether to propose a reduction in grade or removal under this part.

(3) A proposed action may be based on instances of unacceptable performance which occur within a 1 year period ending on the date of the notice of proposed action.

(4) An employee whose reduction in grade or removal is proposed under this part is entitled to:

(i) Advance notice. (A) The agency shall afford the employee a 30 day advance notice of the proposed action that identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance.

(B) An agency may extend this advance notice period for a period not to exceed 30 days under regulations prescribed by the head of the agency. An agency may extend this notice period further without prior OPM approval for the following reasons:

(1) To obtain and/or evaluate medical; information when the employee has raised a medical issue in the answer to a proposed reduction in grade or removal;

(2) To arrange for the employee's travel to make an oral reply to an appropriate agency official, or the travel of an agency official to hear the employee's oral reply;

(3) To consider the employee's answer if an extension to the period for an answer has been granted (e.g., because of the employee's illness or incapacitation);

(4) To consider reasonable accommodation of a handicapping condition;

(5) If agency procedures so require, to consider positions to which the employee might be reassigned or reduced in grade; or

(6) To comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1208(b).

(C) If an agency believes that an extension of the advance notice period is necessary for another

reason, it may request prior approval for such extension from the Chief, Employee Relations Division, Office of Employee Labor Relations, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street, N.W., Washington, DC 20415.

(ii) Opportunity to answer. The agency shall afford the employee a reasonable time to answer the agency's notice of proposed action orally and in writing.

(iii) Representation. The agency shall allow the employee to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as a representative would cause a conflict of interest or position or an employee whose release from his or her official position would give rise to unreasonable costs to the Government or whose priority work assignment precludes his or her release from official duties.

(iv) Consideration of medical conditions. The agency shall allow an employee who wishes to raise a medical condition which may have contributed to his or her unacceptable performance to furnish medical documentation (as defined in § 339.102 of this chapter of the condition for the agency's consideration. Whenever possible, the employee shall supply this documentation following the agency's notification of unacceptable performance under § 432.104. If the employee offers such documentation after the agency has proposed a reduction in grade or removal, he or she shall supply this information in accordance with § 432.105(a)(4)(ii). In considering documentation submitted in connection with the employee's claim of a medical condition, the agency may require or offer a medical examination in accordance with the criteria and procedures of Part 339 of this chapter, and shall be aware of the affirmative obligations of 39 C.F.R. 1613.704. If the employee who raises a medical condition has the requisite years of service under the Civil Service Retirement System or the Federal Employees Retirement System, the agency shall provide information concerning application for disability

retirement. As provided at § 831.501(d) of this chapter, an employee's application for disability retirement shall not preclude or delay any other appropriate agency decision or personnel action.

(b) Final written decision. The agency shall make its final decision within 30 days after expiration of the advance notice period. Unless proposed by the head of the agency, such written decision shall be concurred in by an employee who is in a higher position than the person who proposed the action. In arriving at its decision, the agency shall consider any answer of the employee and/or his or her representative furnished in response to the agency's proposal. A decision to reduce in grade or remove an employee for unacceptable performance may be based only on those instances of unacceptable performance that occurred during the 1 year period ending on the date of issuance of the advance notice of proposed action under § 432.105(a)(4)(i). The agency shall issue written notice of its decision to the employee at or before the time the action will be effective. Such notice shall specify the instances of unacceptable performance by the employee on which the action is based and shall inform the employee of any applicable appeal and/or grievance rights.

§ 432.107. Proposing and taking action based on performance below the fully successful level for PMRS employees.

(a) Proposing action based on performance below the fully successful level. (1) Once an employee has been afforded an opportunity to improve performance to the fully successful level through a performance improvement plan pursuant to § 432.105, an agency may propose a reduction in grade or removal action if the employee's performance during or following the performance improvement plan is below fully successful in one or more of the critical elements for which the employee was afforded an opportunity to improve through a performance improvement plan.

(2) If an employee has performed at the fully successful level for one year

from the beginning of a performance improvement plan (in the critical element(s) for which the employee was afforded a performance improvement plan) and the employee's performance again is determined to be below fully successful, the agency shall afford the employee an additional performance improvement plan before determining whether to propose a reduction in grade or removal under this part.

(3) A proposed action may be based on instances of below fully successful performance which occur within a one-year period ending on the date of the notice of proposed action.

(4) An employee whose reduction in grade or removal is proposed under this part is entitled to:

(i) Advance notice. (A) the agency shall afford the employee a 30-day advance notice of the proposed action that identifies both the specific instances of below fully successful performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of below fully successful performance.

(B) An agency may extend this advance notice period for a period not to exceed 30 days under regulations prescribed by the head of the agency. An agency may extend this notice period further without prior OPM approval for the following reasons:

(1) To obtain and/or evaluate medical information when the employee has raised a medical issue in the answer to a proposed reduction in grade or removal;

(2) To arrange for the employee's travel to make an oral reply to an appropriate agency official, or the travel of an agency official to hear the employee's oral reply;

(3) To consider the employee's answer if an extension to the period for an answer has been granted (e.g., because of the employee's illness or incapacitation;

(4) To consider reasonable accommodation of a handicapping condition;

(5) If agency procedures so require, to consider positions to which the employee might be reassigned or reduced in grade; or

(6) To comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1208(b).

(C) If an agency believes that an extension of the advance notice period is necessary for another reason, it may request prior approval for such extension from the Chief, Employee Relations Division, Office of Employee and Labor Relations, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street, N.W., Washington, DC 20415.

(ii) Opportunity to answer. The agency shall afford the employee a reasonable time to answer the agency's notice of proposed action orally and in writing.

(iii) Representation. The agency shall allow the employee to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as a representative would cause a conflict of interest or position or an employee whose release from his or her official position would give rise to unreasonable costs to the Government or whose priority work assignment precludes his or her release from official duties.

(iv) Consideration of medical conditions. The agency shall allow an employee who wishes to raise a medical condition which may have contributed to his or her deficient performance to furnish medical documentation (as defined in § 339.102 of this chapter) of the condition for the agency's consideration. Whenever possible, the employee shall supply this documentation following the agency's notification that the employee's performance is below fully successful and the establishment of the performance improvement plan under § 432.105. If the employee

offers such documentation after the agency has proposed a reduction in grade or removal, he or she shall supply this information in accordance with § 432.107(a)(4)(ii). In considering documentation submitted in connection with the employee's claim of a medical condition, the agency may require or offer a medical examination in accordance with the criteria and procedures of part 339 of this chapter, and shall be aware of the affirmative obligations of 29 C.F.R. 1613.704. If the employee who raises a medical condition has the requisite years of service under the Civil Service Retirement System or the Federal Employees Retirement System, the agency shall provide information concerning application for disability retirement. As provided at § 831.501(d) of this chapter, an employee's application for disability retirement shall not preclude or delay any other appropriate agency decision or personnel action.

(b) Final written decision. The agency shall make its final decision within 30 days after expiration of the advance notice period. Unless proposed by the head of the agency, such written decision shall be concurred in by an employee who is in a higher position than the person who proposed the action. In arriving at its decision, the agency shall consider any answer of the employee and/or his or her representative furnished in response to the agency's proposal. A decision to reduce in grade or remove an employee for performance below the fully successful level may be based only on those instances of performance that occurred during the one year period ending on the date of issuance of the advance notice of proposed action under § 432.107(a)(4)(i). The agency shall issue written notice of its decision to the employee at or before the time the action will be effective. Such notice shall specify the instances of below fully successful performance by the employee on which the action is based and shall inform the employee of any applicable appeal and/or grievance rights.

§ 432.108. Appeal and grievance rights.

(a) Appeal rights. An employee covered under § 432.102(e) who has been removed or reduced in grade under this part may appeal to the Merit Systems Protection Board if the employee is:

(1) In the competitive service and has completed a probationary or trial period;

(2) In the competitive service serving in an appointment which is not subject to a probationary or trial period, and has completed 1 year of current continuous employment in the same or similar position under other than a temporary appointment limited to 1 year or less; or

(3) A preference eligible in the excepted service who has completed 1 year of current continuous employment in the same or similar position(s).

(b) Grievance rights. (1) A bargaining unit employee covered under § 432.102(e) who has been removed or reduced in grade under this part may file a grievance under an applicable negotiated grievance procedure if the removal or reduction in grade action falls within its coverage (e.g., is not excluded by the parties to the collective bargaining agreement) and the employee is:

(i) In the competitive service and has completed a probationary or trial period.

(ii) In the competitive service serving in an appointment which is not subject to a probationary or trial period, and has completed 1 year of current continuous employment in the same or similar position under other than a temporary appointment limited to 1 year or less; or

(iii) A preference eligible in the excepted service who has completed 1 year of current continuous employment in the same or similar position(s).

(2) 5 U.S.C. 7114(a)(5) and 7121(b)(3), and the terms of an applicable collective bargaining agreement govern representation for employees in an exclusive bargaining unit who grieve a matter under this section through the negotiated grievance process.

(c) Election of forum. As provided at 5 U.S.C. 7121(e)(1), a bargaining unit employee who by law may file an appeal or a grievance, and who has exercised his or her option to appeal an action taken under this part to the Merit Systems Protection Board, may not also file a grievance on the matter under a negotiated grievance procedure. Likewise, a bargaining unit employee who has exercised his or her option to grieve an action taken under this part may not also file an appeal on the matter with the Merit Systems Protection Board.

Note. When 5 C.F.R. was updated on January 1, 1991, the provisions of 5 C.F.R. § 432.108 had not been revised to reflect MSPB appeal rights afforded to most nonpreference eligible excepted service employees with 2 years of current, continuous service by the Civil Service Due Process Amendments of 1990. Undoubtedly, OPM will take action to conform 5 C.F.R. § 432.108 to the provisions of 5 U.S.C. § 4303(e).

§ 432.109. Agency records.

(a) When the action is effected. The agency shall preserve all relevant documentation concerning a reduction in grade or removal which is based on unacceptable performance and make it available for review by the affected employee or his or her representative. At a minimum, the agency's records shall consist of a copy of the notice of proposed action, the answer of the employee when it is in writing, a summation thereof when the employee makes an oral reply, the written notice of decision and the reasons therefor, and any supporting material including documentation regarding the opportunity afforded the employee to demonstrate acceptable performance.

(b) When the action is not effected. As provided at 5 U.S.C. 4303(d), if, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided in accordance with § 432.105(a)(4)(i), any entry or other notation of the unacceptable

performance for which the action was proposed shall be removed from any agency record relating to the employee.

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(2) Army Implementation. The Army implements these OPM regulations in AR 690-400, Chapter 432.

d. Procedures for Performance-Based Actions.

An employee who fails to meet established performance standards in one or more critical job elements may be reduced in grade or removed. The reduction or removal action may only be based on unacceptable performance occurring within one year prior to the date the employee is given notice of the adverse action. 5 U.S.C. § 4303(c)(2). This one-year period may, however, cover more than one performance appraisal period. See Weirauch v. Department of the Army, 782 F.2d 1560 (Fed. Cir. 1986).

Before reduction or removal action is initiated, the employee must be given specific notice of unacceptable performance and a reasonable time to demonstrate acceptable performance. During this performance improvement period ("PIP"), the employee must be given supervisory assistance to correct the unacceptable performance. If performance deficiencies are corrected during the PIP, adverse action is not initiated. However, if the employee's performance returns to an unacceptable level within one year after the beginning of the PIP (the so called "roller coaster" employee), removal or reduction action may be commenced without giving the employee another PIP. Sullivan v. Department of the Navy, 44 M.S.P.R. 646 (1990). See 5 C.F.R. § 432.106(a)(2).

Employees demoted or removed for unacceptable performance frequently challenge the content of the job standards by which their performance is judged. The agency must demonstrate that the performance standards are reasonable, realistic, and attainable. See Johnson v. Department of Army, 44 M.S.P.R. 464 (1990). "Absolute" standards (standards requiring perfection or near perfection) are generally impermissible. See Walker v. Department of Treasury, 28 M.S.P.R. 227 (1985); Callaway v. Department of Army, 23 M.S.P.R. 592 (1984). But see James v. Veterans Administration, 27 M.S.P.R. 124 (1985). Adverse action may not be taken based on "backwards" performance standards (defining unacceptable performance as minimally acceptable

performance). See Oritz v. Department of Justice, 46 M.S.P.R. 692 (1992). Moreover, standards must be objective, "to the maximum extent feasible." 5 U.S.C. § 4302(b)(1).

The employee is entitled to 30 days' advance written notice of the proposed reduction in grade or removal. This notice must identify the specific incidents of unacceptable performance with regard to critical elements of the employee's position on which the agency is relying. An agency is not required to consider the employee's performance during this 30-day advance notice period in reaching its final decision on the proposed action. Gilbert v. Department of Health and Human Services, 27 M.S.P.R. 152 (1985). Like an employee facing a true adverse action based on misconduct, the employee subjected to a Chapter 43 action for unacceptable performance has the right to respond to the advance notice orally, in writing, or both and to be represented by counsel. In a performance-based action, unlike in a misconduct action, the employee is entitled to a decision which has been concurred in by a supervisor above the proposing official. 5 U.S.C. § 4303(b)(1)(D)(ii).

If a reduction in grade or removal is appealed, the agency has the burden of demonstrating unacceptable performance. The standard of proof in a Chapter 43 action is, however, "substantial evidence" rather than the more onerous "preponderance" standard applicable in misconduct cases. Another critical difference between misconduct and performance-based actions is that in a performance case the MSPB, arbitrators, and courts may not mitigate the agency's selected penalty (removal or demotion). Lisiecki v. MSPB, 769 F.2d 1558 (Fed. Cir. 1985), cert. denied, 475 U.S. 1108 (1986); Horner v. Bell, 825 F.2d 391 (Fed. Cir. 1987).

The procedures required for taking performance-based actions also apply to employees in the excepted service. However, appeal rights to the MSPB are governed by 5 U.S.C. § 4303(e) and 5 U.S.C. § 7701. Section 7701(a) provides for appeal to the MSPB of any action "which is appealable to the Board under any law, rule, or regulation." To what extent may an agency, by its regulations, extend an appeal right for unacceptable performance actions to employees not given this right under § 4303(e)? The Court of Appeals for the Federal Circuit in Schwartz v. Department of Transportation, 714 F.2d 1581 (Fed. Cir. 1983) addressed this question.

The petitioner in that case, Mr. Schwartz, was a nonpreference eligible in the excepted service (an attorney-advisor with DOT) until removed for unacceptable performance. Mr. Schwartz appealed to the MSPB which held that it had no jurisdiction because of 5 U.S.C. § 4303.

Mr. Schwartz appealed the MSPB's decision arguing that the Department of Transportation could broaden Chapter 43 rights by regulation. He cited 5 U.S.C. § 7701(a) as the basis for his argument.

The court held that employees do not have appeal rights under Section 7701(a) simply because an agency has issued a regulation which purportedly bestows such a right. It must first be established that the agency issuing the regulation was specifically granted the authority to do so by statute. In this case, Schwartz failed to establish the requisite statutory authorization for the DOT's regulation on appeal rights.

The court read employing agencies' powers under Chapter 43 as being limited to the establishment of the performance appraisal systems, the encouragement of employee participation in the establishment of performance standards, and the use of the results of performance appraisal as a basis for training, rewarding, reassigning, promoting, reducing, retaining, and removing employees. In other words, the discretion given agencies under Chapter 43 is limited to the internal establishment and use of performance appraisal systems, and does not extend to appeals from decisions taken under those systems.

As noted earlier, the Civil Service Due Process Amendments of 1990 extended MSPB appeal rights to most nonpreference eligible excepted service employees with 2 years current, continuous service in the same or similar positions who are removed or demoted for unacceptable performance. Schwartz would, of course, continue to apply to nonpreference eligible excepted service employees not covered by the 1990 amendments.

Of course, nonpreference eligible excepted service employees who have completed the equivalent of a 1-year probationary period but who are not covered by the 1990 amendments may be able to challenge a performance-based adverse action through agency grievance procedures. See infra Chapter 4.

CHAPTER 7

REDUCTIONS IN FORCE

7.1 Introduction.

Because of organizational changes, lack of funds, decreases in available work, or requirements to reinstate a returning employee having reemployment rights, a Federal agency may be required to lay off, reassign, transfer, or terminate some of its employees. In order to do this in a fair and orderly way, the agency needs some sort of procedure enabling it to establish retention priorities among its employees. This is accomplished under the reduction-in-force regulations of the Office of Personnel Management.

Under this system of regulations, employees within the specified organizational or geographical region compete for retention on the basis of four factors specified by law in 5 U.S.C. § 3502: tenure of employment, veterans' preference, total length of civilian and creditable military service, and performance ratings. Employees are ranked on the basis of these factors, and then the employees are released or reassigned beginning with those persons having the lowest ranking. A reduction-in-force at one level can have a domino effect on numerous positions at lower levels in the same Federal agency. The statutory and regulatory requirements for this procedure are the subject of this chapter.

7.2 Statutory Requirements.

Congress has prescribed general criteria for use by a Federal agency in determining which employees to release during a reduction-in-force.

5 U.S.C. § 3502. Order of retention.

> (a) The Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to-
>
> (1) tenure of employment;
> (2) military preference, subject to section 3501(a)(3) of this title;
> (3) length of service; and
> (4) efficiency or performance ratings.

In computing length of service, a competing employee--

(A) who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

(B) who is a retired member of a uniformed service is entitled to credit for--

(i) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(ii) the total length of time in active service in the armed forces if he is included under section 3501(a)(3)(A), (B), or (C) of this title; and

(C) is entitled to credit for service rendered as an employee of a county committee established pursuant to section 590h(b) of title 16, or of a committee or an association of producers described in section 610(b) of title 7.

(b) A preference eligible described in section 2108(3)(c) of this title who has a compensable service-connected disability of 30 percent or more and whose performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this title is entitled to be retained in preference to other preference eligibles.

(c) an employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this title is entitled to be retained in preference to other competing employees.

As a result of this statutory provision, the general rule is that veterans with satisfactory performance ratings receive higher retention standing than nonveterans. But, 5 U.S.C. § 3501, which defines preference eligible employees for purposes of retention preferences, withholds the veterans' preference from certain retired members of the uniformed services. For example, retired military personnel who have 20 or more

years of service are not considered preference eligibles under 5 U.S.C. § 3501(3)(B). Likewise under 5 U.S.C. § 3501(3)(A), a disabled veteran whose injury was not the result of service in war or armed conflict is not entitled to the preference for purposes of determining the order of retention. Thus, an individual may be considered a preference eligible and receive special treatment in connection with an appointment or adverse action but not have that status under the reduction-in-force regulations.

7.3 Regulatory Requirements.

a. Scope of the Competition. A Federal agency is required to follow the regulations in 5 C.F.R. Part 351 whenever it intends to release a competing employee under a reduction-in-force (RIF). An agency is never required to fill a vacant position in connection with a RIF; but if it elects to do so, it must follow the RIF procedure. Both competitive service and excepted service employees can be subjected to a RIF. If this occurs, persons in excepted positions do not compete with the competitive service employees, but are ranked separately and released in the same order as the competitive service employees but from their own list.

Before an agency can determine which employees will be affected, it must establish the competitive area and the competitive level for the RIF. Once this is done it can determine which employees will compete; it can set up the retention register; and it can release those employees with the lowest rankings. The Federal Personnel Manual describes how the scope of competition is established.

Note: An employee who is affected by a reduction-in-force does not have a right to assignment into a vacant position. See Head v. Department of the Army, 4 M.S.P.R. 240 (1980).

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Reduction in Force
(September 18, 1989)

Subchapter S3. Retention Factors

S3-1. Coverage

This subchapter explains the factors which determine the retention standing of competing employees under the RIF regulations.

S3-2. Competitive Area

a. General. Each agency must establish competitive areas. These are the boundaries within which employees compete for retention under RIF procedures. Employees in a competitive area compete only with each other; they do not compete with employees in another competitive area. In any one reduction in force an agency may not use one competitive area for the first round of competition and a different competitive area for subsequent rounds of competition.

b. Extent of area. An agency must define competitive areas solely in terms of organizational unit(s) and geographical location(s). A competitive area may consist of all or part of an agency. It may be larger than the minimum described in subsection S3-2c but must not be smaller. All employees within the organizational unit(s) and geographical location(s) defined are included in the competitive area.

c. Minimum competitive area.

(1) Departmental service. The minimum competitive area at the departmental level (or headquarters) is a major subdivision of the agency within the local commuting area, e.g., a bureau, major command, directorate, or other equivalent major segment of the organization. It may be identified as an organizational segment that is separately organized and clearly distinguished from others in operation, work function, staff, and personnel management.

(2) Field service. The minimum competitive area in the field is an activity under separate administration within the local commuting area. If two or more field activities are grouped at the same field installation but are organizationally independent and separate from each other in operation, work function, staff, and personnel management, each activity may properly be designated a competitive area. For example, although field activities of several major commands may be located at one installation, each major command activity at the installation can meet the definition of minimum competitive area.

(3) Personnel management. As used in this section, personnel management is the authority to take or direct personnel

actions (i.e., the authority to establish positions, abolish positions, assign duties, etc.) rather than the issuance or processing of the documents by which these decisions are effected. The fact that several activities may be serviced by the same personnel office thus does not, of itself, require that they be placed in the same competitive area.

d. Commuting area.

(1) Subsection S2-1k of this chapter provides a general definition of a local commuting area for RIF purposes. Each agency is responsible for defining local commuting areas and applying this definition. There is no OPM mileage standard to determine, for example, when two local duty stations would be included in the same local commuting area.

(2) A minimum competitive area need not be larger than a local commuting area. When either a field or a departmental organization has components in more than one local commuting area, each commuting area may be designated as a separate competitive area. However, when a field and a departmental organization are in the same local commuting area, separate competitive areas may be established for each organization.

e. OPM prior approval. Competitive areas ordinarily should be in effect at least 90 days prior to a reduction in force. When changes in existing competitive areas are made or new areas are established less then 90 days prior to the effective date of a reduction in force, prior approval of OPM is required. The request to OPM should be submitted as early as possible and should include the following:

(1) Identification of the proposed competitive area including the organizational segment, geographic location, and limits of the local commuting area.

(2) A description of how the proposed area differs from the one previously established for the same unit and geographic area.

(3) An organizational chart of the agency showing the relationship between the organizational components within the

competitive area and other components in the commuting area.

(4) The number of competing employees in the proposed competitive area.

(5) A description of the operation, work function, staff, and personnel administration of the proposed area, and, where appropriate, a description of how the area is distinguished from others in these respects.

(6) A discussion of the circumstances which led to the proposed changes less than 90 days before a proposed reduction.

These requests should be sent to:

Associate Director, Personnel
Systems and Oversight Group
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

f. Publication. When an agency establishes or changes competitive areas, it must publish descriptions of the areas or otherwise make them readily available for review by employees and OPM.

S3-3. Competitive Levels

a. General. Each agency must establish competitive levels, i.e., groups of similar positions, and assign each position to a level. Employees compete for retention in their competitive levels during the first round of RIF competition.

(1) Characteristics of competitive levels. A competitive level consists of positions in the competitive area that are:

(a) In the same grade (or occupational level);

(b) In the same classification series; and

(c) Similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one position can successfully perform the critical elements of any other position in the level upon assignment to it, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee. This determination is made on the basis that the jobs are so similar that the agency may readily assign an employee in one position to any of the other positions in the

competitive level without changing the terms of the employee's appointment and without unduly interrupting the agency's work program.

(2) Determinations are not based on the personal qualifications or performance levels of individual employees.

b. Separate competitive levels required. Separate competitive levels are required according to the following categories:

(1) By service. Separate levels shall be established for positions in the competitive service and for those in the excepted service. Positions normally in the competitive service which are encumbered by employees who have excepted service appointments (e.g., Veterans Readjustment Appointments) are in the excepted service for RIF purposes.

(2) By appointment authority. Separate levels shall be established for excepted service positions filled under different appointment authorities. For example, employees appointed under one authority in Schedule A, do not compete with employees appointed under a different Schedule A authority.

(3) By pay schedule. Separate levels shall be established for positions under different pay schedules. For example, GS and GM are considered different pay schedules <u>for RIF purposes</u> and GS and GM positions are always placed in separate competitive levels.

(4) By type of work schedule. Separate levels shall be established for positions filled on a full-time, part-time, intermittent, seasonal, or on-call basis.

(5) By supervisory or nonsupervisory status. Manager or supervisor positions as defined in OPM's Supervisory Grade Evaluation Guide (SGEG), and supervisor or management official positions as defined in 5 USC 7103(a)(10) and (11), shall not be assigned to a competitive level that contains nonsupervisory or nonmanagerial positions. Since the duties and responsibilities of the SGEG manager and supervisor and the 7103 supervisor and management official differ substantially, agencies may need to place

employees in each of these categories in separate competitive levels. Supervisory and management official positions may be assigned to the same competitive level only if the positions share the common characteristics covered in subsection 3-3a(1). Example: A position that meets the SGEG definition of supervisor typically would have supervisory responsibilities not found in a position that only meets the 7103 definition, and on this basis would be placed in a separate competitive level.

(6) By trainee status. Separate levels shall be established for positions filled by an employee in a formally designated trainee or developmental program when the program has all the characteristics covered in subsection S5-8e.

c. Separate competitive levels prohibited. An agency may not assign a position to a separate competitive level based solely on:

(1) The sex of an employee, except when OPM has determined that certification of eligibles by sex is justified;

(2) A requirement to serve a probationary period for initial appointment to a supervisory or managerial position;

(3) A difference in the number of hours or weeks scheduled to be worked by other-than-full-time employees who otherwise would be in the same competitive level;

(4) A requirement to work changing shifts;

(5) A difference in the local wage areas in which wage grade positions are located; or

(6) The grade promotion potential of the position.

S3-4. Retention Register

a. Relationship to competitive level. When a proposed personnel action will result in the release of a competing employee from a competitive level, the agency establishes a retention register for that competitive level. A retention register is a list of competing employees assigned to positions in a single competitive level. A competing employee is an employee in tenure group I, II, or III except as provided in subsections S3-4c and d. Employees are assigned to retention registers based on the grade level

of the position they officially occupy, even if they are still being covered by grade retention at a higher grade level.

b. Employees listed on retention registers. The agency lists on the retention register the name of each competing employee, except as provided in subsections S3-4c and d, who:

(1) Is officially assigned to a position in the competitive level (including employees on paid or unpaid leave, on non-military furlough, on Intergovernmental Personnel Act assignment, or on detail to another position);

(2) Is temporarily promoted <u>from</u> the competitive level by temporary or term promotion; or

(3) Has received a written decision of demotion or reassignment due to unacceptable performance to a position in the competitive level.

c. Employees listed apart from retention registers. Certain employees officially assigned to positions in a competitive level are not included in the retention register for that level, but they are listed on the same document. This is because the agency must *remove them from* positions in the competitive level by means other than reduction in force before releasing any competing employee from the level through RIF action. The agency enters on this separate list, in the following order, the name of each employee who:

(1) Is serving under a specifically limited temporary appointment, term promotion, or temporary promotion (together with the expiration date of the appointment or promotion); or

(2) Has a written decision under 5 C.F.R. Part 432 of removal from the position because of unacceptable (Level 1) or equivalent performance. (An employee who will be retained by the agency competes for retention in the position to which he or she will be demoted or reassigned.)

d. Employees not listed. An employee with restoration rights who is on furlough to perform military duty is not listed on either the retention register or the separate list. These employees are not

affected by RIF actions because of their restoration rights.

e. Official position. An employee's official position is the one in which the agency carries the employee on the rolls and pays the salary or is the one from which the employee has been promoted on a temporary or term basis.

b. Retention Standing. As soon as the scope of the competition in a RIF is established, the retention standing of each affected employee is determined. This determination is made by grouping affected employees according to their tenure group and preference subgroup and then by ranking them based on their length of service and performance rating. Employees are then released in sequence during a RIF in accordance with their retention standing. The civil service regulations describe how this process is accomplished.

S3-5. Order on Retention Register

Competing employees are listed on a retention register in the following order:

a. By tenure group. Tenure group I is first, followed by tenure group II, and then tenure group III;

b. Within each tenure group, by veteran preference subgroup. Subgroup AD is first, followed by subgroup A, and then subgroup B; and

c. Within each subgroup, by years of service which includes performance credit under section S3-9. The employee with the earliest service date is entered first.

3-6. Tenure Groups

a. Competitive service tenure groups are as follows:

(1) Group I includes each career employee who is not serving a probationary period for appointment to a competitive position. (The fact that an employee is serving a probationary period for a supervisory or managerial position does not affect the tenure group of the employee's appointment for RIF purposes.) The following employees are in group I as soon as they complete any required probationary period for initial appointment:

(a) An employee for whom substantial evidence exists of eligibility to immediately acquire status and career tenure and whose case is pending final

resolution by OPM (including cases under Executive Order 10826 to correct certain administrative errors);

(b) An employee who acquires competitive status and satisfies the service requirement for career tenure when his or her position is brought into the competitive service;

(c) An administrative law judge;

(d) An employee appointed under 5 U.S.C. 3104 (which provides for the employment of specially qualified scientific and professional personnel) or a similar authority; and

(e) an employee who acquires status under 5 U.S.C. 3304(c) on transfer to the competitive service from the legislative or judicial branch of the Federal Government.

(2) Group II includes each career-conditional employee and each employee serving a probationary period for initial appointment to a competitive position. (The fact that an employee is serving a probationary period for a supervisory or managerial position does not affect the tenure group of the employee's appointment for RIF purposes.) In addition an employee is in group II when substantial evidence exists of eligibility to immediately acquire status and career-conditional tenure and the employee's case is pending final resolution by OPM (including cases under Executive Order 10826 to correct certain administrative errors).

(3) Group III includes each employee serving under indefinite appointment, temporary appointment pending establishment of a register (TAPER), term appointment, status quo appointment, or any other nonstatus nontemporary appointment. An employee serving under a temporary limited appointment is <u>not</u> in tenure group III and is <u>not</u> a competing employee.

b. Excepted service tenure groups are as follows:

(1) Group I includes each permanent employee whose appointment carries no restriction or condition such as conditional, indefinite, specific time limit, or trial period.

(2) Group II includes each employee:

(a) Serving a trial period; or

(b) Whose tenure is equivalent to a career-conditional appointment in the competitive service in agencies having such excepted appointments.

(3) Group III includes each employee:

(a) Whose tenure is indefinite (i.e., without specific time limit) but not actually or potentially permanent; or

(b) Whose appointment has a specific time limitation of more than one year; or

(c) Who is currently under a temporary appointment limited to one year but has completed one year of current continuous service. An employee serving under such a temporary appointment who does not have one year of current continuous service is not in tenure group III and is not a competing employee.

S3-7. Veteran Preference Subgroups

a. Subgroups. Within each of the three tenure groups on a retention register, employees are listed by veteran preference subgroup. These subgroups are the same for both the competitive and excepted services. The subgroups are as follows:

(1) Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.

(2) Subgroup A includes each preference eligible employee not in subgroup AD.

(3) Subgroup B includes each employee not eligible for veteran preference.

b. Eligibility for retention preference. See FPM Chapter 211 for information on determining an employee's eligibility for veteran preference. In addition, a preference eligible employee who is a retired member of a uniformed service must meet a further condition to be considered a preference eligible for RIF purposes. This condition varies depending

on the rank at which the individual retired from the uniformed service.

c. Retired member below the rank of major (or equivalent). To be considered a preference eligible for RIF purposes, an individual who retired from a uniformed service below the rank of major or equivalent (major is pay grade O-4) must meet the criteria in paragraph (1), (2), or (3) below.

(1) The employee's uniformed service retirement is based on disability that either:

(a) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(b) Was caused by an instrumentality of war and was incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee's retired pay from a uniformed service is not based on 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training. An employee whose retirement is based on at least 20 years of active service (excluding training duty) is considered to have 20 or more years of full-time active service even when the actual day-for-day service totals less than 20 years. For example, if an enlisted person transferred to the Navy Fleet Reserve after 19 years and 6 months actual service but received credit for 20 years for retirement purposes, that person would be considered to have 20 years of full-time active service for purposes of this chapter.

(3) The employee has been continuously employed in a position covered by this chapter since November 30, 1964, without a break in service of more than 30 days.

d. Retired member at or above the rank of major (or equivalent). To be considered a preference eligible for RIF purposes, an individual who retired from a uniformed service at or above the rank of major or equivalent (major is pay grade O-4) must meet the criteria in paragraph (1) or (2) below.

(1) The employee's uniformed service retirement is based on disability that either:

(a) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(b) Was caused by an instrumentality of war and was incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee is a disabled veteran as defined in section 2108(s) of title 5, United States Code, and either:

(a) Receives uniformed service retired pay that is not based on 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training; or

(b) Has been continuously employed in a position covered by this chapter since November 30, 1964, without a break in service of more than 30 days.

e. Reservists. A veteran who at age 60 becomes eligible for retired pay under Chapter 67 of title 10, United States Code (generally known as "reservists") and who retires at or above the rank of major or equivalent (major is pay grade O-4) is subject to the requirements in subsection S3-7d. The veteran is not eligible for retired reservist pay until age 60 and up to that time is not considered a retired member of a uniformed service. To retain retention preference at that age, however, the veteran must meet the definition of disabled veteran in section 2108(2) of title 5 and one of the two requirements in subsection S3-7d(2). Receipt of retired pay under Chapter 67 meets the requirement in subsection S3-7d(2)(a) for retired pay that is not based on 20 or more years of full-time active service.

f. Period of War. Periods of war as referred to in this section are defined in Federal Personnel Manual supplement 296-33.

g. Disabled veteran. A disabled veteran is defined in section 2108(2) of title 5, United States Code, as an individual who has served on active duty in the armed forces, has been separated

therefrom under honorable conditions, and has establish the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Veterans Administration or a military department.

S3-8. Length of Service

a. Service date. An agency establishes a service date for each competing employee in a reduction in force. Employees are listed on a retention register within veteran preference subgroups by length of service, in descending order starting with the earliest service date.

b. Determination of service date. An employee's service date for RIF purposes is one of the following:

(1) The date the employee entered on duty if the employee has no previous creditable service;

(2) The date obtained by subtracting the employee's total previous creditable service from the date the employee last entered on duty; or

(3) The date obtained by subtracting from the date in subsection S3-8b(1) or (2) any service credit for performance to which the employee is entitled under section S3-9.

c. Creditable service. To determine creditable service, compute service dates, and make adjustments for noncreditable service, see FPM supplement 296-33, subchapter S6. A preference eligible employee who is a retired member of a uniformed service receives credit for RIF purposes for:

(1) The length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(2) The total length of time in active service in the armed forces if the retired member is considered a preference eligible for RIF purposes under section S3-7.

S3-9. Credit for Performance

a. Performance recognition. An employee is given performance credit for RIF competition when his or her performance meets certain requirements. Credit is given

by adjusting an employee's service date for RIF purposes (see section S3-8).

b. Performance appraisal systems. Additional service credit is based on annual performance ratings of record received under a performance appraisal system required by 5 C.F.R. Part 430 or under other systems. References in this chapter to performance ratings of outstanding (Level 5), exceed fully successful (Level 4), fully successful (Level 3), minimally successful (Level 2), and unacceptable (Level 1) mean ratings under 5 C.F.R. Part 430. Any reference to one of these rating levels also refers to an equivalent of that level. Each agency subject to 5 C.F.R. Part 430 must assure that it applies these provisions consistent with that part. An agency not subject to 5 C.F.R. Part 430 applies the provisions of its own performance appraisal system as appropriate.

c. Amount of credit. An employee is given additional service credit based on the mathematical average (rounded in the case of a fraction to the next higher whole number) of the value of the employee's last three (actual and/or assumed) annual performance ratings of record received during the three year period prior to the date of issuance of specific reduction in force notices. In determining this average the value assigned to each annual performance rating of record is as follows:

(1) Twenty additional years of service for each performance rating of outstanding (Level 5).

(2) Sixteen additional years of service for each performance rating of exceeds fully successful (Level 4).

(3) Twelve additional years of service for each performance rating of fully successful (Level 3).

(4) No additional service credit is given for performance ratings below fully successful (Level 3).

Example: An employee who had received annual performance ratings of record in the last three years of fully successful (12), fully successful (12), and exceeds fully successful (16) would receive 14 years of additional service credit (12 +

12 + 16 = 40 divided by 3 = 13.3, rounded to 14) in determining retention standing.

d. Ratings used for RIF purposes. Annual performance ratings of record used for RIF purposes are ratings of record covering official appraisal periods which are established by agencies under a performance appraisal system approved by OPM in accordance with 5 U.S.C., Chapter 43; for an agency not subject to Chapter 43, an official performance rating as provided for in the agency's appraisal system. Such ratings are generally issued on an annual basis. To avoid confusion and ensure proper application in RIF, each agency must specify in the agency performance management plan, or other appropriate issuance, which ratings of record will be used for RIF purposes.

e. Basis for credit.

(1) Additional service credit is based on the last three annual performance ratings of record which were received by the employee during the 3-year period prior to the date of issuance of specific RIF notices. To be creditable for RIF purposes, ratings must have been issued to the employee, with all appropriate reviews and signatures, and must also be on record. In the RIF context, this means that the rating is available for use by the office responsible for establishing RIF retention registers. Agencies must therefore ensure that ratings are issued in accordance with established schedules and forwarded to the appropriate office on a timely basis. Since rating procedures may vary under individual agency performance management systems, each agency must set its own internal policy for processing ratings and putting them on record for RIF purposes. This policy must be included in the agency performance management plan or other appropriate issuance, and must be applied on a uniform and consistent basis in the competitive area where the RIF occurs.

(2) To provide adequate time to properly determine employee retention standing prior to a reduction in force, agencies may establish a policy providing for a cutoff date, a specified number of days prior to the date of specific RIF notices. After the cutoff date, no new

annual performance ratings will be put on record and used for RIF purposes. If adopted, this policy must be applied on a uniform and consistent basis in the competitive area where the RIF will occur, and must be documented in the agency performance management plan or other appropriate issuance. Use of a cutoff date does not alter the basis upon which the 3-year period for crediting performance ratings is determined. This is always the 3-year period prior to the date of issuance of specific RIF notices. (For example, if the agency has no policy providing for a cutoff date for performance ratings and issues RIF notices on August 31, 1989, each employee is entitled to credit for performance ratings issued during the 3-year period from September 1, 1986, through August 31, 1989. If the agency has a policy providing for cutoff of performance ratings 30 days before specific RIF notices are issued on August 31, 1989, each employee is entitled to credit for performance ratings issued during the period extending from September 1, 1986, through August 1, 1989.)

(3) If an employee had more than three annual performance ratings of record during the 3-year period prior to the date specific RIF notices are issued, the three most recent annual performance ratings of record are used. An annual performance rating of record received prior to the 3-year period is not used. If an employee has not received three annual performance ratings of record during the 3-year period, credit is given for an assumed rating(s) of fully successful (Level 3) to bring the employee's rating up to three. An agency may <u>not</u> issue a retroactive annual performance rating of record during the 3-year period. Instead, additional RIF service credit is based on an assumed rating of record of fully successful for the missing ratings. Examples: If an employee with two years of Federal service has only two previous annual performance ratings of record, additional service credit is based on the two actual ratings plus one assumed rating of fully successful (Level 3). If an employee has not received any annual performance ratings of record, additional

service credit is based on three assumed ratings of fully successful (Level 3) regardless of the length of the employee's Government service. If an employee for some reason has received five annual performance ratings of record during the three-year period, the agency uses the three most recent annual performance ratings of record.

(4) Regardless of whether the employee's service occurred in one or more agencies, the employee's actual ratings are to be used to the extent they are available. If they are not available in the employee's official records, the current employing agency can accept employee copies of annual performance ratings of record for this purpose.

(5) Annual performance ratings of record are to be used whether they were based on the current or the previous requirements of 5 C.F.R. Part 430. Annual performance ratings of record based on an appraisal system not subject to 5 C.F.R. Part 430 also are to be used.

(6) To determine additional service credit when any of an employee's three previous annual performance ratings of record used other than five summary levels as required by 5 C.F.R. Part 430, the agency determines equivalent rating levels between the systems and credits the employee accordingly. If a previous appraisal was narrative only, an agency either may assign a summary rating if feasible or may use an assumed rating of fully successful (Level 3) for the period covered by the narrative evaluation. The agency's policy is to be applied uniformly and consistently.

(7) An employee's <u>current</u> annual performance rating of record must be identified not only for crediting additional service but also for determining assignment rights (see subsections S5-2b and S5-5). A current annual performance rating of record is generally the employee's last <u>actual</u> annual performance rating of record. However an improved rating received as a result of an opportunity to demonstrate acceptable performance (subsection S3-9f(3)) and an assumed rating following demotion or reassignment due to unacceptable performance (subsection S3-9f(4)) are each also

considered to be a current annual rating of record. An assumed fully successful rating would also be considered a current rating when no actual annual performance ratings of record were received during the three-year period prior to the issuance of specific RIF notices.

f. Unacceptable performance.

(1) A competing employee with a current annual performance rating of record of unacceptable (Level 1) who has not received a final written decision of removal or demotion due to unacceptable performance (e.g., an employee on an opportunity period) is listed on the retention register, not apart from it. The employee is assigned to the appropriate group and subgroup and receives credit for his or her years of service. The employee also receives any service credit to which entitled for the other two previous annual performance ratings of record. An employee who as of the effective date of the reduction in force has received a final written decision to remove is listed apart from the retention register. An employee who has received a final written decision to demote is listed on the retention register for the position to which he or she will be demoted. (See section S3-4.)

(2) An employee who has received a notice proposing removal or demotion due to unacceptable performance but who has not received an annual rating of unacceptable (Level 1) is not assumed to have an unacceptable rating. (See subsection S3-10c for determining the retention standing of an employee who has received a proposed notice of removal or demotion.)

(3) If an employee receives an improved rating as a result of an opportunity under 5 C.F.R. 432 to demonstrate acceptable performance, the improved rating is considered the current annual performance rating of record. The improved rating must have been received before the date of specific RIF notices (or the agency-established cutoff date for putting ratings on record prior to RIF - see subsection S3-9e). An annual performance rating of record of unacceptable (Level 1) given before the opportunity period,

however, is counted as one of the employee's three previous annual performance ratings of record used to determine additional service credit until it is removed. If because of performance improvement during the notice period of a 5 C.F.R. Part 432 action an employee is not demoted or separated, and performance continues to be acceptable for one year after the notice, any record of the unacceptable performance is to be removed from agency records. In this case, no record of the unacceptable rating would exist. If necessary the employee would be credited with an assumed fully successful rating.

(4) An employee who has been demoted or reassigned as a result of an annual performance rating of record of unacceptable, and who does not yet have an annual performance rating of record in the current job as of the date of specific RIF notices (or the agency-established cutoff date for putting ratings on record prior to the RIF - see subsection S3-9e), is assumed to have a current annual performance rating of record of fully successful. An annual performance rating of record of unacceptable (Level 1) given before the demotion or reassignment, however, is counted as one of the employee's three previous annual performance ratings of record used to determine additional service credit.

S3-10. Effective Date of Retention Standing

a. Date of retention standing. An employee's retention standing is determined as of the date he or she is released from a competitive level except that additional service credit for performance is based on annual performance ratings of record received and put on record in accordance with the agency's procedures prior to the date of specific RIF notices (or the agency-established cutoff date for putting ratings on record prior to RIF - see subsection S3-9e). Any changes in factors other than performance that occur during the notice period must be taken into account in determining the employee's retention standing. For example, an employee's tenure may change from career-conditional to career.

b. Date of RIF notices. An agency must establish a single, official date for issuance of all specific notices for each reduction in force in each separate competitive area. The date is the same for determining retention standing for all competing employees even when circumstances require the agency to issue some individual notices after the uniform date. For example, if an agency must give an employee a new 30-day notice when it intends to take action more serious than that first specified (see subsection S7-3e), this new notice period does not change the dates under subsection S3-10a for determining the employee's retention standing.

c. Proposed removal or demotion. When an employee has a pending notice of proposed removal or demotion and the final decision on the proposal is due before the effective date of the reduction in force, the agency cannot determine the employee's retention standing until the final decision is given to the employee. If the final decision is to remove the employee from the competitive level, the employee would not be a competing employee in the competitive level (see subsection S3-4c). *If the decision is to* retain the employee (in either the same or a different competitive level), additional service credit is based on the employee's three previous annual performance ratings of record as of the date of specific RIF notices.

d. Exceptions. The retention standing of an employee temporarily retained in his or her competitive level under a continuing or temporary exception (see subsection S4-4a(a) and (3)) is determined as of the date the employee would have been released from the competitive level had the agency not used the exception. This means the retention standing of such an employee remains fixed as of the day the employee would have been released until the agency completes the RIF action that resulted in the temporary retention.

e. Correction of error in retention standing. When an agency discovers an error in the determination of an employee's retention standing, it must correct the error and adjust any erroneous RIF actions

in accordance with the employee's actual retention standing.

Subchapter S4. Release from Competitive Level

S4-1. Coverage

This subchapter explains the order of release of employees from a competitive level under the RIF regulations. It also explains other actions an agency may take prior to such a release. Competition to remain in a competitive level is called first round competition. Second round competition, or competition for jobs in other competitive levels, is explained in subchapter S5.

S4-2. Movement Within a Competitive Level

a. General. When an employee's position is abolished, the employee is not automatically released from his or her competitive level. The agency must first release noncompeting employees from the competitive level. (See subsection S4-3a.) Then the agency may choose to reassign employees within the competitive level. Further, the agency may reassign any employee in the competitive level to a vacant job at the same grade in the same or a different competitive level (see section S2-6). These actions may make the release of a competing employee by RIF action unnecessary.

b. Options. If a competing employee must be released, an employee in an abolished position has a right to one of the other positions in the level as long as he or she is not the lowest-standing employee. If the employee in the abolished position has the lowest standing, he or she is the one released from the competitive level. Similarly, when satisfying an assignment right of an employee from a different competitive level, an agency is not required to offer the job of the lowest-standing employee. Instead, it may reassign employees within the level and offer any position in the level as long as the assignment right is satisfied and the proper order of release from the level is followed. This order of release from a competitive level and permitted exceptions are discussed in sections S4-3 and S4-4.

S4-3. Regular Order of Release

a. Noncompeting employees. Before a competing employee may be released from a competitive level, an agency must first release from the competitive level each employee:

(1) Serving under a specifically limited temporary appointment to a position in that competitive level;

(2) Serving under a term promotion or temporary promotion to a position in that competitive level (these employees are returned to their permanent positions of record, or equivalent); and

(3) Who has received a written decision of removal under 5 C.F.R. Part 432 because of unacceptable (Level 1) or equivalent performance from a position in that competitive level.

b. Competing employees. After an agency has released all noncompeting employees from a competitive level, it selects competing employees for release in the inverse order of their retention standing beginning with the employee having the lowest standing (see section S3-5). All employees in group III are released before any employee in group II is released; and all employees in group II are released before any in group I is released. Within each group, all employees in subgroup B are released before any employee in subgroup A is released; and all employees in subgroup A are released before any in subgroup AD. Within each subgroup, employees are released in the order of their service dates beginning with the most recent service date. When employees in the same retention subgroup have identical service dates and are tied for release, the agency determines the order in which the tied employees are released. See section S4-4 for exceptions permitted to this regular order of release.

S4-4. Exceptions to Regular Order of Release

a. Restriction. An agency may release a competing employee from a competitive level while retaining in that level another competing employee with lower retention standing only if the action is authorized as a mandatory, discretionary, or liquidation exception.

(1) Mandatory exceptions. Certain employees who have been reemployed after military service have special retention protections requiring an agency to make exceptions to the regular order of release. These are group I or II employees entitled to retention for either six months or one year after restoration under Chapter 353. Each must be retained over other employees in the same subgroup until the end of the retention period. An agency may not separate such an employee by RIF action during the retention period following restoration. If such an employee is reached for release from a competitive level, the agency is obligated to find another position for the employee (see Chapter 353). If the employee cannot be retained in a position in the same competitive area, the agency must offer the employee a position in another competitive area. If the employee refuses all offers and must be separated, the separation is an adverse action rather than a RIF action.

(2) Discretionary continuing exceptions. An agency may make a continuing exception to the regular order of release to keep an employee in a position that no higher standing employee can take over within 90 days and without undue interruption to the agency. For example, this may be used to avoid the interruption or untimely termination of an assignment under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376). (This exception may be made only to retain an employee whose assignment will last more than 90 days beyond the effective date of the reduction in force.)

(3) Discretionary temporary exceptions. An agency may make an exception to the regular order of release for not more than 90 days when needed to retain an employee for 90 days or less after the effective date of release of a higher standing employee from the same retention register. An agency may use this discretionary temporary exception to:

(a) Continue an activity without undue interruption;

(b) Avoid the interruption or untimely termination of an assignment under

the Intergovernmental Personnel Act (5 U.S.C. 3371-3376).

(c) Satisfy a Government obligation to an employee; for example, to delay the effective date of an employee's release long enough to allow a full 30-day notice when he or she is absent from the duty station and cannot receive notice the same day as other employees or when a new notice must be given;

(d) Benefit an employee when the temporary exception does not adversely affect the rights of any higher standing employee who is released ahead of the lower standing employee, e.g., retaining an employee on sick leave until the sick leave is exhausted or the employee has recovered. The temporary retention of a lower-standing employee on sick leave may exceed 90 days but may not exceed the date the employee's sick leave is exhausted.

(4) Liquidation exceptions. When an agency will abolish all positions in a competitive area within 90 days, it must release the employees in subgroup order but may release them regardless of their retention standing within a subgroup, except when an employee must be retained under a mandatory exception. An agency may use both discretionary continuing exceptions and discretionary temporary exceptions during a liquidation. When an agency uses the liquidation provision, it must tell employees and also give the date the liquidation will be completed.

b. Notice to higher-standing employees. When an agency retains an employee under a discretionary continuing exception, it must give written notice of the exception and the reason for it to each higher-standing employee reached for release from the same retention register. When an agency retains an employee under a discretionary temporary exception for more than 30 days after the date a higher standing employee is released from the same retention register, it must give written notice to the higher-standing employee of the exception, the reason for it, and the date the lower-standing employee's retention will end.

c. Record of exceptions. The agency records on the retention register the reason for any exception to the regular order of release. In addition, when a temporary exception is made, the agency lists on the retention register opposite the name of the lower-standing employee the date retention will end.

S4-5. Action Following Release from Competitive Level

a. Another position. An employee reached for release from a competitive level may have a right to be assigned to another position. If so, the employee must be offered that position (or an equivalent one). Assignment rights, called bump and retreat, are discussed in subchapter S5.

b. Separation for furlough. Only when an employee has no right of assignment to another position or turns down an offered position satisfying the assignment right may the agency furlough or separate the employee under RIF procedures. The agency decides whether a furlough is appropriate (see subchapter S6). If a furlough is not appropriate, the employee may be separated. However, an employee may not be separated *while a lower-standing employee in the same* competitive level remains on furlough.

c. Documentation. After an employee's rights have been determined, an official personnel action is necessary to assign the employee to a different position, to furlough the employee, or to separate the employee from the rolls. See FPM supplement 296-33 for instructions on recording these actions.

d. Effective date. The separation of one employee effective at the end of a day and the assignment to another position or furlough of another employee effective at the beginning of the next day are considered simultaneous effective dates.

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c. Assignment Rights. During a RIF, many employees may be reassigned rather than furloughed or separated. In order to be eligible for reassignment, an employee must be qualified for the new position and must meet certain regulatory requirements. In certain instances an agency must reassign an employee in lieu of taking other action, although an agency is never

required to fill a vacant position with an employee displaced by a RIF. The regulations describe what the assignment rights of various employees are. As you read them, consider what happens to the Federal employees when an organization undergoes a major reorganization and a significant reduction in the number of civilian positions.

Subchapter S5. Assignment Rights--Bump and Retreat

S5-1. Coverage

This subchapter explains an employee's eligibility, following release from a competitive level, to be assigned to a position occupied by another employee or to a vacant position. Assignment rights, called bump and retreat, constitute the second round of competition when employees compete for jobs in other competitive levels.

S5-2. Basic Rights

a. Actions. When an employee is released from a competitive level, the agency must determine whether the employee has an assignment right to an available position (see section S5-3). If so, the agency must offer the position (or an equivalent one) to the employee. If an employee has no assignment right or refuses an offer, the agency may furlough (see subchapter S6) or separate the employee.

b. Eligibility. The RIF regulations extend assignment rights to each competitive service employee in tenure group I or II who has a current annual performance rating of minimally successful or higher (see subsection S3-9e(7)). An employee either in tenure group III or with a current annual performance rating of unacceptable has no assignment right. (The RIF regulations do not extend assignment rights to excepted service employees, but an agency may do so under subsection S5-10a(3).)

c. Effect of changing positions. A competing employee who accepts an offer of assignment, or who displaces a lower-standing employee under the RIF regulations, retains his or her same status and tenure in the new position. (See section S5-11 for information on how this relates to the use of temporary positions in RIF.)

d. Agency options. An agency may at its discretion:

(1) Extend additional assignment rights to certain employees as provided in section S5-10;

(2) Offer an employee a vacant position in the same competitive area as an offer of assignment under the RIF regulations (see section S5-6(a);

(3) Offer an employee a vacant position in lieu of RIF separation or other RIF action (see subsection S5-6c);

(4) Make a discretionary continuing or temporary exception to the actions required by subsection S5-2a. Any exception is subject to all the applicable requirements in section S4-4.

e. Restrictions. This chapter does not permit an agency:

(1) To assign an employee to a position with a representative rate higher than that of the employee's current position;

(2) To displace a full-time employee by an other-than-full-time employee or to displace an other-than-full-time employee by a full-time employee;

(3) To satisfy a full-time employee's right of assignment by assigning the employee to a vacant other-than-full-time position, or to satisfy an other-than-full-time employee's right to assignment by assigning the employee to a vacant full-time position;

(4) To designate a position as a trainee or developmental position for the sole purpose of protecting an employee from a RIF action unless the position otherwise meets the conditions covered in subsection S5-8e.

S5-3. Extent of Offer

a. Definition of available position. An available position satisfying an assignment right must:

(1) Be in the competitive service;

(2) Be in the same competitive area;

(3) Last at least three months;

(4) Be one for which the released employee qualifies under section S5-8 unless the agency, at its discretion, chooses to waive qualifications under section S5-9a.

(5) Have a representative rate no higher than the representative rate of the position from which the employee is released;

(6) Be occupied by another employee subject to displacement by the released employee in accordance with section S5-4 or S5-5; and

(7) Have the same type of work schedule (e.g., full time, part-time, intermittent, seasonal, or on-call) as the position from which the employee is released.

b. More than one available position. When more than one available position will satisfy an employee's assignment right, the employee is entitled to the position with the highest representative rate. When two or more positions exist all with the same representative rate, the agency may offer the employee any one of them. An employee has no right to choose a position.

c. Promotion potential of the position. The promotion potential of a position is not a consideration in the identification of an available position for satisfying an assignment right. Employees may be assigned under RIF procedures to positions with higher promotion potential and may be subsequently noncompetitively promoted to the full performance level of that position.

d. Positions occupied by temporary employees. Released employees do not have assignment rights to positions occupied by temporary employees (tenure group 0) in another competitive level. (See section S5-11 for use of temporary positions that are vacant.)

e. Limits on offer. An employee is entitled to only one proper offer and is entitled to no further offer when he or she accepts an offer, rejects an offer, or fails to reply to an offer within a reasonable time. Regardless of an employee's entitlement to only one proper offer, the agency must make a better offer if a position with a higher representative rate (but not higher than the representative rate of the employee's current position) becomes available on or before the effective date of the reduction in force. It makes no

difference whether the employee has accepted or rejected a previous offer. A better position may become available when another employee rejects an offer or vacates a position by resignation, retirement, etc. For example, if the best offer that can be made initially to a GS-11 employee is a GS-7 position and a GS-9 position becomes available later (but still on or before the RIF date), the agency must offer the GS-9 position regardless of the employee's acceptance or rejection of the GS-7 position.

f. Alternative offer. After determining an employee's assignment right, the agency, at its discretion, may also make an alternative offer of a vacant position with the same or a lower representative rate than that of the position to which the employee was entitled. The alternative offer may be a second offer of RIF assignment to a vacant position, or may be an offer of a vacant position in lieu of RIF separation or other RIF action. (For example, this option could permit the employee to continue working in the same commuting area rather than displacing a lower-standing employee at a different duty station within the competitive area. This option could also be used to allow the employee to remain in the same line of work rather than displacing a lower-standing employee who works in a different program within the competitive area.) In making an alternative offer of a vacant position with a lower representative rate, the agency must insure that the employee has also received notice of his or her entitlement to a position with a higher representative rate. (See section S5-6 for material explaining how an agency may offer an employee a vacant position as a RIF offer of assignment, or as an offer in lieu of RIF separation or other RIF action.

5-4. Bumping

a. Requirements. Bumping is an employee's right of assignment to a position occupied by another employee in a lower tenure group, or in a lower tenure subgroup within the same tenure group, in another competitive level in the same competitive area. Upon release from a competitive

level, an eligible employee (see subsection S5-2b) is entitled to bump to an available position which requires no reduction, or the least possible reduction, in representative rate when the following conditions are met:

(1) The occupied position is held by an employee in a lower tenure group or in a lower subgroup within the released employee's own tenure group; and

(2) The occupied position is the same grade or no more than three grades or three grade-intervals (or equivalent) below the position from which the employee is released (see section S5-7).

b. Subgroup superiority. The requirement that the occupied position be held by an employee in a lower subgroup means:

(1) A subgroup IAD employee has bumping rights over employees in IA, IB, and groups II and III.

(2) A subgroup IA employee has bumping rights over employees in IB and groups II and III.

(3) A subgroup IB employee has bumping rights over employees in groups II and III.

(4) A subgroup IIAD employee has bumping rights over employees in IIA, IIB, and group III.

(5) A subgroup IIA employee has bumping rights over employees in IIB and group III.

(6) A subgroup IIB employee has bumping rights over employees in group III.

S5-5. Retreating

a. Requirements. Retreating is an employee's right of assignment to a position formerly held, or essentially identical to one previously held, when the position is occupied by a lower-standing employee in the same tenure subgroup, and is in another competitive level in the same competitive area. Upon release from a competitive level, an eligible employee (see subsection S5-2b) is entitled to retreat to an available position that requires no reduction, or the least possible reduction, in representative rate when the occupied position is:

(1) Held by an employee with a later service date in the same subgroup;

(2) The same grade or no more than three grades or three grade-intervals (or equivalent) below the position from which the employee is released (see section S5-7). The position may be up to five grades (or intervals or equivalents) lower if the released employee is a preference eligible with a compensable service-connected disability of 30 percent or more;

(3) The same position or essentially identical to a position previously held by the released employee in any Federal agency (see subsection S5-5d); and

(4) Held by an employee with a current annual performance rating no higher than minimally successful (Level 2) <u>when the released employee's rating is minimally successful</u>.

b. Lower standing in same subgroup. The requirement that the occupied position be held by an employee with a later service date in the same subgroup is a bump; see section S5-4. Example: A I-A may retreat to a position held by another I-A with less service but may not retreat to a job held by a II-A employee. (Assignment to a lower subgroup is a bump; see section S5-4). Example: A I-A with a service date of March 17, 1958, may displace another I-A with a service date of March 18, 1958.

c. Extent of retreat right. Although an employee may not retreat to a job in a different competitive area, the employee may retreat to a position in the current competitive area that is essentially identical to one held in the same or different competitive area in the current agency or in a different agency.

d. Essentially identical position. In determining retreat rights, a position is considered essentially identical to one previously held if the employee held the previous position as a competing employee (i.e., the employee was not on detail, term or temporary promotion, or temporary appointment in the position - see subsection S4-3a); and the agency determines on the basis of the information available that the two positions are enough alike that, under the criteria in subsections S3-3a and b, they would be placed in the same competitive

level if they were in the same competitive area.

Examples: Employees do not have retreat rights to positions to which they were detailed, or promoted under term or temporary promotion, since they would not have held the position as a competing employee. They would, however, have retreat rights to positions held under term appointment since such employees (Group III) compete in RIF. Competitive service employees do not have retreat rights to competitive service positions that are otherwise like positions they held under excepted service appointments (e.g., Veterans Readjustment Appointments), because excepted service and competitive service positions would never be in the same competitive level under the criteria in subsection S3-3b.

S5-6. Filling Vacancies

a. Agency discretion. An agency is not required to fill vacancies in a reduction in force but may choose to fill all, some, or none of them. When an agency chooses to fill a vacancy with an employee released from his or her competitive level, however, it must do so in accordance with this section.

b. Using vacancies to satisfy an assignment right.

(1) An agency may satisfy an employee's assignment right by assigning the employee to a vacant position in the same competitive area having a representative rate equal to a position to which the employee would be entitled on the basis of bump or retreat rights. An agency may also offer an employee assignment to a vacant position in lieu of separation by RIF. (See subsection S5-6c for the use of vacant positions to place employees in lieu of RIF separation or other RIF actions).

(2) When an agency has decided to use a vacancy as an offer of RIF assignment, the employee's right to the position is determined in the same way as the right to bump or retreat is determined. This means that the vacant position must be in the same competitive area, be no more than three grades or three grade-intervals (or equivalent) below the position held by a

released employee, and that the right to the position is based on subgroup superiority as long as no employee has a retreat right to it. These requirements are applied as follows:

(a) If one employee is released from a competitive level and only one vacancy exists within the bump grade limits, the agency offers that vacancy.

(b) If one employee is released from a competitive level and there are several vacancies the agency chooses to fill within the three-grade (interval) limits, the employee is entitled to the vacancy with the highest representative rate. When more than one of these vacancies have the same representative rate, the agency may offer the employee any one of them. The employee has no right to choose a position.

(c) If two employees, a GS-11 in subgroup IB and a GS-9 in subgroup IA, are released from their competitive levels, and two available vacancies exist at GS-9 and GS-7, the GS-9 employee is entitled to the GS-9 vacancy because of subgroup superiority.

(d) If several employees, all in the same subgroup, are released from their competitive levels and several vacancies exist within the three-grade (interval) limits, the agency may offer any vacancy to any employee unless this would violate an employee's retreat right. Employee service dates are not a consideration in making such offers, unless the agency chooses to use them.

Example: Two GS-13 employees in the same subgroup are released; both are rated fully successful. Two vacancies exist, a GS-13 and a GS-12. Employee A previously held the GS-13 vacancy. If employee A has an earlier RIF service date (7-11-66) than Employee B (2-21-68), then Employee A is entitled to the GS-13 vacancy, because he or she would have a retreat right to it. If Employee A has a later service date (2-21-68) than Employee B (7-11-66), the agency may offer either vacancy to the employees because Employee A would not have a retreat right to the position under these circumstances.

c. Using vacancies to place employees in lieu of RIF separation, or other RIF actions.

(1) When an agency determines that a tenure group I or II employee has no RIF assignment right or if the agency chooses to offer a position in lieu of RIF separation or other RIF action, it may offer the employee a vacant position. The grade-level limits which apply when placing employees through RIF assignment rights do not apply when offering an employee a vacancy in lieu of RIF. This includes the authority to offer a vacant other-than-full-time position to a full time employee or offer a vacant full time position to an other-than-full-time employee. Although the employee was reached for a RIF action, these voluntary offers are not RIF placements and must be made in accordance with the provisions of FPM Chapter 335 if the offered position has more promotion potential than the employee's present position. The placement actions are processed, as appropriate, as a position change, change to lower grade, or change in work schedule and should be documented to show that the employee accepted the position in lieu of RIF. Offers under this authority of positions in the same competitive area, or in different competitive areas within the same local commuting area, must be made on the basis of subgroup superiority and cannot violate the assignment rights of any other competing employee. Offers of positions in different competitive areas which are outside the local commuting area are not subject to these restrictions.

(2) Agencies may also offer vacancies through the agency's reemployment priority list (RPL) to employees who are identified for RIF separation and on that basis placed on the agency's RPL. (See subchapter S9.) Agencies may also use vacant temporary positions to place employees subject to RIF separation (see subsection S5-11c). Grade-level limits do not apply to these placements.

S5-7. Grades, Grade-Intervals, and Equivalents

a. Grades vs. grade-intervals. The grade limits of an employee's assignment rights are determined by the grade progression of the position from which the

employee is released. Some jobs have a one-grade progression, e.g., GS-5-6-7-8; others have a two-grade, or other multi-grade progression, e.g., GS-5-7-9-11. The difference between successive grades in a one-grade occupation is a grade difference and the difference between successive grades in a multi-grade occupation is a grade-interval difference. In RIF, employees are allowed to exercise their assignment rights to positions up to three grades, or three grade intervals, lower than the positions from which they are released. Once this range is determined, employees have assignment rights to positions at all grades within the grade-interval limits, including positions in intervening grades within the grade-interval progression. Examples: An employee released from a GS-11 position in a two-grade interval occupation that progresses GS-5-7-9-11 may bump and retreat up to three grade intervals lower to GS-5, (including GS-6, -8, -10). An employee released from a GS-9 position in a one-grade occupation that progresses GS-6-7-8-9 may bump and retreat up to three grades lower to GS-6.

. . . .

S5-10. Administrative Assignment

a. Discretionary practices. Subject to the restrictions in subsection S5-10b, an agency may at its discretion adopt any of the following practices for assigning employees in a reduction in force:

(1) Consistent with section S5-4, permit competing employees in tenure groups I and II to displace other employees with lower retention standing within the same subgroup. This authority may be used only when it enables an agency to assign a released employee to a position with a representative rate higher than that provided by bumping.

(2) Consistent with section S5-4, permit competing employees in the competitive service in tenure group III to bump other employees in tenure group III. While group III employees have no right of assignment under the RIF regulations, an agency may permit a III-AD to bump a III-A or III-B or permit a III-A to bump a III-B.

It may not, however, permit one group III employee to displace another group III employee in the same subgroup.

(3) Establish a system of assignment rights for competing employees in the excepted service. While excepted employees have no right of assignment under the RIF regulations, an agency may extend rights similar to the provisions in sections S5-4 and S5-5, and subsections S5-10(a)(1) and (2). These assignment rights may only be to other excepted positions filled under the same appointing authority as the position held by the released employee; may be as extensive or more restrictive than those for competitive service employees; and must be uniformly and consistently applied in a RIF.

b. Restrictions. Discretionary assignment practices must be applied uniformly and consistently in any one reduction in force, and employees must be informed of them in advance. Such practices may not provide for:

(1) Displacement of an employee except by an employee with higher retention standing;

(2) Assignment rights for other-than-full-time employees to full-time positions, or assignment rights for full-time employees to other-than-full-time positions, except as an offer of assignment to a vacant position in lieu of separation by RIF;

(3) Assignment of an employee in the competitive service to the excepted service; or

(4) Assignment of an employee in the excepted service to the competitive service.

S5-11. Use of Temporary Positions

a. Agency discretion. An agency may, at its discretion, use a vacant temporary position:

(1) as a RIF offer of assignment, as provided in subsection S5-11b; or

(2) to reemploy a Group I or II employee who is separated by RIF, as provided in subsection S5-11c.

b. Using a temporary position as a RIF offer of assignment. A competing employee has no right of assignment to a specifically

limited temporary position held by a noncompeting employee in another competitive level. However, an agency may, at its discretion, use a vacant temporary position that will last at least three months as a RIF offer of assignment. The offer of the vacant temporary position as a RIF assignment is made on the same basis as other vacant positions offered in RIF (see section S5-6), including the three-grade or grade-interval limits. When this type of placement is made as a RIF offer of assignment, the employee retains his or her previous status and tenure. When the temporary position expires or is abolished, the employee is again entitled to compete under the RIF regulations based on his or her previous status and tenure.

Example: If an employee in subgroup I-A is given a RIF assignment to a temporary position, the employee retains the I-A status and tenure. The action is processed as a position change, reassignment, or change to lower grade, as appropriate, and no change is made in the employee's appointment. When the temporary position expires or is abolished, the employee is again entitled to compete under the RIF regulations based on his or her I-A status and tenure.

c. Using a temporary position to reemploy an employee following RIF separation. An agency may offer a temporary appointment to a vacancy to a Group I or II employee who has no assignment right. When this occurs, the action is processed as a separation followed by a new temporary appointment, and the employee's status and tenure are changed to that which is appropriate for a temporary appointment (tenure group 0). When the temporary position expires or is abolished, the employee is separated as a temporary employee, without regard to the RIF regulations. Offers of temporary appointment in the same competitive area or same local commuting area must be made on the basis of subgroup superiority. This is to insure consistency with the requirement to use subgroup superiority which applies when making placements from the agency's reemployment priority list.

Subchapter S6. Furlough

S6-1. General

a. Use. A furlough action is the placement of an employee in a temporary nonduty and nonpay status on a continuous basis (for example, 10 consecutive days), or a noncontinuous basis (for example, one day a week). RIF procedures must be followed to furlough an employee when the furlough will be for more than 30 consecutive days (or more than 22 work days if done on a noncontinuous basis), is caused by one of the reasons in subsection S2-3a(2), and is not in accordance with preestablished conditions of employment.

b. Time limit. An employee may be furloughed for up to one year. The one-year limit begins the day after the notice period ends and when the furlough begins.

c. Exclusions.

(1) Placement in nonpay and nonduty status in accordance with preestablished conditions of employment is not a RIF action but is covered by the requirements in FPM Chapter 340.

(2) A furlough for 30 days or less (or 22 workdays or less if done on a noncontinuous basis) is not a RIF action but is covered by the procedures in FPM Chapter 752. Nevertheless, an agency may choose to use retention standing as an objective way for determining which employees in a competitive level will be furloughed under FPM Chapter 752 procedures.

S6-2. Restrictions

An agency may not:

a. Furlough any employee it does not intend to recall to duty in the same position within one year; or

b. Separate an employee through reduction in force while an employee with lower retention standing in the same competitive level is on furlough.

6-3. Furlough Retention Rights

a. Release by furlough. An employee is reached for release by furlough from the competitive level in first round RIF competition in the same manner as an employee is reached for release by other actions covered in subsection S2-3a(1). In

accordance with section S4-5, an agency may furlough an employee under the RIF provisions only if the employee has no right of assignment under subchapter S5, or refuses an offer of assignment in second round RIF competition. A furloughed employee who accepts a RIF offer of assignment becomes the incumbent of the offered position unless the employee accepts an offer of recall to the position from which furloughed.

b. Assignment rights. In determining whether a furloughed employee has assignment rights to another position, it is important for the agency to consider whether the offer would result in undue interruption to the activity. (See subsection S5-8a(4).) Since a RIF furlough anticipates an employee's recall to the same position, the agency should consider whether undue interruption would result from the displacement of a lower-standing employee in second round competition, and from the recall of both employees to their positions of record at the end of the furlough period. The assignment right provisions of subchapter S5 do not apply when all employees in the competitive area are furloughed at the same time or on the same basis. For example, if all employees in the same competitive area were furloughed one day a week (either the same day or different days) on a noncontinuous basis for 28 weeks, none of the employees would have a right of assignment to another position. If only some of the employees were furloughed one day a week for 28 weeks and other employees in the same competitive area were not furloughed, the furloughed employees would have a right of assignment to positions held by employees not affected by the furlough only if there was no undue interruption.

S6-4. Recall from Furlough

If all employees furloughed from a competitive level cannot be recalled at the same time, the employees must be recalled according to their retention standing beginning with the highest-standing employee.

S6-5. Separation in Lieu of Recall

a. No recall. If the situation changes and an agency determines that a

furloughed employee cannot be recalled within the one-year period, the employee must be separated unless the employee accepted an offer of assignment to another position under subchapter S5. If some but not all furloughed employees in a competitive level must be separated, employees are selected for separation by retention standing beginning with the lowest-standing employee. A new RIF notice of separation must be given to the furloughed employee at least 30 days prior to the end of the one-year furlough period. The separation of a furloughed employee is a new RIF action.

b. Failure to return. If a furloughed employee refuses or does not respond to an agency notice to return to duty, the agency may separate the employee by RIF effective on the specified date of recall. A new RIF notice of separation is not required.

7.4 A General Overview of the RIF Process.

The establishment of the retention register can best be understood by thinking of it as a repeated screening process. First, the employees are grouped according to the type of their appointment as follows:

Group I - Career employees (non-probationary)

Group II - Career employees serving probationary periods and Career-conditional employees

Group III - Indefinite employees and Term employees

Second, each of these groups is subdivided into three subgroups: AD for disabled veterans (30% variety), A for veterans, and B for nonveterans. Within each subgroup the employees are ranked according to their service dates reflecting their total Federal (civilian and military) service. Employees are given additional service credit based on their last three annual performance ratings, if outstanding (level 5), exceeds fully successful (level 4), or fully successful ratings (level 3) were given.

Three types of employees are listed apart from the retention register: (1) those with temporary appointments limited to one year or less, (2) those

holding only temporary promotions to the affected positions, and (3) those with unsatisfactory performance ratings. These employees are not considered to be "competing employees" and must be released before anyone on the retention register is released.

Some employees who are released from their positions pursuant to a RIF are entitled to reassignment within the agency rather than lay off or separation. These reassignment "rights" are only applicable to Group I and Group II employees. A Group III employee can be released without being offered reassignment because a Group III employee has no right to another job.

An employee in Group I or Group II who is released from his or her position is entitled to a reasonable offer of reassignment if the agency has a suitable job that the employees can assume by displacing another employee with a "bump" or "retreat." A job is suitable only if it is (1) located in the same competitive area, (2) at the same or a lower grade as that from which the competing employee was released, (3) one for which the employee is fully qualified, and (4) one that the employee can fill without unduly interrupting the agency's work. A "bump" occurs when the employee displaces an employee in a lower retention subgroup. A "retreat" occurs when the employee returns to a job from which he or she was promoted (or one like it) and displaces an employee with a later service date in the same subgroup. The agency only has to make one reasonable offer of assignment. It does not have to fill a position vacancy, and it does not have to offer a particular position because the employee would prefer it. An employee who refuses a reasonable offer can be separated. The effect of these assignments is the creation of waves of RIF actions as the employees in each successive lower grade level go through the bumps and retreats in attempting to avoid separation.

Before an employee can be released from his or her competitive level, the employee is entitled to advance written notice at least 30 days prior to the effective date of the release. Frequently, an agency will issue a general notice of the intended RIF action to all employees likely to be affected and then later issue a specific notice to the employees actually affected. In this situation, the specific notice must reach the employee at least ten days prior to the effective release date. The notice is required to contain the following:

S7-3. Forms of Notice

. . . .

b. Contents of specific notices. A specific notice must contain the following information:

(1) The specific RIF action to be taken;

(2) The effective date of the action;

(3) The employee's competitive area, competitive level, subgroup, service date, and annual performance ratings receiving during the last three years;

(4) The place where the employee may inspect the regulations and records pertinent to his or her case;

(5) If applicable, the reasons for retaining a lower standing employee under a discretionary exception authorized by section S4-4;

(6) If applicable, that employees are being separated under liquidation procedures without regard to standing within the subgroup and the date the liquidation will be complete;

(7) The employee's appeal or grievance rights (see section S8-1);

(8) If applicable, specific information on the Reemployment Priority List and the Displaced Employee Program. (See subchapter S9 of this chapter and FPM Chapter 330, subchapters 2 and 3.) An agency has the option of issuing a supplemental notice to provide specific information on these programs, e.g., eligibility criteria and application procedures. However, the agency should give this information to an employee as soon as it determines the employee will not be retained.

As with an adverse action, if the agency decides to take an action more severe than that specified in the notice, the employee is entitled to a new written notice and an additional 30-day period before the more severe action can become effective. Normally, an employee remains in an active duty status during the notice period, although an agency can place an employee on annual leave, on leave without pay, or in a nonpay

status in emergency situations (lack of work or lack of funds).

An employee affected by a reduction in force action may appeal to the Merit Systems Protection Board. The appeal must be in writing and must be initiated under the MSPB's regulations within 20 days of the action's effective date. 5 C.F.R. § 1201.22. The appeal is limited to the issue of whether the agency has correctly applied the RIF procedures. Examples of typical employee appeals include allegations that (1) the agency failed to make a reasonable offer of assignment; (2) the agency failed to grant the employee proper veteran's preference rights; (3) the retention register was improperly established; and (4) the RIF procedure was improperly used in lieu of some other required procedure. If the employee wins the appeal at the Merit Systems Protection Board, the agency will be bound by the decision and required to take corrective action, unless it petitions the MSPB to reopen and reconsider the case. 5 C.F.R. § 1201.113.

Note 1. On June 17, 1991, OPM published proposed regulations which would require agencies to give employees at least 60 days written notice prior to a reduction in force. The 60-day requirement would not apply, however, in situations caused by an immediate shortage of funds or other unforeseeable circumstance or when fewer than 50 employees in the same competitive area are being separated. In these situations, the current 30-day notice rule would apply. Under the proposed rule, an agency could still satisfy the notice requirement by issuing a 60-day general notice followed by a specific notice at least 10 days prior to the effective date of the separation. See 56 Fed. Reg. 27695-96 (June 17, 1991). Legislation which would extend the advance notice period in RIF actions has also been introduced in the 102d Congress. See H.R. 1341, 102d Cong., 1st Sess., 137 Cong. Rec. H1472 (1991).

Note 2. In a RIF appeal, the burden of proof is on the agency to prove by a preponderance of the evidence that a reduction in force was invoked for one of the legitimate reasons set forth in 5 C.F.R. § 351.201(a). Once the agency has met this burden, the employee must provide rebuttal evidence to place into issue the agency's asserted reasons for the RIF action. Losure v. Interstate Commerce Commission, 2 M.S.P.R. 195 (1980).

Note 3. The determination of an employee's retention standing includes possible extra credit for

performance of duty above the fully successful level. The agency is required to use the employee's current performance rating for this purpose. The current rating is the rating which is on record on the day when the RIF notice is issued. Thus, a rating of "outstanding" which has not yet received agency approval (under agency performance appraisal regulation) at the time the RIF notice is issued cannot be considered.

Note 4. Where procedural error is present in an agency reduction-in-force the appellant must show harmful error in the agency's application of those procedures. There is no harmful error where the correct application of procedural rights in a RIF would not change the outcome. Horne and Miller v. Interstate Commerce Commission, 5 M.S.P.R. 208 (1981). However, where the agency error involves substantive rather than procedural rights of the affected employee, the Board will not have to consider the harmful error question. Only procedural rights are subject to the harmful error standard of 5 U.S.C. § 7701(c)(2)(A). Barney Ray v. Department of Air Force, 3 M.S.P.R. 445 (1980).

7.5 Improper Use of Reduction-in-Force Actions.

The following administrative decision by the Civil Service Commission illustrates what happens if an agency attempts to use the RIF procedures improperly in lieu of the adverse action procedures.

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS EXAMINING OFFICE
WASHINGTON, D.C. 20415

(18 September 1973)

APPEAL OF A. ERNEST FITZGERALD
UNDER PART 351, SUBPART I
OF THE CIVIL SERVICE REGULATIONS

Appeal from the action of the Department of the Air Force in separating the appellant by reduction-in-force from the position of Deputy for Management Systems, GS-17, Step 4, $31,874.00 per annum, Office of the Secretary, Assistant Secretary for Financial Management, Washington, D.C., effective January 5, 1970.

INTRODUCTION

By letter dated January 20, 1970, John Bodner, Jr. and William L. Sollee, Attorneys at Law, submitted an appeal to this office

in behalf of Mr. A. Ernest Fitzgerald. Investigation was conducted and numerous lengthy submissions to the file were received from both the appellant and the agency. The appellant raised a question as to the bona fides of the reduction-in-force (RIF) as it was applied to him, contending that the RIF was used as a subterfuge to conceal the agency's action in firing him because of his November 13, 1968 testimony of the C-5A cost overruns. Since Mr. Fitzgerald was a preference eligible and the various submissions to the file did constitute a prima facie showing that the reduction-in-force may have been based upon an intention to separate the appellant for cause rather than for a nonpersonal reason, a hearing was scheduled to inquire into the circumstances surrounding the RIF.

The agency was requested and agreed to make available to testify Secretary of the Air Force Robert Seamans, Assistant Secretary Spencer Schedler, Administrative Assistant to the Secretary John Lang, Deputy Administrative Assistant Thomas Nelson, Air Force Chief of Staff General John D. Ryan, Comptroller of the Air Force Lieutenant General Duward Crow, Director of Office of Special Investigations (OSI) Brigadier General Joseph J. Cappucci, and Colonel James D. Pewitt.

In accordance with the Civil Service regulations in effect at that time, the hearing was not open to the public. However, a verbatim transcript of the proceeding was prepared by an independent court reporting firm. The hearing was conducted on May 4, 5; June 16, 17, 18, and 22, 1971. On the latter date the hearing was suspended in compliance with a temporary restraining order and subsequent injunction issued by the U.S. District Court for the District of Columbia relative to the issue of an "Open Hearing." The hearing, open to the public, resumed on January 26, 1973 after all litigation on this issue had been completed. Additional hearing sessions were held on January 29, 30, 31; February 2, 28; March 5, 6, 7, 20, 21, 22, 28, 30; April 3, 4, 5, 6, 19; and May 3, 1973.

. . . .

[See Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972), where the court held Fitzgerald had a right to an open and public hearing before the Commission in his appeal for reinstatement to his Federal employment.]

ANALYSIS AND FINDINGS

By letter dated November 4, 1969 the agency gave Mr. Fitzgerald notice of his proposed separation by reduction-in-force, effective January 5, 1970, due to the abolishment of this position, "necessitated by a reorganization under the current Air Force retirement program."

. . . .

Turning now to the reduction-in-force action itself, the agency's position is that as a part of Defense Department's Project 703, the Air Force was required to reduce expenditures one (1) billion dollars in fiscal year 1970. This involved large cut-backs in military and civilian personnel nationwide and in the headquarters staff of the Department. Each office in the Secretariat was given a specific number of reductions to be effected. SAFFM was assigned a net reduction of two (2) spaces. As part of a reorganization of that office five (5) positions were abolished and three (3) new positions were established. Of the five (5) positions abolished Mr. Fitzgerald's was the only professional position. The other four (4) were secretarial positions.

The agency contends that the abolishment of Mr. Fitzgerald's position, initiated by Assistant Secretary Spencer J. Schedler and approved by Secretary Robert Seamans, was based upon a valid management decision to reorganize SAFFM in order to improve its cost effectiveness capability and at the same time achieve the required reduction of two (2) spaces.

The agency further contends that Secretary Seamans and Assistant Secretary Schedler were not in office at the time of Mr. Fitzgerald's November 1968 testimony; that they alone were responsible for the decision to reorganize the financial management office; that the testimony Mr. Fitzgerald gave a year earlier was not the reason or a reason for their decision; and

that neither had sought or received any instructions to abolish the appellant's position.

Mr. Fitzgerald contends that the RIF as applied to him was not for non-personal reasons and was, in essence, an agency adverse action based upon his November 13, 1968 testimony on the C-5A cost overruns.

The record reveals that out of the 80 positions abolished in the Office of the Secretary of the Air Force, Mr. Fitzgerald was the only employee who actually was issued a RIF notice and who was actually separated by RIF (L/N 723-724). As his part of the Project 703 reductions, Assistant Secretary Schedler was required to take a cut of two (2) spaces. He accomplished this by abolishing four (4) secretarial positions plus Mr. Fitzgerald's position and creating three (3) new positions.

The Air Force, through the testimony of witnesses and documentary evidence, did show that a reorganization of SAFFM had taken place; that the appellant's position had been abolished and not recreated; and that there was some need to reorganize in addition to reducing the office staff by two (2) positions.

The appellant has not questioned the validity of the Project 703 reductions and the resultant reduction-in-force, only the agency's decision to abolish his position and include him in that RIF.

The reduction-in-force system as provided for by Statute and Commission regulations is a system for releasing employees from their competitive levels when their release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights. The system is predicated upon the concept of competition for retention based upon tenure, veterans preference, length of service, and performance rating.

Reduction-in-force may be necessary because of conditions inside or outside the agency. Agency management may reduce certain phases of its work as the workload changes. Appropriations may be reduced or cut-off entirely, or the agency may be allowed to use only part of its

appropriations. These and other factors occurring singly or in combination may make it necessary for the agency to have a reduction-in-force.

Reduction-in-force may require the separation of all employees in part of an agency or may require separation of some and shifting about of others. Small reductions may require no involuntary separations when there are enough transfers, retirements, and other voluntary losses. Some reductions, in fact, require no reduction in the number of employees but are accomplished through reorganization.

Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located, and where they are to be filled, abolished, or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work. A surplus of employees in any part of an agency requires the agency to determine whether the employees will be assigned to vacant positions, be adversely affected for reasons related to performance or conduct, or compete in reduction-in-force.

These are management responsibilities and the management determinations regarding these responsibilities are not ordinarily subject to review . . . in a reduction-in-force appeal.

It would be a valid and proper exercise of its management prerogative for an agency faced with the necessity for reducing its force to select for abolishment those functions and/or positions that are least necessary to the accomplishment of, or are making the least substantive contribution to, the agency's mission.

In this situation the lack of substantive contribution may be due to a change in the agency's mission or its method or approach to the accomplishment of its mission. It may also be that the lack of substantive contribution is due to the incumbent of the position.

Inherent in the Commission's reduction-in-force system and one of its fundamental

precepts is that it be used only for reasons that are non-personal to the employees affected. The reduction-in-force system must not be used to remove inadequate or unsatisfactory employees in lieu of following the Commission's adverse action procedures set forth in Part 752 of the Civil Service Regulations.

Federal Personnel Manual Chapter 351, Subchapter 1 states in part as follows:

"1-9. IMPROPER USE OF REDUCTION IN FORCE

There sometimes has been a tendency to distort the reduction-in-force system by using it to eliminate inadequate employees."

Thus, an allegation that the RIF was a subterfuge to conceal an agency removal action taken without following the adverse action procedures, when supported by a sufficient showing that the RIF action may have been based upon a non-personal reason for reducing the force, goes directly to the question of the bona fides of the RIF and will be reviewed on appeal.

In order to properly evaluate the propriety of the RIF action as applied to Mr. Fitzgerald it is essential that we review and analyze the circumstances leading up to and surrounding the decision to abolish his position and to include him in the project 703 RIF.

From our review of the complete appellate record including all submissions by both parties and the transcript of the hearing (26 days), we find the circumstances to be as follows:

Mr. Fitzgerald received an excepted appointment to the position of Deputy for Management Systems, Office of the Assistant Secretary of the Air Force for Financial Management (SAFFM) on September 20, 1965 (AF-1/30/70, Attachment #4). While no specific time limit was established as to the length of this appointment, it is clear from Mr. Fitzgerald's testimony of his conversations with the then Assistant Secretary, Dr. Leonard Marks, that it was to be for only a few years (TR 2618-2621).

Assistant Secretary Marks resigned on December 31, 1967 and was succeeded by Thomas H. Nielsen who was appointed Assistant Secretary for Financial Management

on January 1, 1968 (L/N 366). Mr. Nielsen submitted a proposed reorganization plan for his office dated January 9, 1968 (AF-6/25/70, P-253) focusing additional attention on cost performance, designating the appellant as the focal point for this effort and proposing increasing his staff.

Mr. Fitzgerald was first contacted by the Proxmire Committee in the Summer of 1968 to testify on the C-5A (TR 2720-2722). This request was put into writing by Senator William Proxmire on October 18, 1968 (APP-1/20/70, Attachment #2).

The file contains unrefuted allegations and testimony that there was high level Air Force and DOD opposition to Mr. Fitzgerald testifying.

Mr. Fitzgerald did testify before the Proxmire Committee on November 13, 1967 and discussed possible cost overruns on the C-5A plane. This testimony received a great deal of publicity for it was the first public disclosure of cost overruns on that project.

. . . .

Mr. Fitzgerald visited the Civil Service Commission on January 10, 1969 to complain of the alleged loss of tenure and his supervisor's statement that his usefulness to the Air Force was at an end. Therefore, Assistant Secretary Nielsen prepared a memorandum for record (M.Ex #7, 1/13/69 attachment). This memo states that Mr. Nielsen reviewed the entire matter of the tenure controversy with Mr. Fitzgerald who stated that he mailed a copy of the first SF-50 to the Committee immediately after the conclusion of the November 13, 1968 hearing and that when the second form was received it was mailed directly to the Proxmire Committee. The memo also states that Mr. Nielsen told the appellant "I felt his actions in this connection had ended his usefulness to the Air Force."

Secretary Seamans testified it was his belief that Mr. Fitzgerald released the SF-50's in the tenure controversy in order to obtain publicity and to place the Air Force in a bad light (TR 430-431, 435-437); that his actions inflamed the situation; exacerbated relations between Mr. Fitzgerald and people in the Secretariat; and "that's when it became much more of a confrontation"

(TR 480-481). Secretary Seamans also stated that Mr. Fitzgerald was a celebrity and a controversial person at the time as a result of the press releases concerning the tenure controversy (TR 438-439).

Colonel Pewitt testified that Assistant Secretary Nielsen gave Mr. Fitzgerald the "Lang Memo;" that Mr. Nielsen felt Fitzgerald "had betrayed a personal confidence" by the way the memo was handled; and that Mr. Nielsen lost confidence in the appellant and his usefulness to the Air Force (TR 1991-1992). Colonel Pewitt also stated that he thought Mr. Fitzgerald's days in the Air Force were numbered and that he might be leaving because of the tenure-nontenure publicity and the Lang Memo (TR 2121-2122).

It is clear that the "Lang Memo" and Secretary Nielsen's declaration that Mr. Fitzgerald had lost his usefulness to the Air Force both stemmed from the Washington Post January 1, 1969 front page article erroneously implying that the appellant lost his career tenure in retaliation for his testimony on the cost overrun in the C-5A project. It is also evident that the Air Force considered Mr. Fitzgerald responsible for this erroneous implication reaching the news media.

. . . .

Assistant Secretary Nielsen considered Mr. Fitzgerald's usefulness to the Air Force to be at an end as of January 8, 1969. Therefore, he obviously did not include Mr. Fitzgerald in his proposed reorganizations of February 26, 1969 and May 5, 1969. Mr. Nielsen's last proposal is essentially the same as the reorganization Assistant Secretary Schedler, with Secretary Seamans' approval, finally put into effect. This reorganization abolished Mr. Fitzgerald's position and led to his separation by RIF on January 5, 1970.

Mr. Schedler testified that he did not decide to abolish Mr. Fitzgerald's position until late September or early October 1969. However, Secretary Seamans and Secretary Laird came to the decision that Mr. Fitzgerald had to leave the Air Force much earlier than Mr. Schedler was willing to admit. They were busy looking for another

position outside the Air Force for the appellant as early as May 1969. One of the positions under consideration was with the Fitzhugh Blue Ribbon Panel, previously discussed.

Secretary Seamans denied being instructed directly, or ordered by anyone to terminate Mr. Fitzgerald. However, he initially declined to respond to any and all questions concerning possible communications he may have had with, or any advice received from, the White House staff regarding Mr. Fitzgerald. This declination was based on the doctrines of Executive Privilege and privileged communications. Secretary Seamans was advised by this examiner (TR 499) as follows:

> "Mr. Secretary, I am without authority to order you to answer the question. If the answer to the question becomes relevant and material, all I can do is to take into consideration your refusal to answer the question."

Secretary Seamans subsequently testified that at some point in time prior to Mr. Fitzgerald's job being abolished he did receive some advice from the White House; however, he refused to discuss it any further (TR 839).

By letter dated August 2, 1973, with a copy to the agency representative, appellant's attorney submitted a copy of a January 20, 1970 internal White House memo from Alexander Butterfield to Mr. H.R. Haldeman that had just been discovered. The agency was offered but declined the opportunity to comment. This memo states:

> "You'll recall that I relayed to you my personal comments while you were at San Clemente, but let me cite them once again-partly for the record-and partly because some of you with more political horse sense than I will probably want to review the matter prior to next Monday's press conference.
>
> "--Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.

"--Last May he slipped off alone to a meeting of the National Democratic Coalition and while there revealed to a senior AFL-CIO official (who happened to be unsympathetic) that he planned to "blow the whistle on the Air Force" by exposing to full public view that Service's 'shoddy purchasing practices.' Only a basic no-goodnik would take his official business grievances so far from normal channels. As imperfect as the Air Force and other military services are, they very definitely do not go out of their way to waste Government funds; in fact, quite to the contrary, they strive continuously (at least in spirit) to find new ways to economize. If McNamara did nothing else he made the Services more cost-conscious and introspective-so I think it is safe to say that none of their bungling is malicious . . . or even preconceived.

"--Upon leaving the Pentagon-on his last official duty-he announced to the press that 'contrary to recent newspaper reports,' he was not going to work for the Federal Government, but instead, was going to 'work on the outside' as a private consultant.

"We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.

"We owe 'first choice on Fitzgerald' to Proxmire and others who tried so hard to make him a hero."

The information contained in the memo concerning Mr. Fitzgerald's May 1969 statements at a meeting of the National Democratic Coalition had not previously come to light in this proceeding. In the light of Secretary Seamans' refusal to furnish testimony on conversations he had with, or advice he received from the White House Staff; and our notification to the Secretary (TR 499), quoted supra, we must conclude and

do hereby find that Mr. Fitzgerald's May 1969 statements were the subject of Secretary Seamans' discussion with the White House staff. We must also conclude and do hereby find that these statements by Mr. Fitzgerald were one of the underlying reasons for the decision to abolish Mr. Fitzgerald's position and to terminate his employment with the Air Force.

. . . .

Our findings, supra, reveal many instances of dissatisfaction with Mr. Fitzgerald. In addition, Secretary Seamans testified (TR 964) that:

> "It is obvious from the testimony these past three days that I was not satisfied with Mr. Fitzgerald's performance. I made no pretense that I was."

After carefully reviewing the complete appellate record and in view of all of the foregoing analysis, findings, and conclusions, we find that the agency's decision to abolish Mr. Fitzgerald's position and to include him in the Project 703 reduction-in-force improperly resulted from and was influenced by reasons purely personal to the appellant; and was for the purpose of terminating his employment with the Air Force.

Secretary Seamans, in discussing his dissatisfaction with Mr. Fitzgerald also stated (TR 964):

> "But at the same time it does not give Mr. Fitzgerald immunity against having his job abolished, and the abolition of the job for improvement in our management capability was a separate and distinct step, or action."

It is true that an undesirable, inadequate, or unsatisfactory employee is not immune from having his position abolished. However, the decision to abolish that employee's, or any employee's, position must be based solely on reasons not personal to the employee. These employees must be removed from their positions by other means because the spirit, intent, and letter of the Commission's regulations require that the reduction-in-force system be used for reasons that are not personal to the

employees affected. The more an employee is deserving of being fired, the more inappropriate it is to abolish his position and separate him by reduction-in-force.

In the case at hand, where we have found from the evidence of record that the decision to abolish Mr. Fitzgerald's position and to separate him by reduction-in-force was influenced by, and resulted from, reasons that were personal to the appellant; and where the appellant was an employee entitled to the adverse action procedures set forth in Part 752-B of the Civil Service regulations; we find his separation by reduction-in-force to be improper, inappropriate, and contrary to the spirit, intent, and letter of the Commission's regulations.

RECOMMENDATION

Accordingly, we recommend that Mr. Fitzgerald be restored retroactively on January 5, 1970 to the position from which he was improperly separated, or to any other position of like grade, salary, and tenure in the Excepted Service and with the same or similar qualification requirements as his former position. Please furnish this office with a copy of the SF-50 accomplishing the recommended corrective action.

7.6 Grade and Pay Retention.

The Civil Service Reform Act of 1978 provides for grade and pay retention for certain employees whose grade or pay would be reduced as a result of a RIF or a reclassification action. Employees who are not separated from Federal service but who accept positions at lower pay grades may claim the benefits of this statute. Final regulations implementing these new provisions have been published. See 5 C.F.R. Part 536. Consider the impact of these new retention provisions on funding and personnel management.

5 U.S.C. § 5361. Definitions.

For the purpose of this subchapter--

(1) "employee" means an employee to whom Chapter 51 of this title applies, and a prevailing rate employee, as defined by

section 5342(a)(2) of this title, whose employment is other than on a temporary or term basis;

(2) "agency" as the meaning given it by section 5102 of this title;

(3) "retained grade" means the grade used for determining benefits to which an employee to whom section 5362 of this title applies is entitled;

(4) "rate of basic pay" means, in the case of a prevailing rate employee, the scheduled rate of pay determined under section 5343 of this title;

(5) "covered pay schedule" means the General Schedule, any prevailing rate schedule established under subchapter IV of this chapter, or the performance management and recognition system under Chapter 54 of this title;

(6) "position subject to this subchapter" means any position under a covered pay schedule; and

(7) "reduction-in-force procedures" means procedures applied in carrying out any reduction in force due to a reorganization, due to lack of funds or curtailment of work, or due to any other factor.

§ 5362. Grade retention following change of positions or reclassification.

(a) Any employee--

(1) who is placed as a result of reduction-in-force procedures from a position subject to this subchapter to another position which is subject to this subchapter and which is in a lower grade than the previous position, and

(2) who has served for 52 consecutive weeks or more in one or more positions subject to this subchapter at a grade or grades higher than that of the new position, is entitled, to the extent provided in subsection (c) of this section, to have the grade of the position held immediately before such placement be considered to be the retained grade of the employee in any position he holds for the 2-year period beginning on the date of such placement.

(b) (1) Any employee who is in a position subject to this subchapter and

whose position has been reduced in grade is entitled, to the extent provided in subsection (c) of this section, to have the grade of such employee for the 2-year period beginning on the date of the reduction in grade.

(2) The provisions of paragraph (1) of this subjection shall not apply with respect to any reduction in the grade of a position which had not been classified at the higher grade for a continuous period of at least one year immediately before such reduction.

(c) For the 2-year period referred to in subsections (a) and (b) of this section, the retained grade of an employee under such subsection (a) or (b) shall be treated as the grade of the employee's position for all purposes (including pay and pay administration under this chapter and Chapters 54 and 55 of this title, retirement and life insurance under Chapters 83 and 87 of this title, and eligibility for training and promotion under this title), except-

1) for purposes of subsection (a) of this section,

(2) for purposes of applying any reduction-in-force procedures,

(3) for purposes of determining whether the employee is covered by the performance management and recognition system established under Chapter 54 of this title, or

(4) for such other purposes as the Office of Personnel Management may provide by regulation.

(d) The foregoing provisions of this section shall cease to apply to an employee who--

(1) has a break in service of one workday or more;

(2) is demoted (determined without regard to this section) for personal cause or at the employee's request;

(3) is placed in, or declines a reasonable offer of, a position the grade of which is equal to or higher than the retained grade; or

(4) elects in writing to have the benefits of this section terminate.

§ 5363. Pay retention.

(a) Any employee--

(1) who ceases to be entitled to the benefits of section 5362 of this title by reason of the expiration of the 2-year period of coverage provided under such section;

(2) who is in a position subject to this subchapter and who is subject to a reduction or termination of a special rate of pay established under section 5305 of this title (or corresponding prior provision of this title); or

(3) who is in a position subject to this subchapter and who (but for this section) would be subject to a reduction in pay under circumstances prescribed by the Office of Personnel Management by regulation to warrant the application of this section; or

(4) who is in a position subject to this subchapter and who is subject to a reduction or termination of a rate of pay established under subchapter IX of Chapter 53;

is entitled to basic pay at a rate equal to (A) the employee's allowable former rate of basic pay, plus (B) 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay if such allowable former rate exceeds such maximum rate for such grade.

(b) For the purpose of subsection (a) of this section, "allowable former rate of basic pay" means the lower of--

(1) the rate of basic pay payable to the employee immediately before the reduction in pay; or

(2) 150 percent of the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay.

(c) The preceding provisions of this section shall cease to apply to an employee who--

(1) has a break in service of one workday or more;

(2) is entitled by operation of this subchapter or Chapter 51, 53, or 54 of

this title to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under this section; or

(3) is demoted for personal cause or at the employee's request.

. . . .

§ 5366. Appeals.

(a) (1) In the case of the termination of any benefits available to an employee under this subchapter on the grounds such employee declined a reasonable offer of a position the grade or pay of which was equal to or greater than his retained grade or pay, such termination may be appealed to the Office of Personnel Management under procedures prescribed by the Office.

(2) Nothing in this subchapter shall be construed to affect the right of any employee to appeal--

(A) under section 5112(b) or 5346(c) of this title, or otherwise, any reclassification of a position; or

(B) under procedures prescribed by the Office of Personnel Management, any reduction-in-force action.

(b) For purposes of any appeal procedures (other than those described in subsection (a) of this section) or any grievance procedure negotiated under the provisions of Chapter 71 of this title--

(1) any action which is the basis of an individual's entitlement to benefits under this subchapter, and

(2) any termination of any such benefits under this subchapter, shall not be treated as appealable under such appeals procedures or grievable under such grievance procedures.

CHAPTER 8

MERIT SYSTEMS PROTECTION BOARD - PRACTICE AND PROCEDURES

8.1 Statutory Power and Authority of MSPB.

The general power and authority of the Board are established by statute.

5 U.S.C. § 1204 Powers and functions of the Merit Systems Protection Board

> (a) The Merit Systems Protection Board shall-
>
> (1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2033 of title 38, or any other law, rule, or regulation, and subject to otherwise applicable provisions of law, take final action on any such matter;
>
> (2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;
>
> . . .
>
> (4) review, as provided in subsection (f) of this section, rules and regulations of the Office of Personnel Management.
>
> (b)(1) Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.
>
> (2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual --
>
> (A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or

possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

(B) order the taking of depositions from and responses to written interrogatories by, any such individual.

(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A) or section 1214(b), upon application by the Board, the United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

(e)(1)(A) In any proceeding under subsection (a)(1), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

(B)(i) The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment, except that an agency (other than the Office of Special Counsel) may not request any such order with regard to an investigation by the Office of Special Counsel from the Board during such investigation.

(2)(A) In enforcing compliance with any order under subsection (a)(2) of this section, the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.

. . .

More details concerning the MSPB's appellate jurisdiction and procedures in MSPB appellate actions are also established by statute.

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) (1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear

such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) if an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection(e), unless--

(i) the deciding official determines that the granting of such relief is not appropriate; or

(i)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection(e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)III) that presents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision--

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d) (1) In any case in which--

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office; the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e) (1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless--

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion. The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may--

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently, if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals being processed more expeditiously and would not adversely affect any party.

(g) (1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in

by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

. . . .

Note. The remainder of 5 U.S.C. § 7701 deals with the authority of the MSPB to establish alternative methods of settling cases and with the requirement on the MSPB to announce publicly when it will complete appellate consideration of each case. "Mixed cases" or appeals involving allegations of discrimination are processed under a special procedure outlined in 5 U.S.C. § 7702, which is reprinted in Chapter 10 of this casebook.

8.2 MSPB Regulations.

a. Jurisdiction. The Board's regulations, most recently amended on December 29, 1989, describe the two types of jurisdiction it exercises, and the types of cases in which each is exercised.

5 C.F.R. § 1201.2 Original jurisdiction.

The Board's original jurisdiction includes the following cases:

(a) Actions brought by the Special Counsel;

(b) Requests, by persons removed from the Senior Executive Service for performance deficiencies, for informal hearings; and

(c) Actions taken against administrative law judges under 5 U.S.C. 7521.

5 C.F.R. § 1201.3 Appellate jurisdiction.

(a) Generally. The Board has jurisdiction over appeals from agency actions when the appeals are authorized by

law, rule, or regulation. These include appeals from the following actions:

(1) Reduction in grade or removal for unacceptable performance (5 C.F.R. part 432; 5 U.S.C. 4303(e));

(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 C.F.R. part 752, Subparts C and D; 5 U.S.C. 7512);

(3) Removal, or suspension for more than 14 days, of a career appointee in the Senior Executive Service (5 C.F.R. part 752, Subparts E and F; 5 U.S.C. 7541-7543);

(4) Reduction-in-force action affecting a career appointee in the Senior Executive Service (5 U.S.C. 3595);

(5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 C.F.R. 531.410; 5 U.S.C. 5335(c));

(6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employee's Retirement System (5 C.F.R. parts 831 and 842; 5 U.S.C. 8347(d)(1)-(2) and 8461(e)(1));

(7) Disqualification of an employee or applicant because of a suitability determination (5 C.F.R. 731.401);

(8) Termination of employment during probation or the first year of a veterans readjustment appointment, when (i) the employee alleges discrimination because of partisan political reasons or marital status; or (ii) the termination was based on conditions arising before appointment and the employee alleges that the action is procedurally improper (5 C.F.R. 315.806, 38 U.S. C. 2014(b)(1)(D));

(9) Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status (5 C.F.R. 315.908(b));

(10) Separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of reduction in force (5 C.F.R. 351.901);

(11) Furlough of a career appointee in the Senior Executive Service (5 C.F.R. 359.805);

(12) Failure to restore a former employee to employment following military service, or following partial or full recovery from a compensable injury (5 C.F.R. 353.401);

(13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force or after partial or full recovery from a compensable injury (5 C.F.R. 302.501, 5 C.F.R. 330.202);

(14) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 C.F.R. 352.508);

(15) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 C.F.R. 352.209);

(16) Failure to re-employ a former employee after detail or transfer to an international organization (5 C.F.R. 352.313);

(17) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 C.F.R. 352.707);

(18) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 C.F.R. 352.807); and

(19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 C.F.R. 300.104).

(b) Appeals involving an allegation that the action was based on appellant's "whistleblowing." Appeals of actions appealable to the Board under any law, rule, or regulation, in which the appellant alleges that the action was taken because of the appellant's "whistleblowing (a violation of the prohibited personnel practice described in 5 U.S.C. 2302(b)(8)), are governed by part 1209 of this title. The provisions of Subparts B, C, E, F, and G of part 1201 apply to appeals and stay requests governed by part 1209 unless other specific provisions are made in that part.

(c) Limitations on appellate jurisdiction, collective bargaining agreements and election of procedures:

(1) For an employee covered by a collective bargaining agreement under 5 U.S.C. 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(i) an appealable action involving discrimination under 5 U.S.C. 2302(b)(1), reduction in grade or removal under 5 U.S.C. 4303, or adverse action under 5 U.S.C. 7512, may be raised under the Board's appellate procedures or under the negotiated grievance procedures, but not under both;

(ii) any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

(2) Choice of procedure. When an employee has an option of pursuing an action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between those procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first.

(3) Review of discrimination grievances. If an employee chooses the negotiated grievance procedure under paragraph (c)(2) of this section and alleges discrimination as described at 5 U.S.C. 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with § 1201.154.

(d) Appealability not affected by retirement status or election. In determining the appealability of an action to the Board under any law, rule, or regulation, neither the status of the appellant under any retirement system established under a Federal statute nor any election made by the appellant under such system may be taken into account.

Note 1. MSPB review of the removal of a probationary employee under 5 C.F.R. § 1201.3(a)(8) is extremely limited. MSPB has jurisdiction only if the probationer demonstrates that (1) the removal was based on discrimination because of marital status or political affiliation or (2) the limited procedural rights set out in 5 C.F.R. § 315.806 were not afforded in connection with a removal based on pre-employment reasons. For cases interpreting these narrow grounds for appellate jurisdiction, see Shah v. GSA, 7 M.S.P.R. 626 (1981); Uriarte v. Department of Agriculture, 6 M.S.P.R. 393 (1981); Van Daele v. USPS, 1 M.S.P.R. 601 (1980).

Note 2. Generally, an employee adversely affected by a reduction in force or the denial of a within grade ("step") increase may appeal such actions to the MSPB (see 5 C.F.R. §§ 1201.3(a)(5) and (10)); however, if the employee is a member of a bargaining unit and the collective bargaining agreement does not exclude RIF actions and denials of step increases from grievance and arbitration coverage, the employee must use the negotiated grievance procedure to challenge the action. No MSPB jurisdiction exists in such circumstances. Sirkin v. Department of Labor, 16 M.S.P.R. 432 (1983) (RIF); Lovshin v. Department of Navy, 16 M.S.P.R. 14 (1983) (denial of step increases). See 5 C.F.R. § 1201.3(c).

b. Hearing Procedures.

The hearing procedures for cases before the Board are contained in 5 C.F.R. Part 1201. Subpart B contains procedures for appellate cases and Subpart D contains procedures for original jurisdiction cases.

c. Discovery. The MSPB regulations set forth below provide for discovery using the Federal Rules of Civil Procedure as a general guide.

5 C.F.R. § 1201.71 Purpose of Discovery

> Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case.

Parties are expected to start and complete discovery with a minimum of Board intervention.

5 C.F.R. § 1201.72 Explanation and scope of discovery.

(a) Explanation. Discovery is the process, apart from the hearing, by which a party may obtain relevant information, including the identification of potential witnesses, from another person or a party, that the other person or party has not otherwise been provided. Relevant information includes information which appears reasonably calculated to lead to the discovery of admissible evidence. This information is obtained to assist the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. Those rules, however, are instructive rather than controlling.

(b) Scope. Discovery covers any nonprivileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.

(c) Methods. Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission.

5 C.F.R. § 1201.73 Discovery Procedures.

(a) Discovery from a party. A party seeking discovery from another party must start the process by serving a request for discovery on the representative of the other party or the party if there is no representative. The request for discovery must state the time limit for responding, as

prescribed in § 1201.73(d), and must specify the time and place of the taking of the deposition, if applicable.

When a party directs a request for discovery to an officer or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency.

(b) Discovery from a nonparty including a nonparty Federal agency. Parties should try to obtain voluntary discovery from nonparties whenever possible. A party seeking discovery from a nonparty Federal agency or employee must start the process by serving a request for discovery on the nonparty Federal agency or employee. A party may begin discovery from other nonparties by serving a request for discovery on the nonparty directly. If the party seeking the information does not make the request, or if it does so but fails to obtain voluntary cooperation, it may obtain discovery from a nonparty by filing a written motion with the filing judge, showing the relevance, scope, and materiality of the particular information sought. If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the Board will issue a ruling on the motion and will serve the ruling on the moving party. That official also will provide the party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any Board-approved discovery request and subpoena on the individual or entity, or for arranging for their service.

(c) Responses to discovery requests. (1) A party, or a Federal agency that is not a party, must answer a discovery request within the time provided under paragraph (d)(2) of this section, either by furnishing

to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for objection.

(2) If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond in full to a Board-approved discovery order, the requesting party may file a motion to compel discovery. The requesting party must file the motion with the judge, and must serve a copy of the motion shall be served on the other party and on any nonparty entity or person from whom the discovery was sought. The motion must be accompanied by:

(i) A copy of the original request and a statement showing that the information sought is relevant and material; and

(ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement (see Appendix IV.)

(3) The other party and any other entity or person from whom discovery was sought may respond to the motion to compel discovery within the time limits stated in paragraph (d)(4) of this section.

(d) Time limits.

(1) Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response.

(2) A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the

subpoena, unless the parties agree on another time or place.

(3) Any motion to depose a nonparty (along with a request for a subpoena) must be submitted to the judge within the time limits stated in paragraph (d)(1) of this section or as the judge otherwise directs.

(4) Any motion for an order to compel discovery must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with the judge within 10 days of the date of service of the motion.

(5) Discovery must be completed within the time the judge designates.

5 C.F.R. § 1201.74 Orders for discovery.

(a) Motion for an order compelling discovery. Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the judge in accordance with § 1201.73(c)(2) and (d)(4).

(b) Content of Order. Any order issued will include, where appropriate:

(1) A provision that the person to be deposed must be notified of the time and place of the deposition;

(2) Any conditions or limits concerning the conduct or scope of the proceedings or the subject matter that may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment, or oppression.

(3) Limits on the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(4) Other restrictions upon the discovery process that the judge sets.

(c) Noncompliance. The judge may impose sanctions under § 1201.43 of this part for failure to comply with an order compelling discovery.

How does 5 C.F.R. 752.404(b), which gives an employee the right to review material "relied upon" to support a proposed action, affect the scope of discovery?

Bize v. Department of the Treasury
3 M.S.P.R. 155 (1980)

OPINION AND ORDER

The appellant is a Criminal Investigator, GS-12, with the Internal Revenue Service, Baton Rouge, Louisiana. He was suspended for 30 days for failure to safeguard his pocket commission and enforcement badge and failure to prevent them from being improperly used. He appealed to the Board's Dallas Field Office. In the initial decision, issued September 17, 1979, the presiding official found the reasons for the actions supported by a preponderance of the evidence and sustained the suspension action. The petition for review set forth some 21 asserted errors or exceptions to the initial decision. The assertions shall be discussed individually below. . .

The reasons on which the appellant's suspension was based grew out of an incident which occurred at the Alexandria, Louisiana Airport on the night of December 26, 1977. The appellant was not on duty on that date. Following a family dinner at his grandmother's home, the appellant took his uncle, Samuel O. Foster, to the airport for a return flight to his home in California, first stopping for some drinks.

Though some of the details and circumstances are in dispute, as will be seen, it is clear that the appellant and his uncle arrived at the airport some time before the flight was scheduled to depart. The airline ticket agent told them the flight was delayed. The appellant and his uncle went for some drinks rather than wait at the airport. Ultimately, upon return to the airport, Mr. Foster found he had missed his flight and in the ensuing arguments with airline personnel he displayed the appellant's pocket commission to the airline ticket salesperson to show he was not "without influence."

In March, 1978, the airline official contacted his congressman to complain about the incident. After congressional inquiry concerning the matter, the Internal Revenue Service had it investigated. After the "Report of Investigation" was submitted, adverse action against the appellant was initiated.

The appellant was specifically charged with:

> (1) Failure to adequately safeguard his pocket commission and enforcement badge, in violation of IRM 0735.1, Text 223.7.
>
> (2) Failure to prevent his pocket commission and enforcement badge from being improperly used in violation of IRM 0735.1, Text 223.7.

The agency presented the incident in the specification to reason 2 as follows:

> On December 26, 1977, your pocket commission and enforcement badge was used by Mr. Steve Foster, your uncle, to intimidate Mr. Bruton Dawkins, an airline official. You were present when the incident started; you saw that Mr. Foster had your pocket commission and enforcement badge in his hand while he was berating the airline official. You did not retrieve your credentials during the altercation or restrain Mr. Foster for having improper possession of them. They were subsequently used by Mr. Foster, after you had left the scene, to intimate the airline official.

The appellant said that he was unaware that his uncle had his badge, and that as soon as he found out he escorted his uncle out of the terminal.

. . . .

Allegation 4 is that the presiding official erroneously refused to order the agency to produce the "Report of Investigation." The report was prepared by an inspector of the Internal Security Division of the IRS. The proposing official, Mr. Hinchman, testified that he received the report, but on cross-examination it appeared that he may have

relied only on portions of the report. The deciding official did not see the whole report.

In a pre-hearing motion, appellant had initially requested the presiding official to order the agency to produce the entire report. . . . The agency's position was that it did not rely on the full report and that appellant was supplied with the pages of the report on which it relied--pages 3, 4, 9 and 10. Therefore, the agency contended, since the appellant was not entitled to more than the material relied on, the request was irrelevant. . . . The presiding official denied appellant's request for the report because it was not necessary to a decision in the case. . . .

The appellant's request for production of the investigation report has been evaluated throughout the proceedings in terms of compliance with 5 C.F.R. 752.404(b), which gives an employee the right to review materials which the agency relied on to support a proposed action. While there was some uncertainty about which material the proposing official relied on . . . the finding that the appellant received the pertinent pages of the investigation report is supported by the evidence. However, we conclude that 5 C.F.R. 752.404(b) was erroneously interpreted as limiting appellant's right to only that evidence on which the agency relied.

5 C.F.R. 752.404 speaks to the procedures which an agency must follow when proposing and executing an action under 5 U.S.C. 7513. The section 752.404 process does not, and was not intended to, provide an employee an adversary hearing with all the concomitant rights that such a process connotes. Section 752.404 guides an agency during its processing of a 5 U.S.C. 7513 action, but it is not a limitation upon the rights of appellants in appeals under 5 U.S.C. 7701 and accompanying regulations.

Prior to enactment of the Civil Service Reform Act, the majority view was that the right accorded employees in section 752.404(b) defined that evidence an agency was required to produce. Hoover v. United States 513 F.2d 603, 606 (Ct. Cl. 1975);

Heffron v. United States, 405 F.2d 1307 (Ct. Cl. 1969). More recently the U.S. Court of Appeals, in a decision to the contrary, viewed the issue in terms of due process instead of the narrow ambit of the regulation, and held that the appellant was entitled to production of the relevant report absent any valid claim of privilege by the agency. McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

The McClelland decision is even more persuasive when considered in conjunction with the Board's regulations, which were not applicable to the case, since the extent of discovery procedures available in an administrative hearing is primarily determined by the particular agency. McClelland, supra, at 1258. The Board's discovery procedures are set forth at 5 C.F.R. 1201.71 et seq. While a presiding official may exclude evidence from a hearing because it is repetitious, 5 C.F.R. 1201.62, there is no provision which allows for the exclusion of evidence because the agency did not rely on it.

In 5 C.F.R. 1201.75, the Board stated that guidance in discovery matters may be obtained from the Federal Rules of Civil Procedure, but that such "rules should be interpreted as being instructive rather than controlling." While it is clear that the FRCP are not of legal effect in cases before the Board, they offer guidance in the area of discovery and should be studied by presiding officials.

Particularly instructive to the issues of this case is FRCP 26(b), which sets forth the scope of discovery; it reads, in pertinent part, as follows:

> (b) Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim of defense of any other party, including the existence,

> description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis supplied)

Following the lead case of Hickman v. Taylor, 329 U.S. 495 (1947), courts have liberally interpreted the meaning of "relevant" for purposes of discovery. The U.S. Court of Appeals has held that evidence is relevant, for discovery purposes, as long as it is "germane" to the subject matter. Local 13, Detroit Newspaper Union v, N.L.R.B., 598 F.2d 267, 271 (D.C. Cir. 1979). It should be kept in mind that relevancy for purposes of discovery is different from the question of admissibility. Thus, if evidence which is not admissible is likely to lead to the discovery of admissible evidence, it is relevant for purposes of discovery. Rozier v. Ford Motor Co., 573 F.2d 1332, 1342 (5th Cir. 1978).

The Board's presiding officials have been given similar authority in relation to discovery requests. In 5 C.F.R. 1201.72, discovery is defined as "the process whereby a party may obtain information . . . for the purposes of assisting . . . in planning and developing his/her case." Evidence which assists in planning a case may or may not be admissible, but as in FRCP 26(b), it is discoverable.

Since one of the main functions of the Board is the adjudication of cases within its jurisdiction, 5 U.S.C. 1205, the fairness of such adjudications can only be enhanced by disclosure of the facts in a case. Therefore, uncertainty as to the relevancy of requested evidence should be resolved in the favor of the movant, absent any undue delay or hardship caused by such request. . . .

> The evidence denied appellant in this case was central to the case. The report detailed an investigation conducted into the charges which were subsequently levied against appellant, and selected portions of the report were relied on by the agency. It is reasonable to infer that the report contains summaries of witness interviews which were not disclosed to appellant. Without imputing any bad faith to the agency, it is reasonable to conclude that even if they were not exculpatory in nature, such summaries could lead to exculpatory evidence, or other witnesses. Considering that the agency had resources to conduct interview nation-wide, access to the report would be helpful to the appellant, if for no other reason than to assist him in deciding how to commit his resources. Notably, production of the report would have placed no burden on the agency, nor would it have delayed the proceedings. Therefore, we conclude that the presiding official erroneously denied appellant's request for production of the full report and, if necessary, rule on any claims of privilege advanced by the agency. . . Assuming no valid privilege prevents production of the report, the presiding official must determine if further proceedings are appropriate and issue a new initial decision taking into consideration the evidence and arguments advanced after production of the report insofar as they raise matters not already fully decided herein. . . .
>
> Accordingly, the initial decision is VACATED and the case is REMANDED for further consideration consistent with this Opinion.

Failure to comply with an order for discovery issued by an administrative judge may result in serious sanctions.

5 C.F.R. § 1201.43 Sanctions.

> The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to the circumstances set forth in paragraphs (a), (b), and (c) of this section.

(a) Failure to comply with an order. When a party fails to comply with an order, the judge may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;

(3) Permit the requesting party to introduce secondary evidence concerning the information sought; and

(4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

(b) Failure to prosecute or defend appeal. If a party fails to prosecute or defend an appeal, the judge may dismiss the appeal with prejudice or rule in favor of the appellant.

(c) Failure to make timely filing. The judge may refuse to consider any motion or other pleading that is not filed in a timely fashion in compliance with this subpart.

Consider the effect on the agency of such a sanction in the following case.

Fuller v. Department of the Treasury
10 M.S.P.R. 13 (1982)

The appellant was suspended for 30 days for using a Government vehicle to transport his wife from her workplace to their residence and using a Government vehicle to travel on personal business. The agency charged him with violating 31 U.S.C. 638a(c)(2). Misuse of a Government Vehicle. A 30-day suspension is the minimum statutory penalty for such a violation. The appellant argued that he was disparately treated in that other employees in similar situations were either not charged at all or were charged with violations of minor rules with lesser penalties. The appellant requested, and the presiding official ordered the agency to produce documents relating to disciplinary actions taken against other employees for unauthorized use of a

Government vehicle. The agency refused to comply with that order and the presiding official declined to impose sanctions for that refusal, concluding that sanctions would not serve the end of justice. He then upheld the agency action. In his petition for review, the appellant argued that the presiding official erred in failing to impose sanctions. OPM intervened arguing that the agency has discretion to determine whether misuse has occurred in terms of 31 U.S.C. 638a(c)(2), and that once the agency makes that determination, it must comply with the statutory penalty. The Board found that the documents sought to be produced could have led to the discovery of information relevant to the appeal. The Board held them to be within the types of materials subject to discovery under 5 C.F.R. 1201.72. The Board stated that it does not serve "the end of justice" to permit an agency to deny an appellant materials relevant to the development of his case or to ignore an agency's direct disobedience of a presiding official's proper order. It concluded that the presiding official in the instant case abused his discretion in not imposing sanctions. The Board found that the most appropriate sanction was that found at 5 C.F.R. 1201.43(a)(4), and thereby struck all of the agency's pleadings and submissions. It then found that the agency was unable to meet its burden of proof and reversed the suspension action.

At Appendix A are sample forms for use in MSPB discovery.

8.3 Proving Your Case Before the MSPB.

a. Standard of Review of Agency Actions. Under 5 U.S.C. § 7701(c)(1), two different standards of proof are applied in reviewing agency personnel actions.

(1) Personnel actions based on unacceptable performance described in 5 U.S.C. § 4303 must be supported by substantial evidence.

(2) All other personnel actions must be supported by a preponderance of the evidence.

The legislative history of this portion of the 1978 Civil Service Reform Act demonstrates a clear congressional intent to change the personnel system to give agencies more flexibility in disciplining and removing employees for unacceptable performance.

The MSPB in Parker v. Defense Logistics Agency, 1 M.S.P.R. 505 (1980), describes how it views both standards:

> Unlike the preponderance standard, which requires evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue, the substantial evidence standard requires only evidence of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions. This standard precludes the Board's presiding official from substituting his or her own judgment for that of the agency. It obliges the presiding official to determine only whether, in light of all the relevant and credible evidence before the Board, a reasonable person could agree with the agency's decision (even though other reasonable persons including the presiding official might disagree with that decision).

Appeals to the MSPB of agency denials of within grade pay increases are tested by the same standard of review as Chapter 43 unacceptable performance actions - substantial evidence. Romane v. Defense Contract Audit Agency, 706 F.2d 1286 (Fed. Cir. 1985). But see Schramm v. Department of Health and Human Services, 682 F.2d 85 (3d Cir. 1982).

b. Evidentiary Issues.

The agency taking adverse action against an employee has the burden of proving by substantial evidence (performance actions) or a preponderance of the evidence (all other cases) that the action is justified. The extent to which hearsay evidence may be used to meet that burden is discussed in detail in the following MSPB decision.

Borninkhof v. Department of Justice,
5 M.S.P.R. 77 (1981)

OPINION AND ORDER

This proceeding is before us on a petition for review of an initial decision sustaining a 40-day suspension imposed under 5 U.S.C. § 7513(b). Appellant, a border patrol agent of the Immigration and Naturalization Service of the Department of Justice, was suspended for 40 days on three charges set forth in a letter of proposed action.

. . . .

Appellant timely appealed the suspension and requested a hearing. In his appeal, appellant, insofar as is pertinent here, denied the specifications underlying the first charge; denied the specifications underlying the second charge, except with respect to the no contest plea; and contended that the allegations in the third charge were "overstated." It is thus clear that appellant's appeal was based on serious disputes of material facts. Resolution of those facts was essential to a disposition of this appeal.

At the hearing, the agency called two witnesses. Both testified as to the first and second charges based on their reading of the investigatory record. Neither witness had been present at any of the incidents referred to, nor had they talked to anyone who had been present. One witness, the second-line supervisor, also testified as to the third charge on the basis of a conversation he had had with the first-line supervisor, who reported appellant's conduct and language to him, and on the basis of which the second-line supervisor had prepared a memorandum in the investigatory record. Appellant repeatedly objected to the testimony by these witnesses as hearsay because he was unable to cross-examine them on the substance of the information in the investigatory report. He was consistently overruled.

The presiding official found that all three charges and the specifications under each had been proved by a preponderance of the evidence; and that, therefore, the

agency action promoted the efficiency of the service. He affirmed the agency action. His initial decision relied solely on evidence included in the agency's investigatory file and did not mention the testimony of the agency witnesses.

In his initial decision, the presiding official first addressed the question of the agency's failure to produce any witnesses for cross-examination on the disputed material facts. He concluded that appellant had not been denied due process. The presiding official concluded that the agency had no mandate under 5 U.S.C. § 7 1 or 5 C.F.R. § 1201.24(c) to produce any witnesses at the hearing. He further concluded that appellant could have subpoenaed as witnesses the persons knowledgeable about the incidents on which the specifications were based and that appellant's election not to do so defeated his claim of denial of due process.

In resolving the disputed facts under the first two charges, the presiding official relied entirely on statements made during the investigation by the ranch manager, his son (the ranch foreman), the arresting deputy sheriff, two other deputy sheriffs, a guard on the ranch, and a jailer. None of the statements were signed. Each statement contained a preface that it was given freely and voluntarily, that the declarant was under oath, and that the declarant was willing to sign a transcript of the tape, providing it was a true and correct copy. Neither the declarant, nor the transcriber, nor the investigator who conducted the interviews testified at the hearing.

Appellant, who did testify, and three witnesses called by him, whose statements were also included in the investigatory file, disputed materially the hearsay testimony and the other statements with respect to what had transpired at the ranch, the jail, and the bar. Moreover, it was demonstrated at the hearing that two sentences had been omitted from the statement of one witness. The omitted sentences tended to exculpate appellant.

The initial decision states that appellant challenged the use of the

statements of the other declarants because he could not verify their accuracy, and he argued to the presiding official that the statements had little probative value because they were unsigned. The presiding official found that any omission in the prior statements of appellant's witness had been cured by his testimony and found that the statements of the witnesses generally conformed to their testimony, and, thus, the lack of signature on the witnesses' prior statements did not reduce their probative value. He made no similar findings with respect to the other statements and could make none because the other declarants did not testify, and the agency's witnesses had no knowledge other than what they had read in the investigatory file.

The presiding official accepted as accurate and credible almost all the information in the unsigned statements of the other declarants. . . . The presiding official balanced the live testimony of appellant and his three witnesses, all subjected to cross-examination, against the unsigned statements that formed the basis of the agency's case as to events at the ranch and the jail. The presiding official proceeded to discount the live testimony of appellant and his witnesses because there was "evidence that alcohol was involved." This evidence was recited from the unsigned statements and was contradicted by live testimony. The presiding official did not state why unsigned statements without more had sufficient weight to constitute probative evidence that would support the agency's burden of proof.

In his petition for review, appellant contends that the agency's evidence was totally hearsay, lacking in probative value, and insufficient to meet the preponderance of the evidence test and that to affirm the initial decision would constitute a denial of due process. The agency's cryptic response to these arguments is that "the record speaks for itself."

It bears emphasizing that on an appeal from an adverse action under 5 U.S.C. § 7513(b), the agency has the burden of proof and must sustain the burden of proof by a preponderance of the evidence. 5 U.S.C. §

7701(c)(1)(B). Contrary to the initial decision, we think it is irrelevant in this case whether appellant could have called the declarants as witnesses. The only question before us is whether the agency has sustained its burden of proof by a preponderance of the evidence it produced in this case.

We note that the agency's hearsay evidence was properly admitted at the hearing under well-settled law that relevant hearsay evidence is admissible in administrative proceedings. We are also fully aware that hearsay evidence has been held to constitute substantial evidence in some circumstances. We conclude nevertheless that the agency's hearsay evidence is insufficient in the circumstances of this case to sustain the agency's burden of proof by a preponderance of the evidence.

Richardson v. Perales is the landmark case recognizing that hearsay may constitute substantial evidence. In that case, the Supreme Court held that hearsay evidence alone was sufficient to defeat a claimant's appeal from a denial of social security disability benefits by the Secretary of Health, Education and Welfare, despite contradictory live testimony of claimant and his personal physician. The hearsay evidence, consisting of five medical reports by physicians who had examined the claimant, was considered substantial evidence. The Court, first, however, expressed its confidence in the underlying reliability and probative value of the medical reports. The Court then concluded that the integrity of the administrative process was not damaged by reliance on the medical reports to refute the contradictory live testimony. Thus, Perales, while holding that hearsay alone may constitute substantial evidence, has not, we think, changed the traditional test used both before and after that decision, that the assessment of the probative value of hearsay evidence necessarily rests on the circumstances of each case. Rather, Perales has been perceived as a rejection of any rule that hearsay may not per se constitute substantial evidence. We adopt that interpretation of Perales.

It still remains for the trier of fact to weigh the probative value of the hearsay evidence in the circumstances of the case. In Perales, the Court noted that the medical reports had been prepared routinely by unbiased physicians who had examined the claimant, that such reports were regularly used in the agency's adjudication of hundreds of thousands of disability claims, and that courts had recognized their reliability even in formal trials and had admitted them as an exception to the hearsay rule. In other cases where hearsay alone has been held sufficient to sustain an agency action other factors entered into the court's determination of the reliability and trustworthiness and, hence, probative value of the hearsay evidence. For example, in Peters v. United States, an agency action was sustained both on the testimony of persons who had spoken to the absent declarants of signed sworn statements and on the signed sworn statements. The court relied heavily on the fact that the witness who testified had spoken to the affiants, and it was possible to test the credibility of the witness testifying as to the hearsay, the accuracy of his recollection of the hearsay statement, and his ability and opportunity to observe the affiant and hear what was said of the hearsay. The court also noted the lack of subpoena power that disabled the agency from calling the affiants.

In School Board of Broward County, Florida v. Dept. of HEW, the court found substantial hearsay relied on to support an administrative finding denying eligibility for Federal aid. Following the example of Perales, the court looked for assurance of underlying reliability and probative value to determine whether the hearsay evidence constituted substantial evidence. The court stated that two impartial witnesses testified as to statements made to them, that direct evidence was unavailable, that there was no subpoena power for the agency to call witnesses to give direct testimony, and, thus, the case rested on the only available evidence, which was uncontradicted by the School Board.

More recently in Schaefer v. United States, the U.S. Court of Claims affirmed an agency's removal action and held that statements regarding plaintiff's misconduct, signed by three of his co-workers, were of sufficient probative force to constitute substantial evidence. The court found sufficient assurance of the truthfulness of this hearsay evidence, relying on the fact that the individuals signed their respective statements and another person witnessed their doing so and also signed the statement. While noting that in appropriate cases uncorroborated hearsay could constitute substantial evidence, the court pointed out that the statements in this case all contained corroboration in the administrative record.

In other cases decided since Perales, courts have not hesitated to dismiss hearsay evidence as insubstantial under the circumstances of the case. In Reil v. United States, the court found it could not rationally choose to believe statements that lacked authentication, that conflicted with other statements made by a declarant who was not impartial, and that were denied by live testimony.

In McKee v. United States, the court found the hearsay evidence lacking in sufficient assurance of its truthfulness to overcome sworn live testimony of a claimant where the hearsay evidence (captions on pictures) was unsworn and its authorship was unknown. The court observed, however, that had the hearsay evidence been the best available and had the Government asked the Board to accept it, "the situation could have been entirely different."

In Browne v. Richardson, the court refused to give substantial weight to a medical report prepared by a physician who neither examined the claimant of disability benefits nor testified at the hearing. In Martin v. Secretary of HEW, the court similarly refused to consider a report prepared by a physician who had not examined the claimant as substantial evidence. The court held that "an examination of a claimant adds such significant weight to a medical opinion as to the presence or absence of disability that, without it, the

opinion, standing alone, cannot constitute substantial evidence to support a conclusion which relies solely on it. . . .

In Henley v. United States, the court also concluded that the agency's evidence, which was quite similar to the evidence presented in the instant case, was devoid of substantiality. In that case, the agency presented two live witnesses, who were agency employees but who had no direct personal knowledge of the charges against the plaintiff, as well as documentary evidence consisting of mostly unsworn and unsigned statements. The court noted that the entirety of the evidence presented against the plaintiff was non-expert testimony in a situation where the credibility of witnesses was crucial. In criticizing the evidence, the court stated that not only was the evidence primarily unsworn hearsay, but it could not depend on any of the factors that ordinarily redeem hearsay. The court explained: "the already undesirable nature of hearsay was compounded by the inability of the witnesses to verify anything about credibility.

In Cooper v. United States, the Court of Claims recently found that the decision to terminate an employee on the basis of alleged acts of sexual misconduct was not supported by substantial evidence where the removal was based upon information contained in four paragraphs of an investigatory report. The contents of the report consisted of data excerpted from state arrest records, a police officer's report of interviews with witnesses, and an interview with an investigator. The court, noting that the agency's investigator failed to take the stand at plaintiff's hearing, concluded that this type of evidence was "attenuated and highly unreliable," and at best was "triple hearsay." Although plaintiff never denied the charges against him, and neither testified on his own behalf nor produced any witnesses attesting to his innocence at the hearing, the court believed the inferences from such inaction were insufficient to overcome the lack of evidence supporting plaintiff's removal.

In sum, the judicial precedents examining the weight to be given hearsay

evidence, particularly documentary evidence such as an administrative record, included the following facts in considering the probative value of the hearsay evidence:

> (1) the availability of persons with first-hand knowledge to testify at the hearing;
>
> (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing;
>
> (3) the agency's explanation for failing to obtain signed or sworn statements;
>
> (4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made;
>
> (5) consistency of declarant's accounts with other information in the case, internal consistency, and their consistency with each other;
>
> (6) whether corroboration for statements can otherwise be found in the agency record;
>
> (7) the absence of contradictory evidence;
>
> (8) credibility of declarant when he made the statement attributed to him.

At the same time, judicial precedent has held no more than that hearsay evidence may be "substantial" evidence to support an administrative determination upon judicial review. As emphasized earlier, we are bound by the statutory standard that precludes our sustaining an agency adverse action under Chapter 75 unless the agency's action is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(2)(B).

Hearsay evidence that meets the "substantial" standard may not have sufficient probative value or weight to meet the preponderance standard. These standards have been distinguished and set forth by the Board in Parker v. Defense Logistics Agency for the benefit of presiding officials. The substantial evidence standard requires evidence only of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach

different conclusions, while the preponderance standard requires evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue.

It must therefore be determined whether the agency's evidence in this case has sufficient reliability in the face of contradictory sworn live testimony to meet the preponderance standard. That determination must be made on the basis of the entire record before the Board.

By not relying on the testimony of the agency's witnesses to support any of his findings of fact, the presiding official presumably did not accord the testimony any probative value. If that was his intention, then he was correct. The agency witnesses' testimony on the first and second charges was wholly without probative value. The declarants had never made any statements on the subject in the presence of the witnesses. The witnesses were therefore unable to verify the accuracy of the transcriptions or recount what they heard and saw, or in any way assess the probativeness of the statements when they were being made. The Board's judgment in this case is consistent with the judgments in Browne and Martin, in which the court refused to accept as substantial evidence reports of physicians who had not examined the claimant.

But in ignoring the agency's testimony and relying on the investigatory record, the presiding official did not avoid the problem of hearsay. The presiding official has, in effect, subsequent to the hearing, treated the agency's case as if it had simply offered the investigatory record at the hearing without introducing witnesses.

The statements that form the basis for the presiding official's findings of fact are hearsay, nevertheless, and the circumstances in which they are relied on dictate what weight they should have in this case. Before accepting the statements as sufficient to sustain the agency's action, a reasonable judgment must be made as to their probative value, using the factors outlined above. The presiding official failed to make that judgment. We do so now.

The case is before us in this posture: In the face of contradictory live testimony at the hearing, the presiding official has accepted the agency's unsigned hearsay statements, without more, as dispositive of disputed facts that the agency must prove. The agency has offered no explanation as to why it did not obtain the declarant's signatures on their statements and/or have someone witness the statements; neither has the agency explained why it failed to present any witnesses with first-hand knowledge at the hearing. These statements are patently not like medical reports. Although the statements were consistent with each other, the declarants were actors to a greater or lesser degree in the incidents at issue and cannot be considered disinterested; the statements were not routinely made; nor have statements of this kind traditionally enjoyed judicial acceptance at hearings.

Moreover, here the evidence must be sufficient to sustain the burden of proof, not merely meet a claimant's evidence. The statements are fundamentally of a kind that cannot, without more, be accorded the weight of substantial evidence. In addition, by being unsigned, not even the declarants have signified the accuracy of the transcriptions or the truth of the statements. Furthermore, the fact that two sentences tending to exculpate appellant were omitted from the transcripts diminishes the probative value of these statements. While appellant apparently had the opportunity to review the statements prior to the hearing and to subpoena the declarants to appear at the hearing, the burden is not upon appellant to call witnesses that the agency needs to prove its case.

We are therefore not prepared to find on this record that the agency's evidence is sufficient to establish that the contested facts are more probably true than untrue. We agree with the court's criticism in Henlnishes the probative value of these statements. While appellant apparently had the opportunity to review the statements prior to the hearing and to subpoena the declarants to appear at the hearing, the burden is not upon appellant to call

witnesses that the agency needs to prove its case.

We are therefore not prepared to find on this record that the agency's evidence is sufficient to establish that the contested facts are more probably true than untrue. We agree with the court's criticism in Henley of an agency's reliance on evidence merely consisting of two live witnesses without first-hand knowledge of the charges against plaintiff and unsworn and unsigned statements. It serves no purpose to speculate what other evidence might have satisfied the agency's burden in this case. It should be apparent, however, that direct testimony by the declarants, if available, would have avoided the pitfalls of reliance on hearsay evidence.

On the basis of the whole record, including appellant's and his witnesses's sworn, contradictory testimony, the agency's unsigned statements do not rise to a probative value sufficient to resolve the factual disputes favorably to the agency. We hold that the agency has failed to sustain its burden of proof on the first two charges by a preponderance of the evidence.

On the third charge, insubordination, appellant did not materially dispute what happened as set out in the memorandum in the investigatory report. In his appeal, he challenged the charge on the ground that it was "overstated." His testimony and that of his witnesses showed that despite his opposition to the detail, he did go; that the language he used was common among the male employees where he was stationed; that the supervisor to whom he had used the language also used obscene or profane language as much as anyone else. The evidence introduced by appellant on this charge was thus mitigating of any effects his conduct and speech might have had. The initial decision held, nevertheless, that even if commonly used at appellant's duty station, four-letter words were not an acceptable form of verbal communication by an employee, even in anger, to his supervisor and concluded that the charge of insubordination had been proven by a preponderance of the evidence.

Because the incident was not materially disputed and the presiding officer credited

the substance of the live testimony, we do not have here the question of the probative value of hearsay testimony. Appellant's undisputed testimony was that his immediate supervisor did not react to appellant's language and did not warn appellant that he might be subject to discipline for using such language. The record shows that it was not the immediate supervisor who provided discipline, but rather the second-line supervisor who testified at the hearing. There is no showing as to how the incident affected the efficiency of the service and under the circumstances we can discern none. Thus, the agency has failed to meet its burden of proof on the third charge.

The petition for review is granted and the initial decision is reversed. This is a final decision of the Merit Systems Protection Board.

The agency is hereby ordered to cancel the appellant's 40-day suspension and to submit evidence of compliance with this decision to the appropriate field office within five days of issuance of this decision.

8.4 Interim Relief.

Following the hearing and closing of the record, the MSPB administrative judge prepares an initial decision. Pursuant to the Whistleblower Protection Act of 1989, 5 U.S.C. § 7701(b)(2), if the employee prevails in the initial decision, the employee "shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review. . . ." Interim relief will generally include an order returning the employee to the job pending a final decision. An agency is not required, however, to award back pay or attorney fees before a final decision. 5 U.S.C. § 7701(b)(2)(C). If the agency determines that returning the employee to the job would be unduly disruptive, the agency may elect to provide the employee with front pay and benefits pending a final decision. See 5 U.S.C. § 7701(b)(2)(B). The MSPB will not accept an agency's petition for review of the initial decision unless the agency has complied with the requirements for interim relief. See 5 C.F.R. 1201.115(b)(4). OPM has published proposed rules to implement the interim relief requirements imposed by the Whistleblower Protection Act of 1989. See 56 Fed. Reg. 4562 (Feb. 5, 1991).

8.5 Award of Attorney's Fees in MSPB Cases.

The MSPB may require an agency to pay reasonable attorney fees incurred by an appellant, employee, or applicant, who prevails before the Board if "warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." 5 U.S.C. § 7701(g)(1).

When is an employee a prevailing party? When is an award warranted in the interest of justice? The Court of Appeals for the Federal Circuit discussed both those issues as well as the relationship between 5 U.S.C. § 7701(g)(1) and the Back Pay Act in the two cases which follow.

Sims v. Department of the Navy,
711 F.2d 1578 (Fed. Cir. 1983)

DAVIS, Circuit Judge.

Petitioner Glenn H. Simms asks review of the final order (September 28, 1982) of the Merit Systems Protection Board (MSPB or board) denying him attorney fees for litigation before the MSPB.

I.

Sims, a civilian employee of the Department of the Navy, was removed on August 31, 1979 from his position as an instrument mechanic at the Naval Weapons Support Center in Crane, Indiana. On appeal to the MSPB, he admitted the substance of the charges but maintained that the penalty of removal was too harsh. The MSPB's presiding official sustained the agency removal action in an initial decision on November 20, 1979. On review by the board itself, the MSPB mitigated the removal to a 10-day suspension, finding that the presiding official's analysis was in conflict with its decision in Douglas v. Veterans Administration, 5 MSPB 313 (1981), because "the record here fails to demonstrate that the agency considered the consistency of the penalty it imposed on appellant with those imposed upon other employees for similar offenses", even though his "misconduct was premeditated and cannot be condoned."

Sims subsequently was denied an award of the attorney fees incurred in these actions, first by the presiding official and then by the board on review, on the basis that no entitlement to attorney fees was established under either the Back Pay Act, 5 U.S.C. § 5596(b), or the Civil Service Reform Act, 5 U.S.C. § 7701(g)(1). The board agreed with the presiding official that an award was not "warranted in the interest of justice" under the Civil Service Reform Act because "the agency's action was not 'clearly without merit,'" see Allen v. U.S. Postal Service, 2 MSPB 582 (1980), and that entitlement under the Back Pay Act was to be measured by the same "interest of justice" standard.

Petitioner claims the MSPB erred in denying him the fees because (1) an award of attorney fees is mandated by the Back Pay Act without reference to the "interest of justice" standard of section 7701(g) of the Civil Service Reform Act, (2) alternatively, the award is "warranted in the interest of justice", and (3) the amount of fees requested is reasonable. We deal in turn with the first two points; it is unnecessary to reach the third.

II.

Although a purely facial examination of the Back Pay Act suggests some support for petitioner's position on that piece of legislation, a more thorough look in light of the legislative history indicates otherwise. Provision for attorney fees was added to the relief previously available under the Back Pay Act by the Civil Service Reform Act of 1978, Pub.L. No. 95-454, § 702, 92 Stat. 1111, 1216 (codified at 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. V. 1981)). Section 5596(b)(1)(A)(ii) in pertinent part now states:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which

> has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--
> (A) is entitled, on correction of the personnel action, for the period for which the personnel action was in effect--
> * * * * * *
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with Chapter 71 of this title, or under Chapter 11 of Title I of the Foreign Service Act of 1980, shall be awarded with standards established under Section 7701(g) of this title; and . . . .

Petitioner contends that this section establishes two different standards for the award of attorney fees in back pay cases in which an employee meets the criteria set out in subsection (b)(1). In those cases "which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with Chapter 71 of this title, or under Chapter 11 of Title I of the Foreign Service Act of 1980," reasonable attorney fees "shall be awarded" in accordance with 5 U.S.C. § 7701(g)(1) of the Civil Service Reform Act. Section 7701 regulates the MSPB's appellate procedures. Under § 7701(g)(1), the board "may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party" when the board determines that "payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." (Emphasis added.)

In all other Back Pay Act cases, Sims says, the provision requires that "the employee--is entitled . . .--[to] reasonable attorney fees. . . .", without any

qualification. (Emphasis added.) Thus, he argues, because his case does not involve a "decision relating to an unfair labor practice. . . ." (or other specified type), he is entitled to the award of reasonable attorney fees without regard to the "interest of justice" standard.

We disagree with this reading of the statute. . . .

Absent any other indication of the meaning of this ambiguous provision, petitioner's interpretation would not be unreasonable. But the legislative history demonstrates that Congress clearly intended awards of attorney fees under both provisions to be guided by the same "interest of justice" standard. . . .

. . . .

The District of Columbia Circuit likewise has recently given weight to this same Back Pay Act legislative history. In Crowley v. Schultz, 704 F.2d 1269, 1274 (D.C. Cir. 1983), that court held that the "Savings Clause" of the Civil Service Reform Act applies to that part of the Reform Act which grants attorney fees in Back Pay Act cases (i.e., § 5596(b)(1)(A)(ii) as well as cases falling under § 7701(g). At issue was whether this provision required reversal of the district court's grant of Crowley's request for attorney fees in a Back Pay Act action that was commenced prior to passage of the Act. The district court had reasoned that the savings provision did not apply to Back Pay Act cases, and had awarded attorney fees on the theory--now espoused by petitioner Sims here--that § 5596(b)(1)(A)(ii) mandated such an award without qualification.

In reversing the district court, the Court of Appeals concluded that "[t]here is no reason to suppose that . . . judicial relief under the Back Pay Act, should be treated any differently" from relief under § 7701(g). The court supported its holding with a discussion of the same legislative history which we have quoted above, noting that "[w]e find no reason to treat differently provisions which analytically fit together and which Congress considered together." Crowley, 704 F.2d at 1274. See also Wells v. Harris, 2 MSPB 572, 574-575

(1980) (applying the legislative history to the board's interpretation of the two attorney fee provisions); 5 C.F.R. § 550.806 (1982) (regulation prescribed by the Office of Personnel Management, pursuant to 5 U.S.C. § 5596(c) which adopts the "interest of justice" standard for § 5596(b)(1)(A)(ii).

III.

The remaining question is whether the board erred in denying petitioner an award of attorney fees under the "interest of justice" standard. In Allen v. United States Postal Service, 2 MSPB 582 (1980), the board analyzed the legislative history of 5 U.S.C. § 7701(g)(1) and offered the following summary of illustrative, but not exhaustive, "circumstances considered to reflect 'the interest of justice'":

> 1. Where the agency engaged in a "prohibited personnel practice" (§ 7701(g)(1));
>
> 2. Where the agency's action was "clearly without merit" (§ 7701(g)(1)), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency;
>
> 3. Where the agency initiated the action against the employee in "bad faith," including:
>
> a. Where the agency's action was brought to "harass" the employee;
>
> b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways";
>
> 4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee;
>
> 5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

Allen, 2 MSPB at 593.

Petitioner urges that his cases falls within those contemplated by this standard because his punishment was mitigated, and also because the record shows that the

employing agency knew or should have known that it would not prevail on the merits. He seems to be arguing that because the punishment was mitigated from one which the agency knew or should have known would not be upheld, the agency should be responsible for his attorney fees in having prolonged the matter. We agree, however, with the presiding official and the board that petitioner's circumstances do not warrant an award of attorney fees.

That the employee's punishment was mitigated from removal to a 10-day suspension does not, in itself, strike us as a circumstance which warrants--in the interest of justice--an award of attorney fees, particularly because he admits the wrongdoing which gave rise to the mitigated penalty. The agency's adverse action was not "clearly without merit," and it concerned indisputably improper conduct. There is insufficient evidence, moreover, that the agency knew or should have known it would not prevail. To say that the agency did not succeed in removing petitioner is not to say that it did not "prevail on the merits." *There was never any question* regarding the merits of the agency's case, the substance of which petitioner has admitted. If there were indications of bad faith or ill will by the agency in attempting to remove petitioner our conclusion might differ, but the mitigation in penalty occurred because of something the agency could not have known at the time of petitioner's hearing. In reducing the sanction, the board applied a standard derived from its April 10, 1981 decision in Douglas v. Veterans Administration, 5 MSPB 313, which requires that the agency demonstrate consistency in the imposition of penalties on employees charged with similar offenses. We cannot say that the agency knew or should have known in 1979, when the adverse action was initiated, the substance of a 1981 MSPB decision or that it would be applied retroactively to petitioner's case.

. . . .

We do not at all say that Sims' attorney performed less than creditably or that he is not entitled to receive adequate compensation from petitioner. Counsel

succeeded in reducing the sanction from total removal to a 10-day suspension; through his efforts Sims was entitled to reinstatement and presumably received about two years in back pay (or its equivalent). But the question here is, not whether the attorney should be paid for his success, but only whether the Government is the one to bear that burden under the criterion Congress has established. All we hold is that the MSPB properly ruled that the Government should not bear that burden here. See also Sterner v. Department of the Army, supra, 711 F.2d 1563 (Fed. Cir. 1983). Affirmed.

Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983).

EDWARD S. SMITH, Circuit Judge.

Petitioner appeals from the decision of the Merit Systems Protection Board (board) denying his petition for attorney's fees under the Civil Service Reform Act of 1978.

I.

Petitioner was a computer operator with the Department of the Army. He was removed, effective February 23, 1981, on the basis of five charges of misconduct. Petitioner admitted two of the charges--falsely using his superior's name to obtain priority for a project and briefly leaving the computer center unattended in connection with a Christmas party--and he denied the other three.

In an exhaustive opinion, the presiding official found that the Army had failed to prove the three contested charges. On the basis of the two admitted charges she ordered the penalty reduced to a 16-day suspension, the maximum permitted by the Army's Table of Penalties. No petition for review was filed and the field office decision became final on July 30, 1981.

On August 19, 1981, petitioner filed for attorney's fees pursuant to the Civil Service Reform Act. Under the guidelines set out by the board in Allen v. United

States Postal Service,[2] the presiding official identified three issues to be considered prior to award of fees: (1) whether petitioner was the prevailing party, (2) whether attorney's fees were warranted in the interest of justice, and (3) whether the requested fees were reasonable. She held that petitioner was "technically the prevailing party in that the removal action was reversed," but concluded that since petitioner "was not found to be 'substantially innocent of the charges * * * the interests of justice would not be served by awarding him attorney fees." The issue of the reasonableness of the claimed fees was not reached. The board denied review on July 26, 1982, and petitioner appealed to this court.

Two issues are presented on appeal. First, the Government questions whether petitioner was a prevailing party and so even eligible for attorney's fees. Second, petitioner contests the board's finding that an award would not be warranted in the interest of justice. We hold that petitioner was a prevailing party, but that the board did not abuse its discretion in declining to award attorney's fees.

. . . .

We hold that an award of attorney's fees under section 7701(g)(1) has two prerequisites, both of which must be fulfilled, both of which must be considered in all cases, and as to both of which the petitioner bears the burden of proof: (1) the petitioner must be a prevailing party, and (2) the award must be warranted in the interest of justice. The reasonableness of the fee is a subsidiary (though no less crucial) issue which need only be addressed after entitlement is established. Other factors, like existence of an attorney-client relationship and actual payment of the fees, are of course also necessary ingredients. However, we prefer the two-prerequisite analysis because it emphasizes the two factors which were made express conditions by the statute while

[2] Allen v. United States Postal Service, 2 MSPB 582, 586 (1980).

actual payment and the attorney-client relationship, like the requirements that the petitioner be an employee or applicant, are implicit conditions and likely to be given in most cases.

The present case is no oddity in this respect. There has never been any dispute that petitioner was an employee and that he hired and paid an attorney. The reasonableness of the fees has never needed to be reached. So we turn to the two issues in this case: whether petitioner meets the two prerequisites to an award of attorney's fees.

III.

The Government contends that petitioner is ineligible for an award of fees in that he is not a prevailing party within the meaning of the first prerequisite because he was not substantially innocent of the charges against him.

A.

The meaning of "prevailing party" in section 7701(g)(1) is an issue of first impression for this court. The board has considered it and in the Hodnick case said:[7]

> An appellart may be deemed a "prevailing party" for purposes of such an award if he or she has obtained all or a significant part of the relief sought in petitioning for appeal * * *.

The board supported its position by reference to other attorney's fees and costs statutes. The general rule under the Civil Rights Act of 1964, the Civil Rights Attorney's Fees Awards Act of 1976, and the

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[7] Hodnick v. Federal Mediation & Conciliation Serv., 4 MSPB 431, 434 (1980).

The board went on to say that an award could be made "regardless of whether a final decision has been reached" so long as a causal relationship exists between the appeal and the reduced penalty. Id. While this position is supported by the weight of authority, see, e.g., Hanrahan v. Hampton, 446 U.S. 754, 757-58, 100 S. Ct. 1987, 1989-1990, 64 L.Ed.2d 670 (1980) (per curiam) (attorney fees under 42 U.S.C. § 1988); Foster v. Boorstin, 561 F.2d 340, 342-43 (D.C. Cir. 1977) (42 U.S.C. § 2000e-5(k)), it is not presented by the facts in this case and we express no opinion on it.

Freedom of Information Act is that a party need not have completely prevailed on every issue, but only have substantially prevailed or have prevailed on a significant portion of his claims. This is a sensible basis for determining the interpretation of prevailing party here, as there is no indication that Congress uses that term in different ways in different contexts. We would only add that the Equal Access to Justice Act, to which we have in the past turned for guidance in interpreting section 7701(g)(1), has also been interpreted to require less than total victory to satisfy the requirement of prevailing. We therefore approve the board's formulation of the standard, quoted above, for determining who is a prevailing party.

In applying this standard, it should be borne in mind that determining who prevails is really no more than a totaling up of who won and who lost. It is a practical matter: for example, if a penalty is imposed against an employee and, as a result of his appeal, it is reduced, then that employee may be deemed to have prevailed. The determination of who prevailed is, after all, only a threshold test of eligibility; the more difficult question of entitlement is reserved for the second prerequisite, "warranted in the interest of justice." Eligibility is broad but the entitlement standard operates to limit it.

B.

Given this analysis, petitioner's lack of substantial innocence is not controlling at the first, eligibility, stage. Whether a party prevails is not a question of merit or justice, but a practical test designed to determine as an initial matter who is eligible for attorney's fees. However, the extent of a party's victory is clearly relevant generally to the justice of his cause. Therefore, corollary to our holding with respect to prevailing party, we also hold that the de minimis nature of the victory obtained by a prevailing employee may be considered by the board under the aegis of the second, "interest of justice," prerequisite. This consideration is entirely consistent with the board's guidelines in the Allen case in that it

concentrates on the magnitude of the injustice done the employee and in that the Allen guidelines do not purport to exclude other factors relevant to the interest of justice.

. . . .

Removal is the most serious penalty available to the agency and the most harmful to the employee, so the avoidance of removal should be considered a sufficient degree of success to overcome use of this factor to deny fees.

In the present case, petitioner appealed three of the five charges against him and the penalty of removal based thereon. The board reversed all three charges and reduced the penalty to a suspension. Thus, as a practical matter, petitioner prevailed. The presiding official was right on the mark in saying that petitioner prevailed--"technically" or otherwise--"in that the removal action was reversed." The fact that petitioner got everything he asked for makes this an easy case; he has never contested the two charges upon which the board based the suspension penalty. Petitioner having established his eligibility for an award, we now turn to the question of his entitlement.

IV.

Petitioner asks that we remand the case to the board for reconsideration of entitlement. The board, petitioner claims, has interpreted the interest of justice standard solely to punish governmental misconduct and has subsequently failed to consider the compensatory purpose of the provision for award of attorney's fees.

Our first task is to reaffirm what is already settled: the board is given great discretion under section 7701(g)(1) in awarding attorney's fees and consequently this court will accord the board's determination great deference. The permissive language of the statute--"may require payment" (emphasis supplied)--and the subjectivity of the ultimate standard--"warranted in the interest of justice"--compel this conclusion, and the legislative history confirms it.

. . . .

The board in the Allen case set out guidelines for awarding attorney's fees in

the "interest of justice." It discussed at great length the statute, its legislative history, and other precedent in the attorney's fees area, and it concluded:

> We do not believe it advisable to expound further at this early stage of implementing the award provision. Particular applications can best be determined by the Board on a case by case basis, with the benefit of a full record and the insights and reasoning of the presiding official who heard the evidence in each case. * * *
>
> We do, nonetheless, believe we can provide prospective guidance by summarizing here circumstances as extracted from the legislative history of the Reform Act, which may warrant fee awards. While some of the examples mentioned in the course of the deliberations on the Reform Act may overlap in concept, or might be covered as well by the two statutory illustrations in section 7701(g)(1) as enacted, the examples as originally expressed provide a useful indication of circumstances considered to reflect "the interest of justice":
>
> 1. Where the agency engaged in a "prohibited personnel practice" (§ 7701(g)(1));
>
> 2. Where the agency's action was "clearly without merit" (§ 7701(g)(1)), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency;
>
> 3. Where the agency initiated the action against the employee in "bad faith," including:
>
> a. Where the agency's action was brought to "harass" the employee;
>
> b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways";
>
> 4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee;

5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

We emphasize that the foregoing summary is not exhaustive, but illustrative. Nor is it a catalogue of litmus paper tests for award or denial of attorney fees. Rather, these examples should serve primarily as directional markers toward "the interest of justice"--a destination which, at best, can only be approximate. * * * [Footnotes omitted.]

The Allen guidelines are reasonable and are firmly based in the statute and legislative history; we therefore have no basis for altering the Allen guidelines, noting that all they are is a set of guidelines and that Allen itself emphasized that the examples given were "not exhaustive."

Petitioner charges that these guidelines unduly emphasize agency malefaction at the expense of employee compensation and that the board has taken the position that it will not consider economic hardship in granting fees. This position, he argues, violates the compensatory goal of attorney's fee awards.

Petitioner overstates the board's position. In the Kirkpatrick case, on which petitioner relies, the board held that to award attorney's fees to "all applicants or potential applicants for disability retirement who prevail * * * in the interest of justice" (emphasis supplied) would in effect collapse the prevailing party prerequisite into the interest of justice prerequisite, in violation of the Allen analytical structure of separate prerequisites.[28] The board has not absolutely rejected economic hardship as a criterion for award of attorney's fees, but rather has rejected its use to permit awards in all cases.

. . . .

Economic hardship per se would not perform this limiting function because

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[28] Kilpatrick v. Office of Personnel Management, 5 MSPB 97, 98 (1981).

removal or suspension and the consequent litigation costs will always be a hardship and Congress has chosen to redress this hardship only in certain cases. The board therefore correctly rejected a standard which emphasizes economic hardship as a principal determinant of the interest of justice.

We note, however, that Kirkpatrick is limited to rejection of an extremely broad claim of entitlement and that the Allen guidelines do not purport to be exhaustive. The statutory examples are likewise not meant to be exhaustive. Section 7701(g)(1) does have a general goal of removing impediments to the litigation of a meritorious claim, as the board has recognized, so the board may well wish to consider extraordinary economic hardship in appropriate cases, for example, cases in which the extraordinary hardship was caused by the agency's misconduct.

On this basis, we now examine the record to determine whether the board improperly refused to consider evidence of economic hardship. Petitioner's sole economic contentions in his petition for attorney's fees were that he "has been forced to incur legal expenses, * * * personal hardship, and emotional stress." He has subsequently alleged no more than this. His claim presents no more than what an incorrectly removed employee suffers, and tc award fees here would in effect nullify the interest of justice requirement, as in the Kirkpatrick case. It is true that the presiding official did not allude to this allegation of hardship, but the allegation falls so far short of extraordinariness that remand would serve no purpose. The presiding official instead concentrated on the justiciability of the agency's and petitioner's conduct and found fees not to be warranted. On appeal petitioner can only really argue that the board incorrectly exercised its judgment. Given the deference which we must give such judgments, it must stand. We note, however, that we see no reason to dispute the board's judgment in this case.

AFFIRMED.

Note 1. The MSPB, in Rose v. Department of Navy, 36 M.S.P.R. 352 (1988), awarded attorney fees where an employee's removal was mitigated to a 60-day suspension. The Board found that the Navy had acted arbitrarily, capriciously, or otherwise unreasonable in imposing a removal. The Board further found that the agency knew or should have known that its decision to remove the employee could not withstand Board scrutiny. See also Lambert v. Department of Air Force, 34 M.S.P.R. 501 (1987).

Note 2. In cases where a decision is based on a finding of discrimination or of a prohibited personnel practice, the employee recovers attorney fees as a prevailing party. No specific showing that an award of fees is in the interest of justice is required in such cases. See 5 U.S.C. §§ 1221(g)(1) and 7701(g)(2).

Note 3. Prevailing employees may only recover "reasonable" fees. For a general discussion of how reasonable fees are calculated, see Blum v. Stenson, 465 U.S. 886 (1984); Kling v. Department of Justice, 2 M.S.P.R. 464 (1980). For a discussion of how fees are calculated when an employee is represented by a salaried union attorney, see Goodrich v. Department of Navy, 733 F.2d 1578 (Fed. Cir. 1984), cert. denied, 469 U.S. 1189 (1985); Kean v. Department of Army, 41 M.S.P.R. 618 (1989).

CHAPTER 9

JUDICIAL REVIEW OF PERSONNEL ACTIONS

9.1. Judicial Review of MSPB Actions.

a. Statutory Provision. In cases involving decisions or orders by the Merit Systems Protection Board, Congress has specifically outlined by statute the applicable standards of review, the scope of review, and the appropriate venue for review. Although the MSPB is not empowered to review all Federal personnel actions, the statutory judicial review provisions apply in many situations, such as serious adverse actions and reductions-in-force.

5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board.

(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended

(29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, 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. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Note. The jurisdiction of the Court of Appeals for the Federal Circuit over final orders of the MSPB was effective 1 October 1982. That jurisdiction is exclusive and replaces the jurisdiction previously exercised by the various Courts of Appeals and the Court of Claims. The Federal Court Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25 (1982)).

b. Subject Matter Jurisdiction. The Court of Appeals for the Federal Circuit, in Rosano v. Department of the Navy, 699 F.2d 1315 (Fed. Cir. 1983), and in the case which follows, established that the scope of the subject matter jurisdiction of the court was identical to the scope of the subject matter jurisdiction of the Board except for discrimination cases.

Carroll v. Department of Health and Human Services
703 F.2d 1388 (Fed. Cir. 1983).

COWEN, Senior Circuit Judge:

Petitioner in this case seeks review of the final decision of the Merit Systems Protection Board (MSPB or Board) denying her a within-grade pay increase.

. . . .

II. THE JURISDICTIONAL ISSUE

At the threshold we are met with the Government's suggestion that we lack jurisdiction and its assertion that the court's only recourse is to transfer the case to the Court of Appeals for the Eleventh Circuit or the District of Columbia Circuit. The Government's position is based upon the decision of the Court of Claims in Holder v. Department of the Army, 670 F.2d 1007 (Ct. Cl. 1982), that determinations concerning the granting or denying of within-grade step increases pursuant to section 5335 lie within the discretion of the employing agency and consequently are beyond the scope of the Tucker Act (28 USC § 1491). When counsel for the Government urged us to transfer the case, he was unaware of this court's decision in Rosano v. Dept. of the Navy (Fed. Cir. No. 32-82, slip op. Feb. 14, 1983), which was handed down after this case was submitted. It appears that he also overlooked the fact that The Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25

(1982)), not only granted this court exclusive jurisdiction in all appeals from the Board under 7703(b)(1), but also removed the limitations which the Tucker Act had theretofore imposed upon the Court of Claims. As this court stated in Rosano, that Act removed from section 7703 the reference to the Tucker Act which is the basis for the holding in Holder. The legislative history of the 1982 Act demonstrates the clear intent of the Congress to confer jurisdiction on this court of all appeals from the Board "including cases in which the Court of Claims did not have jurisdiction." Furthermore, this court pointed out in Rosano that "with respect to cases brought under section 7701, the scope of the subject matter jurisdiction of this court is identical to the scope of the jurisdiction of the Board." 5 USC § 7701 gives the Board jurisdiction over "any action which is appealable to the Board under any law, ruling, or regulation." By the provisions of 5 C.F.R. § 1201.3, a regulation which was in effect at all times pertinent to this action, the Board's appellate jurisdiction includes "(2) denial of within-grade step increases."

Finally, in rejecting the Government's challenge to our jurisdiction, we call attention to the fact that The Federal Courts Improvement Act of 1982 removed all jurisdiction over Board appeals from the other circuits. 5 USC § 7703.

Consider, however, the possible limitations on this jurisdiction as discussed in the following case concerning an appeal from an MSPB decision that an employee was not eligible for disability retirement under 5 U.S.C. § 8337(a).

Pitzak v. Office of Personnel Management
710 F.2d 1476 (10th Cir. 1983)

The petitioner's challenge to the Board's order argues several bases for reversal: (1) the decision to deny the petitioner disability retirement was arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence; (2) the Board failed to follow the

procedures required by law when it discredited the testimony of the petitioner's medical expert that was not refuted on cross-examination and when it failed to sanction the OPM for untimely responses; and (3) the failure of the Board to follow required procedures violated the petitioner's equal protection and due process rights. The OPM contends that the decision to deny the petitioner disability retirement is not subject to judicial review and thus that this Court is without jurisdiction to consider the petitioner's claims. We consider the jurisdiction argument first.

The petitioner relies upon 5 U.S.C. § 7703(a)(1), which provides:

> Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

Judicial review under that section is vested in the Court of Claims or the United States Courts of Appeals, which can set aside agency action that is arbitrary, capricious, an abuse of discretion, obtained by improper procedures, unsupported by substantial evidence, or otherwise not in accordance with law. 5 U.S.C. § 7703(b)(1), (c). The OPM claims that judicial review of disability retirement determinations is controlled by 5 U.S.C. § 8347(c), as it read prior to amendment in 1980. That section provided:

> (c) The Office [of Personnel Management] shall determine questions of disability and dependency arising under this subchapter. The decisions of the Office concerning these matters are final and conclusive and are not subject to review.

The OPM claims that the language of 5 U.S.C. § 8347(c) precludes all judicial review of an action in which a determination of disability is made.

While the scope of judicial review of administrative agency action may be limited by statute, there is a presumption that agency action is reviewable; judicial review

will be precluded only if Congress' intent to preclude such review is clear and convincing. Barlow v. Collins, 397 U.S. 159, 166-67 (1970) (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967). The OPM argues that the statute specifically dealing with disability determinations controls over the general statute dealing with reviewability of the orders of the Board; it also argues that the language stating that the decisions of the OPM are final and conclusive and not subject to review clearly evinces an intent to preclude review. It cites Chase v. Director, Office of Personnel Management, 695 F.2d 790 (4th Cir. 1982), Morgan v. Office of Personnel Management, 675 F.2d 196, 199 (8th Cir. 1982), and Washington v. Jacobs, 458 F.2d 785, 787 (D.C. Cir.), cert. denied, 409 U.S. 895 (1972). Those cases state that disability determinations in which the request for disability retirement was initiated by the employee are not judicially reviewable.

We read 5 U.S.C. § 8347(c) to give the OPM final and unreviewable authority to make the factual determination whether an applicant for disability retirement is disabled. In this case, the petitioner's claims that the decision of the OPM to deny him disability retirement was arbitrary and capricious, an abuse of discretion, or unsupported by substantial evidence are actually challenges to the factual determination of the agency. Therefore, we cannot review them. However, we do not hold that all judicial review is barred. Rather, we agree with those cases holding that the circuit courts may review decisions of the Board to determine whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" Scroggins v. United States, 397 F.2d 295, 297 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968). See also Parodi v. Merit Systems Protection Board, 690 F.2d 731, 736-37 (9th Cir. 1982); Plaxico v. Merit Systems Protection Board, No. 80-3214 (6th Cir. August 18, 1980). A specific statute controls over a general

statute, Morton v. Mancari, 417 U.S. 535, 550-51 (1974), but "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Id. at 551. It is possible to give effect to Congress' obvious intent to foreclose judicial review of the sufficiency of the medical evidence in these cases, yet preserve the generally recognized duty of the courts to require a governmental agency to follow the procedural and substantive framework established in the act the agency administers and to prevent the agency from violating constitutional rights. See Dunlop v. Bachowski, 421 U.S. 560, 567-68 (1975). Therefore, the claims of the petitioner that the OPM and the Merit Systems Protection Board failed to comply with the required procedures and that the agency actions violated his constitutional rights are subject to review.

c. Scope of Review. While 5 U.S.C. § 7703(c) clearly limits the court's review to the record, appellants have requested a de novo consideration of the evidence in the record. Consider the response to such a request in the following case.

Polcover v. Secretary of the Treasury
477 F.2d 1223 (D.C. Cir. 1973),
cert. denied, 414 U.S. 1001 (1973)

. . . .

II.

On November 30, 1964, appellant, a Grade GS-12 Internal Revenue Agent with eighteen years experience in the Federal service and a Veterans Preference Act beneficiary, received a Notice of Proposed Adverse Action from his District Director. The Notice stated, in pertinent part:

It is proposed to both suspend you for not more than thirty days and remove you from the Service in order to promote the efficiency of the Revenue Service for the following reasons:

Charge I: Acceptance of a Bribe
Specification: On or about May 19, 1961, you accepted the sum of $1,000.00 from Mr. Albert M. Goldstein, an accountant of 4 E. 43rd Street, New York, New York, to influence your decision and action in your audit of the 1959 income tax return of his client, R. Carl and Sarah M. Chandler.
Charge II: Failure to Report the Offer of a Bribe
Specification: You failed to report the offer of the bribe set forth in the specification to Charge I above.

. . . .

III.

Appellant's challenge is not focused solely on the substantiality of the evidence supporting the Commission's determination of removal, but includes allegations of a multitude of procedural errors which he asserts violated his rights under either the Veterans' Preference Act or the United States Constitution. We have considered all (although all are not specifically discussed), and reject all.

We decline to enter into a lengthy discussion of the facts and underlying evidence supportive of the Commission's action. We recognize the limits imposed on our scope of review . . . which bind us to the agency record and preclude a de novo consideration of the evidence. The test is not how we would decide the issue based on the evidence in the record, but whether substantial evidence in the record supports the decision of the Commissioner. See, e.g., Moore v. Administrator, 155 U.S.App.D.C. 14, 475 F.2d 1283 (1973).

The evidence before the Commission's Board of Appeals and Review consisted primarily of that presented to the hearing officer on January 9, 1968, pursuant to the appeal taken to the Regional Commissioner. Included therein is the transcript of the criminal trial testimony of Mr. Goldstein (reasserting that a bribe was given), and Mr. Chandler (disclaiming knowledge of a bribe), a sworn affidavit of Goldstein to the effect that he had given a $1,000 bribe to appellant in exchange for a favorable audit of Chandler's 1959 income tax return, and various work papers of Goldstein and

Chandler tending to support the bribe allegation. Undoubtedly the hearing officer and the various appellate levels after him gave significant weight to the sworn affidavit and testimony of Goldstein. Appellant's evidence consisted chiefly of a complete denial of involvement, his own work papers (which supported the taxpayer's claimed liability, but which were not submitted to the IRS until the day of the alleged bribe), and an attack (which was of some merit) upon Goldstein's credibility. Although we might otherwise view the evidence were we in the legal position of the hearing officer or the Commission, we have little difficulty finding that substantial evidence supports their conclusion that the preponderance of the evidence sustains the specifications and consequent removal. As such, that conclusion must not be altered.

Appellant makes much of the fact that he was acquitted of the parallel criminal charges filed against him, and that the acquittal was in the face of evidence identical to that before the Commission. The difference between proof to a "preponderance" of the evidence, the burden assumed by the agency in administrative proceedings of this nature, and proof "beyond a reasonable doubt," the burden assumed by the Government in criminal prosecutions, is critical. As the second circuit court of appeals stated in Finfer v. Caplin, 344 F.2d 38, 41 (2d Cir. 1965), cert. denied, 382 U.S. 833 . . . (1965):

> The law does not require that the proof which might lead to an administrative determination that removal would be for the best interests of the IRS be of the same quality as would be necessary to convince a jury beyond a reasonable doubt to convict in a criminal case. The jury, to be sure, had not been convinced beyond a reasonable doubt but the Commissioner could well have concluded that the evidence was substantial enough to justify a refusal to reinstate.

See also Silver v. McCamey, 95 U.S.App.D.C. 318, 221 F.2d 873, 875 (1955).

. . . .

Ample opportunity was given to the appellant to raise the existence of procedural defects in the proper forum, at the agency and Commission levels, so that evidentiary hearings and a thorough sounding of the matter could be initiated. Appellant did raise several specific challenges, notably those relating to delay, cross-examination, and substantiality, but until now any infirmities in the powers of the oral reply hearing officer have not even been hinted. The boiler plate language of challenge to all procedures is not the minimum specification of issues we deem necessary.

The fluctuating state of the law could excuse a misdirected challenge to the authority of the oral reply officer, but not the absence of a challenge altogether. Litigation must end somewhere. In this scheme of judicial review that somewhere (as to the issues to be considered on appeal) is the Commission. "Great is the art of beginning, but greater the art is of ending." Finding no good reason to divert from the general rule the opinion of the district court is

Affirmed.

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d. Standard of Review. While courts have consistently refused to consider the evidence in the record de novo, courts have not always agreed on the particular standard by which they would review the agency's decision based on that evidence. The 1978 Civil Service Reform Act, at 5 U.S.C. § 7703(c), established the standard of review for appeals from decisions of the MSPB.

Consider the representative judicial interpretation of that standard which follows.

Boylan v. U.S. Postal Service
704 F.2d 573 (11th Cir. 1983)

PER CURIAM:

Vincent Boylan, a City Letter Carrier for the United States Postal Service in Orlando, Florida, appeals a final order of the Merit Systems Protection Board

sustaining his suspension and removal from employment because he allegedly disposed of third-class mail scheduled to be delivered on his route. This Court has jurisdiction to review such final orders under 5 U.S.C.A. § 7702(b) (superseded) and 28 U.S.C.A. § 2342(6) (repealed). In this appeal, Boylan claims that the Board's decision is not supported by substantial evidence, . . . and that the suspension and removal were effected without compliance with required procedures.

SUBSTANTIAL EVIDENCE

The incident resulting in Boylan's suspension and removal occurred on January 17, 1981, when the manager of the Moselle Manor Apartments discovered a large quantity of third-class mail under a U-Haul trailer next to a trash dumpster in the apartment complex parking lot.

Boylan's first contention on appeal is that the Board's finding that he disposed of the mail is unsupported by substantial evidence. In reviewing final decisions of the Merit Systems Protection Board, the Civil Service Reform Act of 1978 directs this Court to:

> . . . review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
> (3) unsupported by substantial evidence. . . .

5 U.S.C.A. § 7703(c). Under this standard of review, a court will not overturn an agency decision if it is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Brewer v. United States Postal Service, 647 F.2d 1093, 1096 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The question is not what the court would believe on a de novo appraisal, but whether the administrative determination is supported by substantial

evidence on the record as a whole. Brewer, 647 F.2d at 1096. Evidence supporting the agency's finding, as well as evidence offered in opposition, must be examined. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950).

The record contains evidence that (1) 163 of the 172 pieces of mail recovered under the trailer were scheduled for delivery on Boylan's route, (2) the postal inspector who collected the mail recognized some of the mail as being the same kind of third-class mail available for delivery that morning from Boylan's postal station, (3) the mail was found in a "fresh and unsoiled" condition, and (4) Boylan had not observed any signs of forced entry into his mail truck or any indication that the mail had been disturbed. Although Boylan suggested that children playing in the area might have been responsible for the incident, he also stated that he had seen no children in the area, and had offered the explanation "simply in a manner of speculation."

Under these circumstances, we conclude that the Board's decision was supported by substantial evidence.

. . . .

PROCEDURAL ISSUES

Boylan contends the Board should have set aside his removal because of four procedural errors committed by the Postal Service. Under 5 U.S.C.A. § 7701(c)(2), the Board may set aside an adverse action against an employee if the employee demonstrates harmful error in the application of the procedures invoked to arrive at that decision. "Harmful error" is defined by regulation as follows:

> Harmful error: Error by the agency in its application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

5 C.F.R. § 1201.56(c)(3).

First, Boylan alleges harmful error in that he received only 16 days notice of his proposed suspension, rather than the 30-day notice required under 5 U.S.C.A. § 7513(b)(1). In upholding the Postal Service, the Board relied on the so-called "crime exception" to the required notice period which allows immediate action when "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. . . ." 5 U.S.C.A. § 7513(b)(1).

Under the regulations, Boylan had the burden of showing that the 16-day notice prejudiced his rights. Although the Postal Service had relied on another invalid exception in giving the short notice, the Board's determination that Boylan suffered no prejudice because the 16-day notice was justified by the crime exception was not an abuse of discretion.

Boylan contends that the crime exception to the notice requirement cannot be invoked without a showing of criminal intent. The Board has determined in previous decisions that direct proof of criminal intent is unnecessary where the evidence presented to the Board demonstrates that the agency's action was based upon a "reasonable cause to believe" that a crime had been committed. Filson v. department of Transportation, FAA, MSPB Order No. AT075209304 (July 14, 1981), at 8. This interpretation by the Board of its own regulations is entitled to deference. See Udall v. Tallman, 380 U.S. 1, 18 85 S. Ct. 792, 802, 13 L.Ed.2d 616 (1965); Adkins v. Hampton, 586 F.2d 1070, 1073 (5th Cir. 1978). Here, the Postal Service had "reasonable cause to believe" a crime had been committed without a specific showing of intent, and was not required to show a criminal conviction or bring formal criminal charges in order to invoke the crime exception of the notice requirement. See Schapansky v. Department of Transportation, FAA, MSPB Order No. DA075281F1130 (October 28, 1982), at 7.

Although Boylan contends he was denied access to the mail involved in this incident in violation of 5 U.S.C.A. § 7513(e), which requires copies of the agency's proposed action "together with any supporting

material" to be furnished to the employee upon request, the record indicates that Boylan examined the mail at his initial interview with the postal inspector on January 21, 1981. A letter dated March 11, 1981 advised the Board that the mail was in the Postal Service's possession and Boylan's representative could examine it by making an appointment to do so. The letter indicated that a copy was sent to Boylan's attorney at that time. In addition, a copy of the letter was served on Boylan and his attorney on April 7, 1981. The Board did not abuse its discretion in concluding that Boylan suffered no harmful error.

Finally, Boylan argues that he was not provided with a copy of the carrier by-pass record introduced at the hearing. This document reflected the number of pieces of mail returned by a carrier to the post office each day. The document's evidentiary impact was cumulative and its introduction into evidence was without objection. It was not mentioned in the Board's initial decision or in its final order. In administrative disciplinary proceedings, where a removal action is based upon substantial evidence and conforms with the law, courts have refused to hold "that every deviation from specified procedure, no matter how technical, automatically invalidates a discharge, especially in the absence of any showing of prejudice." Dozier v. United States, 473 F.2d 866, 868 (5th Cir. 1973); see Anonymous v. Macy, 398 F.2d 317, 318 (5th Cir. 1968), cert. denied, 393 U.S. 1041, 89 S. Ct. 666, 21 L.Ed.2d 588 (1969). Boylan has made no showing that any harm resulted from the procedures followed.

AFFIRMED.

9.2 Judicial Review of Actions Involving Discrimination. The 1978 Civil Service Reform Act established an entirely new procedure for reviewing administratively and judicially those actions involving allegations of employment discrimination. Three levels of administrative review are established, and interlocutory judicial review is permitted at numerous stages in the procedure. The statute and regulations outlining this review are set out in Chapter 10.

9.3 Judicial Review of Other Personnel Actions.

All personnel actions are not appealable to the MSPB under 5 U.S.C. § 7701, and thus are not reviewable under 5 U.S.C. § 7703. Of particular note are actions taken against probationary employees. Consider the limited circumstances when courts will review agency actions against probationary employees.

Wren v. MSPB
681 F.2d 867 (D.C. Cir. 1982)

WALD, Circuit Judge:

This is a petition by a former probationary employee of the Department of the Army ("Army") seeking review of an order of the Merit Systems Protection Board ("MSPB" or "Board") dismissing her appeal from a job termination for lack of jurisdiction. Petitioner claims that her discharge was in retaliation for "whistleblowing" on official mismanagement, waste, abuse of authority and violation of regulations and was therefore a prohibited personnel practice under 5 U.S.C. § 2302(b)(8). She requests that the Board's order be vacated and the case remanded to the Board so that it can review the decision of the Office of Special Counsel of the Board ("OSC") refusing to investigate petitioner's allegation of reprisal for whistleblowing. The OSC's decision to terminate its investigation into the cause of petitioner's dismissal was rendered as a result of a separate petition filed by petitioner at the same time she sought MSPB review. After petitioner's appeal to the Board had been dismissed, the OSC refused to exercise 5 U.S.C. § 1206 authority to investigate petitioner's allegation, finding that it was more appropriately resolved "under an administrative appeals procedure or applicable grievance procedure." Although we agree that the OSC's failure to investigate the petition in this case was not justified by the reasons given, we cannot afford petitioner any relief in this appeal. If judicial relief from the OSC's inaction lies at all, it must be sought in a separate action. The only matter properly before this court is the Board's decision

that it had no jurisdiction over Wren's appeal from the Army's adverse personnel action. We find that decision a correct one. Accordingly, we must affirm the decision of the Board.

I. BACKGROUND

The Army appointed petitioner, Celia A. Wren, Guidance Counselor, GS-1710, Grade 9 at the Wertheim Educational Center, West Germany, on August 21, 1978, and dismissed her on March 9, 1979. The notice of termination stated that petitioner's job performance was unsatisfactory, that petitioner was uncooperative and that she failed to attend job performance seminars. The notice also informed petitioner that she had no right to appeal the Army's decision unless she alleged that it was based upon discrimination. Nevertheless, on March 7, 1979, petitioner appealed to the MSPB, claiming that her termination was a reprisal for whistleblowing regarding agency regulatory violations and mismanagement, and therefore a prohibited personnel practice under Title I, section 101(a) of the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 2302(b)(8). Simultaneously, petitioner requested the OSC to undertake an investigation into her allegation pursuant to 5 U.S.C. § 1206(a).

II. THE AGENCY DECISION

After examining the CSRA and regulations promulgated thereto, the Presiding Official held that there was no "right of appeal to the MSPB for excepted service employees who are terminated during a trial period." . . . Consequently, he dismissed the petition for lack of jurisdiction.

On appeal, the Board affirmed the dismissal for the same reason. . . . The Board also observed, however, "that procedures do exist whereby [Wren's] . . . allegation may be investigated by the Special Counsel . . ." Accordingly, the Board referred the petition to the Acting Special Counsel "for such action as she may find appropriate." But by the time the Board referred the petition to the OSC, that office had, apparently, already determined not to conduct any investigation.

As previously noted, petitioner had sought an OSC investigation in March, 1979

at the same time she filed her MSPB appeal. On August 27, 1979, the Special Counsel requested further information regarding the complaint. Documents were sent by petitioner's counsel from West Germany on October 22, 1979, but not received by the OSC until November 19, 1979, four days after the case had been closed for failure to submit the requested information. It does not appear from the record that the case was reopened upon receipt of the documents, or even that petitioner was notified at that time that the case had been closed. Nor was the case later reopened after the Board referred it to the OSC in April, 1980. On September 24, 1980, petitioner wrote to inquire about the status of the OSC investigation, and on October 15, 1980, was informed that her case had been closed almost a year earlier, shortly before the requested information had been received. In addition, the OSC informed petitioner that

> [T]his Office is authorized to receive and investigate allegations of certain activities prohibited by civil service law, rule, or regulation (primarily the prohibited personnel practices set forth in 5 U.S.C. 2302) and may recommend (but not order) corrective action when it is determined that a prohibited personnel practice has been or is being committed. This Office, however, is not authorized to deal with or seek redress for employee complaints or grievances which may be resolved more appropriately under established complaint, grievance, or appeals procedures unless it involves a prohibited personnel practice specified in 5 U.S.C. 2302. [5 U.S.C. 1206(a)(1) and (3)]
>
> Upon review of the information you provided, we have determined that your allegations deal with matters that may be resolved more appropriately under an administrative appeals procedure or applicable grievance procedure. We, therefore, will not undertake an investigation in your case at this time.

Thus, so far as it appears on the record, the merits of petitioner's allegation that she had been fired in retaliation for whistleblowing, a prohibited personnel practice, were never investigated by the OSC. Instead, a year after closing the investigation, the OSC directed petitioner to pursue her grievance along a "more appropriate" route, although that route had, in fact, already been declared inaccessible to her (and all probationary employees) by the MSPB.

III. WREN'S PETITION

On June 16, 1980, Wren filed a timely petition in this court for review of the Board's decision dismissing her appeal for lack of jurisdiction. After filing this appeal, petitioner received notice from the OSC that it had closed her case one year earlier. Thus, although this appeal is from the Board's decision to dismiss, petitioner also argues that the case must be remanded to the Board so that it can direct the OSC to fulfill its statutory responsibility to investigate petitioner's prohibited personnel practice allegation, which had been referred to it by the Board. Petitioner stresses the irony of being denied relief by the MSPB which assumed that OSC relief was available and then being denied relief by the OSC which assumed that MSPB relief was available.

Petitioner concedes on appeal that as a non-tenured employee she is "not statutorily entitled, per se, to direct review of her termination by the MSPB." The statute grants only "employees" the right to appeal to the MSPB from an adverse agency personnel action. 5 U.S.C. § 7701(a); see also Piskadlo v. Veterans' Administration, 668 F.2d 82 (5th Cir. 1982). An employee is defined as "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less. . . ." 5 U.S.C. § 7511(a)(1)(A); see also 5 C.F.R. §§ 315.801-.802. At the time of her termination, petitioner had been employed for approximately nine months. However, petitioner reasons: the Board has

jurisdiction over cases involving reprisals against whistleblowers brought to it by the OSC, 5 U.S.C. § 1206(c)(1)(A); and once such matters have been brought to the Board, it rather than the OSC has power to take "final agency action," 5 U.S.C. § 1205(a)(1); therefore the Board's jurisdiction over worthy whistleblower cases will be undermined if petitions to the OSC are not investigated sufficiently to determine whether they have merit. Thus, she argues, the Board has authority here at least to order the OSC to undertake a proper investigation of petitioner's allegation.

Unfortunately, we cannot accept petitioner's statutory construct. Although we agree that the OSC must, under the terms of the Act, investigate an alleged prohibited personnel practice involving reprisals against whistleblowing to the extent necessary to determine whether there is a reasonable probability that the allegation is meritorious, and that it must issue reasons for terminating an investigation, we can find no MSPB authority to enforce these statutory requirements. Therefore, if the OSC fails to perform its statutory duties, as here, relief--if it lies at all--must be sought in a separate action in the district court to compel the OSC to perform its statutory duties. Cf. Dunlop v. Bachowski, 421 U.S. 560 (1975) (5 U.S.C. §§ 702 and 704).

IV. STATUTORY ANALYSIS

A primary purpose of the CSRA was to safeguard employees--tenured and non-tenured--who "blow the whistle" on illegal or improper official conduct. Title I, section 101(a) of the Act proclaims:

> (9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--
>
> > (A) a violation of any law, rule, or regulation, or
> >
> > (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2301(b)(9). Under the Act, it is a prohibited personnel practice for an official to retaliate against an employee for

> (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. . . .

5 U.S.C. § 2302(b)(8). "Protecting employees who disclose Government illegality, waste, and corruption" was regarded as "a major step toward a more effective civil service." S. Rep. No. 969, 95th Cong., 2d Sess. 8 (1978), reprinted in U.S. Code Cong. & Admin. News 1978, p. 2723, 2730. II House Committee on Post Office and Civil Service, 95th Cong. 1st Sess., Legislative History of the Civil Service Reform Act of 1978 at 1632 (1979) (hereinafter Legislative History). The Senate Report explained:

> In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

Id., U.S. Code Cong. & Admin. News 1978, p. 2730. In a similar vein, the House Report, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 386, reprinted in I Legislative History 760, explained:

> Right now, a Federal employee who "blows the whistle" (sometimes even to a congressional committee) on activities at his agency which are a violation of law, mismanagement, abuse of authority, waste of funds or a danger to the public may be more likely to be harassed or fired than praised or rewarded. There is no effective means other than drawn out administrative and court proceedings for a whistleblower to set things right. We all lose when reasonable and constructive criticism of agencies by those who know them best is stifled.

Congress designated the MSPB and the OSC to protect whistleblowers against reprisal.

> The MSPB was entrusted with the appellate review authority over agency personnel action formerly vested in the Civil Service Commission. . . . As this court, per Bazelon, J., recently detailed in

Frazier v. Merit Systems Protection Board, 672 F.2d 150, 154-55 (D.C. Cir. 1982) (hereinafter Frazier), there are two routes by which whistleblowing controversies can reach the Board for review: (1) a Chapter 77 appeal from an adverse agency personnel action, which can only be brought by tenured employees, 5 U.S.C. §§ 7701-03; and (2) a section 1206(c)(1)(B) petition for "corrective action" by the OSC. The only route to MSPB review open to petitioner, a non-tenured employee, was via the OSC.

The OSC was modeled after the Office of General Counsel of the National Labor Relations Board ("NLRB"). . . . Both offices are filled by Presidential appointment, 5 U.S.C. § 1204; 29 U.S.C. § 153(d), and operate substantially independently of the agency with which they are associated. 5 U.S.C. § 1206; 29 U.S.C. § 160. The semi-autonomous nature of the OSC, like that of the General Counsel of the NLRB, was deemed necessary to allow it to fulfill its investigative and prosecutorial functions--to investigate illegal employment practices and seek their correction before the MSPB. . . . The sponsors of the CSRA expected the OSC to "serve[] first and foremost as the protector of employees' rights and as a conduit to prevent reprisals and help agencies purge wrongdoing." Thus, the Special Counsel is, as this court has recently remarked, "an ombudsman responsible for investigating and prosecuting violations of the Act." Frazier, 672 F.2d at 162.

In fulfilling its ombudsman or prosecutorial responsibility, the OSC is required by the Act to investigate an alleged prohibited personnel practice, and, if it terminates that investigation for lack of merit, to issue a written statement of reasons:

> (1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

> (2) If the Special Counsel terminates any investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation and the reasons therefor.

5 U.S.C. § 1206(a) (emphasis added); see also 5 C.F.R. 1250. Yet, in this case, petitioner was not informed that her case had been closed until a year later, when it was explained that requested documentation had arrived four days too late and that, in any event, her case was "more appropriately" resolved elsewhere--although by this time the MSPB had dismissed the petitioner's appeal for lack of jurisdiction. . . . So far as we can tell from the record, petitioner's case was never investigated, as the statute requires. Moreover, OSC's belated reasons for termination of the investigation were apparently based upon an inapplicable provision of the statute, and thus were erroneous in law.

The plain language of the statute and the legislative history clearly indicate that while the scope of an initial OSC investigation need only be extensive enough to determine whether there are reasonable grounds to believe a prohibited personnel practice is occurring, has occurred, or will occur, "[s]ome preliminary inquiry will . . . be necessary . . . to determine whether a charge warrants a thorough inquiry." Further, although the legislative history indicates that the statement of reasons for termination of the OSC's investigation need not be "detailed" and that the OSC has discretion to decide what form notice should take, it is equally clear that "a brief notification of the summary reasons for the termination" is required. Informing petitioner a year after closing the investigation that her case was more appropriately resolved elsewhere, particularly after the MSPB had held that it had no jurisdiction over her appeal, did not, in our view, conform to the statutory mandate. Although the OSC may routinely

defer action on a prohibited personnel practice when a matter is pending before the MSPB, 5 C.F.R. § 1251.2, that was not the situation here when the OSC issued a statement of reasons. Further, the OSC's reason for termination, i.e., the availability of other processes, erroneously relied upon a provision of the statute, 5 U.S.C. § 1206(e)(2), which is inapplicable to petitioner's case. That provision states that "no investigation" is allowed, if more appropriate avenues of relief are available, of allegations involving

> (D) activities prohibited by any civil service law, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and
>
> (E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

It is apparent from our reading of the statute and the legislative history that section 1206(e)(2) was an additional grant of authority to the OSC to investigate practices which would not come within its section 1206(a) prohibited personnel practice jurisdiction. Thus, we disagree with the Government's argument that the OSC's response in this case was justified under 5 U.S.C. § 1206(e). The authority vested in the OSC under that "special" situation provision is "[i]n addition to" the OSC's primary authority and responsibility to investigate and to seek correction of prohibited personnel practices, such as whistleblowing. 5 U.S.C. §§ 1206(a) and 2302(b); . . . ("The new section 1206(e) authorizes the Special Counsel to investigate allegations of the Hatch Act and certain other special matters.") (emphasis added). This additional authority in no way detracts from the OSC's duty under section 1206(a). Indeed, we find nothing in the statute to qualify the OSC's authority and responsibility to investigate an employee's allegation of retaliation for whistleblowing

at least to the extent of ascertaining if that complaint is meritorious.

V. DISPOSITION

The case is here on review of the MSPB's order dismissing a probationary employee's appeal for lack of jurisdiction. The petitioner understandably wants some remedy for the OSC's failure to perform its statutory duty to initiate some kind of inquiry into the merits of an allegation of retaliation for whistleblowing. As we see it, this is a non-discretionary aspect of the OSC's statutory responsibility. Seemingly, then, there should be a remedy for petitioner where the OSC has failed to perform even that initial inquiry into the whistleblowing allegation, and its reasons for inaction are legally invalid. However, the proper remedy for the OSC's failure cannot be an appendage to this appeal from a legally correct decision of the Board that it had no jurisdiction to consider petitioner's appeal from her job termination.

We remain troubled, however. In enacting the CSRA, Congress sought to create an efficient system for protecting all employees from reprisals for whistleblowing. The only remedy available under the CSRA for a probationary employee alleging a dismissal in reprisal for whistleblowing is OSC oversight. By failing to investigate petitioner's complaint and to issue a valid statement of reasons for termination, the OSC has not fulfilled its charge and has thereby cast doubt upon the efficacy of a new and promising statutory system for protecting whistleblowers.

It is possible--although obviously we do not decide the point--that petitioner may have an action for mandamus in the district court to compel some form of inquiry into the merits.[9] Quicker still would be a

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[9] Despite substantial precedent to the effect that federal mandamus does not ordinarily lie under 28 U.S.C. § 1361 to compel prosecutions or even investigations, see Inmates of Attica v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970); Moses v. Kennedy, 219 F. Supp. 762 (D.C. Cir. 1963), we believe that a strong case can be made that by enacting

voluntary reopening of Wren's case by the OSC in order to conduct whatever inquiry is necessary to determine whether her allegation of retaliatory discharge for whistleblowing is meritorious.

For the foregoing reasons, the petition is denied.

So ordered.

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the CSRA Congress intended to afford a whistleblower the right to have a complaint of retaliation investigated to the extent necessary to determine whether there were reasonable grounds for the allegation, i.e., we believe that the OSC does not have totally unreviewable discretion to refuse to look at the complaint altogether or to refuse to look at it for reasons unauthorized by the statute. We know that Congress obviously meant the OSC to have authority to dismiss claims which are groundless and frivolous on their face, and that it intended that the OSC develop a systematic means of screening employee complaints to weed out the unmeritorious ones. It is also quite clear from the statutory language and corresponding legislative history that Congress did not mean to make the OSC's decisions to terminate or conduct an investigation or bring a proceeding before the Board reviewable on the merits. . . . But we cannot so easily conclude that Congress meant to provide no means to enforce the OSC's failure to perform a ministerial duty, i.e., to investigate or to screen to some degree employee complaints which allege prohibited personnel practices. The CSRA contains an unequivocal statutory mandate, incorporated into the OSC's own regulations, which states:

> The Special Counsel is required to receive and to investigate allegations of prohibited personnel practices. . . .

5 C.F.R. § 1250.2(a). It would be difficult to square unreviewable refusal to investigate with the strong language found in the legislative history.

Although several district courts have ruled that a private right of action does not lie under § 2302 to enforce a whistleblower's protections against retaliation, Apodaca v. United States Government Printing Office, No. 80-2978 (D.C.C. Sept. 16, 1981); Brawner v. United States Department of the Navy, No. 80-3195 (D.D.C. April 27, 1981); Cutts v. Ferris, No. 80-1992 (D.D.C. July 29, 1981); Dearsman v. Kurtz, 516 F. Supp. 1255 (D.D.C. 1981); Scarangella v. Schweiker, No. 81-0744 (D.D.C. Aug. 7, 1981), those cases did not involve the limited request here, i.e., that the OSC investigate the complaint to determine whether it was meritorious.

Borrell v. U.S. International Communications Agency
682 F.2d 981 (D.C. Cir. 1982)

WALD, Circuit Judge:

This is an appeal from a decision of the district court, dismissing a complaint brought by a former probationary employee of the United States International Communications Agency ("ICA"). Dr. Phyllis F. Borrell, plaintiff-appellant, charged that she was discharged in reprisal for her whistleblowing on official violations of law, waste and abuse of authority. Her claim was based upon Title I, section 101(a) of the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 2302(b)(8)(A), which prohibits an official from taking an adverse personnel action against an employee as a reprisal for:

> (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--
>
> > (i) a violation of any law, rule, or regulation, or
> >
> > (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs
>
> . . . .

In addition, Borrell alleged that her discharge violated the first and fifth amendments to the Constitution in that it abridged her free speech rights and deprived her of liberty without due process of law. . . . The district court dismissed all of the claims: the CSRA claim was dismissed for want of jurisdiction; the constitutional claims were denied because the court found that Borrell's discharge was "not tainted by constitutional improprieties" and that Borrell was not deprived of liberty or property; . . . . We uphold the district

court's ruling on the CSRA . . . claim, but remand because of the inadequacy of the district court's findings on the constitutional . . . claim.

I. BACKGROUND

Dr. Phyllis F. Borrell was hired by ICA as a probationary employee, GS-12 on April 23, 1979. . . .

By the summer of 1979, appellant became aware of and started to complain to fellow employees about certain practices in the agency which she believed constituted violations of law and regulations, mismanagement, gross waste of funds and abuse of authority. Specifically, she complained about allegedly improper use of repeatedly extended purchase order contracts for two vendors working on the premises of ICA, unnecessary and wasteful travel, use of Government time by one official for private real estate transactions, and the improper hiring of the spouse of a senior ICA employee. Until she began to complain, there had been no complaints from her superiors about her work performance--indeed, in June she was told that she had an "excellent" probability of continued employment.

From early August until mid-October, appellant worked for Ms. Gail Becker, the only one of four supervisors for whom appellant worked to issue her a less than satisfactory work rating. On October 22, 1979, Becker sent a memorandum to Richard Suib, Chief of the Exhibits Development and Project Division, requesting that Borrell be transferred. Three days later, appellant was informally advised that Suib had decided to recommend her discharge. On November 14, 1979, appellant was officially notified of her discharge, effective thirty days thereafter. The reason provided were:

> (a) an inability to adapt to the overall work program in the exhibits Service, and (b) an inability to meet deadlines primarily related to purchase order contracts.

On December 19, 1979, Borrell petitioned the Office of Special Counsel ("OSC") of the Merit Systems Protection Board ("MSPB") to investigate her discharge pursuant to 5 U.S.C. § 1206(a), contending that it was a

reprisal for whistleblowing--a prohibited personnel practice under 5 U.S.C. § 2302(b)(8). The OSC denied a 5 U.S.C. § 1208 request for a stay of termination; however, the district court, per Parker, J., in response to Borrell's complaint for declaratory and injunctive relief, postponed the effective date of her termination until January 9, 1980. On January 10, 1980, while Borrell's petition was pending before the OSC, Judge June Green dismissed her complaint. Judge Green held that the district court lacked subject matter jurisdiction because appellant had "failed to exhaust the administrative remedies available to her from the MSPB and its Office of Special Counsel." This court initially dismissed appellant's appeal from that order, but on rehearing vacated its dismissal order and remanded to the district court citing an OSC letter, which stated, in relevant part:

> The Civil Service Reform Act of 1978 does not require Federal employees to submit a complaint or allegation to this Office. Whether the Special Counsel seeks a stay of a personnel action before the Merit Systems Protection Board is purely discretionary with the Special Counsel, and in any event the employee is not a party to the proceeding. The nature of the inquiry and investigation conducted by the Special Counsel upon receipt of a complaint is also discretionary. Additionally, an employee does not have any appeal rights to the Merit Systems Protection Board, from a decision or determination made by the Office of the Special Counsel. Nor is there any provision for judicial review of a Special Counsel determination.
>
> It should further be noted that if the Special Counsel files a request for an order of corrective action with the Merit Systems Protection Board pursuant to 5 U.S.C. 1206(c)(1)(B), the affected employee is not a party unless the Board permits him to intervene.

> Moreover, cases which the Special Counsel has closed are frequently reopened based on new information received from a complainant or a third party. The only statutory time limit imposed on the Special Counsel relates to referral of certain whistleblower allegations to agencies pursuant to 5 U.S.C. 1206(b)(3). Thus, in many instances it would be extremely difficult to determine when the process in this Office is to be regarded as concluded.

On remand, after a trial before the court, Judge Green dismissed the action. Meanwhile, the OSC pursued Borrell's allegations and on July 21, 1980 terminated the investigation, finding "nothing to substantiate the allegation [ ]" of retaliation for whistleblowing. After an investigation, the OSC concluded that "Borrell's termination was based on certain aspects of her performance which were determined to be less than satisfactory by her supervisors." The district court's dismissal of Borrell's whistleblowing allegation was based upon its determination that a probationary employee had no implied private right of action under the CSRA to challenge a dismissal in a separately initiated court action. The district court stated that appellant had "no right to judicial review of personnel actions not found by its Special Counsel to involve prohibited personnel actions." The court also rejected appellant's constitutional claims: on the "substantial factual issue . . . as to whether [Borrell's] termination was improperly motivated in retaliation for [her] constitutionally protected exercise of free speech," the court held "that her dismissal was not tainted by unconstitutional improprieties."

II. ANALYSIS

A. CSRA Claim

The district court ruled that it lacked jurisdiction in a separately initiated court action to retry the OSC's finding that appellant's discharge was based upon unsatisfactory performance rather than any whistleblowing activities. Appellant, on

the other hand, contends that although the CSRA nowhere explicitly provides for a private right of action in district court to enforce its prohibition against reprisal for whistleblowing, such a right can and must be "implied." Appellant reasons that by enacting the CSRA Congress sought "to achieve a Federal work force administered 'consistent with merit system principles and free from prohibited personnel practices,' 5 U.S.C. § 1101,"; nontenured, as well as tenured, employees were meant to be protected from prohibited personnel practices; the right to petition the OSC to investigate and to seek correction of prohibited personnel practices--the only explicit remedy provided probationary employees--is patently inadequate; and in the absence of a post-investigation prosecution by the OSC the probationary employee will be left without remedy. In sum, Congressional intent will go uneffectuated if the decision of the district court is upheld.

Whether there is an implied right of action under the CSRA for purported whistleblowers is primarily a question of legislative intent. In Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court announced a four-part test to determine whether a non-express private right of action can be inferred from a statute:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a Federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on Federal law?

In enacting the CSRA, we find that Congress did not intend to create a private statutory right of action to enforce restrictions against reprisals for whistleblowing. Although Congress sought to safeguard all employees, both tenured and non-tenured, from prohibited personnel practices and thereby to insure a "more effective civil service" for the public generally, it established in the Act a detailed enforcement scheme to effect its purpose. That scheme allows probationary employees such as appellant relief only through investigation and corrective action by the OSC. See Wren v. Merit Systems Protection Board, 618 F.2d 867, at 873 (D.C. Cir. 1982) (hereinafter Wren). The OSC is authorized and required by the CSRA, 5 U.S.C. § 1206(a)(1), to investigate allegations of prohibited personnel practices to the extent necessary to determine whether there are reasonable grounds to believe the allegations. If the investigation results in a finding of prohibited personnel practice, the OSC may seek correction before the MSPB. 5 U.S.C. § 1206(c)(1)(A). The OSC may also seek an interim stay of a personnel action from the MSPB if it determines that there are reasonable grounds to believe that the action constitutes a prohibited personnel practice. 5 U.S.C. § 1208. In addition to OSC relief, tenured employees may also independently pursue a Chapter 77 appeal to the Board. 5 U.S.C. § 7701; see Frazier v. Merit Systems Protection Board, 672 F.2d 150 (D.C. Cir. 1982). In 5 U.S.C. § 7512, Congress explicitly provided that the limited definition of "employee," referring only to tenured employees, did not apply to OSC investigations and correction actions. Thus, we are unable to conclude from the statute that Congress intended to provide an independent judicial remedy to employees, probationary or tenured, to enforce the statutory prohibition against reprisal for whistleblowing activities. Although Congress intended to protect all whistleblowers, the protection afforded probationary employees was limited to that available under 5 U.S.C. § 1206. Congress apparently wanted not only to provide an

effective and expeditious process for investigating whistleblower allegations, but also to protect against abuse of that process to halt termination based on unsatisfactory job performance. Judicial review of the OSC's decision not to investigate or to prosecute is limited, at most, to insuring compliance with the statutory requirements of an inquiry into employee allegations to the extent necessary to determine if the allegations are meritorious and of a brief statement of reasons for terminating an investigation. See Wren at 872-874. Our conclusion that no private right of action was intended by Congress is also based upon 5 U.S.C. § 7703, which provides for judicial review of adverse agency appeals exclusively in the courts of appeals or Court of Claims, except in cases involving claims of discrimination under Title VII, the Age Discrimination in Employment Act or the Equal Pay Act. From this we surmise that Congress did not mean to allow the district courts any extensive supervisory jurisdiction over the way in which the CSRA's mandates are enforced.

In sum, we cannot accept appellant's arguments in support of an implied right of action under the CSRA. We think Congress meant to establish the OSC as an exclusive avenue of relief to probationary employees alleging prohibited personnel practices under the CSRA.

Our inquiry does not end at that point, however. The prohibited personnel practice of retaliation against whistleblowers may also violate first amendment constitutional rights. Therefore we must consider whether petitioner's action in the district court based upon constitutional claims was justifiably dismissed.

B. Constitutional Claims

Borrell alleged that the ICA's decision to discharge her abridged her "freedom of speech under the First Amendment, in that her right as a probationary employee freely and constructively to comment upon and improve the functions of Defendant ICA and its Exhibits Service, a matter of legitimate public concern, was intentionally suppressed." The district court rejected the claim, stating without elaboration that

"the Court finds that [Borrell's] dismissal was not tainted by unconstitutional improprieties."

The district court apparently assumed--and we agree--that Borrell's allegation that she was dismissed because she voiced concerns over agency practices presented a claim of deprivation of a first amendment liberty without due process of law. . . . Thus the question of whether the CSRA meant to wipe out such a preexisting cause of action comes immediately to the fore. This is an altogether different question from that discussed previously, i.e., whether the CSRA created a new statutorily-based cause of action for whistleblowing retaliation. It is thus not governed by Cort v. Ash principles. Instead, the issue is whether Congress meant to take away from probationary employees preexisting rights of action to pursue constitutional rights in district court actions.

We think not. Where newly enacted statutory remedies are unavailable to a particular segment of employees, the Supreme Court appears to have imposed a kind of "clear statement" requirement on Congress, requiring it to indicate explicitly its intent to displace judicially-created remedies for constitutional deprivations. . . . On the contrary, we can find no such clear statement here. Nevertheless, the Government argues that the district court's decision must be sustained because the CSRA preempts all alternative remedies for all employees, even those preexisting judicial remedies based upon the Constitution which have not been replaced by administrative appeals or judicial review of any kind.

The Government's preemption argument is based upon Brown v. General Services Administration, 425 U.S. 820, 96 S. Ct. 1961, 48 L.Ed.2d 402 (1976). There the Supreme Court held Title VII of the Civil Rights Act of 1964 to be the exclusive source of judicial remedies for discrimination arising out of Federal employment. . . .

The Government also argues that the District Court for the District of Columbia has, in two cases similar to the instant

one, applied Brown to dismiss constitutional claims. Brawner v. United States Department of the Navy, No. 80-3195 (D.D.C. April 27, 1981); Dearsman v. Kurtz, 516 F. Supp. 1255 (D.D.C. 1981). However, those cases, as well as Brown, are significantly different from this case. The Title VII statutory remedy involved in Brown was specifically found by the Court to have provided an enhanced and integrated administrative and judicial remedy to replace the former problematic judicial cause of action for discrimination. Brawner and Dearsman involved tenured employees who had access to the adverse action procedure of 5 U.S.C. § 7701, as well as to the OSC, 5 U.S.C. § 1206. We do not here presume to rule on the issue of whether the CSRA appeal procedures culminating in judicial review for tenured employees are the exclusive means of relief. We decide only that the limited statutory remedy provided probationary employees, who have no appeal to the MSPB or to a judicial forum at all from an adverse personnel action or from an OSC decision not to prosecute, is not an adequate enough substitute for a prior judicial cause of action so that we can infer from the statute a Congressional desire to eliminate the preexisting right. . . .

The Government argues, however, that to permit a constitutional claim to be brought on behalf of a probationary employee will frustrate Congressional intent that judicial review of prohibited personnel practice claims should be resolved in the courts of appeals or Court of Claims and not the district courts. Our answer is that here we are concerned with appellant's constitutional claim, not her CSRA claim. The CSRA lays down a prescribed route for appeals from all prohibited personnel actions. Whistleblower cases involve only one of eleven prohibited personnel practices. We would, furthermore, be hard pressed to deny jurisdiction over a constitutional claim when the only alternative statutory remedy allows no right of individual participation by the injured employee and permits no judicial review of the merits of the agency official's decision

not to investigate or prosecute the employee's claim.

It seems clear to us that Congress intended the CSRA to provide additional, not decreased, protection for Federal employees who blow the whistle on illegal or improper Government conduct. Congress was patently aware that existing remedies were deficient. But we can find no clear signal in that legislative history that Congress meant to deprive appellant of the only cause of action which she has to protect her constitutional rights and which she had even before the CSRA was passed.

The district court found--and the Government argues alternatively on appeal--that Borrell failed to prove sufficiently that her discharge was caused by her first amendment activities rather than her poor work performance. The test for determining whether first amendment rights have been violated was set out by this court in Mazaleski v. Truesdell, 562 F.2d 701, 715 (D.C. Cir. 1977):

> The test . . . requires not only that a plaintiff assume the initial burden of showing that his conduct was constitutionally protected and that it was a "substantial" or "motivating" factor in the Government's adverse action, but also that, if plaintiff has carried his burden, the Government may show by a preponderance of the evidence that it would have reached the same decision had the protected conduct never occurred. . . . The touchstone for decision, therefore, is the employee's job performance considered in its entirety.

See also . . . Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977). In a case quite similar to the instant case, Tygrett v. Barry, 627 F.2d 1279 (D.C. Cir. 1980), involving a discharged probationary employee of the District of Columbia active in lobbying for passage of a bill increasing employee pay, who alleged that his discharge violated the first amendment, the court observed: "When confronted with firings that implicate a public employee's First Amendment rights, the courts are required to

conduct an individualized and searching review of factors asserted by the employer to justify the discharge." 627 F.2d at 1282-83.

The record in this case offers much evidence to suggest that appellant's complaints about alleged unnecessary and wasteful travel by an agency official, the operation of a private real estate business from Government offices by another, violation of nepotism rules by still another and extended purchase order contracts for vendors working on the premises of ICA, influenced her discharge. Conversely, there was also evidence that Borrell's performance fell short of a satisfactory level. Unfortunately, the district court made one laconic finding only: that appellant's discharge was "not tainted by unconstitutional improprieties." Surely that cannot be enough to satisfy the requirements of Rule 52(a) of the Federal Rules of Civil Procedure in this kind of case, where the core of the dispute is whether the employee was discharged for complaining about agency irregularities, admitted in part, or for poor job performance. Here the content of the complaint was later shown clearly to be reasonable. (The Government concedes that Borrell disapproved of and complained to her co-workers about improprieties "generally known to have been occurring in the Exhibits Service" and that her complaining did not have a disruptive effect on the operations of the Service. The Government, in turn, argues that Borrell complained no more than her co-workers, and that her complaints were not addressed to anyone in the "chain of command." We do not find these attempted diminutions of her whistleblower activities to be particularly persuasive or even relevant. See 5 C.F.R. § 1250.3(c) (OSC regulations state a protected disclosure may be "to any person within or outside the agency").

A court sitting without a jury is required by Rule 52(a) to "find the facts specifically and state separately its conclusions of law thereon. . . ." This mandate was not satisfied by the court's single statement of the ultimate fact.

> For this court to exercise adequately its power of review, the district court must make specific findings about the nature and truth of Borrell's allegations, the circumstances and timing of her complaints (including when she began to complain, to whom she complained, whether and when her complaining came to the attention of her superiors, and whether others in the agency were complaining about similar acts within the agency) and the history of Borrell's work performance (including the nature of the assignments, supervisor ratings, and timing of supervisory evaluations in relation to her complaints). All this is minimally necessary if the appellate court is to insure that Federal employees' first amendment rights are not precipitously chilled.
>
> CONCLUSION
>
> For the foregoing reasons, the dismissal of appellant's CSRA and . . . claims is affirmed, and the remainder of the case is remanded for proceedings consistent with this opinion.
>
> So ordered.

Note. The Whistleblower Protection Act of 1989 allows whistleblowers (i.e., employees who allege a violation of 5 U.S.C. § 2302(b)(8)) to take their own case to the Merit Systems Protection Board, if OSC fails to act within 120 days. See 5 U.S.C. § 1214(a)(3).

9.4 Constitutional Tort Actions.

Another avenue employees have attempted to use to seek review of personnel actions is a constitutional tort claim against their supervisor under Bivens v. Six Unknown Names Agents, 403 U.S. 38 (1971). This approach has largely been unsuccessful because of the Supreme Court's decision in Bush v. Lucas, 403 U.S. 367 (1983), in which the Court stated that claims arising out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States preclude supplementing that regulatory scheme with new nonstatutory damages remedy. Following the Bush decision, however, several circuit courts refused to apply Bush to personnel practices which Congress had elected to exclude from coverage under civil service rules. See Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) (Bush does not preclude Bivens claims by

probationary employee whose remedies under Civil Service Reform Act are very limited). See also Doe v. Department of Justice, 753 F.2d 1092 (D.C. Cir. 1985) (excepted service employee); Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983); McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987). The rationale for these decisions was largely undercut by the Supreme Court's subsequent decision in Schweiker v. Chilicky, 487 U.S. 412 (1988). In Schweiker, the Supreme Court held that courts must give "appropriate deference to indications that congressional inaction has not been inadvertent," and should not create Bivens remedies when "design of Federal Government programs suggests that Congress has provided what it considers to be adequate remedial mechanisms for constitutional violations that may occur in course of its administration." As the Eighth Circuit noted in McIntosh following remand from the Supreme Court for consideration in light of Schweiker, Schweiker creates "a sort of presumption against judicial recognition of direct [Bivens] actions for violations of the Constitution by Federal officials or employees." McIntosh v. Turner, 861 F.2d 524, 526 (8th Cir. 1988). In addition, the employee must also be able to overcome the immunity defense to recover on a Bivens theory.

CHAPTER 10

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

10.1 Statutory Basis.

a. Title VII, 1964 Civil Rights Act. Prior to 1972 the only recourse a Federal employee had for an incident of employment discrimination was to file an administrative complaint with the Civil Service Commission. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., provided statutory administrative and judicial remedies for employees in the private sector, but excluded Federal employees from its coverage. The United States was not included within the definition of "employer" for purposes of the Act.

The administrative remedy for Federal employees prior to 1972 was created by Executive Order 11478. This executive order is still in effect, although it has been amended several times since it was first issued. Under the current version of this executive order, an aggrieved employee is entitled to an initial agency review of the complaint followed by a right to appeal to the Equal Employment Opportunity Commission (EEOC). The executive order outlines this remedy, highlights the Federal policy toward equal opportunity, and empowers the EEOC to issue regulations and hear complaints.

Executive Order 11478
EQUAL EMPLOYMENT OPPORTUNITY
IN THE FEDERAL GOVERNMENT

> It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.
>
> As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. . . .

Sec. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age.

Sec. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments

and agencies as it deems necessary and appropriate to carry out this Order.

Sec. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

Sec. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

. . . .

Richard Nixon

The White House
August 8, 1969

[Executive Order 11478 (8 Aug 69) as amended by Executive Orders 11590 (23 Apr 71) and 12106 (26 Dec 78).]

The original executive order and its implementing regulations created a tedious, time-consuming complaint procedure which was generally ineffective. Enforcement of equal opportunity requirements by the old Civil Service Commission was uneven, and the system was frequently said to impede rather than enhance the attainment of equal opportunity in the Federal Government. Federal employees dissatisfied with the

resolution of their complaints had no statutory basis upon which to seek judicial review of the administrative procedure; and they were faced with insurmountable obstacles, such as sovereign immunity defenses, when they attempted to sue.

Congress remedied this in 1972 with the enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, which amended numerous sections of Title VII and added Sections 717 and 718. Section 717, codified at 42 U.S.C. § 2000e-16, extended to certain Federal employees the statutory right to file civil actions alleging discrimination on the basis of race, color, religion, sex, or national origin, if resolution of their administrative complaints was unsatisfactory. Section 718 (42 U.S.C. § 2000e-17) imposed the requirement on Federal contractors to have affirmative action plans. As you read the excerpt of the statute and the materials that follow, consider the extent to which the shortcomings of the old regulatory system were remedied by the statute.

42 U.S.C. § 2000e-16
Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage.

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Enforcement powers of Commission; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation

of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress.

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be

notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant.

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or

order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000-5(f) through (k) of this title applicable to civil actions.

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity.

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

42 U.S.C. § 2000e-17.
Procedure for denial, withholding, termination, or suspension of Government contract subsequent to acceptance by Government of affirmative action plan of employer; time of acceptance of plan.

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by an agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to

affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

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b. Age Discrimination in Employment Act. A prohibition against age discrimination in Federal employment was added to the equal employment opportunity requirements imposed on the Federal Government by Pub. L. No. 93-259, the Age Discrimination in Employment Act (ADEA). As codified in 29 U.S.C. § 633a, ADEA, which became effective on 1 May 1974, uses language almost identical to that in 42 U.S.C. § 2000e-16.

§ 633a. Nondiscrimination on account of age in Federal Government employment.

(a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section.

The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

> (1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;
>
> (2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and
>
> (3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. . . .

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be

commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

. . . .

[Section 631(b) referenced in the above statute reinforces the provisions of this section by reiterating that Federal employees must be at least 40 years of age in order to be covered by ADEA.]

As under Title VII, the EEOC is now authorized to enforce the age provisions "through appropriate remedies, including reinstatement or hiring of employees with or without backpay." But, not all Federal employees and applicants for employment are protected by the age discrimination provisions. Only those persons who are at least 40 years old are included within the protections.

Under the age discrimination provisions, a Federal employee may either file an administrative complaint of age discrimination or bypass the administrative avenues of recourse and bring a civil action directly in Federal district court for legal or equitable relief. But, if no administrative age discrimination complaint has been filed with the EEOC, the statute requires the employee to give the EEOC at least 30 days' advance notice of his or her intent to file the civil action. And, this

advance notice must be filed within 180 days after the alleged discriminatory act occurred. 29 U.S.C. § 633a(d). See Stevens v. Department of Treasury, 111 S. Ct. 1562 (1991). This 180-day provision acts like a statute of limitations on age discrimination actions.

c. Rehabilitation Act of 1973. Discrimination on the basis of physical or mental handicap was prohibited by the Rehabilitation Act of 1973, codified at 29 U.S.C. § 791. Subsequently, the 1978 Rehabilitation Act Amendments extended the remedies, procedures, and rights under Title VII to employees encountering discrimination based on such a handicap (29 U.S.C. § 794a).

§ 791 Employment of handicapped individuals.

. . . .

Federal agencies; affirmative action program plans

> (b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the [Equal Employment Opportunity] Commission and to the [Interagency] Committee [on Handicapped Employees] an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps.

Section 791(b) has been held to require agencies and the Civil Service Commission (now The Equal Employment Opportunity Commission) to provide opportunity for individuals to raise claims of employment discrimination based on physical or mental handicap. See Ryan v. Federal Deposit Insurance Corp., 565 F.2d 762 (D.C. Cir. 1977). The EEOC regulations in this area are currently codified at 29 C.F.R. §§ 1613.701-1613.709.

§ 794a. Remedies and attorneys fees.

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-16], including the application of sections 706(f) through 706(k) [42 U.S.C.A. § 2000e-5(f) through (k)], shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

10.2 Regulatory Requirements.

a. EEOC Implementation of Title VII, 1964 Civil Rights Act.

EEOC regulations implementing Title VII are currently codified at 29 C.F.R., Part 1613, Subpart B.[1]

[1]On October 31, 1989, the EEOC proposed a comprehensive revision of the substantive and procedural rules governing the processing of Federal sector EEO complaints. See 54 Fed. Reg. 45747-45769 (October 31, 1989). The new rules will be published as 29 C.F.R. Part 1614. On October 12, 1990, the EEOC forwarded a draft

Every agency is required by 29 C.F.R. § 1613.212 to include in its regulations a procedure for accepting and processing administrative discrimination complaints from employees or applicants for employment who believe they have been discriminated against because of race, color, religion, sex, or national origin. The general structure for agency complaint procedures and rights to appeal to EEOC and obtain judicial review are described in the following regulations.

29 C.F.R. § 1613.213. Precomplaint processing.

> (a) The agency shall require that an aggrieved person who believes that he or she was discriminated against because of race, color, religion, sex, national origin, age or handicapping condition consult with an Equal Employment Opportunity Counselor to try to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of the counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct the final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. If, within 21 days, the matter has

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of proposed final rules to all Federal agencies for coordination. A revised draft for final agency coordination was sent on April 15, 1991. It is expected that rules will be published in 1991 and will become effective 4 to 6 months following publication. Until then, the current rules contained in 29 C.F.R. Part 1613 will remain in effect.

not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing, at the time of the final interview, of his or her right to file a complaint of discrimination. The notice shall inform the complainant of his or her right to file a discrimination complaint at any time up to 15 calendar days after receipt of the notice of the appropriate official with whom to file a complaint and of complainant's duty to assure that the agency is immediately informed if the complainant retains counsel, or any other representative. The Counselor shall not attempt in any way to restrain the aggrieved pe·son from filing a complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from that person.

(b) Upon initial contact or as soon thereafter as possible, the Equal Employment Opportunity Counselor shall inform each aggrieved person of the possible applicability of 5 U.S.C. § 7121(d) to the alleged discriminatory action. The Equal Employment Opportunity Counselor shall communicate the substance of section 1613.219 concerning the election of remedies to each aggrieved person.

(c) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(d) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties under this section.

29 C.F.R. § 1613.214. Filing and processing of complaint.

(a) Time limits. (1) An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or

submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if--

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the date of receipt of the notice of the right to file a complaint.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge, in writing, to the complainant or representative receipt of the complaint and advise the complainant in writing of all administrative rights and of the right to file a civil action as set forth in § 1613.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by

circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

(b) Representation and official time. (1) At the stage in the processing of a complaint, including the counseling stage under § 1613.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice. (2) If the complainant is an employee of the agency, he/she shall have a reasonable amount of official time to prepare the complaint if otherwise on duty. If the complainant is an employee of the agency and he designates another employee of the agency as his/her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint. (3) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission (or the agency prior to a hearing on the complaint) may, after giving the representative an opportunity to respond, disqualify the representative.

29 C.F.R. § 1613.215. Rejection or cancellation of complaint.

(a) The agency head or designee shall reject or cancel a complaint:

(1) That fails to state a claim under § 1613.212 or that states the same claim that is pending before or has been decided previously by the agency;

(2) That alleges that an agency is proposing to take action that may be discriminatory;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party;

(4) That is filed untimely, unless the agency extended the time limits in accordance with § 1613.214(a)(4);

(5) That the complainant elected to pursue under a negotiated grievance procedure as identified in § 1613.219;

(6) That the complainant has failed to prosecute. The agency may cancel an allegation or a complaint for failure to prosecute only after it has provided the complainant with a written request, that includes a notice of the proposed cancellation, to provide certain information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within 15 calendar days of its receipt. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available; or

(7) If the complainant refuses within 15 calendar days of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's Director of Equal Employment Opportunity, or a designee reporting directly to the Director, has certified in writing that the agency's written offer of relief constitutes full relief. An offer of full relief under this subsection is the appropriate relief in § 1613.271. The offer need not contain the decision whether disciplinary action is necessary, but the basis for the decision shall be recorded separately from the complaint file.

(b) The agency head or designee shall transmit the decision to reject or cancel a complaint by letter to the complainant and the complainant's representative. The decision letter shall inform the complainant of the right to appeal the decision to the Commission, the time limit for filing an appeal with the Commission, and the complainant's right to file a civil action as described in § 1613.281.

29 C.F.R. § 1613.216. Investigation.

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. . . .

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a written authorization: (1) To investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

. . . .

29 C.F.R. § 1613.217. Adjustment of complaint and offer of hearing.

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant

has reviewed the investigative file. For this purpose, the agency shall furnish the complainant, or the complainant's representative if there is one, a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. . . .

(b) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement, the complainant shall notify the Director of Equal Employment Opportunity, in writing, of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Upon receipt of the complainant's written allegation of noncompliance with the settlement agreement, the agency shall have thirty (30) calendar days in which to resolve the matter and to respond to the complainant, in writing, concerning the matter. If, after thirty (30) calendar days from the date of the agency's receipt of the complainant's written allegations of noncompliance with the settlement agreement, the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement. The complainant may file such an appeal 35 days after service of the allegations of noncompliance, but must file

an appeal within 20 days of the receipt of an agency's determination. Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it may deem necessary or it may direct that an investigation or hearing on the matter be conducted, as may be appropriate. If the Commission determines that agreement has not been complied with and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased under the terms of the settlement agreement. Complaints that alleged reprisal or further discrimination violate a settlement agreement shall be processed as individual complaints under § 1613.214 rather than under this section.

(c) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing: (1) Of the proposed disposition of the complaint, (2) of the right to a hearing, unless a recommended decision is issued under § 1613.218(g), and decision by the agency head or designee if he/she notifies the agency in writing within 15 calendar days of the receipt of the notice that he/she desires a hearing, and (3) of the right to a decision by the head of the agency or designee without a hearing.

(d) If the complainant fails to notify the agency of his/her wishes within the 15-day period prescribed in paragraph (c) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (c) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and the representative which shall inform the complainant of the right of appeal to the Commission and the time limit applicable to such an appeal and of the right to file a civil action as described in § 1613.281. If the Equal Employment

Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency or designee for decision under § 1613.221.

29 C.F.R. § 1613.218. Hearing.

(a) Administrative Judge. The hearing shall be conducted by a Commission Administrative Judge with an appropriate security clearance, except in instances where the Commission finds it is practical to delegate this responsibility to a complaints examiner or Administrative Judge from another agency who shall not be an employee of the agency in which the complaint arose. (For purposes of this paragraph, the Department of Defense is considered to be a single agency.) When the Commission does not provide the Administrative Judge, it will supply the agency with the name of an Administrative Judge from another agency with an appropriate security clearance who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) Arrangements for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 1613.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the Administrative Judge in making recommended decision on the complaint), to the Administrative Judge who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the Administrative Judge determines that further investigation is needed, the Administrative Judge shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 1613.216 apply to any further investigation by the agency on the complaint. The Administrative Judge shall

schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the Administrative Judge to have a direct connection with the complaint. . . .

(2) The Administrative Judge shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the Administrative Judge shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policies or practices relevant to the complaint shall be received in evidence. The complainant and the agency, or the representative of either shall be given the opportunity at the hearing to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of Administrative Judge. In addition to the other powers vested in the Administrative Judge in accordance with this subpart, the Administrative Judge is authorized to:

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof and receive relevant evidence;

(4) Order the production of documents, records, comparative data, statistics, affidavits or the attendance of witnesses;

(5) Limit the number of witnesses whose testimony would be unduly repetitious; and

(6) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. . . .

(f) Witnesses at hearing. The Administrative Judge shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when the Administrative Judge determines that the appearance of an employee is necessary. The

Administrative Judge may also request the appearance of an employee of any Federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The Administrative Judge shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the Administrative Judge and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the Administrative Judge. If the explanation is inadequate, the Administrative Judge shall so advise the agency and it shall make the employee available as a witness at the hearing. If the explanation is adequate, the Administrative Judge shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee at another time or through a written interrogatory. An employee of an agency shall be in a duty status during the time he/she is made available as a witness.

(g) If the Administrative Judge determines that there are no issues of material fact, the Administrative Judge may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue a recommended decision without holding a hearing. The recommended decision will conform to § 1613.218(i) in all other aspects.

(h) Record of hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the Administrative Judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is

accepted, the Administrative Judge shall make the document available to the agency representative for reproduction.

(i) Findings, analysis, and recommendations. The Administrative Judge shall transmit to the head of the agency or designee: (1) The complaint file (including the record of the hearing), (2) the findings and analysis of the Administrative Judge with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the Administrative Judge on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The Administrative Judge shall notify the complainant of the date on which this was done. In addition, the Administrative Judge shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

29 C.F.R. § 1613.219. Relationship to grievance procedures.

(a) Allegations of discrimination on grounds of race, color, religion, sex, national origin, age or handicapping condition may be raised under a grievance procedure by employees in agencies that are subject to the provisions of 5 U.S.C. 7121(d) and who are covered by a collective bargaining agreement that provides for allegations of discrimination to be raised in the negotiated grievance procedure. Allegations of discrimination by employees not covered by such a negotiated grievance procedure or by employees of agencies not subject to 5 U.S.C. 7121(d) shall be processed as complaints under § 1613.214 et seq.

(b) In cases where a person is covered by a negotiated grievance procedure

permitting allegations of discrimination, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect the forum in which to pursue the matter: either the process described in this part or a negotiated grievance procedure. An aggrieved employee who files a grievance in writing with an agency whose negotiated agreement with an employee organization permits the acceptance of grievances which allege discrimination prohibited by this subpart, may not thereafter file a complaint on the same matter under the provisions of this subpart irrespective of whether the grievance has raised an allegation of discrimination within the negotiated grievance procedure. Any such complaints filed after a grievance has been filed on the same matter shall be rejected without prejudice to the complainant's rights to proceed through the negotiated grievance process, including the complainant's right to request the Commission to review a final decision as provided in 5 U.S.C. 7121(d) and at § 1613.231(b). The agency decision letter rejecting such a complaint shall advise the complainant of the right to appeal the agency decision to the Commission. An election, pursuant to this paragraph, to proceed under this Part is indicated only by the filing of a formal complaint, in writing. Use of the pre-complaint process as described in § 1613.213 does not constitute an election for the purposes of this section.

29 C.F.R. § 1613.220. Avoidance of delay.

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of the complaint by the Administrative Judge under § 1613.218.

(b) The head of the agency or designee shall cancel a complaint if the complainant fails to prosecute the complaint without undue delay by following the procedures for cancelling a complaint under § 1613.215.

(c) . . . [This section requires status reports to the Commission on pending complaints and provides for special measures when the agency procrastinates.]

(d) When the Administrative Judge has submitted a recommended decision it shall become a final decision binding on the agency 60 calendar days after the receipt of the complete complaint file and the recommended decision by the agency unless the agency has already issued a final decision. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the Administrative Judge under § 1613.218(i) and a copy of the hearing record and also shall notify him in writing of the right to appeal to the Commission and the time limits applicable to such an appeal and of the right to file a civil action as described in § 1613.281. The agency shall provide the Administrative Judge with a copy of its final decision on each complaint on which a recommended decision has been issued.

29 C.F.R. § 1613.221. Decision by head of agency or designee.

(a) The head of the agency or designee shall make the decision of the agency on a complaint based on the preponderance of evidence in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b) (1) The decision of the agency shall be in writing, shall reflect the date of its issuance, and shall be transmitted to the complainant and his or her representative either by certified mail, return receipt requested, or by any other method which enables the agency to show the date of receipt.

(2) When the Administrative Judge has issued a recommended decision on the complaint under § 1613.218(g) or (i)(3), the decision letter shall transmit a copy of such recommended decision and a copy of the hearing record if a hearing was held. The decision of the agency shall adopt, reject, or modify the decision recommended by the

Administrative Judge. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejection or modifying the findings of fact or conclusions of law made by the Administrative Judge.

(3) When there has been no hearing and no recommended decision under § 1613.218(g), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall: (1) Advise the complainant and his or her representative that any request for attorney's fees or costs must be documented and submitted within 20 calendar days of receipt, (2) Require remedial action to be taken in accordance with § 1613.271, (3) Review the matter giving rise to the complaint to determine whether disciplinary action is appropriate and (4) Record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be recorded in the complaint file.

(d) When the final agency decision provides for an award of attorney's fees or costs, the amount of these awards shall be determined under § 1613.271(c). In the unusual situation in which the agency determines not to award attorney's fees or costs to a prevailing complainant, the agency shall set forth in its decision the specific reasons for denying the award.

(e) The decision letter shall inform the complainant of his or her right to appeal the decision of the agency to the Commission, and shall include the text of § 1613.233(a) and (b), as appropriate. The decision letter shall also inform the complainant of his or her right to file a civil action in accordance with § 1613.281, and of the time limits applicable to such an appeal.

29 C.F.R. § 1613.231. Right to appeal to the Commission.

(a) A complainant may appeal to the Commission the decision of the head of the agency or designee: (1) To reject or cancel the complaint or any portion for reasons covered by § 1613.215; or (2) under the circumstances set forth in § 1613.217(b); or (3) on the merits of the complaint, under § 1613.217(d), § 1613.220(d) or § 1613.221, or on the award of attorney's fees or costs. (b) A complainant may appeal to the Commission on issues of employment discrimination raised in a negotiated grievance procedure covered by section 1613.219(a), where the agency's negotiated labor-management agreement permits such issues to be raised. A complainant may appeal the decision: (1) Of the agency head or designee on the grievance; (2) of the arbitrator on the grievance; or (3) of the Federal Labor Relations Authority (FLRA) on exceptions to the arbitrator's award. A complainant may not appeal under this subsection, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration or is before the FLRA. Any appeal prematurely filed in such circumstances shall be dismissed without prejudice.

29 C.F.R. § 1613.232. Where to appeal.

The complainant shall file his appeal in writing, either personally or by mail, with the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041.

29 C.F.R. § 1613.233. Time limit.

(a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is

received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this Part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award attorney's fees or costs is made, the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) When issues of discrimination have been raised in a negotiated grievance process, a complainant may file a Notice of Appeal of such issues up to 20 days after: (1) receipt of an agency decision on the grievance and expiration of the time during which the union and the agency may move the matter to the next state of the grievance process; (2) receipt of an arbitrator's award; or (3) receipt of the decision of the FLRA on exceptions to the arbitrator's award.

* * * * *

29 C.F.R. § 1613.234. Appellate procedures and Finality.

(a) Procedures. On behalf of the Commission, the Office of Review and Appeals shall review the complaint file and all relevant written representations submitted by either party. The Office may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. There is no right to a hearing before the Office or the Commission upon appeal. The Office or the Commission shall issue a written decision setting forth its reasons for the decision and shall send copies to the complainant, the complainant's designated representative, and the agency. When corrective action is ordered, the agency shall report within the time specified to the Office that the corrective action has been taken.

(b) Finality. A decision issued under this section is final within the meaning of §§ 1613.281 and 1613.641 unless: (1) within 30 days of receipt a decision issued under paragraph (a) of this section, either party files a timely request to reopen pursuant to § 1613.235, or (2) the Commission on its own motion reopens the case.

29 C.F.R. § 1613.261. Freedom from restraint, interference, coercion and reprisal.

It is unlawful to restrain, interfere, coerce or discriminate against complainants, their representatives, witnesses, Directors of Equal Employment Opportunity, Equal Employment Opportunity Officers, Investigators, Counselors and other agency officials with responsibility for processing discrimination complaints because of involvement with a discrimination charge during any stage in the presentation and processing of a complaint, including the counseling stage under § 1613.213, or because an individual filed a charge of discrimination, testified, assisted or participated in any manner with an investigation, proceeding or hearing or because of any opposition to an unlawful employment practice under this Part.

29 C.F.R. § 1613.271. Remedial actions.

(a) When an agency, or the Commission, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, as explained in Appendix A of this part, which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that similar found violations of the law will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would

have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Backpay, computed in the same manner prescribed by 5 C.F.R. 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer of employment is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by 5 C.F.R. 550.805, from the date he would have been appointed until the date the offer was made, subject to the limitation of paragraph (b)(4) of this section. The agency shall inform the applicant, in its offer of employment, of

his right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency nevertheless shall take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) Backpay under this paragraph for complaints under Title VII or the Rehabilitation Act may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant.

(c) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by 5 C.F.R. 550.805, unless the record contains clear and convincing evidence that the employee would not have been promoted or employed at a higher grade, even absent discrimination. The backpay liability under Title VII or the Rehabilitation Act may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date the employee would have been promoted.

(2) If the record contains clear and convincing evidence that, although discrimination existed at the time selection for promotion was made, the employee would not have been promoted even absent discrimination, the agency shall eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) Attorney's fees or costs-(1) Awards of attorney's fees or costs. The provisions of this subpart relating to the award of attorney's fees or costs shall apply to allegations of discrimination or retaliation prohibited by section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, and sections 501 and 505 of the Rehabilitation Act, 29 U.S.C. 791 and 794a. In a decision by an agency, under §§ 1613.217, 1613.220(d), 1613.221 or 1613.612 or by the Commission, under §§ 1613.234, 1613.235, 1613.262, 1613.631 or 1613.632, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs incurred in the processing of the complaint or charge.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of the complaint required in § 1613.214 and after the complainant has notified the agency that he/she is represented by an attorney, except that fees are allowable for a reasonable period of time prior to the notification of representation for any service performed in reaching a determination to represent the complainant. Written submissions to the agency which are

signed by the representative shall be deemed to constitute notice of representation.

(2) Amount of awards. When a decision of the agency, under §§ 1613.217(c), 1613.220(d), 1613.221 or 1613.612 or of the Commission, under §§ 1613.234, 1613.235, 1613.262, 1613.631, or 1613.632 provides for an award of attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees, as appropriate, to the agency within 20 days of receipt of the decision. A statement of Attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing. If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 calendar days of receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs within 30 calendar days of receipt of the statement and affidavit. Such decision shall include the specific reasons for determining the amount of the award.

(i) The amount of attorney's fees shall be calculated in accordance with the existing case law using following standards:

(A) The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate.

(B) This amount maybe reduced or increased in considering the following factors, although ordinarily many of these factors are subsumed within the calculation set forth above: The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorney due to acceptance of the case, the customary fee,

whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in some cases of exceptional success shall any of these factors be used to enhance an award computed by the formula set forth in paragraph (d)(2)(i)(A).

(ii) The costs which may be awarded are those authorized by 28 U.S.C. 1920 to include-

(A) Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case;

(B) Fees and disbursements for printing and witnesses; and

(C) Fees for exemplification and copies of papers necessarily obtained for use in the case.

Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a Federal employee who is in a duty status when made available as a witness.

29 C.F.R. § 1613.281. Statutory right.

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States district court:

(a) Within thirty (30) calendar days of receipt of notice of final action taken by agency on a complaint.

(b) After one hundred-eighty (180) calendar days from the date of filing a complaint with the agency if there has been no decision.

(c) Within thirty (30) calendar days after receipt of final action taken by the Commission on the complaint, or

(d) After one hundred and eighty (180) calendar days from the date of filing an appeal with the Commission, if there has been no Commission decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

29 C.F.R. § 1613.282. Notice of right.

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 1613.215, 1613.217, 1613.220, or § 1613.221. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under § 1613.234.

29 C.F.R. § 1613.283.
Effect on administrative processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

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b. EEOC Implementation of Age Discrimination in Employment Act.

The EEOC regulations implementing this Act are at 29 C.F.R., Part 1613, Subpart E. They generally require that agencies establish procedures as they must for Title VII type cases.

29 C.F.R. § 1613.511 General.

An agency shall provide regulations governing the acceptance and processing of complaints of discrimination on account of age which, subject to § 1613.514, comply with the principles and requirements in §§ 1613.213 through 1613.222, 1613.241 and 1613.261 through 1613.271 of this part.

29 C.F.R. § 1613.512 Coverage.

> The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with the agency who believes that he or she has been discriminated against on account of age and who, at the time of the action complained of, was an employee or applicant for employment at least 40 years of age. A complaint may also be filed by an organization for the person with his or her consent.

29 C.F.R. § 1613.514 Exclusions.

> Sections 1613.281 and 1613.282 shall not apply to the processing of discrimination complaints on account of age. The reference to § 1613.281 in §§ 1613.215, 1613.217, 1613.220, and 1613.221 may not be included in agency regulations required by this subpart.

Judicial review under this act is governed by 29 U.S.C. § 633a(c) and (d).

c. EEOC Implementation of Rehabilitation Act of 1973.

The EEOC regulations implementing this Act are at 29 C.F.R. Part 1613, Subpart G. They also require that agencies establish procedures as they must for Title VII cases, and provide for use of EEOC's procedural rules for processing Title VII complaints. See 29 C.F.R. §§ 1613.708 and 1613.709.

The EEOC has also published helpful rules explaining what a handicap is and what agencies must do to accommodate a person's handicap to be in compliance with the law.

29 C.F.R. § 1613.702 Definitions.

> (a) "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) "Physical or mental impairment" means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(c) "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) "Has a record of such an impairment" means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.

(e) "Is regarded as having such an impairment" means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment.

(f) "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used: (1) Meets the experience and/or education requirements (which may include passing a written test) of the position in question, or (2) meets the criteria for appointment under one of the special appointing authorities for handicapped persons.

29 C.F.R. § 1613.703 General policy.

Agencies shall give full consideration to the hiring, placement, and advancement of qualified mentally and physically handicapped persons. The Federal Government shall become a model employer of handicapped individuals. An agency shall not discriminate against a qualified physically or mentally handicapped person.

29 C.F.R. § 1613.704 Reasonable accommodation.

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

29 C.F.R. § 1613.705 Employment criteria.

(a) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used

by the agency, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Civil Service Commission's Director of Personnel Research and Development Center to be available.

(b) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

29 C.F.R. § 1613.706 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the medical qualification requirements, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Civil Service Commission may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(b) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty. Provided, That: (1) All entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions which do not routinely require medical

examination indicates a condition for which further examination is required because of the job-related nature of the condition, and (2) the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for handicapped persons.

(c) To enable and evaluate affirmative action to hire, place, or advance handicapped individuals, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if: (1) The agency states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action and (2) the agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that: (1) Managers, selecting officials, and other involved in the selection process or responsible for affirmative action may be informed that the applicant is a handicapped individual eligible for affirmative action; (2) supervisors and managers may be informed regarding necessary accommodations; (3) first aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; (4) Government officials investigating compliance with law, regulations, and instructions relevant to equal employment opportunity and affirmative action for handicapped individuals shall be provided information upon request; and (5) statistics generated from information obtained may be used to manage, evaluate, and report on

equal employment opportunity and affirmative action programs.

29 C.F.R. § 1613.707 Physical access to buildings.

(a) An agency shall not discriminate against qualified handicapped applicants or employees due to the inaccessibility of its facility.

(b) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968.

The following charts illustrate how the individual complaint system currently works.

Procedures for Processing Individual Complaints of Discrimination Based on Race, Color, Religion, Sex, National Origin, Age, or Physical or Mental Handicap

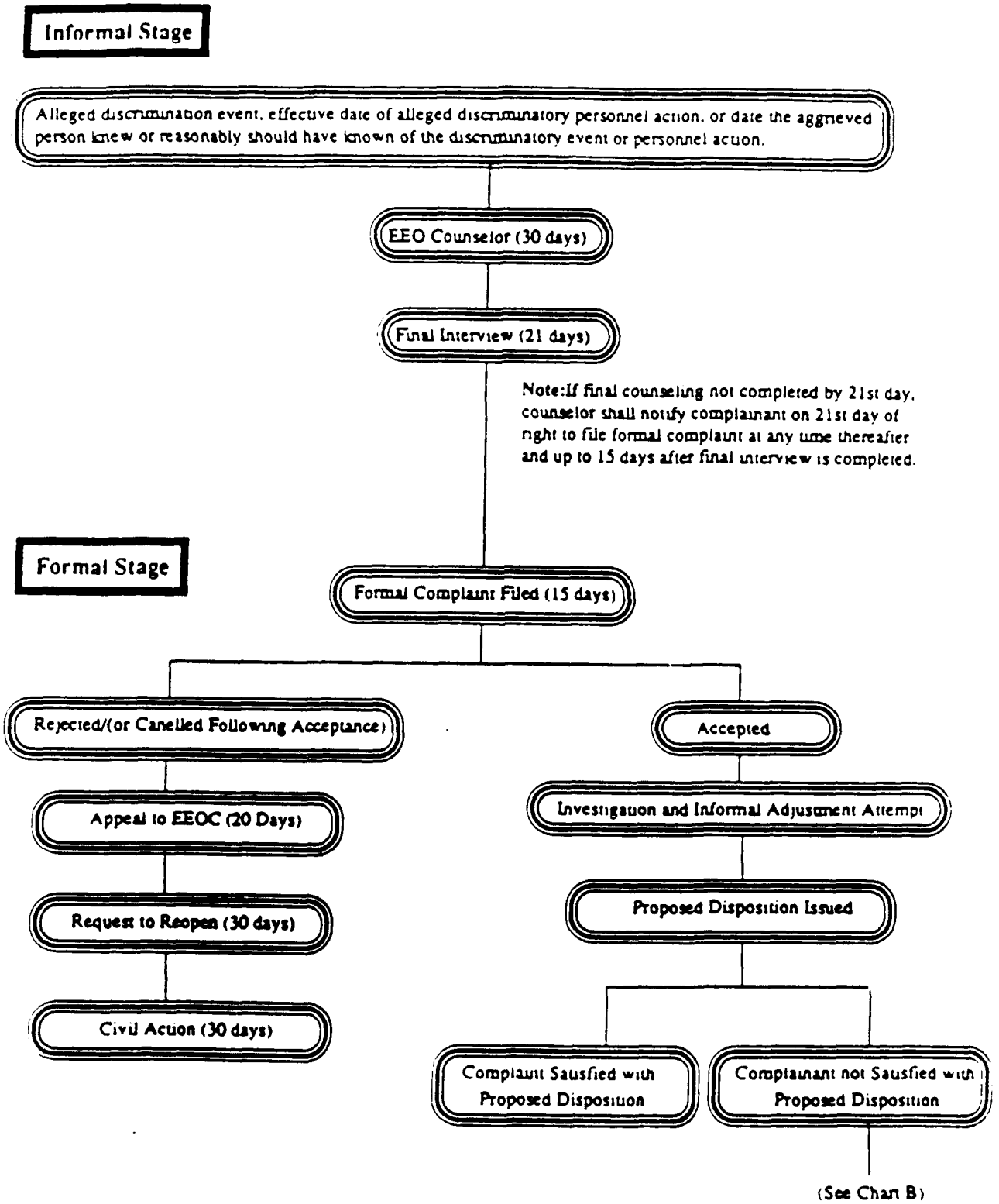


Chart A

Complainant Not Satisfied with Proposed Disposition

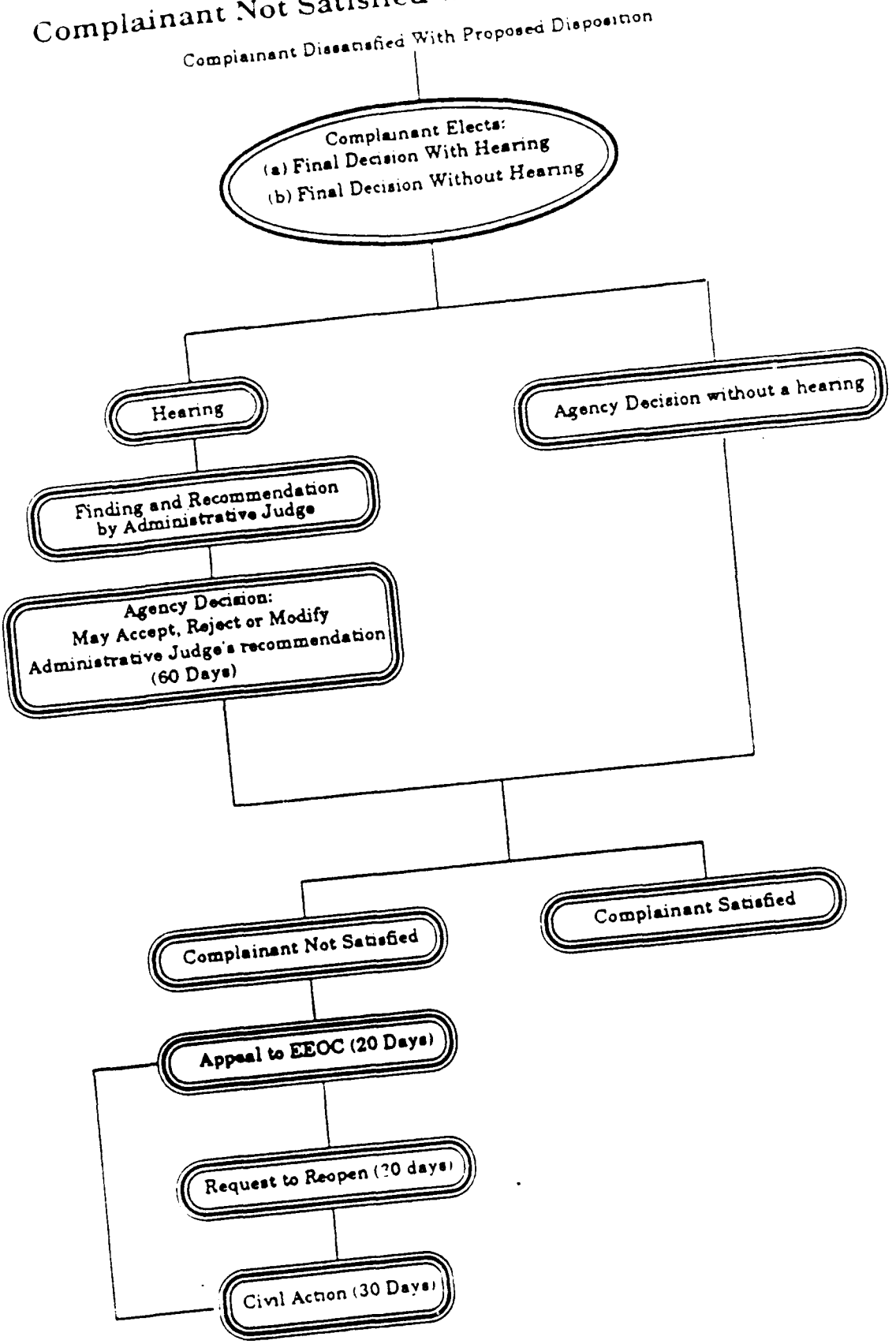


Chart B

d. Class Complaints. In addition to the individual complaint system outlined in the regulatory excerpts above, the EEOC has published in 29 C.F.R. Part 1613, Subpart F, special procedures for processing administrative class complaints of discrimination. These regulations, which became effective on April 18, 1977, are considerably more complex than those pertaining to individual complaints. For example, the EEOC, not the agency, makes the initial determination under the class complaint procedure of whether a class complaint may be maintained by the person initiating the complaint. This involves an evaluation of the complaint to see if the tests of numerosity, typicality, commonality, and adequate representation are met so that the interests of the class will be adequately protected and fairly represented.

In contrast to an individual complaint, however, a class complaint may be initiated up to 90 days after the alleged incident of discrimination occurred. But, the general outline of the proceedings is the same: informal counseling, final interview, formal complaint, investigation, attempt at informal resolution, appeal to the Office of Review and Appeals of the EEOC, and finally civil suit. In either case, whether an individual or a class complaint is initiated, the complainant must be personally aggrieved by the personnel action which is the substance of the complaint. Otherwise, the potential complainant has no "standing" to complain. Under current regulations, there is no provision for a third party complaint. The former third party procedure was eliminated when the class complaint regulations were published.

Since the implementation of administrative class procedures, courts have generally required exhaustion of the administrative class requirements before filing a judicial class complaint. See McIntosh v. Weinberger, 810 F.2d 1411, 1423-25 (8th Cir. 1987); Wade v. Secretary of Army, 796 F.2d 1369, 1373 (11th Cir. 1986).

10.3 Mixed Cases. The procedures discussed in sections 10.1 and 10.2 are applicable to discrimination cases which contain no issue appealable to the Merit Systems Protection Board. A "mixed case" is one based on an action that is appealable to the MSPB and includes an allegation of discrimination.

a. Statutory Basis. Congress developed a very detailed and intricate procedure for the processing of such cases by the MSPB, the EEOC, and the courts. The

procedure provides the employee with several options to pursue administration and judicial relief.

5 U.S.C. § 7702. Actions involving discrimination.

> (a) (1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who--
>
> (A) has been effected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and
>
> (B) alleges that a basis for the action was discrimination prohibited by--
>
> (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16c),
>
> (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),
>
> (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),
>
> (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or
>
> (v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph, the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.
>
> (2) In any matter before an agency which involves--
>
> (A) any action described in paragraph (1)(A) of this subsection; and
>
> (B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;
>
> the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of--

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b) (1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either--

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law--

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking

(within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5) (A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and--

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law,

(A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole--

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d) (1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including--

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2) (A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this section, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6) (A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of--

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e) (1) Notwithstanding any other provision of law, if at any time after--

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this title, there is no final agency action under subsection (b), (c), or (d) of this section; an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(d)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

b. Regulatory Implementation. Both the MSPB and the EEOC have published regulations establishing detailed procedures, consistent with 5 U.S.C. § 7702, for the processing of "mixed cases." MSPB regulations are at 5 C.F.R. Part 1201, Subpart D. EEOC regulations are at 29 C.F.R. Part 1613, Subpart D.

(1) EEOC Regulations. 29 C.F.R. Part 1613.

Subpart D--Processing Mixed Case Complaints

Sec.
1613.401 Purpose, scope, and applicability.
1613.402 Definitions.
1613.403 Election.
1613.404 Retroactivity.
1613.405 Procedures for agency processing of mixed case complaints
1613.406 Processing of complaints on proposals.
1613.407 Timely processing.
* * * * *

Subpart D--Processing Mixed Case Complaints

§ 1613.401 Purpose, scope and applicability.

(a) Purpose. This subpart sets forth the regulations under which the Equal Employment Opportunity Commission will carry out its responsibilities for the administration and enforcement of Section

205 of the Civil Service Reform Act of 1978, 5 U.S.C. 7702, with respect to matters of alleged employment discrimination prohibited by Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794a, Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, and Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d).

(b) Scope. This subpart shall govern the treatment of complaints in which allegations of discrimination are raised, in connection with an action appealable to the Merit Systems Protection Board (MSPB), provided that the action which forms the basis of the complaint was initiated on or after January 11, 1979 (the effective date of the Civil Service Reform Act). This subpart governs the procedures applicable: (1) When a complainant elects to bring the matter which forms the basis of the complaint before his/her agency, by filing a complaint of discrimination, pursuant to this part; (2) when an appealable action, pending before the MSPB, is remanded for agency processing, pursuant to 5 C.F.R. 1201.155(c); and (3) when a petition to review the decision of the MSPB on the issues of discrimination is filed with the Commission, pursuant to 5 U.S.C. 7702(b).

(c) Applicability. This subpart applies to all persons who have a right of appeal to the MSPB.

§ 1613.402 Definitions.

(a) Mixed Case Complaint. A mixed case complaint is: (1) a complaint of employment discrimination filed with a Federal agency, based on race, color, religion, sex, national origin, handicap, age, and/or reprisal, related to, or stemming from an action taken by an agency against the complainant, which action may be appealed to the MSPB, pursuant to any law, rule or regulation; or (2) a complaint of sex-based wage discrimination, filed with the Commission, related to or stemming from an action taken by an agency against a complainant, which action may be appealed to

the MSPB, pursuant to any law, rule or regulation. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations which the MSPB has jurisdiction to address.

(b) Mixed Case Appeals. A mixed case appeal is an appeal filed with the MSPB, which jurisdiction to entertain, and which alleges that the agency action which forms the basis for the appeal was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap, age and/or reprisal, or alleges that such appealable action resulted in sex-based wage discrimination.

(c) Complaint. A complaint is a formal complaint of discrimination, filed with the appropriate person designated to receive complaints at the agency, pursuant to § 1613.214 of Subpart B of this Part.

(d) Proposal. A proposal, as used in this subpart, means any document issued by an agency to an employee, pursuant to any requirements contained in regulations issued by the Office of Personnel Management (OPM), which proposes to take an action against that employee which, if effected, could be appealed by that employee to the MSPB.

(e) Handicap Definitions. The definitions set forth at § 1613.702 of Subpart G of this Part are hereby incorporated by reference into this subpart and are applicable to any mixed case complaint which contains issues of handicap discrimination.

§ 1613.403 Election.

An aggrieved person may initially file a mixed case complaint with an agency, pursuant to this part, or [s]he may file a mixed case appeal directly with the MSPB, pursuant to 5 C.F.R. 1201.151, but not both. An agency shall inform every employee who is the subject of an action which is appealable to the MSPB and who has raised the issue of discrimination either orally or in writing, during the processing of the action, of his/her right to file a mixed case complaint, if the employee believes the action to be based, in whole or in part, on

discrimination, or to file a mixed case appeal with the MSPB. The person shall be advised that [s]he may not initially file both and that whichever is filed first (the mixed case complaint or the appeal) shall be considered an election to proceed in that forum. For the purposes of this subsection, filing of a mixed case complaint occurs when the complaint is filed with an appropriate agency official, in accordance with § 1613.214(a)(3) of Subpart B of this Part.

. . . .

§ 1613.405 Procedures for agency processing of mixed case complaints.

(a) Rejections. Whenever an agency is presented with a mixed case complaint concerning an action that has previously been appealed by the complainant to the MSPB, the agency shall reject the complaint (in writing), citing this subsection as the authority therefor, regardless of whether the allegations of discrimination raised in the mixed case complaint were raised in the previous appeal to the MSPB. The agency shall advise the aggrieved person, as part of the decision rejecting such a complaint, that [s]he must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 C.F.R. 1201.155.

(b) Cancellation. Whenever the agency learns that a mixed case complaint, which has been filed with and accepted by the agency, contains issues which also form the basis of an appeal which has been filed with the MSPB, the agency shall determine which was filed first (i.e., the mixed case complaint or the appeal). If the appeal to the MSPB was filed first, the agency shall cancel (in writing) that portion of the mixed case complaint related to the action appealed to the MSPB and advise the complainant, as part of the decision which cancels the complaint (in whole or in part), that [s]he must bring the allegations of discrimination to the attention of the MSPB, pursuant to 5 C.F.R. 1201.155. If the mixed case complaint was filed first, the agency shall so advise the MSPB and request that the MSPB dismiss the appeal without

prejudice and, thereafter, the agency shall process the complaint, pursuant to § 1613.405(e) and issue an agency decision within 120 calendar days. An agency may also cancel a mixed case complaint when it learns that the complainant has chosen to appeal the matter to the MSPB upon expiration of 120 calendar days from the date that the mixed case complaint was filed with the agency.

(c) Effect of Rejection or Cancellation. An agency decision to reject or cancel a mixed case complaint pursuant to §§ 1613.405(a) or (b) is not subject to appeal to the EEOC, except where §§ 1613.405(a) or (b) has been misapplied to a nonmixed case matter (in which case an appeal may be filed pursuant to § 1613.231 of Subpart B).

(d) MSPB Remands. The MSPB may remand allegations of discrimination to an agency or, in Equal Pay Act matters, to the EEOC, pursuant to 5 C.F.R. 1201.155(a) or (c). In such cases, the agency or the EEOC shall investigate those allegations, as required by the MSPB or by applicable EEOC regulation.

(e) Procedures. When a complainant, pursuant to § 1613.403, elects to proceed initially through the agency rather than with the MSPB, the procedures set forth in §§ 1613.211 through 1613.221(d) of Subpart B of this Part shall govern the processing of the mixed case complaint, with the following exceptions: (1) There shall be no hearing, as provided in § 1613.218 and as referenced in §§ 1613.217(b)(2) and 1613.221(b)(2) and (3); (2) At the time that an agency advises a complainant of the acceptance of a mixed case complaint, pursuant to § 1613.214, the agency shall also advise the complainant of the following: (i) The complaint shall be processed in accordance with this subpart; (ii) if no agency decision is issued within 120 calendar days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter, up to, but not later than, one year from the filing of the complaint, or may file a civil action, as specified at § 1613.417(g); and (iii) if the complainant

is dissatisfied with the agency's decision on the mixed case complaint, [s]he may appeal the matter to the MSPB (not EEOC), within 20 calendar days of receipt of the agency's decision; (3) At the time that an agency issues to the complainant its notice of proposed disposition, pursuant to § 1613.217(b), the agency shall advise the complainant that the complainant: (i) May request a decision (pursuant to § 1613.221 of Subpart B of this Part) from the agency, without a hearing and, thereafter, appeal that decision to the MSPB (and, in connection therewith, request a hearing), within 20 calendar days of receipt of that agency decision, or (ii) if no decision is received within 120 calendar days of filing the mixed case complaint, may appeal the matter directly to the MSPB (not EEOC) at any time after expiration of 120 calendar days, up to, but no later than, one year after filing the mixed case complaint and of his/her right to file a civil action, as described at § 1613.417(g); (4) At the time that the agency issues its decision on a mixed case complaint (pursuant to § 1613.221) the agency shall advise the complainant of his/her right to appeal the matter to the MSPB (not EEOC), within 20 calendar days of receipt, and of his/her right to file a civil action, as described at § 1613.417(a).

§ 1613.406 Processing of complaints on proposals.

(a) Where the Agency Decision is Appealable to the MSPB. (1) Any complaint which is filed, pursuant to this Part, in connection with an agency proposal to take an action that is appealable to the MSPB, shall be consolidated, pursuant to § 1613.251 of Subpart B of this Part, with any subsequent mixed case complaint filed in connection with that agency decision to take such action, either as proposed or as modified during the processing of the proposal, and shall be processed in accordance with this subpart. (2) If, following a complaint on a proposal, the complainant subsequently files an appeal with the MSPB on the subsequent agency

decision resulting from the proposal, the agency shall cancel the complaint on the proposal. The complainant shall be advised by the agency that any allegations of discrimination contained in that complaint should be raised with the MSPB, in connection with the pending appeal. (3) If a complaint is filed on a proposal, and no appeal is filed with the MSPB on the subsequent appealable agency decision resulting from that proposal, and no complaint is filed with the agency on that appealable decision, the complaint on the proposal shall be deemed to include the final decision as an issue (as of the effective date of such final decision) and shall be processed as a mixed case complaint, in accordance with § 1613.405.

(b) Where the Agency Decision is Not Appealable to the MSPB. Where a proposal does not result in an agency decision which is appealable to the MSPB (e.g., a proposal to remove which is modified by the agency decision to a 5 day suspension), such a complaint shall be processed pursuant to Subparts B, E, F and/or G of this Part, as appropriate.

§ 1613.407 Timely processing.

A mixed case complaint shall be processed in a timely manner by the agency, so that the agency's decision (pursuant to § 1613.221 of Subpart B of this Part) on such a complaint is issued within 120 calendar days from the date the complaint was filed. When a complaint concerning a proposal to take an action that is appealable to the MSPB is consolidated, pursuant to § 1613.406, with a mixed case complaint concerning an agency decision to take the action as proposed or as modified, and that agency decision is appealable to the MSPB, the 120 calendar day time frame for processing the consolidated mixed case complaint begins to run as of the date the complaint concerning that agency decision is filed. For the purposes of § 1613.406(a)(3), the 120 calendar day time frame for processing the complaint shall begin to run as of the effective date of the final decision.

(2) MSPB Regulations. 5 C.F.R. Part 1201, Subpart E.

§ 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.

Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

(a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board within 20 days after the effective date of the agency action being appealed.

(b) If the appellant has filed a timely formal complaint of discrimination with the agency:

(1) An appeal must be filed within 20 days after the appellant receives the agency resolution or final decision on the discrimination issue; or

(2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under § 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

(d) If the appellant has filed a grievance with the agency under its negotiated grievance procedure in accordance with 5 U.S.C. 7121, he or she may ask the Board to review the final decision under 5 U.S.C. 7702 within 25 days of the date of issuance of that decision. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

(1) A statement of the grounds on which review is requested;

(2) References to evidence of record or rulings related to the issues before the Board;

(3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and

(4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing.

(e) The record will close upon expiration of the period for filing the response to the petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

5 C.F.R. § 1201.156 Time for processing appeals involving allegations of discrimination.

(a) Issue raised in appeal. When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after of the appeal is filed.

(b) Issue not raised in appeal. When an appellant has not alleged prohibited discrimination in the appeal, but has raised the issue later in the proceeding, the judge will decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

(c) Discrimination issue remanded to agency. When the judge remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the issue is raised.

5 C.F.R. § 1201.157 Notice of right to judicial review.

Any final decision of the Board under 5 U.S.C. 7702 will notify the appellant of his or her right, within 30 days after receiving the Board's final decision, to petition the Equal Employment Opportunity Commission to consider the Board's decision, or to file a civil action in an appropriate United States district court. If an appellant elects to waive the discrimination issue, an appeal may be filed with the United States Court of Appeals for the Federal Circuit as stated in § 1201.119 of this part.

REVIEW OF BOARD DECISION

5 C.F.R. § 1201.161 Action by the Equal Employment Opportunity Commission; judicial review.

(a) Time limit for determination. In cases in which an appellant petitions the Equal Employment Opportunity Commission for consideration of the Board's decision under 5 U.S.C. 7702(b)(2), the Commission will determine, within 30 days after the date of petition, whether it will consider the decision.

(b) Judicial review. The Board's decision will become judicially reviewable on:

(1) The date on which the decision is issued, if the appellant does not file a petition with the Commission under 5 U.S.C. 7702(b)(1); or

(2) The date of the Commission's decision that it will not consider the petition filed under 5 U.S.C. 7702(b)(2).

(c) Commission processing and time limits. If the Commission decides to consider the decision of the Board, within 60 days after making its decision, it will complete its consideration and either:

(1) Concur in the decision of the Board; or

(2) Issue in writing and forward to the Board for its action under § 1201.162 of this subpart another decision, which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law:

(i) The decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive related to prohibited discrimination; or

(ii) The evidence in the record as a whole does not support the decision involving that provision.

(d) Transmittal of record. The Board will transmit a copy of its record to the Commission upon request.

(e) Development of additional evidence. When asked by the Commission to do so, the Board or a judge will develop additional evidence necessary to supplement the record. This action will be completed within a period that will permit the Commission to make its decision within the statutory 60-day time limit referred to in paragraph (c) of this section. The Board or the judge may schedule additional proceedings if necessary to comply with the Commission's request.

(f) Commission concurrence in Board decision. If the Commission concurs in the decision of the Board under 5 U.S.C. 7702(b)(3)(A), the appellant may file suit in an appropriate United States district court.

5 C.F.R. § 1201.162 Board action on the Commission decision; judicial review.

(a) Board decision. Within 30 days after receipt of a decision of the Commission issued under § 1201.161(c)(2), the Board shall consider the decision and:

(1) Concur and adopt in whole the decision of the Commission; or

(2) To the extent that the Board finds that, as a matter of law:

(i) The Commission decision is based on an incorrect interpretation of any provision of any civil service law, rule, regulation, or policy directive; or

(ii) The evidence in the record as a whole does not support the Commission decision involving that provision, it may reaffirm the decision of the Board. In doing so, it may make revisions in the decision that it determines are appropriate.

(b) Judicial review. If the Board concurs in or adopts the decision of the Commission under paragraph (a)(1) of this section, the decision of the Board is a judicially reviewable action.

5 C.F.R. § 1201.171 Referral of case to Special Panel.

If the Board reaffirms its decision under § 1201.162(a)(2) of this part with or without modification, it will certify the matter immediately to a Special Panel established under 5 U.S.C. 7702(d). Upon certification, the Board, within 5 days (excluding Saturdays, Sundays, and Federal holidays), will transmit the administrative record in the proceeding to the Chairman of the Special Panel and to the Commission. That record will include the following:

(a) The factual record compiled under this section, which will include a transcript of any hearing;

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

5 C.F.R. § 1201.172 Organization of Special Panel; designation of members.

(a) A Special Panel is composed of:

(1) A Chairman, appointed by the President with the advice and consent of the Senate, whose term is six (6) years;

(2) One member of the Board, designated by the Chairman of the Board each time a Panel is convened;

(3) One member of the Commission, designated by the Chairman of the Commission each time a Panel is convened.

(b) Designation of Special Panel members. -- (1) Time of designation. Within 5 days of certification of a case to a Special Panel, the Chairman of Board and the Chairman of the Commission each will designate one member from his or her agency to serve on the Special Panel.

(2) Manner of designation. Letters designating the Panel members will be served

on the Chairman of the Panel and on the parties to the appeal.

5 C.F.R. § 1201.173 Practices and procedures of Special Panel.

(a) Scope. The rules in this subpart apply to proceedings before a Special Panel.

(b) Suspension of rules. Unless a rule is required by statute, the Chairman of a Special Panel may suspend the rule, in the interest of expediting a decision or for other good cause shown, and may conduct the proceedings in a manner he or she directs. The Chairman may take this action at the request of a party, or on his or her own motion.

(c) Time limit for proceedings. In accordance with 5 U.S.C. 7702(d)(2)(A), the Special Panel will issue a decision within 45 days after a matter has been certified to it.

(d) Administrative assistance to the Special Panel. (1) The Board and the Commission will provide the Panel with the administrative resources that the Chairman of the Special Panel determines are reasonable and necessary.

(2) Assistance will include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the Commission are responsible for all administrative costs the Special Panel incurs, and, to the extent practicable, they will divide equally the costs of providing administrative assistance. If the Board and the Commission disagree on the manner in which costs are to be divided, the Chairman of the Special Panel will resolve the disagreement.

(e) Maintaining the official record. The Board will maintain the official record of the appeal. It will transmit two copies of each submission that is filed to each member of the Special Panel in an expeditious manner.

(f) Filing and service of pleadings. (1) The parties must file the original and six copies of each submission with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419.

The Office of the Clerk will serve one copy of each submission on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be made by mail or by personal delivery during the Board's normal business hours (8:30 a.m. to 5:00 p.m.). Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail, provided by the U.S. Postal Service, if they file their submissions by mail.

(4) A submission filed by Express Mail is considered to have been filed on the date of the Express Mail Order. A submission that is delivered personally is considered to have been filed on the date the Office of the Clerk of the Board receives it.

(g) Briefs and responsive pleadings. If the parties wish to submit written argument, they may file briefs with the Special Panel within 15 days after the date of the Board's certification order. Because of the short statutory time limit for processing these cases, the Special Panel ordinarily will not permit responsive pleadings.

(h) Oral argument. The parties have the right to present oral argument. Parties wishing to exercise this right must indicate this desire when they file their briefs or, if no briefs are filed, within 15 days after the date of the Board's certification order. Upon receiving a request for argument, the Chairman of the Special Panel will determine the time and place for argument and the amount of time to be allowed each side, and he or she will provide this information to the parties.

(i) Postargument submission. Because of the short statutory time limit for processing these cases, the parties may not file postargument submissions unless the Chairman of the Special Panel permits those submissions.

(j) Procedural matters. Any procedural matters not addressed in these regulations will be resolved by written order of the Chairman of the Special Panel.

5 C.F.R. § 1201.174 Enforcing the Special Panel decision.

The Board, upon receipt of the decision of the Special Panel, will order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board apply to this matter. These regulations are set out in Subpart F of this part.

5 C.F.R. § 1201.175 Judicial review of cases decided under 5 U.S.C. 7702.

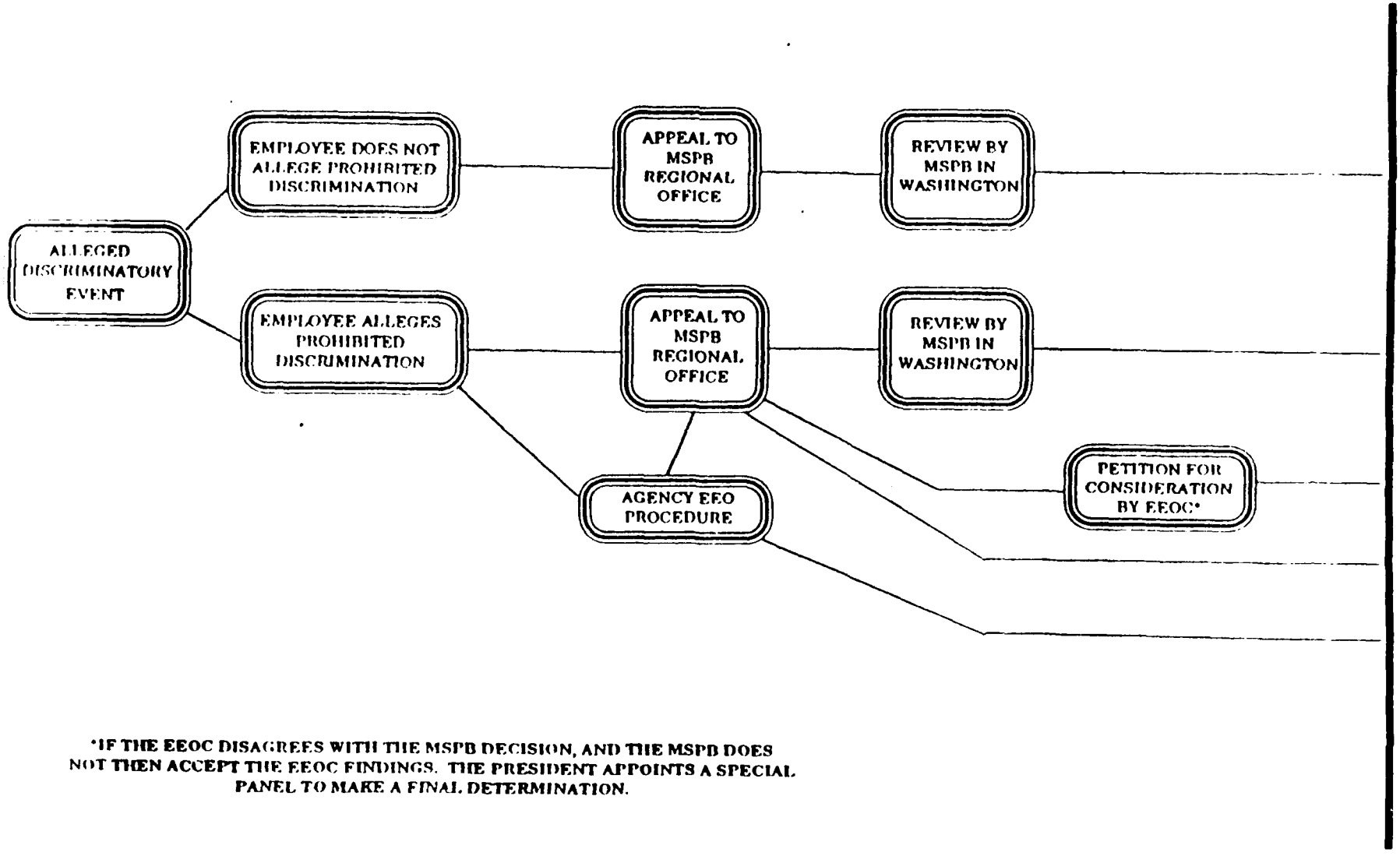
(a) Place and type of review. The appropriate United States district court is authorized to conduct all judicial review from cases decided under 5 U.S.C. 7702. Those cases include appeals taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a(c)); and section 15(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)).

(b) Time for filing. Regardless of any other provision of law, requests for judicial review of all cases decided under 5 U.S.C. 7702 must be filed within 30 days after the appellant received notice of the judicially reviewable action.

(3) The following charts depict the mixed case procedures. Note that the available options depend, in part, on whether the employee is a member of a bargaining unit.

MIXED CASE PROCESSING

EMPLOYEE NOT IN A BARGINING UNIT



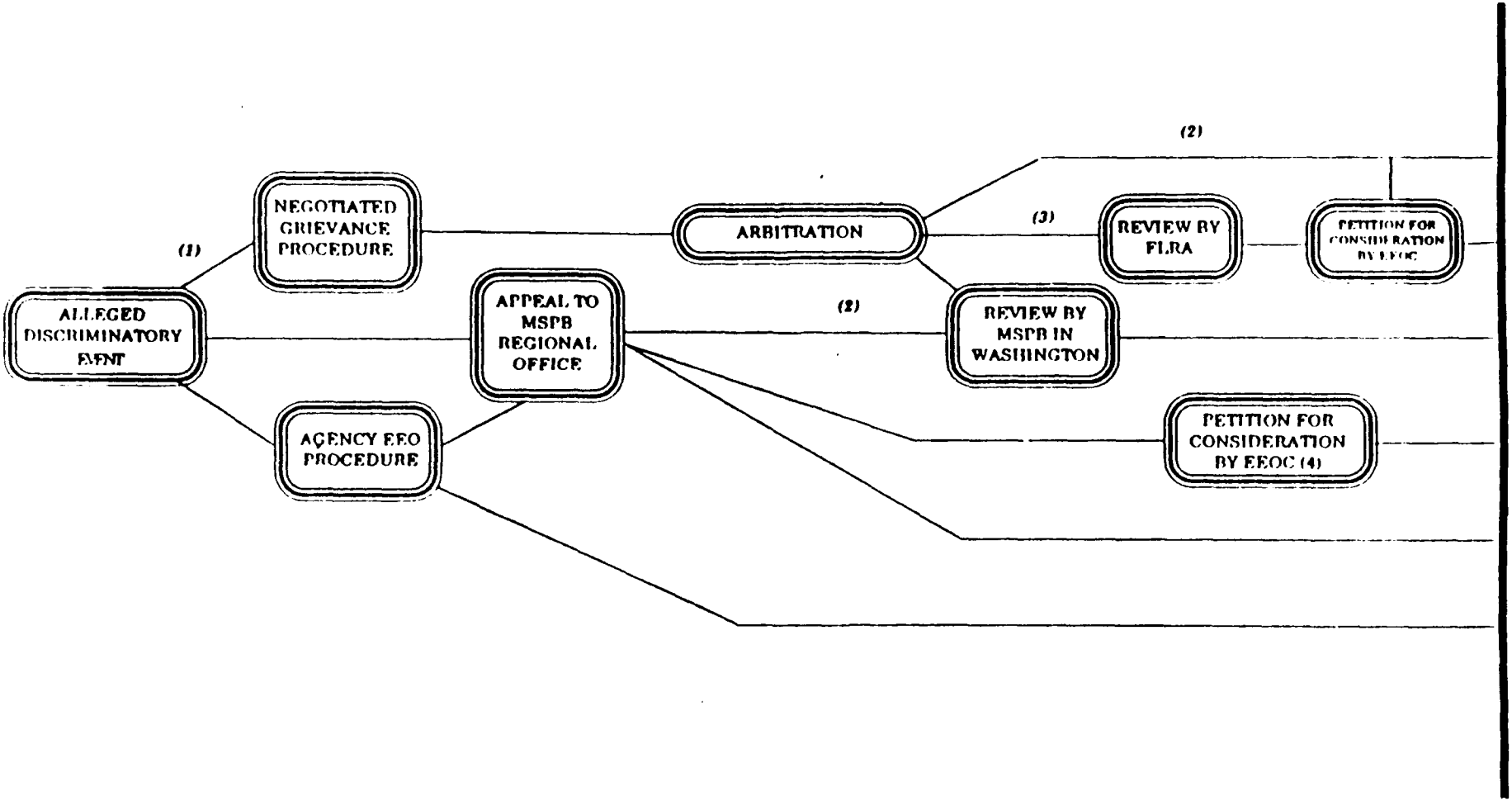
*IF THE EEOC DISAGREES WITH THE MSPB DECISION, AND THE MSPB DOES NOT THEN ACCEPT THE EEOC FINDINGS. THE PRESIDENT APPOINTS A SPECIAL PANEL TO MAKE A FINAL DETERMINATION.

10-66

Chart D

MIXED CASE PROCESSING

BARGINING UNIT EMPLOYEE - EMPLOYEE ALLEGES PROHIBITED DISCRIMINATION



10-67

(1) This avenue is not available if the negotiated grievance procedure excludes the matteres. Some negotiated grievance procedures exclude any matter which may be appealed under MSPB and/or EEOC procedures.

(2) The employee may appeal to the EEOC or the MSPB from an arbitrator's decision prior to seeking judical review.

(3) Adverse actions (except for suspensions for 14 days or less) and performance-based actions may not be reviewed by the FLRA.

(4) If the EEOC disagrees with the MSPB decision, and the MSPB does not accept the EEOC findings, the President appoints a Special Panel to make a final determination.

Chart E

10.4 Exclusivity of Title VII Remedy.

Suppose a Federal employee would like to bypass the filing of the administrative complaint, can that employee use some other legal theory to obtain judicial review of the challenged personnel action? In the private sector, the Federal courts have recognized that certain post-Reconstruction civil rights statutes, e.g., 42 U.S.C. § 1981, may provide alternative theories upon which to attack discriminatory employment practices. But, because of the delay until 1972 in affording statutory EEO protection to Federal employees, the availability of these other remedies had to be decided by the U.S. Supreme Court.

Brown v. General Services Administration
425 U.S. 820 (1976)

MR. JUSTICE STEWART delivered the opinion of the Court.

The principal question presented by this case is whether § 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in Federal employment.

The petitioner, Clarence Brown, is a Negro who has been employed by the General Services Administration since 1957. He is currently classified in grade GS-7 and has not been promoted since 1966. In December 1970 Brown was referred, along with two white colleagues, for promotion to grade GS-9 by his supervisors. All three were rated "highly qualified," and the promotion was given to one of the white candidates for the position. Brown filed a complaint with the GSA Equal Employment Opportunity Office alleging that racial discrimination had biased the selection process. That complaint was withdrawn when Brown was told that other GS-9 positions would soon be available.

Another GS-9 position did become vacant in June 1971, for which the petitioner along with two others was recommended as "highly qualified." Again a white applicant was chosen. Brown filed a second administrative complaint with the GSA Equal Employment Opportunity Office. After preparation and review of an investigative report, the GSA Regional Administrator notified the petitioner that there was no evidence that

race had played a part in the promotion. Brown requested a hearing, and one was held before a complaints examiner of the Civil Service Commission. In February 1973, the examiner issued his findings and recommended decision. He found no evidence of racial discrimination; rather, he determined that Brown had not been advanced because he had not been "fully cooperative."

The GSA rendered its final decision in March 1973. The Agency's Director of Civil Rights informed Brown by letter of his conclusion that considerations of race had not entered the promotional process. The Director's letter told Brown that if he chose, he might carry the administrative process further by lodging an appeal with the Board of Appeals and Review of the Civil Service Commission and that, alternatively, he could file suit within 30 days in Federal district court.

Forty-two days later Brown filed suit in a Federal District Court. The complaint alleged jurisdiction under Title VII . . . "with particular reference to" § 717; under 28 U.S.C. § 1331 (general Federal-question jurisdiction); under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202; and under the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981.

The respondents moved to dismiss the complaint for lack of subject-matter jurisdiction, on the ground that Brown had not filed the complaint within 30 days of final agency action as required by § 717(c) The District Court granted the motion.

The Court of Appeals for the Second Circuit affirmed the judgment of dismissal. 507 F.2d 1300 (1974). It held, first, that the § 717 remedy for Federal employment discrimination was retroactively available to any employee, such as the petitioner, whose administrative complaint was pending at the time § 717 became effective on March 24, 1972. The appellate court held, second, that § 717 provides the exclusive judicial remedy for Federal employment discrimination, and that the complaint had not been timely filed under that statute. Finally, the court ruled that if § 717 did not pre-empt other remedies, then the

petitioner's complaint was still properly dismissed because of his failure to exhaust available administrative remedies. We granted certiorari, 421 U.S. 987 (1975), to consider the important issues of Federal law presented by this case.

The primary question in this litigation is not difficult to state: Is § 717 . . . the exclusive individual remedy available to a Federal employee complaining of job-related racial discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe § 717's position in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways. As Mr. Chief Justice Marshall once wrote for the Court: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." United States v. Fisher, 2 Cranch 358, 386 (1805).

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex, or national origin. . . . Until it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect Federal employees. . . . Although Federal employment discrimination clearly violated both the Constitution, Bolling v. Sharpe 347 U.S. 497 (1954), and statutory law, 5 U.S.C. § 7151, before passage of the 1972 Act, the effective availability of either administrative or judicial relief was far from sure. Charges of racial discrimination were handled parochially within each Federal agency. . . . Although review lay in the Board of Appeals and Review of the Civil Service Commission, Congress found "skepticism" among Federal employees "regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement."

If administrative remedies were ineffective, judicial relief from Federal

employment discrimination was even more problematic before 1972. Although an action seeking to enjoin unconstitutional agency conduct would lie, it was doubtful that backpay or other compensatory relief for employment discrimination was available at the time that Congress was considering the 1972 Act. For example, in Gnotta v. United States, 415 F.2d 1271, the Court of Appeals for the Eighth Circuit had held in 1969 that there was no jurisdictional basis to support the plaintiff's suit alleging that the Corps of Engineers had discriminatorily refused to promote him. Damages for alleged discrimination were held beyond the scope of the Tucker Act, 28 U.S.C. § 1346, since no express or implied contract was involved. . . . And the plaintiff's cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Mandamus Act, 28 U.S.C. § 1361, was held to be barred by sovereign immunity, since his claims for promotion would necessarily involve claims against the Treasury.

. . . .

Concern was evinced during the hearings before the committees of both Houses over the apparent inability of Federal employees to engage the judicial machinery in cases of alleged employment discrimination. . . . Although there was considerable disagreement over whether a civil action would lie to remedy agency discrimination, the committees ultimately concluded that judicial review was not available at all or, if available, that some forms of relief were foreclosed. . . .

The conclusion of the committees was reiterated during floor debate. Senator Cranston, coauthor of the amendment relating to Federal employment, asserted that it would, "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases . . . ." 118 Cong. Rec. 4929 (1972). Senator Williams, sponsor and floor manager of the bill, stated that it "provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court." Id., at 4922.

The legislative history thus leaves little doubt that Congress was persuaded that Federal employees who were treated

discriminatorily had no effective judicial remedy. And the case law suggests that that conclusion was entirely reasonable. Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act to cover Federal employees. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.

This unambiguous congressional perception seems to indicate that the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of Federal employment discrimination. We need not, however, rest our decision upon this inference alone. For the structure of the 1972 amendment itself fully confirms the conclusion that Congress intended it to be exclusive and pre-emptive.

. . . .

Sections 717(b) and (c) establish complementary administrative and judicial enforcement mechanisms designed to eradicate Federal employment discrimination. . . . [The Court reviews the organization of § 717 and the enforcement scheme established.]

The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 *does not* contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the

eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

The petitioner relies upon our decision in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In Johnson the Court held that in the context of private employment Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the Johnson case. Second, the holding in Johnson rested upon the explicit legislative history of the 1964 Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and Federal statutes." 421 U.S., at 459, quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). Congress made clear "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1886, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." 421 U.S., at 459, quoting H. R. Rep. No. 92-238, p. 19 (1971). See also Jones v. Alfred H. Mayer Co., 392 U.S. 409 415-417 (1968). There is no such legislative history behind the 1972 amendments. Indeed, as indicated above, the congressional understanding was precisely to the contrary.

In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies. . . .

In the case at bar . . . the established principle leads unerringly to the conclusion that § 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in Federal employment.

We hold, therefore, that since Brown failed to file a timely complaint under § 717(c), the District Court properly dismissed the case. Accordingly, the judgment is affirmed.

It is so ordered.

Note. One of the reasons Federal employees have attempted to use legal theories other than Title VII to obtain judicial review is the restrictive 30-day limit on filing suit in Federal court.[2] How successful would a plaintiff be in reviving an EEO claim (and thereby obtaining an additional 30 days within which to sue) by filing a request to reopen with the EEOC? In Chickillo v. Commanding Officer, 406 F. Supp. 807 (E.D. Pa. 1976), aff'd without opinion, 547 F.2d 1159 (3d Cir. 1977), the court would not permit this sort of attempt to skirt the timeliness requirements.

10.5 Scope of Judicial Review - Federal EEO Complaints.

When Congress amended Title VII in 1972 to include Federal employees, it directed that certain of the existing procedural provisions in Title VII should govern civil actions by Federal employees, "as applicable." 42 U.S.C. § 2000e-16(d). The referenced provisions established the specific rules and guidelines for private sector litigation, and the meaning of the phrase "as applicable" caused confusion in the lower Federal courts. One of the primary issues was whether a Federal employee was entitled to a trial de novo or merely a review of the administrative record in Federal court. The U.S. Supreme Court resolved this issue in the following case.

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[2]Many of the courts that considered the question concluded that this 30-day requirement was jurisdictional and had to be met in order for the plaintiff to maintain the action. See Eastland v. Tennessee Valley Authority, 553 F.2d 364 (5th Cir. 1977). Recently, however, the Supreme Court held that the 30-day suit filing period in 42 U.S.C. § 2000e-16(c) was not jurisdictional but was more in the nature of a statute of limitations which, in appropriate circumstances, could be subject to equitable tolling. Irwin v. Veterans Administration, 111 S. Ct. 453 (1990).

Chandler v. Roudebush
425 U.S. 840 (1976)

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1972 Congress extended the protection of Title VII of the Civil Rights Act of 1964 . . . to employees of the Federal Government. A principal goal of the amending legislation, the Equal Employment Opportunity Act of 1972, . . . was to eradicate "entrenched discrimination in the Federal service," Morton v. Mancari, 417 U.S. 535, 547, by strengthening internal safeguards and by according "[a]ggrieved [Federal] employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under title VII." The issue presented by this case is whether the 1972 Act gives Federal employees the same right to a trial de novo of employment discrimination claims as "private sector" employees enjoy under Title VII.

I

The petitioner, Mrs. Jewell Chandler, is a Negro. In 1972 she was employed as a claims examiner by the Veterans' Administration. In August of that year she applied for a promotion to the position of supervisory claims examiner. Following a selection procedure she was designated as one of three finalists for the position. The promotion was awarded to a Filipino-American male. The petitioner subsequently filed a complaint with the Veterans' Administration alleging that she had been denied the promotion because of unlawful discrimination of the basis of sex and race. After an administrative hearing on the claim, the presiding complaints examiner submitted proposed findings to the effect that the petitioner had been discriminated against on the basis of sex but not race and recommended that she be given a retroactive promotion to the position for which she had applied. The agency rejected the proposed finding of sex discrimination as not "substantiated by the evidence," and accordingly granted no relief. The petitioner filed a timely appeal to the Civil Service Commission Board of Appeals

and Review, which affirmed the agency's decision.

Within 30 days after receiving notice of the Commission's decision, the petitioner brought the present suit in a Federal District Court under § 717(c) of the Civil Rights Act of 1964 . . . [as amended]. After moving unsuccessfully for summary judgment, she initiated discovery proceedings by filing notice of two depositions and a request for the production of documents. The respondents moved for an order prohibiting discovery on the ground that the judicial action authorized by § 717(c) is limited to a review of the administrative record. The petitioner opposed the motion, asserting that she had a right under § 717(c) to a plenary judicial trial de novo. The District Court adopted the holding of the United States District Court for the District of Columbia in Hackley v. Johnson, 360 F. Supp. 1247, rev'd sub nom. Hackley v. Roudebush, 171 U.S. App. D.C. 376, 520 F.2d 108, that a "trial de novo is not required [under § 717(c)] in all cases" and that review of the administrative record is sufficient if "an absence of discrimination is affirmatively established by the clear weight of the evidence in the record. . . ." 360 F. Supp., at 1252. Applying this standard of review, the District Court determined that "the absence of discrimination is firmly established by the clear weight of the administrative record" and granted summary judgment in favor of the respondents. The Court of Appeals affirmed the judgment, agreeing with the District Court's ruling that § 717(c) contemplates not a trial de novo but the "intermediate scope of inquiry expounded in Hackley v. Johnson . . . ." Chandler v. Johnson, 515 F.2d 251, 255 (CA9). We granted certiorari to resolve a conflict among the Circuits concerning the nature of the judicial proceeding provided by § 717(c). 423 U.S. 821.

II

We begin with the language of the statute. Section 717(c) . . . states that within 30 days after notice of final adverse administrative action on a Federal employee's discrimination complaint by

either the employing agency or the Civil Service Commission (in the event a permissive appeal is taken), or after 180 days of delay by the agency or the Commission, the employee "may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." Section 717(d) . . . goes on to specify that "[t]he provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder."

. . . .

It is well established that § 706 of the Civil Rights Act of 1964 accords private-sector employees the right to de novo consideration of their Title VII claims. Alexander v. Gardner-Denver Co., 415 U.S. 36; McDonnell Douglas Corp v. Green, 411 U.S. 792, 789-799; Norman v. Missouri Pacific R. Co., 414 F.2d 73, 75 n. 2 (CA8). The "employee's statutory right to a trial de novo under Title VII [of the Civil Rights Act of 1964] . . . ," Alexander v. Gardner-Denver Co., supra, at 38, embodies a congressional decision to "vest Federal courts with plenary powers to enforce the [substantive] requirements [of Title VII] . . . ." Id., at 47.

The 1972 amendments to the 1964 Act added language to § 706 which reflects the de novo character of the private sector "civil action" even more clearly than did the 1964 version. . . . The terminology employed by Congress--"assign the case for hearing," "scheduled . . . for trial," "finds"--indicates clearly that the "civil action" to which private-sector employees are entitled under the amended version of Title VII is to be a trial de novo.

Since Federal-sector employees are entitled by § 717(c) to "file a civil action as provided in section 706 . . ." and since the civil action provided in § 706 is a trial de novo, it would seem to follow syllogistically that Federal employees are entitled to a trial de novo of their employment discrimination claims. The Court of Appeals, however, held that a contrary result was indicated by the words "as applicable" in § 717(d) and by the

legislative history of § 717, and in support of that position the respondents further argue that routine de novo trials of Federal employees' claims would clash with the 1972 Act's delegation of enforcement responsibilities to the Civil Service Commission and would contravene this Court's view that "de novo review is generally not to be presumed." Consolo v. FMC, 383 U.S. 607, 619 n.17.

A. The Meaning of the Phrase "As Applicable"

The opinion of the District Court for the District of Columbia in Hackley v. Johnson, relied on by the Court of Appeals here, expressed the view that the phrase "as applicable" in § 717(d) evidences a congressional intent to restrict or qualify the right to a de novo proceeding granted by § 717(c). 360 F. Supp., at 1252 n.9. A careful reading of § 717(d) and the provisions to which it refers indicates, however, that the phrase was intended merely to reflect the fact that certain provisions in §§ 706(f) through (k) pertain to aspects of the Title VII enforcement scheme that have no possible relevance to judicial proceedings involving Federal employees.

. . . Several of these procedures could not possibly apply to civil actions involving Federal employees. . . . [The] provisions, allowing suits and permissive intervention by the EEOC or the Attorney General, could have no possible application to "civil actions" under § 717(c), because the individual Federal employee or job applicant is the only party who can institute and maintain a "civil action" under that subsection.

. . . .

The most natural reading of the phrase "as applicable" in § 717(d) is that it merely reflects the inapplicability of provisions in §§ 706(f) through (k) detailing the enforcement responsibilities of the EEOC and the Attorney General. We cannot, therefore, agree with the view expressed by the District Court in Hackley v. Johnson, supra, and relied on by the Court of Appeals here, that Congress used the words "as applicable" to voice its intent to disallow trials de novo by

aggrieved Federal employees who have received prior administrative hearings. . . . This Court pointed out in Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370, that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." To read the phrase "as applicable" in § 717(d) as obliquely qualifying the Federal employee's right to a trial de novo under § 717(c) rather than as merely reflecting the inapplicability to § 717(c) actions of provisions relating to the enforcement responsibilities of the EEOC or the Attorney General would violate this elementary canon of construction.

B. Legislative History

The legislative history of the 1972 amendments reinforces the plain meaning of the statute and confirms that Congress intended to accord Federal employees the same right to a trial de novo as is enjoyed by private-sector employees and employees of state governments and political subdivisions under the amended Civil Rights Act of 1964. . . . [The Court's detailed analysis of the legislative history of the 1972 amendments has been deleted.]

The Court of Appeals held that "the district judge faced with a demand for a trial de novo is entitled to determine, at a pretrial conference or otherwise, why the plaintiff believes that a trial de novo is necessary," 515 F.2d, at 255, and concluded that the petitioner had presented "nothing before the district court to indicate that a useful purpose would be served by having a trial de novo." Ibid. This approach substantially parallels the holding in Hackley v. Johnson:

> "The trial de novo is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required.

> If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." 360 F. Supp., at 1252.

Nothing in the legislative history indicates that the Federal-sector "civil action" was to have this chameleon-like character, providing fragmentary de novo consideration of discrimination claims where "appropriate," ibid., and otherwise providing record review. On the contrary, the options which Congress considered were entirely straightforward. It faced a choice between record review of agency action based on traditional appellate standards and trial de novo of Title VII claims. The Senate committee selected trial de novo as the proper means for resolving the claims of Federal employees. The Senate broadened the category of claims entitled to trial de novo to include those of private-sector employees, and the Senate's decision to treat private- and Federal-sector employees alike in this respect was ratified by the Congress as a whole.

C. Presumption Against De Novo Review

Given the clear expression of congressional intent, as revealed in both the plain language of § 717 and the legislative history of the 1972 amendments, we find unpersuasive the respondents' reliance on decisions by this Court indicating that "de novo review is generally not to be presumed." Consolo v. FMC, 383 U.S., at 619 n.17; United States v. Carlo Bianchi & Co., 373 U.S. 709, 715.

. . . .

The respondents' contention that administrative dispositions of Federal employee discrimination complaints would, unlike arbitral decisions under collective-bargaining agreements or preliminary EEOC findings of "no reasonable cause," typically furnish an adequate basis for "substantial evidence" review cannot overcome the clear import of the statutory language and the legislative history. The Congress was aware of the fact that Federal employees would

> have the benefit of "appropriate procedures for an impartial [agency] adjudication of the complain[t]," and yet chose to give employees who had been through those procedures the right to file a de novo "civil action" equivalent to that enjoyed by private-sector employees. It may well be, as the respondents have argued, that routine trials de novo in the Federal courts will tend ultimately to defeat, rather than to advance, the basic purposes of the statutory scheme. But Congress has made the choice, and it is not for us to disturb it.
>
> Since the Court of Appeals in this case erroneously concluded that § 717(c) does not accord a Federal employee the same right to a trial de novo as private-sector employees enjoy under Title VII, its judgment must be reversed and the case remanded for further proceedings consistent with this opinion. It is so ordered.

Note. When an employee seeks judicial review of a mixed case in district court, the court performs only a record review of the nondiscrimination issues of the mixed case. See Morales v. MSPB, 932 F.2d 800 (9th Cir. 1991); Rana v. United States, 812 F.2d 887 (4th Cir. 1987); Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986); Hayes v. Government Printing Office, 684 F.2d 137 (D.C. Cir. 1982).

APPENDIX A

FORMS FOR USE

IN

MSPB DISCOVERY PROCEEDINGS

The following is by no means intended to be a complete list of all of the discovery forms that the Agency may utilize during the discovery period. It is intended solely to provide sample formats. Note that Appellants frequently are represented by attorneys who are accustomed to using the discovery procedures and techniques and you, as Agency representative, must be prepared to respond.

MOTIONS

1. Motion for the Issuance of Subpoenaes

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No:
	)	
	)	Date: _____
	)	
DEPARTMENT OF THE ARMY,	)	
	)	
Agency.	)	

MOTION FOR THE ISSUANCE OF SUBPOENAES DUCES TECUM

COMES NOW, THE DEPARTMENT OF THE ARMY, through its designated representative, and hereby requests that subpoenaes duces tecum be issued to the persons named below, directing them to appear at the hearing in the above-named appeal for the purpose of giving their testimony and producing for review, inspection and copying, all letters, memoranda, notes, summaries, or other written records in whatever nature or form, which

in any way pertain to (specify the reason or reasons for which you are requesting the records; e.g., records of arrest and conviction, etc.):

(List here the names and addresses of the witnesses for whom subpoenaes are being requested. If you have not done so already, provide a brief summary of the testimony you expect each witness to give.)

The Agency believes that the testimony and documents sought are relevant to the matters at issue in this appeal and that subpoenaes duces tecum are necessary to compel the attendance of the above-named witnesses.

WHEREFORE, the Agency respectfully requests that the Board issue the aforementioned subpoenaes duces tecum.

Respectfully submitted,

_____
Richard Roe
Agency Representative

2. Motion to Compel Answers to Interrogatories and/or Production of Documents

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No.:
	)	
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
	)	
Agency.	)	

MOTION TO COMPEL ANSWERS TO INTERROGATORIES

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, and pursuant to 5 C.F.R. 1201.72(c)(2), moves for an Order from the

administrative judge requiring John A. Jones, Appellant in the above-named appeal, to provide answers to the Agency's First Set of Interrogatories, dated (date).

The Interrogatories were served upon the Appellant and his designated representative on (date). The Appellant has not filed answers to the Interrogatories and has not filed an objection to them.

The evidence and/or information sought is relevant to matters at issue in this appeal, or will lead to the discovery of relevant evidence and/or information. Accordingly, the Agency moves for an Order directing the Appellant forthwith to respond to each and every question set forth in the Agency's First Set of Interrogatories, mentioned above.

For the Agency:

_____

Richard Roe
Agency Representative

(The Motion to Compel Production of Documents is substantially similar to that for compelling answers to Interrogatories.)

3. Motion for the Imposition of Sanctions

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No.:
	)	
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
	)	
Agency.	)	

MOTION FOR IMPOSITION OF SANCTIONS

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, pursuant to 5 C.F.R. 1201.43 and, for the reasons set forth below, moves for the imposition of sanctions against the Appellant.

The Agency's First Set of Interrogatories were served upon the Appellant on (date). When the Appellant failed to answer said Interrogatories and filed no objection to them, the Agency sought and obtained an Order from the administrative judge directing the Appellant to submit his/her answers to the Agency on or before (date).

The Appellant has not submitted answers to the Interrogatories and otherwise has failed to respond to the Board's Order.

In view of the Appellant's willful failure to comply with the Order of the administrative judge, the Agency prays that the Board issue an Order dismissing the appeal with prejudice, or imposing such other sanctions against the Appellant as the administrative judge deems appropriate.

Respectfully submitted,

_____
Richard Roe
Agency Representative

4. Motion for Extension of Time

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No.:
	)	
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
	)	
Agency.	)	

MOTION FOR EXTENSION OF TIME TO ANSWER INTERROGATORIES

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, and moves the administrative judge for an Order granting an extension of time for the reasons set forth below:

On (date), John A. Jones, Appellant, served the Agency with interrogatories pursuant to 5 C.F.R. 1201.72, et seq.

There are 48 of these interrogatories, many of them requiring the Agency to examine its books and records and to compile data, all of which will require a great deal of time.

The Agency is ready and willing to answer said interrogatories, but cannot do so within the period of time fixed by the administrative judge. As shown by the affidavits of the Personnel Officer and the Finance Officer, attached hereto, it will require at least 60 days for the Agency to compile the information necessary to answer said interrogatories.

WHEREFORE, the Agency prays that the Board issue an Order granting the Agency an enlargement of time within which to answer said Interrogatories or, alternatively, to relieve the Agency of the responsibility for providing answers to these interrogatories within the time specified by the administrative judge.

Respectfully submitted,

_____

Richard Roe
Agency Representative

(Be sure to attach the affidavits setting forth a full explanation of the reasons for the Agency's inability to answer the Interrogatories requested.)

INTERROGATORIES/PRODUCTION OF DOCUMENTS

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No.:
	)	
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
	)	
Agency.	)	

AGENCY'S FIRST SET OF INTERROGATORIES

THE DEPARTMENT OF THE ARMY, by and through its designated representative, herewith serves upon JOHN A. JONES and his representative, SAM SMITH, the following written interrogatories under the provisions of 5 C.F.R. 1201.72, et seq.

You are required to answer these Interrogatories separately and fully in writing, under oath, and to serve a copy of your answers to the Agency's representative within _____ days after service hereof.

All of the following interrogatories shall be continuing in nature until the date of the hearing, and you are required to supplement your answers as additional information becomes known or available to you.

No. 1

Were you scheduled for duty during the hours from 8 o'clock A.M. to 4:30 P.M., on January 2, 3, 4, 7, 8, 9, 10 and 11, 19___?

No. 2

If you were not scheduled for work during the hours cited in Interrogatory No. 1 above, what was your duty schedule for each day listed?

No. 3

Did you report for work for each of the days on which you were scheduled to work, as described in your answers to Interrogatories No. 1 and No. 2?

No. 4

If the answer to Interrogatory No. 3 is "no," please state the reason(s) why you did not report to work on the dates set forth therein, including:

a. whom you advised of these reasons and when;

b. each fact which supports each reason;

c. the identity of each and every document which supports your reasons; and

d. whether you possess any of these documents; if so, which ones.

(Continue with questions designed to elicit information to show that Appellant's absences were unauthorized. You may also ask other questions.)

No ( )

Do you contend that the Agency, in taking the action to remove you from your position, committed harmful error? If your answer is "yes," please state:

a. each fact which supports your contention, including specific references to all statutes, regulations, and procedures which you contend were violated;

b. in what way this alleged error was "harmful;"

c. the identity of each document which supports your contentions; and

d. whether you possess any of the documents; if so, which ones.

For the Agency:

Richard Roe
Agency Representative

REQUEST FOR ADMISSIONS

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No.:
	)	
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
	)	
Agency.	)	

REQUEST FOR ADMISSION OF MATTERS AND GENUINENESS OF DOCUMENTS

THE DEPARTMENT OF THE ARMY, by and through its representative, requests that JOHN A. JONES, and his designated representative, SAM SMITH, make the following admissions for the purpose of this appeal only:

That each of the following documents, attached to this Request, is genuine. (Here list the documents and briefly describe each document.)

That each of the following statements is true. (Here list the statements, based upon the reasons stated in the Notice, including statements regarding the past record.)

For the Agency:

_____
Richard Roe
Agency Representative

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

This is to certify that I have this day served (name) in the foregoing case with a copy of these pleadings: Agency's First Set of Interrogatories, Motion to Produce Documents and Request for Admissions, by depositing in the United States mail a copy of the same in a properly addressed envelope as follows with adequate postage:

(Address)

This _____ day of _____, 19___.

_____
Richard Roe
Agency Representative