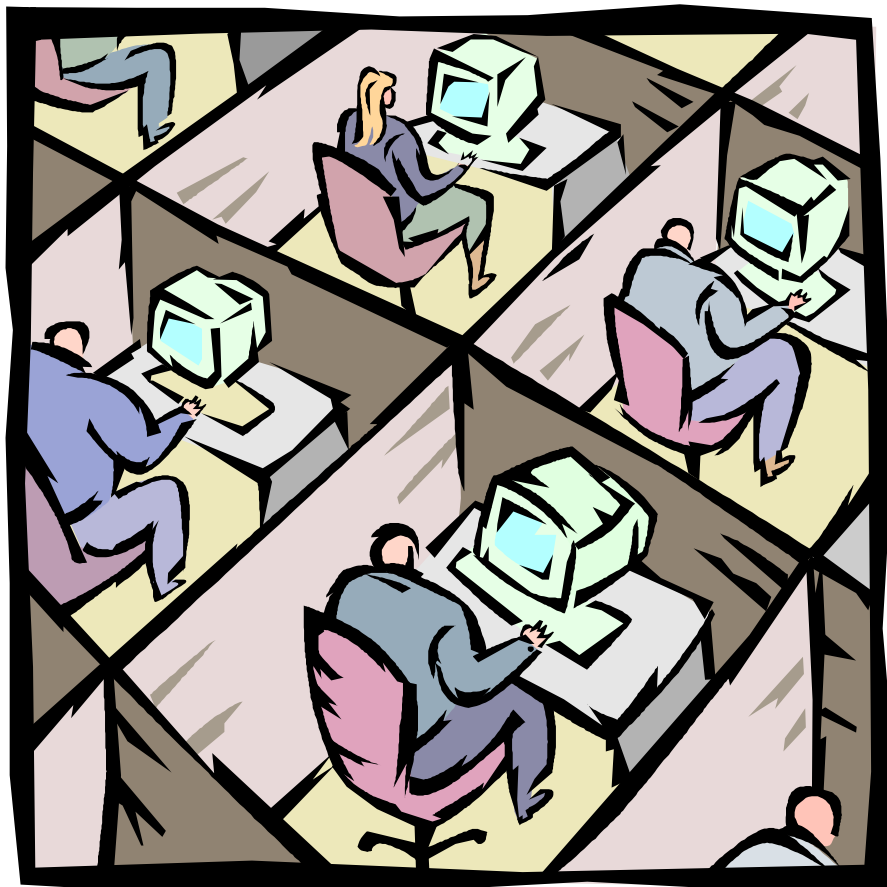


LAW OF Federal Employment



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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 nine 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 the agency grievance system. Chapter 4 addresses the procedural and substantive issues involved in federal employee discipline. Chapter 5 reviews the civilian employee performance appraisal system and performance based personnel actions. Chapter 6 is a review of reduction in force procedures. Chapter 7 summarizes the rules for practice before the Merit Systems Protection Board. Chapter 8 surveys the extent of judicial review of federal personnel actions. The last chapter addresses equal employment opportunity in the federal sector, with emphasis on the complaint process.

Each of these chapters includes materials that 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 intended to provide a basic understanding of federal civilian personnel law and to serve as a basic reference for civilian personnel problems.

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.

Civilian employees' importance to the Department of Defense has increased greatly during the past ten years as the size of the active uniformed services has decreased. Despite hiring restrictions and strength reductions, approximately one-third of the Department of Defense workforce is civilian employees; the Army, for example, still employs approximately two hundred eighty thousand appropriated fund civilian employees. These employees do not have the same relationship to their employer that soldiers have to their superiors. A civilian employee, for example, generally is not subject to the Uniform Code of Military Justice and may leave Federal employment at anytime. The civilian employee may also be represented by a labor union. This book is a survey of the law relating to civilian employees.

The number of labor unions representing Federal employees has increased significantly in recent years. This increase heightens the need for judge advocates to be well-versed in civilian personnel law 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 Army Judge Advocate General initiated the Labor Counselor Program in July 1974. The other services followed suit. Under this program, DoD lawyers (military or civilian) are designated at military installations worldwide to provide legal advice and assistance to military and civilian managers. Labor Counselors are expected to be knowledgeable in Federal civilian employee policies and procedures and to assist the command in promoting healthy labor-management relations. Labor Counselor duties include participating in labor contract negotiations, arbitration sessions, and unfair labor practice proceedings. Labor Counselors also represent the command in adverse action proceedings and hearings before the Merit Systems Protection Board; and assist the command in resolving equal employment opportunity complaints locally and before administrative judges of the Equal Employment Opportunity Commission. The Labor Counselor's active participation in these varied activities has increased since the Program was initiated, and The Army Judge Advocate General reemphasized the value of the program in 1977, 1982, and again in 1985 in TJAG Policy Letter 85-3. Labor Counselor functions 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 concerns the statutes and regulations governing management of Federal employees and personnel actions in general, and can be subsumed under the label, "Law of Federal Employment" which is the subject of this text. The second area addresses 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 text, JA 211. The Law of Federal Employment and Federal

Labor Relations are interrelated disciplines. A Labor Counselor cannot advise management representatives at a bargaining session without first becoming familiar with civilian personnel law generally. A disciplinary action against an employee, inversely, may be challenged through a grievance under a collective bargaining agreement. It is therefore important to understand both areas when advising commanders and supervisors concerning civilian employees.

Current civil service law sets rigorous standards for agencies to follow and establishes three separate agencies to oversee management of the Federal workforce. The military departments must follow the policies and procedures established by statute and these agencies' regulations. The law provides for checks on how well the DoD follows these procedures--through appeals by employees, review of certain programs and regulations, and independent investigation of agency actions. The uniformed services may issue supplemental regulations addressing personnel policies only if they comply with the rules and guidelines established by these agencies.

In 1883 Congress enacted the Pendleton Act to reform the Federal civil service system. Under this law, 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 commission, set policy and established procedures used by all executive agencies. On January 1, 1979, however, the Civil Service Reform Act of 1978 became law and 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. OPM, 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, implements Administration policy by promulgating policy and establishing procedures applicable to Federal employee matters.

The MSPB assumed the appellate functions of the former Civil Service Commission. (5 U.S.C §§ 1201-1206). The MSPB 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 MSPB 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 OPM. The MSPB is divided into five regional offices and five field offices that hear appeals within their jurisdiction. The 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 MSPB and established as an independent agency. The President appoints the Special Counsel 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. (5 U.S.C. §§ 1211-1219).

In the Civil Service Reform Act, Congress enacted for the first time general merit principles 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. Commission of prohibited personnel practices 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 MSPB. An official has numerous procedural rights in this type of action, the consequences of which may include suspension, removal, reduction in grade, a five-year debarment from Federal employment, or a civil penalty up to \$1,000.

Note. If an offending official is a member of the uniformed services, the Special Counsel may not initiate a disciplinary proceeding before the MSPB, but rather, will transmit recommendations for appropriate disciplinary action to the Secretary of the appropriate military department. 5 U.S.C. § 1215(c).

1.2 Constitutional Authority.

The Constitution grants Congress the authority to provide for and control the civil service below the level of Presidential appointments. The 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 delegated 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 OPM) and the granting to its 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 (U.S.W.Va. 1898).

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 President's authority is exercised within the framework of a very extensive legal structure governing civilian employment found throughout Title 5, U.S. Code.

b. Delegation to OPM. 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). Congress has also authorized the President to delegate to the Director of the OPM 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 OPM, see 5 U.S.C. §§ 1101-1105 and §§ 1301-1303.

NOTE: On 30 November 1999, the President signed the Veterans Millenium Health Care and Benefits Act (P.L. 106-117). Section 511 of this new law amended the Veterans Employment Opportunities Act of 1998. For a brief explanation of the impact of this new law, see the OPM website at www.opm.gov.

c. Congressional Control. Despite delegating authority to the President and OPM, 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 that prescribe generally how the civil service is to be organized and managed by the OPM. The President also has issued other executive orders independent of the Civil Service Rules that establish Federal policies or create special programs for Federal employees.

b. OPM.

(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 had previously published a Federal Personnel Manual (FPM) system, which constituted its official medium for issuing to other agencies personnel regulations and instructions, policy statements, and related materials on Government-wide personnel programs. The FPM system consisted of the basic Federal Personnel Manual, the FPM Supplements, the FPM Letters, and the FPM Bulletins. Executive Order 12861, September 11, 1993, directed the elimination of half of all federal civilian personnel regulations. OPM, to achieve this end, planned to eliminate, or "sunset," the FPM system in the fall of 1993. The FPM was officially "sunset" on December 31, 1993. Portions of the FPM have been selectively retained and converted into other formats (C.F.R., executive order, or OPM Directive). For most purposes, however, the FPM no longer exists as a reference tool.

1.5 Military Regulations.

a. Department of Defense. In 1978, the DOD 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 the structure of the former Federal Personnel Manual.

b. Department of the Army. The Army's civilian personnel regulations are located in the 690 series. These regulations contain the official Army instructions governing civilian personnel administration and supplement the DOD Civilian Personnel Manual. They can also be found on the Internet on <http://www.cpol.army.mil/>.

c. Department of the Air Force. Air Force Instructions regulating civilian personnel matters are in the 36 series. They can be found on the Internet at <http://afpubs.hq.af.mil/> or through FLITE.

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, West Publishing Company assumed official publication of Board decisions in the Merit Systems Protection Board Reporter (cite ____ M.S.P.R. ____). Board decisions from 1994 through 2000 are also available online at the MSPB's web site, www.mspb.gov. Other unofficial sources, such as Information Handling Services (microfiche, CD-ROM, and hard copy) and Labor Relations Press (hard copy), are also available. There is a full discussion of MSPB jurisdiction and procedures in Chapter 7 of this book.

b. Equal Employment Opportunity Commission decisions. The decisions of the Equal Employment Opportunity Commission (EEOC) currently are published by Information Handling Services and are available on microfiche or in CD-ROM format. A full discussion of the role of the EEOC and the processing of equal employment opportunity complaints is provided in Chapter 9. EEOC decisions may also be researched at <http://www.eeoc.gov/>.

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 8 of this book.

CHAPTER 2

EMPLOYMENT IN THE FEDERAL CIVIL SERVICE

2.1 Types of Civilian Employees.

a. General. The Federal civil service consists of all appointed positions in the three branches of the Federal Government, except those in the uniformed services. 5 U.S.C. § 2101. There are many different types of employees in the Federal civil service. These employees differ in how they are hired or "appointed" into their jobs, how they are paid, and the substantive and procedural due process rights they receive in certain personnel actions. This chapter will focus on the major categories of Federal civil service employees and on the significance of the differences. These materials address only executive branch employees; employees of the judicial and legislative branches are beyond the scope of this text.

Positions in the Federal civil service generally can be divided into three categories: (1) the competitive service, (2) the excepted service, and (3) the senior executive service. All are defined by statute. The vast majority of DOD employees are either in the competitive or excepted service; therefore, this text will not address problems involving the senior executive service employees. For further information see 5 U.S.C. §§ 3131-3136.

b. The competitive service. The competitive service consists of all civil service positions in the Federal Government that 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. Sometimes these employees are referred to as "classified civil servants" or "classified service" employees. Many acts of Congress use these terms interchangeably. Employees generally 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, more commonly, 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 or "schedules" of excepted service positions. OPM publishes an annual update of these schedules in the federal register, usually in September or October.

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. 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 subject to political patronage and 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. An employee's due process rights are tied to employment status in the competitive service or excepted service. Competitive service employees generally receive procedural and substantive due process rights in connection with certain personnel actions after one year, while most excepted service employees must serve a two-year "probationary" period before becoming entitled to due process rights. *See, e.g.,* 5 C.F.R. § 752.401(c).

There are two exceptions to the rule stated above. The first exception is that excepted service employees who are either war veterans or have been deployed and received an expeditionary or campaign badge generally receive rights equivalent to those of competitive service employees under the Veterans' Preference Act of 1944, P.L. 78-359, 58 Stat. 387, June 27, 1944. *Dreher v. U.S. Postal Service*, 711 F.2d 907 (9th Cir. 1983). The FY 98 Defense Authorization Act (PL 105-85) extended veteran's preference to Gulf War veterans (those having served in the theater) and to recipients of the Armed Forces Service Ribbon for service in Operation Joint Endeavor or Operation Joint Guard in the Former Yugoslavia. Those receiving the expeditionary medal for relief efforts in Somalia, Rwanda, Macedonia, or Haiti are also eligible for a veteran's preference.

The second exception allows actions against all "probationary" employees without the normal due process rights. All new civil service employees are required to serve a probationary period. More specifics of this probationary requirement will be addressed in detail later; however, a competitive service employee or a preference eligible excepted service employee gets virtually no procedural or substantive due process protections until after the one-year probationary period. *Immigration and Naturalization Serv. v. Federal Labor Relations Auth.*, 709 F.2d 724 (D.C. Cir. 1983); *Stern v. Dep't of Army*, 699 F.2d 1312 (Fed. Cir. 1983)*cert. denied*, 462 U.S. 1122, 103 S.Ct. 3095, 77 L.Ed.2d 1354 (1983). *Piskadlo v. Veterans Administration*, 668 F.2d 82, 83 (1st Cir.1982), (probationary federal employee had no statutory right of appeal to the Merit Systems Protection Board, and had no regulatory right of appeal to Board for the handicap discrimination alleged. 5 U.S.C.A. §§ 7511(a)(1)(A),

7702(a)(1)). Other excepted service employees receive no due process until after two years of current, continuous service.

A more detailed review of employee rights is contained in Chapters 3 and 4 of this text.

e. Notes and Discussion.

Note 1. 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. §§ 7511-7513.

Veterans receive no special consideration for promotions under this statute, but the initial hiring advantage and the retention rights have allowed veterans to fill a large number of Federal jobs compared to their composition in the total work force. The statutory advantages bestowed on veteran preference eligibles is covered in more detail later in this text.

Nonveterans have frequently challenged in Federal court the significant benefits provided to veterans by law. In one such case, *Fredrick v. United States*, 507 F.2d 1264 (Ct. Cl. 1974), the plaintiff claimed he was entitled to the job retention protection of the Veterans' Preference Act in 5 U.S.C. §§ 3501-3502 during a reduction-in-force. His challenge was based on the equal protection and due process clauses of the Fifth Amendment; he alleged discrimination because he had "served" his Government in a civilian capacity as a War Service Appointee. The Court of Claims upheld the validity of the veterans' preference provisions finding 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 were (1) a soldier's loss of personal freedom, (2) the rigors of military duty--discipline, possible relocation overseas, and potentially hazardous duty, and (3) the problems of reorientation to civilian life 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 in an equal protection challenge. In *Massachusetts v. Feeney*, 442 U.S. 256 (1979), a Massachusetts law gave veterans an absolute preference over nonveterans if they passed the state civil service exam. The Massachusetts law provides an even broader right of preference than the federal law. As such, in upholding the Massachusetts statute, the Supreme Court effectively eliminated future challenges to the Federal preference provisions.

2.2 Becoming a Federal Civil Service Employee.

Many of an employee's procedural and substantive due process rights depend on the employee's status. Understanding the legal requirements for attaining employee status is therefore essential to determine the employee's rights.

a. Statutory requirements generally. 5 U.S.C. § 2105 requires three elements for a person to attain the status of Federal Government employee. The first step is appointment in the civil service by one of several designated officials; the second is performance of a Federal function; and finally, supervision in the performance of duties by a federal official. All three requirements must be satisfied for the individual to become an employee. Of the three requirements, the appointment requirement 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. A completed Standard Form 50 can however, also evidence an appointment, "Notification of Personnel Action." While both forms are normally used in 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 servicing CPOC is the appointing/approval authority.

The proper appointment requirement is demonstrated by the following cases that decided employees had not been appointed into the Federal service. *Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986) (finding 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) (finding employee of government contractor RCA was not a federal employee despite years of working in federal worksite under supervision of federal official). *Watts v. Office of Personnel Management*, 814 F.2d 1576 (Fed. Cir. Apr 01, 1987) *cert. denied* 484 U.S. 913, 108 S.Ct. 258, 98 L.Ed.2d 216. In *Bridgewood v. Department of Veterans Affairs*, 75 M.S.P.R. 480 (1997), *aff'd without op.*, 153 F. 3d 565 (Fed. Cir. 1998), the court ruled that appellant was not "employee" during the period in which she served in a without-compensation (WOC) training position. The time she served in that position could not be counted towards her three-year period necessary for appellant to be considered 'career employee'; so as to be placed in tenure group of career employees for reduction in force (RIF) purposes. Appellant was not paid compensation and

benefits as an "employee" under civil service system during her WOC appointment, and evidence concerning WOC appointment reflected that her services were retained merely by contract.

See also *Bevans v. Office of Personnel Management*, 900 F.2d 1558 (Fed. Cir. 1990) (OPM decided that petitioner's deceased husband's survivorship benefits did not include the time he spent as an employee of a proprietary corporation of the Central Intelligence Agency (CIA). Deceased's husband, an attorney, had worked for Air America, a CIA run corporation, during the Vietnam War. Because he had not received a clear and unequivocal appointment into the Federal service, the deceased's spouse could not prove that he had been an employee of the United States Government. The Federal Circuit affirmed OPM's determination.); *Skalafuris v. United States*, 683 F.2d 383 (Ct. Cl. 1982). (The Civil Service Commission decided that plaintiff was a probationary employee at the time of his termination. The Court of Claims affirmed, holding that a probationary employee, who commenced work, and received pay prior to receiving an official appointment into the Federal service did not become a Federal employee for purposes of his 1 year probationary period until such time as his appointment was effective.)

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), *overruled on other grounds* *Hagmeyer v. Department of the Treasury*, 852 F.2d 531 (Fed. Cir. 1988). In *McCarley*, 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 therefore had neither performed a Federal function nor been supervised while performing his duties by a Federal employee. Because *McCarley* was merely an appointee and not an employee, he was not entitled to the procedural protections established by law for employees when management canceled his appointment.

d. Notes and Discussion.

Note 1. While the courts have determined that a completed SF 50, SF 52, or oath of office constitutes 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. Dep't of Commerce*, 729 F.2d 772 (Fed. Cir. 1984), where 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 erroneously reflected that he had been hired by transfer and that his probationary period was completed. 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. A proper appointment is normally necessary to become an employee, but the MSPB has acknowledged 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 considered an employee unless the appointment violates an absolute statutory prohibition. *Travaglini v. Department of Educ.*, 23 M.S.P.R. 417 (1984). *See also Torres v. Department of Treasury*, 47 M.S.P.R. 421, (M.S.P.B. 1991)(Individual who shows that he is otherwise entitled to adverse action procedures does not lose that protection merely because agency's action was based on an unlawful appointment; only exception to rule is an appointment that violates an absolute statutory prohibition so that appointee is not qualified for appointment in the civil service.) Absent such an absolute statutory prohibition on appointment, the employee is entitled to all the due process rights that a similarly situated employee would receive. *See Devine v. Sutermeister*, 724 F.2d 1558 (Fed. Cir. 1983), *superseded on other grounds* *Bloomer v. Department of Health and Human Serv.*, 966 F.2d 1436 (Fed. Cir. 1992) where 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 the status of "employee" within the statutory definition. A competitive service employee receives additional rights and protections that escalate with seniority.

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. 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; it 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 are covered later in this text in the discussion of personnel actions and procedural requirements. For an excellent discussion of how the probationary period is calculated and the results of management failing to remove an employee before the probationary period expires, *see Daniel v. Department of Veterans Affairs*, 68 M.S.P.R. 459 (1995).

Under some circumstances, an employee may have to serve more than one probationary period while moving from one job to another within Federal employment. An

employee may be able to "tack" time served in a probationary period toward satisfaction of the probationary period in a new position. For a discussion of when tacking is permitted and when an entirely new probationary period is required, *see Francis v. Department of the Navy*, 53 M.S.P.R. 545 (1992).

b. Notes and Discussion.

Note 1. A simple rule to follow in probationer cases is that all employees (with limited exceptions) appointed from a civil service register must serve a new probationary period. *See* 5 C.F.R. § 315.801(a)(1). This rule applies even when an employee has successfully completed a probationary period and is later appointed from a register to a substantially similar position or to a position in the same job series at a higher grade. *See Arispe v. Department of the Air Force*, 43 M.S.P.R. 96 (1990), *Flowers v. Department of Navy*, 60 M.S.P.R. 167 (1993). For an excellent review of the probationary period applicable to excepted service employees under the Civil Service Due Process Amendments of 1990, *see Todd v. Merit Systems Protection Bd.*, 55 F.3d 1574 (Fed. Cir. 1995) (holding that employees whose rights were not specifically addressed by the Act were not affected by its provisions). *See also Anderson v. Merit Systems Protection Bd.*, 12 F.3d 1069 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 2673 (1994) (holding temporary employees not covered by the due process amendments could not establish MSPB jurisdiction by estoppel).

Note 2. The probationary period ends at the completion of the last duty period on the day before the anniversary date of appointment. An employee given notice of removal on the last duty day of the probationary period has, therefore, completed the probationary period and the removal is defective. *See Stanley v. Department of Justice*, 58 M.S.P.R. 354 (1993); *Dagstani v. Department of Housing and Urban Dev.*, 15 M.S.P.R. 700 (1983). This is true because the personnel action does not become effective until midnight of the date the action is taken. *See Stephen v. Department of Air Force*, 47 M.S.P.R. 672 (1991) (Evidence supported administrative judge conclusion that employee was separated after she completed her probationary period. Under the Federal Personnel Manual (FPM), an effective preprobationary period separation must occur prior to end of tour of duty on last day before anniversary date. Since separations are otherwise effective at midnight, and agency's advance notice of termination and Standard Form 50-B documenting action stated that employee's termination was effective on the last day before her anniversary date, but documents did not specify that action was effective at a time prior to completion of her tour of duty on that day, agency's advance notice of termination could not be construed to provide that termination was effective at beginning of day.) *Toyens v. Dep't of Justice*, 58 M.S.P.R. 634 (1993); *Shannon v. Dep't of Air Force*, 19 M.S.P.R. 510 (1984). To ensure proper termination of a probationer, make the removal effective at least several business days before the anniversary date of appointment.

c. Probationary Period for Newly-Appointed Supervisors. Newly-appointed supervisors and managers must also serve a probationary period. The purpose of this probationary period is to test the managerial and supervisory skills of the new employee. 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. Both the Army and Air Force have chosen to use a one-year period in all cases unless a special exception is granted. See AR 690-300, ch. 315.9; AFI 36-1001, para 3.1.

A manager who fails to complete satisfactorily the probationary period must be reassigned to a position no lower in grade than the lower of the supervisory position currently occupied or the position occupied before taking the supervisory position. 5 C.F.R. § 315.907. There is generally no appeal right upon return to the nonsupervisory position, see 5 C.F.R. § 315.908, and the reassignment may not be grieved under the Department of Defense grievance procedure (adopted by 18 March 1994 memorandum and succeeding in the Army AR 690-700, Chapter 771-1 and by Air Force Instruction 36-1001). See also *DeCleene v. Department of Educ.*, 71 M.S.P.R. 651 (1996) (holding board lacked jurisdiction over appeal of probationary supervisor who, for failure to satisfactorily complete his probationary period, was returned to position of no lower grade and pay than that from which he was promoted and who did not allege that agency action against him resulted from discrimination based on partisan politics or marital status. 5 U.S.C.A. § 3321(a)(2)). See also *Preyor v. United States Postal Service*, 83 M.S.P.R. 571 (1999). In *Preyor*, the Agency argued for first time on PFR that the Board lacked jurisdiction. Preyor was serving one year probationary term when he was removed from his managerial position. Preyor argued that since he had previously served a probationary term, in a what he argued was a similar position, that as a preference eligible veteran, he was not required to serve an additional probationary term pursuant to 5 U.S.C. § 7511(a)(1)(B). The Board stated that the clear language of the statute did not support Preyor's argument.

d. Tenure upon appointment: career-conditional status. Immediately upon appointment to a competitive service position, an appointee is both a probationary employee and a career-conditional employee. The employee automatically becomes a career employee upon completion of the service requirement established by OPM. The Office of Personnel Management normally requires a three-year period of substantially continuous creditable service to become a career employee. See generally 5 C.F.R. Part 315 for a discussion of career employment.

This "career" status provides the employee with higher retention standing in a reduction-in-force. In a reduction-in-force, a career employee will always be retained over a career conditional employee in the same type job. A detailed discussion of the reduction-in-force process is provided in Chapter 6.

e. Summary of employee status in the competitive service. Upon appointment to a competitive service position, an appointee is normally a probationary career-conditional

employee. After one year, the employee becomes a nonprobationary, career-conditional employee. Finally, after three years, the employee is a nonprobationary career employee. OPM has proposed various adjustments to this scheme of career progression; however, as of the date of publication of this text, no rules have been adopted.

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 their category of pay. 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 fifteen (GS-1 through GS-15) with ten steps per pay grade. Employees progress through the ten steps per pay grade after completion of specified waiting periods and performance at an acceptable level of competence.

(1) General Schedule Pay.

General Schedule employees are compensated on the basis of the General Schedule at 5 U.S.C. § 5332. There is generally 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. Under the Federal Employees Pay Comparability Act of 1990, however, a locality comparability payment for GS employees adds a specific percentage differential, or "locality pay," 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 have been 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% or cancel the raises if there is a state of war or severe economic conditions. See 5 U.S.C. §§ 5301-5307. The exact amount of the Pay Comparability Adjustment has been an annual source of heated debate in Congress.

The General Schedule closely resembles the pay tables familiar to military personnel. 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 (SES grades are, however, personal to the individual). 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. A civilian attorney working in a judge advocate office in

Germany may fill a GS-13 position, therefore, but will, in effect, be demoted to a GS-12 rating upon return to the U.S. if that is the grade of the position to which the employee has return rights. 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. The statutory standard requires an employee to perform at an "acceptable level of competence" to receive a within grade increase. See 5 U.S.C. § 5335(a). Supervisors may withhold these increases from employees who have not performed satisfactorily during the rating period. The 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 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), later replaced the merit pay rules. This system applied to supervisors and managers in pay grades GS-13 through GS-15, designated GM-13 through GM-15, and tied their pay in part to their performance. After temporarily extending the system several times, Congress abolished PMRS. Public Law 103-89, Sep. 24, 1993, the Performance Management and Recognition System Termination Act, abolished PMRS, and provided that the pay scales for GM employees would be converted to equivalent GS grades. Although "GM" titles still exist in the DoD, the Act provides that these employees will be paid from the GS scale.

b. Prevailing rate employees. Prevailing rate employees are the blue collar workers in the civil service. The statutory definition of a prevailing rate employee is at 5 U.S.C. § 5342(a)(2). 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, make up this group of employees. The Office of Personnel Management and Department of the Army have separate regulations applicable to prevailing rate employees, although their rights and obligations are substantially 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 how their pay is calculated. Wage grade pay is based on the prevailing rate of pay for a particular occupation within the private sector in the geographic area of employment. The United States is divided into over 100 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. This lead agency must conduct an annual survey of the rates of compensation within its area and promulgate pay schedules based on the survey. The schedules so derived are binding on all Federal agencies within that wage board 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. The regulatory guidelines for prevailing rate employees are at 5 C.F.R. Part 532.

c. Other Civilian Employees. Legally, not all civilians working at military installations are employees of the United States. Many of them are not covered by the rules and regulations promulgated by the Office of Personnel Management. Employees of nonappropriated fund instrumentalities (NAF), such as the post exchange, the Army and Air Force Motion Picture Service, and the Officer or NCO clubs, for example, 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 employees of the United States. They are, rather, employees of the particular nonappropriated fund instrumentality that employs them. NAFI employees often receive far less due process protection than their appropriated fund counterparts and will never have appeal rights to the MSPB. By statute, however, NAF employees do enjoy the protection of anti-discrimination statutes (i.e., Title VII). See AFI 34-301 for NAF personnel management guidelines in the Air Force.

There are also numerous employees of independent organizations on military installations. These employees are neither uniformed service department 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, the Boy Scouts or Girl Scouts, a PX concessionaire, or contractor employees. None of these employees are entitled to the protections and benefits of a civil service employee.

2.5 Classification of Positions.

a. General. A Federal civilian employee's pay depends on the level or "grade" of the position the employee occupies. A process called "classification" determines this grade. This section will outline 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 receive equal pay for equal work, regardless of which agency employs them. 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 classify each of their positions into the proper job series and grade. To insure proper classification of positions under the OPM standards, OPM conducts periodic audits of agency classification actions.

c. Employee appeals. An employee's pay is based upon the classified grade of the position; the classification process is, therefore, often challenged--particularly if an employee's position has been "downgraded" or reduced in grade. Employees may, at any time, appeal the classification of their positions within their agency or to OPM. A classification appeal may challenge only the appropriateness of the grade for the position or the wage system determination, the General Schedule or the prevailing wage system. Employees may not challenge the accuracy of their job description or OPM's classification standards.

An employee may challenge a classification determination at any time, but any relief granted is only prospective. An appeal decision for the employee will award retroactive relief only in cases involving a downgrade or other action that wrongfully reduced the employee's pay, and then only if the appeal is initiated within 15 days of the effective date of the reduction. Relief is otherwise prospective only. *See* 5 C.F.R. § 511.703. The appeal decision made by OPM is final and binding on the agency.

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

The courts have generally held that classification decisions are nonreviewable. *See, e.g.,* Karamanos v. Egger, 882 F.2d 447 (9th Cir. 1989) (finding that misclassifications are prohibited personnel actions and must be processed as such under the Civil Service Reform Act); Barnhart v. Devine, 771 F.2d 1515 (D.C. Cir. 1985). *See also* Perdeaux v. United States, 33 F. Supp 2d 187 (E.D.N.Y. 1999).

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, Federal employees normally must change positions 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, that determines the grade and pay level. Only if the duties and responsibilities of the position increase, can the position be reclassified and possibly upgraded.

The Federal civil service system is based on merit principles. A competitive service employee may therefore have to take a competitive examination to qualify for promotion to a higher graded position, unless the employee is somehow exempt from the examination requirement. *See* 5 U.S.C. § 3361.

b. Regulatory Implementation. A major exemption from the examination requirement applies to 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. OPM rules limit such promotions to employees in positions covered by a clearly defined merit promotion plan. *See* 5 C.F.R. § 335.103.

The result of this OPM rule has been the adoption by all Federal agencies of merit promotion plans. Part 335 of 5 C.F.R. describes 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 is at AR 690-300, Chapters 335 and 335-1. The Air Force implements 5 C.F.R. § 335.103 through AFI 36-1001, chapter 7.

Such a promotion system rewards eligible employees already employed by an agency by insuring their consideration for job vacancies at equal or higher grades in that agency. Merit promotion plans also ensure that promotions within agencies are based on merit principles rather than favoritism, nepotism, or some other nonmerit factor. Most importantly for the agencies, merit promotion plans provide the agency flexibility by enabling supervisors to fill vacancies without going through the cumbersome competitive procedures using OPM registers for selection of outside candidates.

An alternative to the merit promotion system considered in the "Reinventing Government" proposals involves pay or grade banding. Under this system, employees would be classified into a broad pay or grade "band" instead of into a specific pay grade. These bands would cover the equivalent of two, three, five, or more grade equivalents; over \$20,000 would separate the highest and lowest pay in a band. Instead of seeking an upgrade in grade classification for an employee, management would have authority to simply escalate the employee on the pay band--up to the band maximum. Since this is an exception to GS pay, however, it requires specific authority from Congress. Pay banding has been used in some NAF positions.

c. Judicial Review of Promotion Decisions. The merit promotion system inevitably results in many qualified candidates for promotion being passed over, or nonselected, for a position. Nonselected employees have often attempted to challenge the selection decision in Federal court. These nonselectees have alleged various defects in the process: 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). See also *Maule v. Office of Personnel Management*, 812 F.2d 1396 (Fed. Cir. 1987)(remand to Merit Systems Protection Board was required for determination of whether OPM's refusal to reopen register for federal employee who was on active duty with Air Force Reserve at time of job postings, was "employment practice" within meaning of regulation governing appeals to MSPB).

Nonetheless, the Court of Appeals for the D.C. Circuit has often refused to review other than constitutional claims. *Williams v. Internal Revenue Serv.*, 745 F.2d 702 (D.C. Cir. 1984); *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983). The D.C. Circuit reasons that the Civil Service Reform Act of 1978 established a comprehensive scheme of administrative and judicial review of certain designated personnel actions; therefore, no judicial review is available for other personnel actions absent a constitutional claim.

Note. Unless the employee alleged prohibited discrimination, there has been no administrative appeal procedure for those not selected for promotion. The only basis for filing a grievance over a promotion decision was that the agency followed improper procedures. The

former 5 C.F.R. § 771.108 addressed agency grievance coverage and specifically excluded from grievance coverage "[n]onselection for promotion from a group of properly ranked and certified candidates." OPM has recently repealed this provision. See 60 Fed. Reg. 47039-01 (Sep. 11, 1995). The DOD Grievance process, at para. 13-1.d.2(a) also excludes nonselection for promotion.

2.7 Incentive Awards.

Employees may also be eligible for cash 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 be either 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 incentive awards: suggestion awards, invention awards, special act or service awards, merit step increases, 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. All decisions on performance awards, honorary awards, and employee suggestions and inventions are management discretionary decisions and are not grievable under the DOD grievance procedures. (See para 13-1d(2)(a)). The Air Force incentive award program is governed by AFI 36-1004, *Managing the Civilian Recognition Program*, 1 July 1999.

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CHAPTER 3

EMPLOYEE GRIEVANCES UNDER AGENCY GRIEVANCE PROCEDURES

3.1 Purpose of Agency Grievance Procedure.

Prior civil service regulations required each Federal agency (including the executive agencies and military departments) to establish and maintain an agency grievance procedure. OPM has abolished this requirement in its amendment of 5 C.F.R. Part 771. See 60 Fed. Reg. 47039 (Sep. 11, 1995). Agencies must maintain the grievance systems already in place under the old Part 771 until the agency's grievance process is appropriately modified or revised. (5 C.F.R. § 771.101 Continuation of Grievance Systems.) Each administrative grievance system in operation as of October 11, 1995 that has been established under former regulations under this part must remain in effect until the system is either modified by the agency or replaced with another dispute resolution process.

An agency grievance process serves a variety of purposes. First, it provides a legitimate outlet for an employee to complain about management practices. Second, it allows an employee to obtain review of personnel actions from which there is no statutory appeal right. An employee who receives a letter of reprimand or a 3-day suspension, for example, has no right to appeal the agency action. The employee may, however, file a grievance to obtain limited review of the action. Third, the grievance procedure may provide a forum for challenging some aspect of the employee's working conditions, relationships, or status that is not covered by some other statutory or regulatory procedure. The agency grievance procedures encourage orderly consideration and prompt resolution of employee concerns and dissatisfactions. Management can consider each grievance fairly, equitably and promptly. It should also be noted that the DoD policy is that Alternative Dispute Resolution (ADR) techniques should be used to resolve disputes. Those techniques include problem solving, mediation, facilitation, conciliation, early-neutral evaluation, fact-finding, settlement conferences, ombudsman, peer review, and arbitration.

3.2 Regulatory Requirements.

Each Federal agency can now establish a grievance system for its employees without complying with the requirements of former 5 C.F.R. Part 771. The regulation requires only that agencies maintain current systems until a new grievance process--preferably one implementing alternate dispute resolution techniques--is fully implemented.

3.3 The Department of Defense Grievance System

a. General. Mr. Ronald P. Sanders, the Principal Director to the Assistance Secretary of the Army for Civilian Personnel Policy established a new Agency Grievance System (AGS)

for all DOD military departments through an 18 March 1994 memorandum. It modified this process through publication of DOD 1400.25-M on 20 December 1995 to implement the OPM changes. The Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs, through a 13 February 1996 memorandum, published implementing instructions for the then new DOD process. All matters are excluded under the DOD Grievance System that were excluded by the old 5 C.F.R. 771.105(b) or are not personal to the employee or the employee's personal well being or career. See DoD 1400.25-M, Subchapter 771, D.2.b.(1)-(15) for the listing of subject matter coverage.

b. Procedure. The DOD AGS contains only two steps, compared to the former three-step process in AR 690-600, chap. 771. The employee has the initial option of engaging in informal resolution to a problem through problem-solving. The employee presents the problem to a first or second line supervisor either orally or in writing within 15 days of the event giving rise to the problem. The 15 days runs from the time the employee becomes aware of the event or should have become aware of it. The supervisor has 30 days (which in no event can be extended beyond 60 days) to resolve the problem or inform the employee that no resolution is possible.

If the grievance is not resolved during problem solving, or the employee elects to bypass that stage, the employee files a formal, written grievance with a designated deciding official within 15 days. This deciding official must be at least a second-line supervisor, and will often be a chief of staff or deputy commander. The deciding official must be higher graded than any employee having a direct interest in the outcome of the grievance (except heads of activities or installations). The grievance must state specific dates, facts, and witnesses involved in the problem. The deciding official decides whether and how to investigate the grievance, approves or disapproves a representative for the grievant, and determines the appropriate amount of official time to be allowed for preparation and presentation of the grievance. Investigation can be conducted by the Office of Complaints Investigation on a cost-reimbursable basis, by an uninterested investigator within the command, or other means. The deciding official then issues a written, final decision within 60 days. There is no appeal or review of the deciding official's determination on the grievance. However, an employee may request that an individual at the next higher management level within the DoD Component, if any, review a decision to cancel a grievance.

AFI 36-1203, *Administrative Grievance System*, 1 May 1996, governs the Air Force civilian grievance system. According to the AFI, the employee initially presents the matter either orally or in writing, to their immediate supervisor. If the matter involves an action taken by, or a relationship with, that supervisor, the matter may be presented to the next level supervisor. The employee must clearly advise the supervisor of the basis of the matter and the personal relief or remedy sought. The supervisor to whom the grievance has been submitted must attempt to resolve it and provide a written decision within 15 calendar days (but not later than 30 calendar days) from the date the matter is raised. If the initial 15-day time limit cannot

be met, the supervisor must inform the employee (and the employee's representative) in writing of the date by which a decision will be received.

If the matter is not resolved in the informal stage, the supervisor should inform the employee of the procedures for filing a formal grievance when conveying the decision to the employee. An employee may file a formal written grievance if the matter is not resolved in the informal process (e.g., the requested relief is not granted or management's time limit expired with no decision) or where the employee chooses to bypass the informal process and initially file a grievance. The employee shall file the grievance in writing with the locally designated deciding official. The deciding official shall issue a final written decision that must respond to all issues and shall provide the reasons for the decision. If the grievance is rejected, the deciding official should also give the reasons in writing for the decision. Deciding officials must be assigned to an organizational level higher than any employee involved in the grievance or having a direct interest in the matter being grieved unless the deciding official is the Secretary of the Air Force. The decision is final and not subject to review. However, an employee may request review of the following: a decision to reject, cancel, or otherwise terminate a grievance without a decision on its merits; a decision that did not grant the relief sought when the grievance involved a suspension without pay; or any other decisions as established by local procedures.

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CHAPTER 4

EMPLOYEE DISCIPLINE

SECTION I: Authority and Procedure

4.1 Introduction. Management's ability to take effective disciplinary action is critical to maintaining a well-disciplined work force, whether in the private sector or in the Federal civil service. To attain this goal in the civil service system, 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 available to Federal supervisors, the procedures they must employ to impose each of these actions, and the employee's predecisional and postdecisional due process rights.

The ultimate goal of a disciplinary system is to motivate employees to conform to acceptable standards of conduct. A supervisor's best means for maintaining discipline is through cultivation of a positive work environment and good relations with subordinates. When an employee fails to conform to expected standards, the supervisor must take appropriate remedial action.

4.2 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, but management can impose formal disciplinary for a first infraction whenever appropriate. See AR 690-700, Chapter 751, paragraph 1-3.

b. Informal disciplinary actions. Oral admonishments or counseling and warning letters are actions usually taken by the first or second line supervisor. An informal, oral action should always be noted on the employee's Standard Form 7-B (Employee Record Card) and explained in a corresponding memorandum for record. AR 690-700, Chapter 751, paragraph 1-3b.

c. Formal disciplinary actions. The supervisor in the Army initiates formal disciplinary actions, but they must be coordinated with the servicing CPOC and be reviewed by 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). The supervisor imposing the discipline decides how long the reprimand will remain in the employee's OPF, but the period may not exceed three years. The letter of reprimand will automatically be removed from the employees' file if the employee changes positions and the new position is serviced by a different CPOC.

(2) Suspensions. Suspensions are divided into two categories based on their duration: suspensions for fourteen days or less, and suspensions for more than fourteen days. The procedural rights an employee receives depends on the duration of the suspension. The 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. 5 C.F.R. §§ 752.201(d)(1); 752.402(a).

There is no specific limit on the duration of a suspension; however, a suspension generally cannot be indefinite. *See, e.g., Tigner-Kier v. Department of Energy*, 20 M.S.P.R. 552 (1984). The courts recognize a type of "indefinite" suspension that is linked to the disposition of criminal charges. Such a suspension is not truly indefinite because it is limited by a condition subsequent--the outcome of criminal proceedings. This type of action is discussed fully in paragraph 4.12 of this chapter. Regardless of its length, a suspension results in the employee not reporting to work and not being paid for the period of suspension. *See* 5 C.F.R. § 752.201(d)(4) ("*Suspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.").

(3) Reductions in grade or pay. While reductions in grade or pay are more frequently used in performance-based actions, they may be appropriate for some misconduct problems. Most frequently, a reduction for misconduct is used to reduce a supervisor 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.

4.3 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 the easiest to impose. A supervisor obtains all reasonably available and relevant information and then determines whether a letter of reprimand is warranted. Coordination with the CPOC and review by the Labor Counselor is required. Before deciding whether to impose this type

discipline the supervisor may, but need not, interview the employee involved. An employee generally has no right to counsel at such an interview, but may be entitled to union representation at the interview under 5 U.S.C. § 7114(a)(2)(B) if the employee is in a collective bargaining unit. See AR 690-700, Chapter 751, paragraph 3-2, for more detailed guidance, including instructions on the content of a letter of reprimand.

b. Suspensions for 14 days or less. The statutory basis for these disciplinary actions is 5 U.S.C. §§ 7501-7504. This law and its implementing regulations contain significant pre-decisional, procedural due process requirements; however, these procedures apply only to non-probationary competitive service employees. 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. *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).

Non-probationary competitive service employees receive the following procedural due process (see 5 U.S.C. § 7503; 5 C.F.R. § 752.404) before a suspension for 14 days or less may be imposed:

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.

The right to review all the information relied upon by management in proposing this action does not include questioning the agency officials involved. 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, in the amount of time given to the employee to respond to the proposed action, and in appeal and grievance rights.

Non-probationary competitive service employees and non-probationary excepted service employees (preference eligibles with over one year service and nonpreference eligible excepted service employees with two or more years of current, continuous service) all receive the same pre-decisional due process in a true adverse action. Most excepted service employees now receive due process because of 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. The Civil Service Due Process Amendments (Pub. L. No. 101-376, 104 Stat. 461 (1990)) modified this definition to grant most excepted service employees due process rights in true adverse actions.

Despite these rights for the "protected" employees, agencies still have virtual summary disciplinary authority over non-preference eligible excepted service employees with less than two years current, continuous service and probationary competitive service or excepted service preference eligible employees. *See, e.g.,* *Forest v. Merit Systems Protection Bd.*, 47 F.3d 409 (Fed. Cir. 1995) (non-preference eligible excepted service employee with less than two years of current, continuous employment in a non-temporary appointment has no right of appeal from removal); *Antolin v. Department of Justice*, 895 F.2d 1395, 1397 (Fed. Cir.1989) (Under the plain language of the statute, even when an individual serves a series of temporary appointments of one year or less, that individual does not become an employee for the purpose of 7511(a)(1)). *Fowler v. United States*, 633 F.2d 1258 (8th Cir. 1980); *Shaw v. United States*, 622 F.2d 520 (Ct. Cl.), *cert. denied*, 449 U.S. 881, *reh'g denied*, 449 U.S. 987 (1980); *Ferguson v. Dep't of Interior*, 59 M.S.P.R. 305 (1993); and *Horton v. Dep't of Navy*, 60 M.S.P.R. 397 (1994).

An employee entitled to due process in a true adverse action receives at least thirty days advance written notice of the action and at least seven days to prepare matters in response to the proposed action. *See* 5 U.S.C. § 7513(b)(1). If the agency has reasonable cause to believe the employee has committed a crime for which imprisonment may be imposed, the advance notice period may be reduced to 7 days under the "crime provision." *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 entire notice period.

Title 5, U.S. Code, section 7513(c) provides for an optional predecisional hearing in true adverse actions. The Army, however, has elected not to provide predecisional hearings.

4.4 Appeal and grievance rights. After management has provided an employee predecisional due process and decided to take disciplinary action, the employee may be entitled to challenge the 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 involved, and the employee's individual status.

a. Without a collective bargaining agreement.

(1) True adverse actions. An employee with status (discussed below) who is not covered by a collective bargaining agreement between management and a labor organization can appeal a true adverse action to the Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 7513(d); 5 C.F.R. § 752.405. In this appeal, the employee receives 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 lesser disciplinary actions, employees generally can grieve the action under the DOD AGS. There is no third party hearing or other review outside the command in this system. The final decision on the grievance is made within command channels. Details of the DOD AGS are provided in Chapter 3 above.

There are significant differences in postdecisional appeal rights between a 14-day and 15-day suspensions; courts have, therefore, scrutinized 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 punishments for the same offense will not defeat the employee's appeal rights. *Lyles v. U.S. Postal Service*, 709 F.2d 358 (5th Cir. 1983).

b. With a collective bargaining agreement. Every public sector collective bargaining agreement must contain a grievance procedure that includes an arbitration process that binds the parties. *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 would 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. An employee covered by a collective bargaining agreement can either appeal a true adverse action to the MSPB or grieve the action under the negotiated grievance procedure. The employee must make a binding election; pursuit of one bars later recourse to the other procedure. *Rolon v. Dep't. of Veteran Affairs*, 53 M.S.P.R. 362 (1992). See 5 U.S.C. § 7121(e)(1) and 5 C.F.R. 1201.3(c)(2) for the rule regarding when the employee is held to have made an election; *Jones v. Dep't. of Justice*, 53 M.S.P.R. 117, dismissed, 972 F.2d 1352 (Fed. Cir. 1992)(finding employee's later withdrawal of grievance did not affect validity of election).

An employee in essence forfeits control of an appeal by electing to grieve under a negotiated grievance procedure instead of appealing to the MSPB. *Rolon v. Dep't of*

Veterans Affairs, 53 M.S.P.R. 362 (1992). Under the negotiated grievance procedure, an employee chooses to file a grievance; 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. Dep't of the Air Force*, 725 F.2d 1160 (8th Cir. 1984), *Parks v. Smithsonian Inst.*, 39 M.S.P.R. 346 (1988), *Little v. Department of Treasury*, 65 M.S.P.R. 360, 362 (1994) for examples of such aggrieved employees. Of course, the employee's appeal rights are still defined by law. An employee who has no MSPB appeal rights, therefore, can not further appeal an arbitrator's decision as could a non-probationary employee. See *Burke v. U.S. Postal Serv.*, 888 F.2d 833 (Fed. Cir. 1989) (finding it had no jurisdiction over petition from arbitrator's decision by nonpreference-eligible excepted service postal worker).

(2) Other disciplinary actions. Under a collective bargaining agreement, employees can grieve the lesser disciplinary actions and potentially go to binding arbitration. This is a significant benefit to the employee; without a collective bargaining agreement the employee cannot grieve this type disciplinary action outside the agency. Do not confuse this arbitration right with the arbitrability of true adverse actions. An employee who can not appeal a true adverse action (*i.e.*, probationary competitive service employees, excepted service employees with less than two years, current, continuous service) also can not arbitrate that action, and any union proposal to give those employees arbitration rights is nonnegotiable. *Dep't of Health & Human Servs., v. Federal Labor Relations Auth.*, 894 F.2d 333 (9th Cir. 1990); *Dep't of Treasury v. Federal Labor Relations Auth.*, 873 F.2d 1467 (D.C. Cir.1989); *Dep't of Health & Human Servs., v. Federal Labor Relations Auth.*, 858 F.2d 1278 (7th Cir.1988) (all reversing FLRA's finding that proposal to allow probationary employees arbitration rights was negotiable). *But see* *Suzal v. Director, U.S. Information Agency*, 32 F.3d 574, 580 (D.C.Cir. 1994) (United States Information Agency (USIA) did not act ultra vires when it allowed employee to challenge nonrenewal of appointment through arbitration, since nonrenewal was not "adverse action"; although agencies were probably prohibited from allowing employees to challenge major "adverse actions" through arbitration when Congress had specifically precluded them from appealing such actions to Merit Systems Protection Board (MSPB), no parallel inference could be drawn for "prohibited personnel practices.")

c. Employee status. The type of disciplinary action at issue controls appeal rights, and the existence or absence of a collective bargaining agreement controls grievance rights. The employee's status, however, determines what, if any, appeal and grievance rights the employee has in any disciplinary action.

A probationary employee generally has no statutory appeal right to the MSPB. 5 C.F.R. § 315.806 sets forth the appeal right of a probationary employee, specifically limiting the right of a probationary employee to appeal a termination under sections 315.804 and 315.805. *Pierce v. Government Printing Office*, 70 F.3d 106 (Fed. Cir. 1995); *Horton v. Dep't of Navy*, 60 M.S.P.R. 397 (1994); *McChesney v. Dep't. of Justice*, 55 M.S.P.R. 512 (1992); *Stern v. Department of Army*, 699 F.2d 1312 (Fed. Cir. 1983). Probationary employees also cannot arbitrate a disciplinary action. *INS v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983).

Before passage of the Civil Service Due Process Amendments of 1990, excepted service employees who were not preference eligible had no right to MSPB or judicial review of adverse personnel actions. *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. *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 became entitled to an MSPB appeal in true adverse actions. These employees are now able to arbitrate lesser disciplinary actions and have the option of appealing or grieving true adverse actions once they have satisfied this probationary period. As noted above, however, these employees may not arbitrate true adverse actions unless they could otherwise appeal that action to the MSPB.

4.5 Procedural rights for probationary and excepted service employees in disciplinary actions. Probationary competitive service and probationary veteran's preference excepted service employees receive little due process in disciplinary actions--even true adverse actions. They are, however, entitled by law to some protections.

a. Probationary employee rights. The basis of the action determines, what, if any, process is due a probationary employee.

(1) Predecisional rights. In removals based on conduct or performance during the probationary period, a probationary competitive service employee or a probationary veteran's preference excepted service employee are entitled only to written notice stating the reasons for the action and the effective date of the separation. *See* 5 C.F.R. § 315.804. The employee need not even receive the termination notice before its effective date if the agency acts with reasonable diligence to provide it in advance. *Santillan v. Dep't. of Air Force*, 54 M.S.P.R. 21 (1992). *Lavelle v. Department of Transp.*, 17 M.S.P.R. 8 (1983) (The courts interpreting this provision have recognized that the rights conferred by 5 C.F.R. S 315.804 are very narrow. "Procedurally, a probationary employee has the right only to be notified prior to the termination of his employment as to the agency's 'conclusions as to the inadequacies of [the probationer's] performance or conduct.' " *See e.g., Shaw v. United States*, 622 F.2d 520, 527, 223 Ct.Cl. 532, *cert. denied*, 449 U.S. 881, 101 S.Ct. 231, 66 L.Ed.2d 105 (1980), citing *Perlongo v. United States*, 215 Ct.Cl. 982, 566 F.2d 1192 (1977), *cert. denied*, 436 U.S. 944, 98 S.Ct. 2844, 56 L.Ed.2d 785 (1978), and *Horne v. United States*, 190 Ct.Cl. 145, 148, 419 F.2d 416, 418 (1969)). Although failure to provide such notification prior to

termination has been held to constitute substantial noncompliance with the regulation where the employee did not receive the agency reasons until six months after her discharge (See *Watson v. United States*, 162 F. Supp. 755, 758-759, 142 Ct.Cl. 749 (1958)), such notification does not have to be actually received by the employee prior to the termination where the agency's attempts to give prior notification are diligent and reasonable under the circumstances.

If, however, the action is based, in whole or in part, on incidents 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. and *Pierce v. GPO*, 70 F.3d 106, (Fed. Cir. 1995) (In reviewing the appeal rights of a probationary employee, a claim that the removal was based on either a learning disability or sexual harassment by a supervisor does not constitute a pre-appointment reason entitling the employee limited due process under 5 CFR § 315.805.) Presumably, the employee could file an EEO complaint.; *Munson v. Dep't of Justice*, 55 M.S.P.R. 246 (1992); *James v. Dep't of Army*, 55 M.S.P.R. 124 (1992).

(2) Appeal right to MSPB. By OPM regulation, probationary employees can appeal a firing to the MSPB if the firing is based on a non-frivolous allegation of partisan political reasons or marital status. The MSPB and courts have strictly scrutinized appeals invoking this jurisdiction before granting review.

Partisan political reasons are those relating solely to recognized political parties, candidates for office, and political campaign activities. *Poorsina v. MSPB*, 726 F.2d 507 (9th Cir. 1984). It does not include an employee's affiliation with a labor organization. *Schindler v. General Services Admin.*, 53 M.S.P.R. 171 (1992); *Masticano v. FAA*, 714 F.2d 1152 (Fed. Cir. 1983). *Bante v. Merit Systems Protection Bd.*, 966 F.2d 647 (Fed. Cir. 1992) (discussing the requirement for partisan politics review generally).

Marital status is not the same as sexual discrimination; it includes only discrimination based on marriage. A successful allegation by a single woman would be that management terminated her because it perceived married women as more mature and stable. The converse allegation by a married woman would be termination because management sought a single woman who was less likely to have children and leave the position. *Edem v. Dep't of Commerce*, 64 M.S.P.R. 501 (1994); *Bedynek-Stumm v. Dep't of Agriculture*, 57 M.S.P.R. 176 (1993); *Gribben v. Dep't of Justice*, 55 M.S.P.R. 257 (1992); *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 can appeal a removal to the MSPB for defects in the procedures required by 5 C.F.R. § 315.805. In this appeal, however, the MSPB will not review the substantive merits of the action, but rather only the procedures. *Hibbard v. Department of Interior*, 6 M.S.P.R. 181 (1981).

A probationary employee who appeals to the MSPB based on a non-frivolous allegation of partisan political or marital status discrimination or on improper procedures for pre-employment matters can also properly 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, invoke the jurisdiction of the MSPB; a remedy under those circumstances is only through equal employment opportunity channels. The MSPB will, however, hear evidence of discrimination in any case properly before it. *Roja v. Dep't of Navy*, 55 M.S.P.R. 618 (1992).

(3) Special Counsel action. Any federal employee, even probationers, can complain to the Office of Special Counsel that a personnel action allegedly constitutes a prohibited personnel practice as defined in 5 U.S.C. § 2302(b). The Special Counsel can seek corrective action, if a personnel action appears to have been taken for improper reasons, and administratively prosecute the agency official responsible for the prohibited personnel practice. The Special Counsel brings these cases before the MSPB. The MSPB can also grant the Special Counsel a stay of pending personnel action while it investigates an allegation based on only the Special Counsel's petition. *See generally* 5 C.F.R. Part 1209. Such a stay need be supported only by "reasonable grounds." *Special Counsel v. Dep't of Air Force*, 55 M.S.P.R. 482 (1992). A probationary employee's service during a stay period will not, however, count toward satisfaction of the probationary period 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).

A good faith allegation 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. *Borrell v. U.S. International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982) and *Wren v. MSPB*, 681 F.2d 867 (D.C. Cir. 1982). *DeLeonardis v. Weiseman*, 986 F.2d 725, (5th Cir 1993)(When Office of Special Counsel (OSC) decides to terminate investigation that it began pursuant to employee's complaint of prohibited personnel practice, that decision is not reviewable, even if OSC has allegedly applied incorrect legal standard in deciding to terminate investigation.)

An employee who complains to the Special Counsel that a personnel practice violates the provisions of the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8), however, may bring an independent action before the MSPB if the Special Counsel either defers action or fails to act within 120 days (referred to as the individual right of action, or "IRA"). 5 U.S.C. § 1221; 5 C.F.R. § 120.3(b). *See also Horton v. Dep't of Transp.*, 66 F.3d 279 (Fed. Cir. 1995) (affirming removal and nonselection for promotion appeal by probationary employee who alleged whistleblower reprisal).

(4) DOD Agency Grievance Procedure. The final possible avenue for a probationary employee to challenge a removal is to grieve under the agency's grievance procedure. The DOD procedure is discussed in chapter 3, above. Under prior OPM regulations (5 C.F.R. Part 771), probationary employees were not entitled to grieve removal. Agencies are now free to implement their own grievance systems without the requirements of 5 C.F.R. Part 771. Most will continue to prohibit removal grievances by probationers, as does the DOD Grievance Process. See DOD AGS Memorandum, para 13-1d(2)(c).

b. Excepted service employee rights. Among excepted service employees, only preference eligible employees with one year of service or, after August 17, 1990, most other Schedule A and B excepted service with over two years' continuous service, receive appeal rights to the MSPB from a true adverse action. These employees are considered "non-probationary." Those excepted service employees who do not fall within one of these groups receive even fewer due process protections than competitive service probationary employees.

(1) Predecisional rights. An excepted service employee who is not a preference eligible and not covered by the Civil Service Due Process Amendments of 1990 receives no pre-decisional rights in any disciplinary action. An excepted service employee who is a preference eligible beyond the first year of employment or has two or more years of current, continuous service (non-probationary equivalent) receives the same pre-decisional rights as a non-probationary competitive service employee for true adverse actions. See 5 U.S.C. § 7511. These excepted service employees still receive no pre-decisional rights; however, for suspensions of 14 days or less, see 5 U.S.C. §§ 7501-7503.

(2) Appeal rights to MSPB. Only non-probationary excepted service employees have appeal rights to the MSPB. Probationary excepted service employees can, however, appeal a personnel action based on a non-frivolous allegation of partisan political reasons or marital status, just as probationary competitive service employees. *Kane v. Dept of Army*, 60 M.S.P.R. 605 (1994).

(3) Special Counsel action. Excepted service employees have the same rights as competitive service and all other employees to complain to the Special Counsel and allege that a personnel action is based on a prohibited personnel practice.

(4) DOD 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 DOD AGS.

4.6 Constitutional right to due process. The rights of probationary competitive excepted service employees just discussed are based on statute and regulation. They are the only rights

these employees receive in a disciplinary action, unless they can demonstrate a constitutional right to a hearing based upon the implication of a property right or a liberty interest.

a. Property right. A reasonable expectation of continued employment can create a property right protected by the due process clause of the Fifth Amendment to the U.S. Constitution. *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." *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972). Because federal employees' rights are so specifically delineated in law and regulation, however, a constitutional property right will be implicated only when the Civil Service Reform Act provides due process protections. *Bush v. Lucas*, 462 U.S. 367, 378 n. 14 (1983) (holding civil service protections are "clearly constitutionally adequate").

(1) Statutory right. A property right has been created by statute for non-probationary competitive service employees and non-probationary equivalent excepted service employees. This property right is created by language in 5 U.S.C. § 501, which states 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 expectation 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). No such reasonable expectation of continued employment can arise for a probationary or probationary equivalent employee, since the statutes that enable their employment provide no such right to a hearing.

(2) Other property right. The U.S. Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), held that a property right could be created by something other than a statutory provision. The Court suggested that rules or understandings between an agency and its employees could create an expectancy in continued employment and create 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), where the courts found property rights created by language in agency handbooks suggesting that employment would not be terminated except for cause. *But see Fiorentino v. United States*, 607 F.2d 963 (Ct. Cl. 1979) where 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 for 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 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 Constitutional basis 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 disseminated without an opportunity to respond. *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 that 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. *Siebert v. Gilley*, 500 U.S. 226 (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. The court found that referring to a person being a liar, if disseminated, could adversely affect the individual's ability to take advantage of other employment opportunities. The court also found the dissemination element satisfied by 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 agencies will not state the basis for an adverse action in agency documents unless the employee receives procedural protections that would satisfy due process requirements. See former FPM Supp. 296-33, " § 31-4c and 4d. Although this FPM provision no longer exists, its Constitutional foundation does.

(2) Nature of the remedy. Courts have consistently held that an employee is only entitled to a hearing to clear the employee's name, not to litigate the question of reinstatement, if only a liberty interest is at stake, not a property right. *Codd v. Velger*, 429 U.S. 624 (1977). 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 inadequacy of evidence or credibility issues.

SECTION II: Substantive Requirements for Disciplinary Actions

4.7 Introduction. The preceding section focused exclusively on the procedural aspects of disciplinary actions. This section will focus on the substantive aspects of discipline by examining the proof requirements to sustain a disciplinary action, whether challenged in an appeal to the MSPB or in a grievance and subsequent arbitration hearing.

In every disciplinary action the agency must prove by a preponderance of the evidence that:

- a. The employee committed the act of misconduct forming the basis for the discipline;
- b. The discipline is for "such cause as will promote the efficiency of the service" (5 U.S.C. §§ 7503(a) and 7513(a));
- c. The penalty selected was appropriate for the misconduct and circumstances involved; and
- d. The agency followed proper procedures.

4.8 Proving the Employee's Act of Misconduct.

a. General. Proving an act of misconduct in a hearing before an MSPB administrative judge or an arbitrator is no different than proving a case in any other administrative forum. Formal rules of evidence do not strictly apply at MSPB hearings. *Accord* Hillen v. Dep't of Army, 66 M.S.P.R. 68, 84 (1994); Schrider v. U.S. Postal Service, 36 M.S.P.R. 650 (1988); Debose v. Department of Agriculture, 700 F.2d 1262 (9th Cir. 1983). Crawford v. Department of Treasury, 56 M.S.P.R. 224, (1993). Administrative judges can admit any category of evidence. Arterberry v. Department of Air Force, 25 M.S.P.R. 582 (1985).

Generally, an administrative judge has wide discretion to control the proceedings before him, including the authority to exclude testimony he believes would be irrelevant, immaterial, or repetitious. Purcell v. Department of Agriculture, 55 M.S.P.R. 305 (1992). Any evidence that is relevant, material, and not unduly repetitious will be admitted. Hearsay evidence is admissible and, even standing alone, may be sufficient proof; the nature of the evidence goes to its weight and not to admissibility. Woodward v. Office of Personnel Management, 74 M.S.P.R. 389 (1997); Marable v. Dep't of Army, 52 M.S.P.R. 622 (1992); Campbell v. Department of Transportation, FAA, 735 F.2d 497 (Fed. Cir. 1984). Hearsay evidence alone will usually be insufficient proof if contradicted by sworn nonhearsay testimony. Dubiel v. U.S. Postal Service, 54 M.S.P.R. 428 (1992); 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), in Chapter 8 of this casebook..

b. Evidence of conviction. As an alternative to presenting independent evidence of misconduct, agency counsel can satisfy the agency's burden by use of a state or Federal criminal court conviction. The agency may meet its obligation to prove the misconduct by introducing a judgment of conviction on the same charges stated in the judgment of conviction. The employee does not have a right to relitigate before the MSPB what has already been decided in the criminal trial.

The MSPB recently approved such administrative collateral estoppel, or issue preclusion, in *Beasley v. Dep't of Defense*, 52 M.S.P.R. 572 (1992). The rule had been firmly established 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 was tacitly approved in *Crofoot v. Government Printing Office*, 761 F.2d 661 (Fed. Cir. 1985).

c. Notes and Discussion.

Note 1. One of the requirements for use of collateral estoppel as outlined in *Otherson* is actual litigation of 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 where the individual does not admit the underlying facts and the court does not make a finding on the underlying facts. *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 *Wenzel v. Dep't of Interior*, 33 M.S.P.R. 344, *aff'd*, 837 F.2d 1097 (Fed. Cir. 1987)(approving use of estoppel in nolo plea); *Crofoot v. GPO*, 823 F.2d 495 (Fed. Cir. 1987); *Graybill v. USPS*, 782 F.2d 1567 (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), *aff'd*, *Crofoot v. Government Printing Office*, 823 F.2d 495 (Fed. Cir. 1987).

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. *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 burden of proof; however, if the agency has independent evidence to prove the misconduct, it is wise to also introduce that evidence to preclude the case later being lost if the criminal case is reversed on appeal or the charges of the removal are not identical to those of the conviction. *Owens v. U.S. Postal Service*, 57 M.S.P.R. 63 (1993); *Robinson v. Department of Army*, 21 M.S.P.R. 270 (1984).

d. Evidence of indictment. An agency will occasionally want to discipline an employee pending criminal charges, but it lacks the independent evidence to pursue the charges. An indictment is clearly insufficient evidence of the underlying misconduct. *Brown v. Department of Justice*, 715 F.2d 662, 667 (D.C. Cir. 1983); *O'Connor v. Dep't of Veterans Affairs*, 59 M.S.P.R. 653 (1993); *Roby v. Dep't of Justice*, 59 M.S.P.R. 426 (1993); *Crespo v. U.S. Postal Service*, 53 M.S.P.R. (1992). The agency still has options, however.

A federal agency may take disciplinary action when it has 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. *Accord* *Pararas-Carayannis v. Dep't of Commerce*, 9 F.3d 955 (Fed. Cir. 1993); *Dunnington v. Dep't of Justice*, 956 F.2d 1151 (Fed. Cir. 1992); *Smith v. Gov't Printing Office*, 60 M.S.P.R. 450 (1994); *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 is under investigation is insufficient. *Richardson v. U.S. Custom Serv.*, 47 F.3d 415 (Fed. Cir. 1995); *Reid v. U.S. Postal Service*, 54 M.S.P.R. 648 (1992); *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), *aff'd*, 956 F.2d 1151 (Fed. Cir. 1992) (arrest based on arrest warrant issued by neutral magistrate based on a finding of probable cause sufficient). *See also* *Ellis v. Department of Veterans Affairs*, 60 M.S.P.R. 681 (1994) (Employee's arrest for murder after he shot and killed customer in his bar, newspaper article reporting arrest and employee's admission to his supervisor that he killed someone did not give agency "reasonable cause" to believe that employee had committed crime for which sentence of imprisonment could be imposed, so as to justify his indefinite suspension; newspaper article provided few details of underlying incident, and it was unclear whether employee confessed that he committed murder or simply stated that he acted in self-defense.)

Typically the discipline imposed in this situation is an indefinite suspension pending resolution of the criminal charges. This type of disciplinary action will be examined in detail in paragraph 4.13 of this chapter.

4.9 Proving the Connection Between the Misconduct and the Efficiency of the Service -- "Nexus." Proving that the employee did something wrong, even criminal, is insufficient to justify disciplinary action. Serious disciplinary actions may be taken only "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 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 under the CSRA 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.

Note. The nexus requirement flows from the "efficiency of the service" cause standard in 5 U.S.C. §§ 7503 and 7513. These sections apply only to certain designated employees, *i.e.*, non-probationary competitive service employees and non-probationary excepted service employees. In *Merritt*, the Board briefly examined the prohibited personnel practices listed in 5 U.S.C. § 2302(b)(10) and concluded that this provision extended the cause standard from 5 U.S.C. §§ 7503 and 7513 to virtually all personnel actions against all employees. The agency must, therefore, satisfy the nexus requirement even in lesser adverse actions and those taken against employees other than non-probationary competitive service and non-probationary equivalent excepted service employees. Because of the Board's limited jurisdiction, this issue would only 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. § 302(b)(10).

b. Presenting evidence of nexus. In August 1984, the MSPB decided several nexus cases that continue to be cited as stating the agency's burden of proof. See particularly the following cases and those they cite: *Thomas v. Department of Air Force*, 67 M.S.P.R. 79, (1995); *Ingram v. Dep't of Air Force*, 53 M.S.P.R. 101, *aff'd*, 980 F.2d 742 (1992); *Beasley v. Dep't of Defense*, 52 M.S.P.R. 272 (1992); *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). Since 1984, the MSPB has reversed very few cases based on the lack of nexus. These cases should therefore be used simply for their evidentiary analysis.

These cases, like most nexus cases, help to categorize somewhat the types of evidence the Board will accept as adequate proof of the required nexus. The best evidence is that which demonstrates direct impact, or misconduct, on the job site, *e.g.*, misuse of government equipment. *Sternberg v. Dep't of Defense*, 52 M.S.P.R. 547 (1992). Another on-the-job effect is fellow employees afraid to work with the offending employer. *See Beasley v. Dep't of Defense*; *Backus v. Office of Personnel Management* above. In many cases, that type of evidence is not available.

The second category of evidence 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. *Honeycutt v. Department of Labor* and *Jaworski v. Department of Army*. If "loss of confidence" evidence is not available, look for 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. *Franks v. Department of Air Force*; *Adams v. Defense Logistics Agency*, 63 M.S.P.R. 551 (1994)(Agency established nexus between employee's off-duty possession of marijuana and efficiency of his service by deciding official's unchallenged hearing testimony that employee's misconduct adversely affected agency's trust and confidence in his job performance.)

c. Exception: The presumption of nexus.

(1) Application of the presumption. The MSPB in *Merritt v. Department of Justice* clearly established 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. *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 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 *Hayes* decision is paramount to MSPB practice 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. *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 is determined on a case by case basis. See *Hayes* at 1539, n.3 for a list of cases in which the presumption was applied. See also *Graham v. U.S. Postal Service*, 49 M.S.P.R. 364 (1991) and *Coleman v. U.S. Postal Serv.*, 57 M.S.P.R. 537 (1993) (drinking on job and AWOL presumptively affect efficiency of service). *Wagstaff v. Department of Air Force*, 945 F.2d 418 (Fed. Cir. 1991) (Table, text in WESTLAW)(use of cocaine by aircraft mechanic during lunch hour presumptively affected efficiency of service). The composition of the Board at the time the case is heard will have obvious bearing on the outcome of the "egregious" determination.

(2) Employee rebuttal of presumption. The presumption of nexus is rebuttable. The limited case law in this area indicates that the employee must demonstrate that the misconduct has no adverse impact on the employee's performance, no adverse impact on the performance of other employees, and no adverse impact on the organization. *Allred v. Department of Health and Human Services*, 786 F.2d 1128, (Fed. Cir. 1986)(Presumption of a nexus between the conduct and the employee's job-related responsibilities, which is applicable to employees who engage in egregious misconduct, forces the employee to prove the negative proposition that his retention would not adversely affect the efficiency of the service.) *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 justifies taking disciplinary action. The agency must then demonstrate the appropriateness of the specific discipline imposed.

4.10 Demonstrating the Appropriateness of the Penalty Choice. In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the Board issued its lead decision on how an agency should choose an appropriate penalty. The Board in *Douglas* provided detailed guidance concerning the scope of its review, how and when it would mitigate an agency's chosen penalty, and the relevant factors it would consider in reviewing penalties. *Douglas* 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 ensure consistency with law, rule, regulation, agency table of penalties, and consideration of other relevant factors. *See also* *Uske v. U.S. Postal Svc.*, 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995) *cert. denied*, 516 U.S. 1056, 116 S.Ct. 728, 133 L.Ed.2d 680, 64 USLW 3466 (1996); *Betz v. General Services Admin.*, 55 M.S.P.R. 424 (1992); *Schulmeister v. Dep't of Navy*, 46 M.S.P.R. 13 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991). The other relevant factors set out in *Douglas* have become known as the "Douglas factors."

a. Notes and Discussion.

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. The Court of Appeals for the Federal Circuit approved this analysis in *Nagel v. Department of Health and Human Services*, 707 F.2d 1384 (Fed. Cir. 1983). *See also* *Chauvin v. Dep't of Navy*, 59 M.S.P.R. 675 (1993); *Ingram v. Dep't of Air Force*, 53 M.S.P.R. 101, *aff'd*, 980 F.2d 744 (1992); *Eidmann v. Merit Systems Protection Bd.*, 976 F.2d 1400, (Fed. Cir. 1992).

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 employee challenge to the penalty. *Douglas* requires the agency to produce evidence concerning penalty choice.

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 fact (sic) 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 . . . the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge.

See also *Parsons v. Department of Air Force*, 707 F.2d 1406 (D.C. Cir. 1983); *Mertins v. Dep't of Navy*, 61 M.S.P.R.157 (1994).

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 as Table 1-1 in Change 5 to AR 690-700, Chapter 751 (15 September 1989). The MSPB has repeatedly held that consistency with an agency's table of penalties is a relevant factor in reviewing the appropriateness of a penalty. *Stephens v. Department of Air Force*, 58 M.S.P.R. 502, (1993)(A penalty of removal is within the tolerable bounds of reasonableness for a sustained charge of criminal sexual misconduct. *See, e.g.*, *Graybill v. U.S. Postal Service*, 782 F.2d 1567 (Fed. Cir.), cert. denied, 479 U.S. 963, 107 S.Ct. 462, 93 L.Ed.2d 407 (1986); *Williams v. General Services Administration*, 22 M.S.P.R. 476, 478-79 (1984), *aff'd*, 770 F.2d 182 (Fed. Cir.1985) (Table); *Hayes v. Department of the Navy*, 15 M.S.P.R. 378 (1983), *aff'd*, 727 F.2d 1535 (Fed. Cir.1984)). *See, e.g.*, *Peterson v. Dep't of Transportation*, 54 M.S.P.R. 178 (1992).

a. One issue of concern is 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 similar. The 9th circuit approved this approach in *McLeod v. Department of Army*, 714 F.2d 918 (9th Cir. 1983); however, that court no longer hears appeals from MSPB decisions.

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). The agency always has the burden to justify why the recommended penalty in the table of penalties is inadequate.

c. Most tables of penalties recommend penalties for various offenses based on whether the misconduct is the first, second, or third offense. For purposes of determining whether the misconduct is the first or later offense, all prior misconduct, not just offenses of the same type, may be considered. *Villela v. Department of Air Force*, 727 F.2d 1574 (Fed. Cir. 1984). An employee may challenge the previous disciplinary action being used to enhance the punishment, depending on the circumstances surrounding the agency's processing of that earlier action. If the employee (1) had been informed of the previous disciplinary action in writing, (2) had an opportunity for a substantive review of the action by a higher authority than the one who took the action, and (3) the action was 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. *Hill v. U.S. Postal Service*, 69 M.S.P.R. 453, (1996); *Huettner v. Dep't of Army*, 54 M.S.P.R. 472 (1992); *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 does not preclude the agency's use; it merely allows the employee to challenge the merits of the prior action during the current action. *Parsons v. Department of the Air Force*, 21 M.S.P.R. 438 (1984).

4.11 Mitigation of Penalty Choice: Following *Douglas*, the general rule was deference to the agency in penalty selection. Penalty selection was reviewed under an abuse of discretion standard. *Uske v. U.S. Postal Serv.*, 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995); *Schulmeister v. Dep't of Navy*, 46 M.S.P.R. 13 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991); *Miguel v. Dep't of Army*, 727 F.2d 1081 (Fed. Cir. 1984).

a. *De Minimis* misconduct. In a recent line of cases, however, the Board has mitigated numerous penalties despite the AJ's affirmation of the agency charges and chosen penalty. See, e.g., *Shelly v. Department of the Treasury*, 75 M.S.P.R. 677, (1997)(One-grade demotion, rather than removal, was proper penalty for law enforcement employee's misconduct leading to charges that she gave appearance that she was using her position for other than official business and other unrelated charges arising principally out of incidents in which employee discussed religion with suspect she was investigating and touched suspect's forehead on another occasion and declared that she was rebuking Satan in the name of Jesus. Employee believed that she had engaged in consensual discussion with suspect about religion, her offense was one of poor judgment rather than dishonesty, violence or other serious action, agency official improperly based penalty determination on conclusion that investigator had violated suspect's right to religious freedom although this violation was not charged, employee had rehabilitation potential as she admitted her actions were wrong, and she had 23 years of service

with agency with no previous discipline.); *Perez v. U.S. Postal Service*, 75 M.S.P.R. 503(1997)(Removal was not warranted by supervisory employee's falsification of his employment application in his answer to question involving prior criminal offenses, where employee had 15 years of federal service, including 11 years with agency, he committed no offense involving dishonesty, or any other offense, during his employment with agency, and underlying criminal charge that employee had failed to report was merely "willful failure to appear."); *Matson v. Dep't of Army*, 32 M.S.P.R. 168 (1987); *Casia v. Dep't of Army*, 62 M.S.P.R. 130 (1994); *Taylor v. Dep't of Justice*, 60 M.S.P.R. 686 (1994). *See also* *Skates v. Department of the Army*, 69 M.S.P.R. 366 (1996)(On remand from the Federal Circuit, the Board mitigated the removal of a WG-8 Cook at West Point for theft of government property (left over food) to a 14-day suspension. The Board took into account the *de minimus* value of the food taken, the employee's 17 years of good service, and his dedication to his position as evidenced by his having walked (all the roads were closed) to work during the blizzard of 1993, and then working double shifts, to cook for the cadets.)

b. Not all agency charges sustained. When reviewing a case in which some, but not all, of the agency charges have been sustained, the Board may not independently determine penalties. When the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated whether in its final decision or during proceedings before the Board that it desires a lesser penalty be imposed on fewer charges. *LaChance v. Devall*, 178 F. 3d 1246.

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.

4.12 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 procedural error, even for procedures mandated by statute. *Accord 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); *Diaz v. Department of Air Force*, 63 F.3d 1107 (Fed. Cir. 1995) (Agency employee's removal was not invalidated by agency's failure to remove employee until after period of notice of proposed removal had expired; removal was subject to harmful

error analysis, and employee made no effort to demonstrate that agency's procedural violation affected outcome of agency's decision. 5 U.S.C.A. §§ 4303(c)(1), 7701(c)(2)(A)).

The Board will reverse actions that fail to satisfy minimum Constitutional due process. *Tyler v. U.S. Postal Service*, 62 M.S.P.R. 509 (1994); *Green v. U.S. Postal Service*, 61 M.S.P.R. 34 (1994); *Polite v. Dep't of Navy*, 49 M.S.P.R. 653 (1991). Generally, however, the employee must show "harmful" error by demonstrating the procedural defect would have affected the agency's decision. *Keller v. Department of Navy*, 69 M.S.P.R. 183 (1996); *Kranz v. Dep't of Justice*, 62 M.S.P.R. 630 (1994); *Stephen v. Dep't of Air Force*, 47 M.S.P.R. 672 (1991).

4.13 Indefinite Suspension Pending Disposition of Criminal Charges.

a. General. The MSPB and the courts have recognized a Federal agency's ability to indefinitely suspend an employee pending disposition of criminal charges. *Richardson v. U.S. Custom Serv.*, 47 F.3d 415 (Fed. Cir. 1995); *Pararas-Carayannis v. Dep't of Commerce*, 9 F.3d 955 (Fed Cir. 1993); *Brown v. Department of Justice*, 715 F.2d 662 (D.C. Cir. 1983); *Jankowitz v. United States*, 533 F.2d 538 (Ct. Cl. 1976); *Smith v. Gov't Printing Office* 60 M.S.P.R. 450 (1994); *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*. On appeal, the D.C. Circuit found that the acquitted employee was entitled to compensation for pay and benefits lost during the time of the suspension, *Brown v. Department of Justice*, 715 F.2d 662, 230 U.S.App.D.C. 188 (D.C. Cir. 1983), a finding that was later rejected in *Richardson v. U.S. Customs Service*, 47 F.3d 415, (Fed. Cir. 1995), *infra*.

b. Notes and Discussion.

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. *Jankowitz*. See also *Pararas-Carayannis v. Dep't of Commerce*, 9 F.3d 955 (Fed. Cir. 1993); *Dunnington v. Dep't of Justice*, 956 F.2d 1151 (Fed. Cir. 1992); *Smith v. Gov't Printing Office*, 60 M.S.P.R. 450 (1994); *Crespo v. U.S. Postal Service*, 53 M.S.P.R. 125 (1992); and *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. An arrest or an investigation standing alone is generally insufficient to establish reasonable cause. *Phillips v. Dep't of Veterans Affairs*, 58 M.S.P.R. 12 (1993), *aff'd*, 17 F.3d 1443 (Fed. Cir. 1994); *Martin*; and *Larson v. Department of Navy*, 22 M.S.P.R. 260 (1984). A combination

of circumstances, however, including an arrest or investigation may suffice. *Accord* *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) (finding arrest based on arrest warrant issued by neutral magistrate based on finding of probable cause sufficient).

c. Nature of the action. Indefinite suspension is a temporary action and requires that there be a determinable condition subsequent that will terminate the action. If the suspension is imposed pending disposition of criminal charges, therefore, the agency must promptly terminate the suspension when the charges are resolved. *Newbold v. Dep't of Treasury*, 58 M.S.P.R. 532 (1993); *Drake v. Veterans Administration*, 26 M.S.P.R. 34 (1985).

An indefinite 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. 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.

d. 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. *Newbold v. Dep't of Treasury*, 58 M.S.P.R. 532 (1993); *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. *Rodriguez-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 of administrative action following unsuccessful criminal action in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

e. 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 the employee can demonstrate that the suspension was unjustified or unwarranted when it was imposed or during the period it was in effect. The 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 Court of Appeals for the Federal Circuit (CAFC) addressed the issue in *Wiemers v. Merit Systems Protection Board*, 792 F.2d 1113 (1986) and affirmed the *Jankowitz* rationale. CAFC has recently reaffirmed the denial of back pay when an indefinite suspension was lifted, but was justified when imposed. *Jones v. Dep't of Navy*, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992)

Most recently, the CAFC held that an agency has discretion to grant or deny back pay following an indefinite suspension. In *Richardson v. U.S. Custom Serv.*, 47 F.3d 415 (Fed. Cir. 1995), the CAFC reviewed the denial of back pay to customs agents who were suspended based on an indictment and later reinstated following acquittal of all charges. It found "the agency is neither required to nor precluded from making the reinstatement with back pay retroactive to the date of the suspension. *Id.* at 421. In so finding, the CAFC made reinstatement decisions non-reviewable by the MSPB (since no appealable action is involved, there is no jurisdiction). *See also* *Czubinski v. Department of Treasury*, 76 M.S.P.R. 552, (1997) ("We note that an agency is not precluded from granting back pay for the period of the indefinite suspension under these circumstances. However, '[t]hat decision is a matter for the agency, in the first instance, to make, based on all the facts and circumstances.' *Richardson v. U.S. Customs Service*, 47 F.3d 415, 421 (Fed. Cir. 1995). The proper forum for testing the agency's decision on back pay is the United States Court of Federal Claims in a Tucker Act suit based on the Back Pay Act, or in some cases arbitration under the provisions of a collective bargaining agreement. *Id.* at 422.").

4.14 Constitutional Considerations. The focus of this section has been on the statutory and regulatory provisions governing employee discipline. There are, however, significant constitutional concerns in the substantive aspects of discipline, as there were in the procedural execution of discipline. This section will address several important questions of constitutional dimension in substantive rights.

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. The right to remain silent, however, does not include the right to lie to investigators, investigating allegations of employee misconduct. *See generally*, *LaChance v. Erickson* 118 S.Ct. 753, (1998).

Two general consequences flow from the right to remain silent. 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. *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 the employee is subject to disciplinary action for refusal, and second, that the reply, and its fruits, cannot be used in a criminal proceeding. Following this court-suggested course of action results in a use immunity by operation of law.

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. *Devine v. Goodstein*, 680 F.2d 243 (D.C. Cir. 1983).

b. First Amendment. When an employee alleges that discipline was imposed in retaliation for exercising a first amendment free speech right, two issues commonly arise. 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.

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. For more recent applications of the federal bar to alleged First Amendment violations, see *Hamlet v. United States*, 63 F.3d 1097 (Fed. Cir. 1995) (finding allegations of 1st Amendment denial are insufficient to invoke jurisdiction of court absent specific statutory authority); *Gergick v. Austin*, 997 F.2d 1237, 1239 (8th Cir.1993) (the Civil Service Reform Act contains the exclusive remedy for Whistleblower Protection Act claims), *cert. denied*, 114 S. Ct. 1536 (1994).

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 the 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 absent the employee's protected speech (mixed motive analysis).

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.

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 by preponderant evidence 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 still would have taken the same action. See 5 U.S.C. § 1214(b)(4). See also *Horton v. Dep't of Transp.*, 66 F.3d 279 (Fed. Cir. 1995); *Watson v. Dep't of Justice*, 64 F.3d 1524 (Fed. Cir. 1995); *Clark v. Dep't of Army*, 997 F.2d 1466 (Fed. Cir., 1993), *cert. denied*, 114 S. Ct. 920 (1994); *Kochanoff v.*

Dep't of Treasury, 54 M.S.P.R. 517 (1992); *McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416 (1990).

In the Civil Rights Act of 1991, Congress again modified the Court's mixed motive burdens from *Mt. Healthy* for cases arising under Title VII of the Civil Rights Act of 1964 and the other discrimination laws. In these cases, an employee must first demonstrate (satisfy the burden of production and persuasion) that discrimination was a "motivating factor" in the action. The employee can then receive attorney fees, costs, and injunctive relief, even if the employer can demonstrate it would have taken the same action without discrimination. Should the employer fail to satisfy its burden, it becomes liable for the full range of damages discussed in chapter 9, below. 42 U.S.C. § 2000e-5(g).

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. *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. *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). *Stigile v. Clinton*, 110 F.3d 801, (D.C. Cir. 1997) (Government's interest in protecting president and vice president justified random drug testing of employees who held permanent passes to old executive office building.)

CHAPTER 5

EMPLOYEE PERFORMANCE

5.1 Employee Performance Appraisal System.

a. General.

One of the major changes made by the 1978 Civil Service Reform Act was the introduction of a separate statutory basis for removing employees based on unsatisfactory performance. The foundation of such an action is failure to satisfy performance standards. Until recently, OPM required all federal agencies to adopt a formal performance appraisal system with certain characteristics. It has recently withdrawn this requirement, however, and delegated to federal agencies authority to establish their own performance appraisal systems.

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 5 U.S.C. Chapter 43, which provides for employee performance appraisals.

c. Regulatory Provisions.

(1) OPM Regulations. Regulations published by the Office of Personnel Management implement the statutory requirement of Title 5, Chapter 43. OPM regulations found at 5 C.F.R. Part 430—Performance Management, provide general guidance to agencies while delegating complete authority over performance appraisals to the agency. For example, under 5 C.F.R. § 430.204 (b)(1), Agencies must establish performance appraisal systems that provide for:

(i) Establishing employee performance plans, including, but not limited to, critical elements and performance standards;

(ii) Communicating performance plans to employees at the beginning of an appraisal period;

(iii) Evaluating each employee during the appraisal period on the employee's elements and standards;

(iv) Recognizing and rewarding employees whose performance so warrants;

(v) Assisting employees in improving unacceptable performance; and

(vi) Reassigning, reducing in grade, or removing employees who continue to have unacceptable performance, but only after an opportunity to demonstrate acceptable performance.

(2) The OPM regulations still require agencies to submit performance appraisal systems for approval, since that is required by law. *See* 5 U.S.C. § 4304. This will obviously be a cursory review, at best. Agencies must keep their current performance appraisal system in place until OPM approves the new system.

(3) Military Implementation.

(a) Army. Army implementation of OPM regulations is located at AR 690-400, Chapter 4302, Total Army Performance Evaluation System (TAPES)(1 June 1993).

(b) Air Force. AFI 36-1001, Chapter 2, Managing the Civilian Performance Program, 1 July 1999.

Note. All agency performance plans must be approved by OPM, and the agency must show by substantial evidence, as part of its burden of proof in an employee appeal, OPM approval of its performance appraisal system. *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 that reference OPM approval. *Chennault v. Department of Army*, 796 F.2d 465 (Fed. Cir. 1986). Appendix C-1 of AR 690-400, Chapter 4302, contains a copy of the OPM approval letter on TAPES. AFI 36-1001 specifically cites OPM approval of the Air Force's performance appraisal system.

5.2 Actions for Unacceptable Performance.

a. General. Title 5 U.S.C., Section 4303, provides the statutory authority for actions based on unacceptable performance. These performance-based actions require, as stated above, an appropriate appraisal system under 5 U.S.C. § 4302. An agency may also, in certain circumstances, take action against an employee for unacceptable performance under the misconduct provisions of 5 U.S.C. Chapter 75 (*see* Chapter 5, Section I). *Shorey v. Dep't of Army*, 77 M.S.P.R. 239 (1998); *Lovshin v. Department of Navy*, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986); *Stenmark v. Dep't of Transp.*, 59 M.S.P.R. 462 (1993); *McGillivray v. Federal Emergency Management Agency*, 58 M.S.P.R. 398 (1993).

b. Statutory Requirements. The statute provides substantial procedural due process to employees who will be reduced in grade or removed for unacceptable performance. The procedures include both predecisional notice and opportunity to respond and postdecisional appeal rights.

Note. The Civil Service Due Process Amendments of 1990 amended 5 U.S.C. § 4303(e) effective August 17, 1990. Subsection (e)(3) grants appeal rights for performance based actions to most nonpreference eligible excepted service employees who have completed 2 years of current continuous service in the same or similar positions.

c. Regulatory Requirements.

(1) OPM Regulations. Performance based actions are commonly referred to as "432 actions." This acronym derives from 5 C.F.R. Part 432; the OPM implementing regulations for performance based actions. The Army and Air Force implement these regulations in AR 690-400, Chapter 4302, and AFI 36-1001, Chapter 5, respectively.

d. Procedures for Performance-Based Actions.

(1) An employee who fails to meet established performance standards in one or more Responsibility for the base system TAPES or Objective for the senior system (called "critical elements" in the Air Force) may be reduced in grade or removed. The reduction or removal must be based on unacceptable performance occurring within one year of the date the employee is given notice of the action. 5 CFR 432.105(a)(1). This one-year period may, however, cover more than one performance appraisal period. *Weirauch v. Department of the Army*, 782 F.2d 1560 (Fed. Cir. 1986); *Sullivan v. Dep't of the Navy*, 44 M.S.P.R. 646 (1990); *Brown v. Veterans Admin.*, 44 M.S.P.R. 635(1990).

(2) Before initiating a reduction or removal action, the agency must notify the employee of specific deficiencies in performance and allow the employee a reasonable time to demonstrate acceptable performance. During this performance improvement period ("PIP"), management must assist the employee to improve the unacceptable performance. The length of the performance period depends on the grade and seniority of the employee, but usually lasts between 30-90 days. If the employee improves performance during the PIP to an acceptable level, management takes no action. If, however, the employee's performance returns to an unacceptable level within one year after the beginning of the PIP (the so-called "roller coaster" employee), management can initiate a removal or reduction action without giving the employee another PIP. *Cohen v. General Services Admin.*, 53 M.S.P.R. 492 (1992); *Cockrell v. Dep't of Air Force*, 58 M.S.P.R. 211 (1993); *Sullivan v. Department of the Navy*, 44 M.S.P.R. 646 (1990). See 5 C.F.R. 432.106(a)(1). Only after a full year has passed since the original notice of deficiencies need management provide a new PIP. 5 C.F.R. 432.105(a)(2).

(3) Employees demoted or removed for unacceptable performance frequently attempt to challenge the content of the performance standards by which they were rated. The agency must demonstrate that the performance standards are reasonable, realistic, and attainable. *Johnson v. Department of Army*, 44 M.S.P.R. 464 (1990). "Absolute" standards (standards requiring perfection or near perfection) are generally impermissible, *Hurd v. Dep't of Interior*, 53 M.S.P.R. 107 (1992), *aff'd*, 11 F.3d 1074 (Fed. Cir., 1993) ; *Walker v.*

Department of Treasury, 28 M.S.P.R. 227 (1985); Callaway v. Department of Army, 23 M.S.P.R. 592 (1984); an absolute standard generally constitutes an abuse of discretion unless death, injury, breach of security, or great monetary loss could result from a single failure to meet the standard. Sullivan v. Department of the Navy, 44 M.S.P.R. 646 (1990); Callaway v. Department of the Army, 23 M.S.P.R. 592 (1984). *Contra* James v. Veterans Administration, 27 M.S.P.R. 124 (1985). Performance based actions may not be founded on "backwards" performance standards (defining unacceptable performance as minimally acceptable performance). See Eibel v. Department of Navy, 857 F.2d 1439 (Fed. Cir.1988); Cordioli v. Department of Navy, 976 F.2d 748 (Fed. Cir. 1992) ; Dancy v. Dep't of Navy, 55 M.S.P.R. 331 (1992) (holding backwards standards were effectively "fleshed out" by agency oral and written clarifications); Oritz v. Department of Justice, 46 M.S.P.R. 692 (1991). Standards must also be objective, "to the maximum extent feasible." 5 U.S.C. § 4302(b)(1). This means that performance standards must be sufficiently precise and specific to invoke a general consensus as to its meaning and content. Romero v. E.E.O.C., 55 M.S.P.R. 527 (1992), *aff'd*, 22 F.3d 1104 (Fed. Cir.1994) .

(4) An employee who fails to improve performance to an acceptable level during a PIP is entitled to 30 calendar days advance written notice of a proposed reduction in grade or removal, 5 C.F.R. 432.105(a)(4)(I). This notice must identify the specific incidents of unacceptable performance under the Responsibility or Objective (critical elements in the Air Force) that were failed during the PIP. 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. Sandland v. General Serv. Admin., 23 M.S.P.R. 583 (1984); Gilbert v. Department of Health and Human Serv., 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 and in writing and to be represented by counsel. In a performance-based action, unlike in a misconduct action, the employee is entitled to a decision that has been concurred in by a supervisor above the proposing official. 5 C.F.R. 432.105(b).

(5) If the employee appeals the reduction in grade or removal, the agency has the burden of demonstrating unacceptable performance by "substantial evidence" rather than the "preponderance" standard applicable in misconduct cases. 5 U.S.C. § 7701(c)(1); 5 C.F.R. 1201.56(a)(i). Procedures in performance cases are subject to the harmful error rule. See, e.g., Diaz v. Dep't of Air Force, 63 F.3d 1107 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1208, 116 S.Ct. 1823, 134 L.Ed.2d 929, 64 USLW 3778 (1996)(finding that removal after expiration of proposal notice was subject to harmful error analysis). *But see* Stenmark v. Dep't of Transp., 59 M.S.P.R. 462 (1993); Nafus v. Dep't of Army, 57 M.S.P.R. 386 (1993); Cross v. Dep't of Air Force, 25 M.S.P.R. 353 (1984), regarding what is a "procedural" matter.

(6) In a performance-based case, the MSPB, arbitrators, and courts may not mitigate the agency's selected penalty (removal or demotion) as they can in misconduct cases. 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); Davis v. Dep't of Health and Human Servs., 58

M.S.P.R. 538 (1993); *Cook v. Equal Employment Opportunity Comm'n*, 50 M.S.P.R. 660 (1991).

(7) The procedures required for taking performance based actions also apply to employees in the excepted service. 5 U.S.C. § 4303(e) and 5 U.S.C. § 7701 govern MSPB appeal rights for excepted service employees. Section 7701(a) provides for appeal to the MSPB of any action "which is appealable to the Board under any law, rule, or regulation

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CHAPTER 6

REDUCTIONS IN FORCE (RIFs)

6.1 Introduction.

a. Use of RIF Procedures.

An agency is required to use RIF procedures when an employee is faced with separation or downgrading for a reason such as reorganization, lack of work, shortage of funds, insufficient personnel ceiling, or the exercise of certain reemployment or restoration rights. A furlough of more than 30 calendar days, or of more than 22 discontinuous workdays, is also a RIF action. (A furlough of 30 or fewer calendar days, or of 22 or fewer discontinuous workdays, is an adverse action.)

b. Management Responsibility.

The agency has the responsibility to decide whether a RIF is necessary, when it will take place, and what positions are abolished. However, the abolishment of a position does not always require the use of RIF procedures. The agency may reassign an employee without regard to RIF procedures to a vacant position at the same grade or pay, regardless of where the position is located.

The U.S. Office of Personnel Management's (OPM) Reduction In Force (RIF) regulations are derived from the Veterans' Preference Act of 1944 and are codified in Title 5, United States Code, Sections 3501-3503. 5 USC Section 3502 provides that OPM's RIF regulations must give effect to four factors in releasing employees: (1) tenure of employment (e.g., type of appointment); (2) veterans preference; (3) length of service; and (4) performance ratings. The law does not assign any relative weight to the four factors, or require that the factors be followed in any particular order. OPM implements the laws through regulations published in Part 351 of Title 5, Code of Federal Regulations, and instructions in OPM's Restructuring Information Handbook.

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.

6.2 Statutory Requirements.

Congress has prescribed general criteria for Federal agencies to determine which employees to release during a reduction in force.

Sec. 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 -

(i) service rendered as an employee of a county committee established pursuant to section 8(b) of the Soil Conservation and Allotment Act or of a committee or association of producers described in section 10(b) of the Agricultural Adjustment Act; and

(ii) service rendered as an employee described in section 2105(c) if such employee moves or has moved, on or after January 1, 1966, without a break in service of more than 3 days, from a position in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard to a position in the Department of Defense or the Coast Guard, respectively, that is not described in section 2105(c).

(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.

The general rule under this law is that veterans who qualify as "preference eligibles" with satisfactory performance ratings receive higher retention standing than nonveterans. Many retired veterans do not receive this veterans' preference under 5 U.S.C. § 3501, which defines preference eligible employees for purposes of retention preferences. Retired military personnel who have 20 or more years of service are not considered preference eligibles under 5 U.S.C. §

3501(3)(B) unless their retired pay is based on a disability. 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 order of retention. An individual may therefore be considered a preference eligible for appointment and appeal rights but not for reductions-in-force.

6.3 Regulatory Requirements.

a. Scope of Competition. A Federal agency must follow the regulations in 5 C.F.R. Part 351 whenever it intends to release a competing employee under a RIF. An agency is never required to fill a vacant position during a RIF (5 C.F.R. § 351.201(b)); however, if it elects to do so, it must follow the RIF rules. Both competitive service and excepted service employees can be subjected to a RIF. Excepted service employees are ranked separately from competitive service employees and then released in the same order as the competitive service employees, but from their own list.

(1) Competitive Area.

First, the agency defines the competitive area (e.g., the geographical and organizational limits within which employees compete for retention). A competitive area may consist of all or part of an agency. The minimum competitive area in the departmental service is a bureau, major command, directorate, or other equivalent major subdivision of an agency within a local commuting area. An agency must obtain approval from OPM before changing a competitive area within 90 days of a RIF. 5 C.F.R. § 351.402, defines the competitive area for RIFs. The "commuting area" referred to in § 402 is defined in 5 C.F.R. 351.203 as "the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment." *See also* Ginnodo v. Office of Personnel Mgt., 753 F.2d 1061 (Fed. Cir.), *cert. denied*, 474 U.S. 848 (1985); Blevins v. Tennessee Valley Auth., 46 M.S.P.R. 239 (1990); Compton v. Dep't of Energy, 3 M.S.P.R. 452 (1980). Generally, the competitive area in the military departments is the local installation. The minimum competitive area is a bureau, major command, directorate, or other equivalent major subdivision of an agency within a local commuting area. "Just because a few employees may travel great distances and endure substantial commute times, the agency is not obligated to reflect these extremes in establishing competitive areas." Kelley v. Dept of Defense, 107 F.3d 30 (Fed. Cir. 1997).

(2) Competitive Level.

Next, the agency groups inter-changeable positions into competitive levels based upon similarity of grade, series, qualifications, duties and working conditions. Positions with different types of work schedules (e.g., full-time, part-time, intermittent, seasonal, or on-

call) are placed in different competitive levels. Because of differences in duties and responsibilities, positions of supervisors and management officials are placed in competitive levels comprised only of those positions. Finally, competitive and excepted service positions are placed in separate competitive levels. The end result is many different groups, or levels, of employees. 5 C.F.R. § 351.403 states how to determine competitive levels. See *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994); *Griffin v. Dep't of Navy*, 64 M.S.P.R. 561 (1994); *Kline v. Tennessee Valley Auth.*, 46 M.S.P.R. 193 (1990); *Foster v. U.S. Coast Guard*, 8 M.S.P.R. 240 (1981). See also *Anderson v. Tennessee Valley Auth.*, 77 M.S.P.R. 271, (1998) (employee has substantive right to be placed in properly drawn competitive level). When looking at a competitive level, anyone who qualifies for one position must be able to qualify for all. *Disney v. Dept. of Navy*, 67 M.S.P.R. 563 (1995).

(3) Retention Registers.

Then, the four retention factors are applied and the competitive level becomes a retention register under 5 C.F.R. § 351.404, listing employees in the order of their retention standing. 5 C.F.R. § 351.501 provides for the order of retention in the competitive service. The rules on retention of excepted service employees are substantially the same as those that apply to competitive service employees. 5 C.F.R. § 351.502 provides for the order of retention for the excepted service.

(4) Length of service.

An employee's standing on the retention register often determines whether the employee will stay employed in the agency or be released, or "RIFed," as the saying goes. The employee's standing is determined by the sum of the employee's length of service and constructive credit based on the employee's three most recent performance appraisals. As the following regulations demonstrate, the key to an employee's standing is often the performance appraisals. 5 C.F.R. § 351.503 provides for establishing an employee's length of service, while 5 C.F.R. § 351.504 provides for the credit to be given an employee based upon his performance appraisals.

Note: On November 24, 1997 OPM enacted final rules that enhance the opportunity for federal employees to receive retention service credit during reductions in force based on their actual job performance. The new regulations propose a greater use of actual performance through several mechanisms. First, a longer look back period of six years will be phased in. Second, fewer assumed ratings will be used because an average will be taken of actual ratings. Third, a new method will be used for determining the value of assumed ratings for employees with no ratings. In addition, since September 1995, there have been eight possible performance rating patterns (*e.g.*, pass/fail, traditional five level, etc.). The new regulations propose that if ratings exist under more than one pattern in a competitive area, the agency can decide on credit within certain limits. (See 62 Federal Register 62495-62504

(1997)). The final rules are also available at the OPM internet site: http://www.opm.gov/fedregis/html/nov_97.htm.

(5) Release from competitive level - RIF.

After the agency determines the standing of employees within their levels on the retention register, it is ready to begin its RIF. Starting with the employees with the lowest relative retention standing, the agency releases or reassigns employees and works its way up the register. With few exceptions, the RIF will not affect employees with a higher relative standing on the register until all employees of lower standing have been released or reassigned. 5 C.F.R. § 351.601.

(6) Rights to Other Positions

Employees in Groups I and II with current performance ratings of "Unsuccessful," and all employees in Group III, have no assignment rights to other positions. Employees holding excepted service positions have no assignment rights unless their agencies, at their discretion, choose to offer these rights. Employees in Groups I and II with current performance ratings of at least "Minimally Successful" are entitled to an offer of assignment if they have "bumping" or "retreating" rights to an available position in the same competitive area. An "available" position must: (1) last at least 3 months; (2) be in the competitive service; (3) be one the released employee qualifies for; and (4) be within three grades (or grade-intervals) of the employee's present position. 5 C.F.R. § 351.701

(7) Bumping.

Means displacing an employee in the same competitive area who is in a lower tenure group, or in a lower subgroup within the released employee's own tenure group. Although the released employee must be qualified for the position, it may be a position that he or she has never held. The position must be at the same grade, or within three grades or grade-intervals, of the employee's present position. 5 C.F.R. § 351.701(b). In other words, an employee who has been released from his competitive level may "retreat" to a position that is the same position or an essentially identical one previously held by the released employee in an agency. 5 C.F.R. § 351.701(c)(3); *Magill v. Dept. of Navy*, 64 M.S.P.R. 497 (1994); *Parkhurst v. Dept. of Transportation*, 70 M.S.P.R. 309 (1996).

(8) Retreating

Means displacing an employee in the same competitive area who has less service within the released employee's own tenure group and subgroup. The position must be at the same grade, or within three grades or grade-intervals, of the employee's present position. However, an employee in retention subgroup AD has expanded retreat rights to positions up to five grades or grade-intervals lower than the position held by the released employee. The

position into which the employee is retreating must also be the same position (or an essentially identical position) previously held by the released employee in any Federal agency on a permanent basis. An employee with a current annual performance rating of "Minimally Successful" only has retreat rights to positions held by employees with the same or lower ratings. 5 C.F.R. § 351.701(c)

6.4 A General Overview of the RIF Process.

a. Summary. 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 "competing employees" and must be released before anyone else on the retention register is released.

An employee in Group I or Group II (not Group III) who is released during a RIF is entitled to a reasonable offer of reassignment if the agency has a suitable job that the employee 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 group or subgroup in a different competitive level. A "retreat" occurs when the employee returns to a job from which the employee was promoted (or one like it) and displaces an employee with a later service date in the same subgroup. The agency must only make one reasonable offer of reassignment; it

need neither fill a particular vacant position nor 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.

b. Notice of RIF. Before an employee can be released from a competitive level, the employee is entitled to at least 60 days advance written notice. The notice rules of 5 C.F.R. § 351.801-807 apply. (Replaces old 120-day rule, effective 1 February 2000.)

As with an action for misconduct, 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. An employee normally 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 who is reduced in pay or grade or removed in a reduction in force can appeal to the Merit Systems Protection Board unless the employee is covered by a negotiated grievance procedure (NGP). 5 C.F.R. § 351.901. Employees covered by an NGP must use that process unless it specifically excepts grievance of RIF. *See Bonner v. Merit Systems Protection Board*, 781 F.2d 202 (Fed. Cir. 1986); *Sotak v. HUD*, 19 M.S.P.R. 569 (1984); *Sirkin v. Department of Labor*, 16 M.S.P.R. 432 (1983). (Employee's reduction in grade pursuant to reduction in force fell within negotiated agreement's definition of grievance. Therefore, it was within coverage of exclusive negotiated grievance procedure. Since RIF actions are neither statutorily excepted from coverage, excluded from coverage by the agreement, nor otherwise provided for in statute relating to grievance procedures, Merit Systems Protection Board lacked jurisdiction to hear employee's appeal from the reduction in grade.) An MSPB appeal must be in writing and must be initiated under the MSPB's regulations within 30 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 decision is final 35 days after the opinion is issued, and 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. Administrative remedies are exhausted when a decision becomes final in accordance with this section.

c. Notes and Discussion.

Note 1. 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. *Schroeder v. Dep't of Transp.*, 60 M.S.P.R. 566 (1994); *Losure v. Interstate Commerce Comm'n*, 2 M.S.P.R. 195 (1980).

Note 2. 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 that is on record on the day when the RIF notice is issued. A rating of "outstanding" that has not yet received agency approval (under agency performance appraisal regulation) at the time the RIF notice is issued cannot be considered. This underscores the importance of timely performance appraisals for civilian employees. 5 C.F.R. § 351.504. *AFGE v. OPM*, 821 F.2d 761 (D.C. Cir. 1987); *Haataja v. Department of Labor*, 25 M.S.P.R. 594 (1985); *Mazzola v. Department of Labor*, 25 M.S.P.R. 682 (1985)

Note 3. 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. *See Hill v. Department of Commerce*, 25 M.S.P.R. 205 (1984). (While in *Losure*, the Board made clear that RIF entitlements were substantive rights and that it is the agency's burden to prove by a preponderance of the evidence that it afforded the appellant those rights, the Board subsequently explained that RIFs would not be reversed in those cases where it is shown that the agency's error in not precisely complying with the RIF regulations had no adverse effect on the employee's substantive rights). *See also Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994); *Davidson v. Department of Energy*, 22 M.S.P.R. 531(1984). (Agencies have discretion in organizing their operations and the bona fide modification of these operations will be upheld). Where the agency error involves substantive rather than procedural rights of the affected employee, however, the Board will not have to consider the harmful error question. *Foster v. Department of Trans.*, 8 M.S.P.R. 240 (1981). Only procedural rights are subject to the harmful error standard of 5 U.S.C. § 7701(c)(2)(A). *Ray v. Department of Air Force*, 3 M.S.P.R. 445 (1980); *Speaker v. Department of Education*, 11 MSPB 430, 431, 13 M.S.P.R. 163, 165-66, (1982)(The determination of a properly constituted competitive level is not merely a procedural requirement subject to the harmful error standard of 5 U.S.C. § 7701(c)(2)(A). Rather, it is a substantive right and the burden is on the agency to prove by a preponderance of the evidence that appellant was in a correctly defined competitive level). *See also Buckler v. Federal Retirement Thrift Investment Bd.*, 73 M.S.P.R. 476 (1997).

6.5 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 in 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. *See* 5 C.F.R. Part 536 for implementation of these provisions.

CHAPTER 7

MERIT SYSTEMS PROTECTION BOARD - PRACTICE AND PROCEDURES

7.1 Statutory Power and Authority of MSPB.

The MSPB is a quasi-judicial body created by the Civil Service Reform Act of 1978. It consists of three members appointed by the President with the advice and consent of the Senate for nonrenewable terms of seven years. The MSPB's jurisdiction is limited specifically to matters made appealable to it by law and regulation. Title 5 United States Code, § 1204 enumerates its powers.

Most details concerning the MSPB's appellate jurisdiction and procedures in MSPB appellate actions are established by statute. Under 5 U.S.C. § 7701, employees subjected to an "appealable" personnel action file their appeals initially with an MSPB regional or field office and the case is assigned to an administrative judge (AJ).

Note. The remainder of 5 U.S.C. § 7701 addresses the authority of the MSPB to establish alternative methods of settling cases and 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 will be covered in Chapter 9 of this casebook.

7.2 MSPB Regulations.

a. Jurisdiction. The Board's regulations describe the two types of jurisdiction it exercises and the types of cases in which each is exercised. The most common type of case before the MSPB is, by far, under its appellate jurisdiction stated in 5 C.F.R. § 1201.3. These are the typical employees' appeals from adverse personnel actions.

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 *Bedynek-Stumm v. Dep't of Agriculture*, 57 M.S.P.R. 176 (1993); *McChesney v. Dep't of Justice*, 55 M.S.P.R. 512 (1992), *aff'd*, *McChesney v. MSPB*, 5 F.3d 1503 (Fed. Cir. 1993); *Gribben v. Dep't of Justice*, 55 M.S.P.R. 257 (1992); *Shah v. GSA*, 7 M.S.P.R. 626 (1981); *Uriarte v. Dep't of Agriculture*,

6 M.S.P.R. 393 (1981); *Van Daele v. USPS*, 1 M.S.P.R. 601, *review denied*, 2 M.S.P.B. 16 (1980)).

Note 2. An employee adversely affected by a reduction in force or the denial of a within grade ("step") increase may generally appeal 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 specifically 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. Dep't of Labor*, 16 M.S.P.R. 432 (1983) (RIF); *Lovshin v. Dep't 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 at 5 C.F.R. § 1201.71 provide for using the Federal Rules of Civil Procedure as a general guide for discovery. *See* Sec. 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. The Board, however, has never held that the application of the Federal Rules is mandatory. *See Markland v. OPM*, 73 M.S.P.R. 349 (1997), *aff'd*, *Markland v. OPM*, 140 F.3d 1031 (Fed. Cir. 1998).

7.3 Proving Your Case Before the MSPB.

a. Standard of Review of Agency Actions. Under 5 U.S.C. § 7701(c)(1), the MSPB applies two different standards of proof 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 grant agencies more discretion and flexibility in removing employees for unacceptable performance.

In *Parker v. Defense Logistics Agency*, 1 M.S.P.R. 505 (1980), the MSPB described 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).

Parker v. Defense Logistics Agency, 1 M.S.P.R. 505 (1980).

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*, 760 F.2d 1286 (Fed. Cir. 1985), *White v. Dept. of Army*, 720 F. 2d 209, 232 U.S. App D.C. 34 (D.C. Cir 1983). *But see Schramm v. Dep't of Health and Human Serv.*, 682 F.2d 85 (3d Cir. 1982), *Stankis v. EPA* 713 F. 2d 1181 (5th Cir. 1983)(preponderance of evidence standard used, vice substantial evidence).

b. Evidentiary Issues.

The agency taking an 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.

7.4 Interim Relief.

Following the hearing and closing of the record, the MSPB administrative judge prepares an initial decision. Under the Whistleblower Protection Act of 1989, 5 U.S.C. § 7701(b)(2), an employee who prevails in the initial decision "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 has several options: (1) elect to provide the employee with front pay and benefits pending a final decision. *See* 5 U.S.C. § 7701(b)(2)(B); (2) place the employee in paid, non-duty status if agency determines

that employee's presence at the work site would be unduly disruptive. 5 U.S.C. § 7701(b)(2)(A)(ii). *See* Schultz v. U.S. Postal Serv., 70 M.S.P.R. 633 (1996); DeLaughter v. U.S. Postal Serv., 3 F.3d 1522 (Fed. Cir. 1993); Scofield v. Dep't of Treasury, 53 M.S.P.R. 179 (1992)(MSPB has no authority to review determination that reinstatement would be unduly disruptive); Hanner v. Dep't of Army, 55 M.S.P.R. 113 *aff'd* 48 F.3d 1236 (Fed. Cir. 1995); (3) detail or assign the employee to a position other than the former position, or return him to the former position with restricted duties. The employee must receive the same pay and benefits as in the former position. The reinstatement of the employee can **and should** be achieved through a temporary appointment pending outcome of the petition of review. Wilson v. Dep't of Justice, 68 M.S.P.R. 303 (1995); Avant v. Dep't of Navy, 60 M.S.P.R. 467 (1994).

The MSPB will dismiss an agency's petition for review of the initial decision unless the agency has complied with the requirements for interim relief before the date the petition for review is due and submits the proof with the petition for review. 5 C.F.R. § 1201.115(b)(4). *See* Shaishaa v. Dep't of Army, 60 M.S.P.R. 359 (1994); White v. U.S. Postal Serv., 60 M.S.P.R. 314 (1994); Reid v. U.S. Postal Serv., 61 M.S.P.R. 84 (1994); Ralph v. Dep't of Treasury, 55 M.S.P.R. 566 (1992); Labatte v. Dep't of Air Force, 55 M.S.P.R. 37 (1992); Ginocchi v. Dep't of Treasury, 53 M.S.P.R. 62 (1992); Schulte v. Dep't of Air Force, 50 M.S.P.R. 126 (1991); Dean v. Dep't of Air Force, 50 M.S.P.R. 103 (1991); Baughman v. Dep't of Army, 49 M.S.P.R. 415 (1991). An employee may challenge the agency's compliance with an interim relief order by moving to dismiss the agency's petition for review. DeLaughter v. U.S. Postal Serv., 3 F.3d 1522 (Fed. Cir. 1993); Ginocchi v. Dep't of Treasury, 53 M.S.P.R. 62 (1992); Crespo v. United States Postal Service, 53 M.S.P.R. 125 (1992).

The Board has held, however, that an agency's inadvertent, minor mistake in providing a prevailing appellant with interim relief can be excused if promptly corrected. *See, e.g.,* Woodford v. Dep't of the Army, 75 M.S.P.R. 350, 355-56 (1997) (the agency's petition for review was not dismissed where it submitted evidence with its petition showing that, having made an "undue disruption" determination, it had detailed the appellant to another position effective as of the date of the initial decision, and where, although it failed to pay him for the first two days of the interim relief period and withheld taxes from his pay at a rate higher than appropriate, it promptly took steps to restore those amounts; and where it inadvertently disenrolled him from the health benefits plan he held at the time of the termination, it corrected that error within several weeks). *See also* Franklin v. Dep't of Justice, 71 M.S.P.R. 583, 589-90 (1996)(the agency's petition for review was not dismissed where it submitted evidence with its petition showing that it had given the appellant an interim appointment effective as of the date of the initial decision, and where, although the agency erred in not requesting that his health coverage be reinstated, or providing that deductions be withheld from his Thrift Savings Plan, until two months later, there was no showing that such errors were intentional or not corrected when brought to the agency's attention); Johnson v. Dep't of Justice, 67 M.S.P.R. 494, 497 (1995); Robinson v. Dep't of Veterans Affairs, 67 M.S.P.R. 334, 338-39 (1994); Hanner v. Dep't of the Army, 62 M.S.P.R. 677, 681-82 (1994), *aff'd*, 48 F.3d 1236 (Fed. Cir.1995)

(Table); *Avant v. Dep't of the Navy*, 60 M.S.P.R. 467, 472-75 (1994) (the agency's petition for review was not dismissed where it submitted evidence with its petition showing that it reinstated the appellant effective as of the date of the initial decision, it later discovered that it had failed to pay him for twelve hours during the interim relief period, and it "promptly corrected" its "inadvertent" error).

It is key to remember NOT to cancel the underlying action if the AJ orders interim relief. The appeal then becomes moot! See *Gevaert v. Dep't of Navy*, 65 M.S.P.R. 65 (1994); *Cain v. Defense Commissary Agency*, 60 M.S.P.R. 629 (1994); *Archuleta v. Dep't of Air Force*, 59 M.S.P.R. 202 (1993); *Trotter v. Dept of Defense*, 54 M.S.P.R. 563, 564 (1992) (holding an agency's cancellation of an action will generally moot its petition for review regardless of the agency's intent to effect interim relief).

7.5 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. The employee must prove that fees are "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).

In order to establish entitlement to an award of attorney fees, the appellant must show that: (1) he is a prevailing party; (2) he incurred attorney fees; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430, 432 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir.1995) (Table). See *Hamel v. President's Commission on Executive Exchange*, 987 F.2d 1561 (Fed. Cir.), *cert. denied*, 114 S.Ct. 342 (1993); *Edward Joyce v. Dep't of the Air Force* 74 M.S.P.R. 112 (1997); *Ray v. Dep't of Health and Human Serv*, 64 M.S.P.R. 100 (1994).

The MSPB has refined the test concerning prevailing parties in attorney fee awards. The MSPB, in *Rose v. Dep't 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 unreasonably 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. Dep't of Air Force*, 34 M.S.P.R. 501 (1987). But see *Dunn v. United States Postal Service*, 49 M.S.P.R. 144, 147-48 (1991), where the Board denied an award of fees, holding that the mitigation of the penalty did not in itself warrant a finding that an award of attorney fees was warranted in the interest of justice.

a. Notes and Discussion.

Note 1. In cases where a decision is based on a finding of discrimination or 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); *Kean v. Stone*, 966 F.2d 119 (3d Cir. 1993) (market rate where discrimination found). See also Attorneys' Fee Awards Under 5 USCS sec.7701(g), Which Allows Award of Attorneys' Fees to Prevailing Employee for Appeal to Merit Systems Protection Board from Adverse Employment Decision, 143 A.L.R. Fed. 145 (1998).

Note 2. The Board recently amended its interpretation of what constitutes a "prevailing party" under 5 U.S.C. §§ 7701(g)(1) and (g)(2). It previously required an appellant to "substantially prevail," or receive all or a significant portion of the relief sought. See, e.g., *Roth v U.S. Postal Svc.*, 54 M.S.P.R. 298 (1992). The Board now will award fees to an appellant "who obtains an enforceable judgment against the agency, or enforceable relief through a settlement agreement." *Ray v. Dept of Health and Human Serv.*, 64 M.S.P.R. 100,105 (1994). The Federal Circuit Court of Appeals, however, has held that Board mitigation after sustaining all of the charges does not create a presumption that fees are warranted. See *Dunn v. Dep't of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996); *Sterner v. Dep't of Army*, 711 F.2d 1563, 1565-66 (Fed. Cir. 1983)(holding plaintiffs must show that they substantially prevailed on their claims before the arbitrator and that justice warrants the award). See also *Van Fossen v. MSPB*, 788 F.2d 748, 749 n.5 (Fed. Cir. 1986); *Shelton v. OPM*, 42 M.S.P.R. 214, 217 (1989); *Depte v. Veterans Admin.*, 20 M.S.P.R. 362, 363-64 (1984).

The Civil Service Reform Act expressly limits the availability of attorney's fees to cases in which such an award serves the "interest of justice." 5 U.S.C. § 7701(g)(1). Generally, a court looks to five non-exclusive categories, first articulated by the Board in *Allen v. United States Postal Serv.*, 2 M.S.P.R. 420, 434-35 (1980), to determine whether justice warrants a fee award:

- (1) Whether the agency engaged in a prohibited personnel practice;
- (2) Whether the agency action was clearly without merit or wholly unfounded, or the employee is substantially innocent of the charges;
- (3) Whether the agency initiated the action in bad faith;
- (4) Whether the agency committed a gross procedural error that prolonged the proceeding or severely prejudiced the employee; and
- (5) Whether the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.

Allen v. United States Postal Serv., 2 M.S.P.R. 420, 434-35 (1980).

Note 3. A "prevailing" employee may only recover "reasonable" fees. For a general discussion of how reasonable fees are calculated, *see* Blum v. Stenson, 465 U.S. 886 (1984); McLane v. Dep't of Navy, 33 M.S.P.R. 404 (1987); Ferebee v. Dep't of Navy, M.S.P.R. 447 (1987); Kling v. Dep't of Justice, 2 M.S.P.R. 464 (1980). For a discussion of how fees are calculated when a salaried union attorney represents an employee, *see* Goodrich v. Dep't of Navy, 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); Kean v. Dep't of Army, 966 F.2d 119 (3rd Cir. 1992); Ward v. Brown, 899 F. Supp. 123 (2nd Cir. 1995); AFGE, Local 3882 v. FLRA, 944 F.2d 922 (D.C. Cir. 1991) (market rate for union attorney in FLRA proceeding).

Note 4. For a case in which a "prevailing" employee's attorney is sanctioned, and receives no fees, due to an inflated petition, *see* Keener v. Dep't of Army 136 F.R.D. 140 (1991), *affirmed*, 956 F.2d 269 (1992) (counsel's double-billing); *see also* Grossly Excessive Attorney's Fee Requests under the Civil Rights Attorney's Fees Awards Act: Should the Entire Fee Request be Denied?, 24 U. BALT. L. REV. 149, 176 (1994).

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CHAPTER 8

JUDICIAL REVIEW OF PERSONNEL ACTIONS

8.1. Judicial Review of MSPB Actions.

a. Statutory Provision. In cases involving decisions or orders by the MSPB, Congress has specifically outlined by statute, at 5 U.S.C. § 7703, the applicable standards, scope, and appropriate venue for review. The jurisdiction of the MSPB and the U.S. Court of Appeals for the Federal Circuit to review Federal personnel actions is limited to actions made reviewable by law and regulation, such as serious adverse actions and reductions-in-force.

Note. The U.S. Court of Appeals for the Federal Circuit's jurisdiction over MSPB final orders became 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. *See* 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. Dep't of the Navy*, 699 F.2d 1315 (Fed. Cir. 1983), and in *Carroll v. Dep't of Health and Human Services*, 703 F.2d 1388 (Fed. Cir. 1983), established that the scope of its subject matter jurisdiction is identical to the scope of the subject matter jurisdiction of the Board, except in discrimination cases. 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9). *See also* *Hendrix v. U.S. Dept. of Agriculture*, 117 F.3d 1428 (10th Cir. 1997)(U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from final orders of the MSPB); *Drumheller v. Dep't of Army*, 49 F.3d 1566, 1571 (Fed. Cir. 1995); *Bergman v. Dep't of Commerce*, 3 F.3d 432, 434 (Fed. Cir. 1993); *Afifi v. United States Dep't of Interior*, 924 F.2d 61, 62 (4th Cir. 1991); *Manning v. MSPB*, 742 F.2d 1424 (Fed. Cir. 1984); *Long v. United States Dep't of Air Force*, 751 F.2d 339, 342 (10th Cir. 1984).

However, if a case is a "mixed case," in which "the employee is challenging judicially the board's determinations of both ... discrimination and the nondiscrimination issues," then jurisdiction lies solely with the district court pursuant to 5 U.S.C. § 7703(b)(2). *Williams v. Dep't of Army*, 715 F.2d 1485, 1491 (Fed. Cir. 1983). *See also* *Williams v. Rice*, 983 F.2d 177, 179-80 (10th Cir. 1993); *Hill v. Dep't of Air Force*, 796 F.2d 1469, 1470 (Fed. Cir. 1986). In such a "mixed case", the entire action must be brought in district court, and bifurcated proceedings are prohibited. *See Afifi*, 924 F.2d at 62-63; *Williams*, 715 F.2d at 1490-91. According to one court, the no-bifurcation rule's purpose is to avoid a "tremendous waste of judicial resources." *See Wiggins v. United States Postal Service*, 596 F. Supp 628 (W.D. Va. 1984).

c. Scope of Review. 5 U.S.C. § 7703(c) limits the court's review to the record. Generally, the agency's decision must be sustained unless it is arbitrary, capricious, or abuse of discretion, or

unless an agency decision was obtained without procedures required by law, or unless agency decision is unsupported by substantial evidence; judicial review is based exclusively on administrative record. Thompson v United States Postal Serv., 596 F. Supp. 628 (W.D. Va, 1984).

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. *Boylan v. U.S. Postal Service* 704 F.2d 573 (11th Cir. 1983)

8.2 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 9.

8.3 Judicial Review of Other Personnel Actions.

Not all personnel actions are appealable to the MSPB under 5 U.S.C. § 7701, and thus 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. 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' Admin.*, 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.

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 MSPB, if OSC fails to act within 120 days. *See* 5 U.S.C. § 1214(a)(3). This is commonly referred to as the individual right of action (IRA).

8.4 Constitutional Tort Actions.

Federal employees have also attempted constitutional tort claims against their supervisors under *Bivens v. Six Unknown Named Agents*, 403 U.S. 38 (1971), to obtain review of personnel actions. This approach has been largely unsuccessful because of the Supreme Court's ruling in *Bush v. Lucas*, 462 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 a new non-statutory damages remedy. Following the *Bush* decision, however, several circuit courts refused to apply *Bush* to personnel practices that 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 *McIntosh v. Weinberger*, 810 F.2d 1411 (8th Cir. 1987); *Doe v. Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985) (excepted service employee); *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983).

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). See *Hill v. Dep't of Air Force*, 884 F.2d 1318, (10th Cir. 1989) (employee's allegations that former supervisor violated his due process rights by interfering with his security clearance and his job possibilities were allegations of prohibited personnel practices, and employee thus did not have *Bivens* remedy therefor). See also *Steele v. United States*, 19 F.3d 531 (10th Cir. 1994) (finding FTCA suit by former Air Force employee for "whistleblowing" was preempted by CSRA's comprehensive scheme of redress); *Albright v. United States*, 10 F.3d 790 (Fed. Cir. 1993); *Jones v. Tennessee Valley Auth.*, 948 F.2d 258 (6th Cir. 1991) (holding CSRA provides comprehensive system to protect rights of employees).

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CHAPTER 9

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

9.1 Substantive Law.

a. Title VII, 1964 Civil Rights Act. Before 1972 a Federal employee's only recourse for an incident of employment discrimination was to lodge an administrative complaint with the Civil Service Commission. Title VII of the Civil Rights Act of 1964 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 sole administrative remedy for Federal employees before 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.

The original executive order and its implementing regulations created a tedious, time-consuming complaint procedure that 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 who were dissatisfied with the resolution of their complaints had no statutory basis upon which to seek judicial review of the administrative procedure; they were also 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.

(1) Disparate Treatment Analysis. In a disparate treatment case of employment discrimination, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 334 (1977). The employee must prove the action taken was motivated by prohibited discrimination. Because there is seldom sufficient direct evidence of discrimination ("I don't like _____ class and that's why I didn't promote employee X"), the Supreme Court has developed a test for circumstantial evidence of employment discrimination cases.

Under the "shifting burdens" analysis, the employee must first establish a *prima facie* case of discrimination. The elements of this test vary, depending on the employment matter in dispute. In a job selection or promotion case, the employee must be a member of a protected class (only those matters protected by federal discrimination law); be qualified for the position involved; be passed over for selection; and someone outside the protected class is selected (treated more favorably). In other employment decisions, the final two elements are replaced by the inquiry of whether the circumstances give rise to an inference of discrimination. See *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *U.S. Postal Serv. v. Aikens*, 460 U.S. 711 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993).

The key to a *prima facie* case is different treatment from similarly situated employees outside the complainant's protected class. In a job application action, other applicants are similarly situated; employees seeking promotion are not. In reductions in force, employees within a competitive level and competitive area are similarly situated; employees in other competitive levels and areas are not similarly situated. See *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1994) (where the court misapplied the similarly situated test to find a GS09 and a GS12 were similarly situated in a RIF).

Once the employee establishes the *prima facie* case, the burden of production shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action. The stated reason must, if true, state a valid defense to the allegations. *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Burdine*. In a case under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) alleging discriminatory treatment in employment, the basic allocation of burdens and order of presentation of proof is as follows: first, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination; second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection; third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. The ultimate burden of proof always remains on the plaintiff in an employment discrimination case. After the employer (agency) articulates a legitimate, nondiscriminatory reason for its actions, the employee must prove that reason is mere

pretext for discrimination: in other words, the employer's explanation is unworthy of belief and prohibited discrimination is the more likely reason (keeping in mind that the employee must prove discriminatory intent). *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

(2) Mixed Motive. When there is direct evidence of discrimination, but the employer also has an independent, valid reason for its actions, mixed motive analysis applies. Once the employee proves discrimination was "a motivating factor" in an action, the employer must prove by clear and convincing evidence it would have taken the same action even absent discrimination. 42 U.S.C. § 2000e-2(m). *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995). The employee may still, however, receive declaratory and injunctive relief and recover attorney's fees and costs.

(3) Disparate Impact. Employment practices that are facially neutral but affect one group disproportionately are said to have a disparate impact. An employee who establishes such a practice has proven employment discrimination unless the employer can prove the practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). These cases nearly always turn on statistics. For the appropriate analysis of statistics, see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)(reversing disparate impact finding for improper use of statistics); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)(the appropriate analysis is comparison of the percentage of group's employees to the number of qualified applicants, not the number of the protected group in the geographic area); *Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works*, 947 F.2d 292 (7th Cir. 1991); *Valentino v. U.S. Postal Serv.*, 674 F.2d 56 (D.C. Cir. 1982); *Maddox v. Claytor*, 764 F.2d 1539 (11th Cir. 1985).

(4) Reprisal. An employee who either engages in protected activity under discrimination laws (files or participates in a complaint) or otherwise opposes discriminatory practices is protected by law from retaliation. An employee can prove reprisal discrimination against the employer (agency) by demonstrating a protected activity; an adverse employment action; and, a causal connection between the protected activity and the adverse action. 42 U.S.C. § 2000e-3; *Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993); *Malarky v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993); *Miller v. Williams*, 590 F.2d 317 (9th Cir. 1979). The causal connection can be presumed where the employee shows the employer was aware of the protected activity and the adverse action follows the protected activity closely in time. The employer can successfully defend against the allegation by proving a legitimate, non-retaliatory reason for the adverse action, *Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993); *Butler v. Dep't of Agric.* 826 F.2d 409 (5th Cir. 1987), or that the decision to take the adverse action was made before the protected activity. *Newton v. Leggett*, 7 F.3d 1042 (8th Cir. 1993). An employer who was unaware of the protected activity can not, of course, be guilty of reprisal. *Jackson v. Brown*, 5 F.3d 546 (10th Cir. 1993); *Malarky v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993); *Acosta v. Univ. of the District of Columbia*, 528 F. Supp. 1215 (D.D.C. 1981).

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, incorporates procedures similar to those required by 42 U.S.C. § 2000e-16.

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." The ADEA applies only to Federal employees and applicants who are at least 40 years old, not, as in some state laws, to employees under age 40.

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. If the employee fails to file an administrative age discrimination complaint with the EEOC, the statute requires the employee to give the EEOC at least 30 days' advance notice of intent to file the civil action. This advance notice must also be filed within 180 days after the alleged discriminatory act occurred. 29 U.S.C. § 633a(d). See *Stevens v. Department of Treasury*, 500 U.S. 1 (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. 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). The Rehabilitation Act has been amended several times since its inception, most notably by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, and the 1992 Rehabilitation Act Amendments. Extracts of the current Act are reproduced below. Note that the amended Rehabilitation Act refers to individual with a "disability." The terms "handicap" and "handicapped" are no longer used. This indicates no change in substance, only a reflection of societal use.

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 (disability). *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. Part 1614. In the 1978 amendments to the Rehabilitation Act, Congress granted aggrieved disabled employees the same procedures for processing their complaints as available to Title VII complainants. The 1992 amendments require application of the substantive provisions of the Americans with Disabilities Act (subsection (g) above).

(1) Reasonable Accommodation The Rehabilitation Act, *as amended*, prohibits discrimination against a qualified individual with a disability and requires employers to

reasonably accommodate the qualified disabled who can perform the essential functions of a position with or without reasonable accommodation. An allegation of failure to reasonably accommodate an employee can arise in hiring, placement, or advancement opportunities. In these cases, the employee must have, have a record of, or be regarded as having a physical or mental impairment that substantially limits one or more major life activities. 29 U.S.C. §§ 706, 709; 29 C.F.R. § 1614.203; 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2; *Cook v. State of Rhode Island*, 10 F.3d 17 (1st Cir. 1993); *Ruiz v. U.S. Postal Svc.*, 59 M.S.P.R. 76 (1993); *Ingles v. Neiman Marcus Group*, 974 F.Supp. 996 (S.D.Tex. 1997); *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047(5th Cir. (Tex.) (1998) (Former employee failed to present evidence that his post traumatic stress disorder (PTSD) was impairment that substantially limited major life activity, and thus he failed to make threshold showing of ADA-qualified disability, where employee's earlier symptoms, affecting work and non-work functions, were merely temporary, no facts indicated that employee was unable to perform class of jobs or broad range of jobs, and he retained ability to compete successfully with similarly skilled individuals. Americans with Disabilities Act of 1990, § 3(2), 42 U.S.C.A. § 12102(2); 29 C.F.R. § 1630.2(j)). The employee must be able "with or without reasonable accommodation, [to] . . . perform the essential functions of the position in question without endangering the health and safety of the individual or others. . . ." 29 C.F.R. § 1614.203(a)(6)(1999). An impairment is--

- (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, respiratory (including speech 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.

29 C.F.R. § 1630.2(h)(1999). Major life activities are things like "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." C.F.R. § 1630.2(i)(1999). Employees who can not perform in only one specific job do not suffer an impairment of the major life activity of working. *Heilwell v. Mount Sinai Hospital*, 32 F.3d 718 (2d Cir. 1994), *cert. denied*, 513 U.S. 1147, 115 S.Ct. 1095, 130 L.Ed.2d 1063, 63 USLW 3617, 63 USLW 3625, (1995)(asthma exacerbated only in one particular location did not constitute an impairment); *Kuehl v. Wal-Mart Stores, Inc.*, 909 F.Supp. 794, (D.Colo. 1995)(Inability of employee diagnosed with chronic tibula tendinitis to return to her particular job as door greeter at store without some accommodation, such as sitting on stool, did not demonstrate substantial limitation in the major life activity of working and thus, employee who did not have impairment that precluded her from performing any other job or duty within a class of jobs did not meet the definition of a disabled person under the ADA. Americans with Disabilities Act of 1990, § 3(2), 42 U.S.C.A. § 12102(2); 29 C.F.R. § 1630.2(i); *Byrne v. Board of Educ.*, 979 F.2d 560, 565-66 (7th Cir. 1992); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Maulding v. Sullivan*, 961 F.2d 694, 698 (8th Cir. 1992), *cert.*

denied, 113 S.Ct. 1255 (1993); *Miller v. AT&T Network Sys.*, 915 F.2d 1404, 1404 (9th Cir. 1990) (adopting district court opinion at 722 F.Supp. 633 (D.Or. 1989)); *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1250 (6th Cir. 1985). *Contra*, *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993)(finding without analysis firefighters with skin condition were limited in major life activity of working by no-beard rule). For a case that decided asymptomatic HIV infection is not an impairment that substantially limits one of the major life activities, see *Runnebaum v. Nationsbank of Maryland*, 123 F.3d 156 (4th Cir. 1997).

(2) Essential Functions and Reasonable Accommodation. Essential functions of a position are determined by the employer and derived from the position description and other materials. ". . . [C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8)(2000). *See also* 29 C.F.R. § 1630.2(n)(1999).

Reasonable accommodation of an employee's handicap is at 29 C.F.R. § 1630.2(o) (1999). Closely tied to the issue of reasonable accommodation is undue hardship on the employer. An accommodation that would cause undue hardship need not be provided. *See* 29 C.F.R. § 1630.2(p) (1999). *Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) (finding that the financial condition of an employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship); *Whillock v. Delta Air Lines, Inc.*, 926 F.Supp. 1555, (N.D.Ga. 1995) (Even assuming that employee who allegedly suffered from multiple chemical sensitivity syndrome could perform essential functions of job as airline reservation sales agent if "accommodated" by allowing her to work at home, such an accommodation was not reasonable, and, accordingly, employee was not entitled to relief on ADA claims. Reservations mini-office at someone's home would prevent computer terminal from being used other than during that individual's work hours, reservation sales agents necessarily had access to large amount of airline's classified and confidential information and security of that information could not be maintained in reservation sales agent's home, and agents did not work in isolated unsupervised environment but, instead, airline provided extensive in-person and on the job training, monitoring, evaluating and counseling that was essential to proper functioning of job. Americans with Disabilities Act of 1990, § 102(b)(5)(A), 42 U.S.C.A. § 12112(b)(5)(A)). *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983); *Bolstein v. Dep't of Labor*, 55 M.S.P.R. 459 (1992); *Cohen v. Dep't of Army*, 46 M.S.P.R. 369 (1990); *Widger v. VA*, 37 M.S.P.R. 368 (1988). *See also* *Accommodating the Handicapped Federal Employee*, 35 A.F. L. Rev. 69, (1991).

An agency that attempts to reasonably accommodate an employee and fails will not be liable for compensatory damages. 42 U.S.C. § 1981a(a)(3); *Hocker v. Dep't of Transp.*, 63 M.S.P.R. 497 (1994), *cert. denied*, 516 U.S. 1116, 116 S.Ct. 918, 133 L.Ed.2d 848, 64 USLW 3556, 64 USLW 3557 (1996).

(3) Drug use. The Rehabilitation Act amendments of 1992 excludes from the definition of a disabled individual any one who claims disability based on current use of illegal drugs. 29 U.S.C. § 705(20)(F)(iii). *See also* 42 U.S.C. § 12114(a) ("For purposes of this subchapter, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.").

(4) Alcoholism. Both the EEOC and MSPB have determined that federal employers are no longer required to provide reasonable accommodation to an alcoholic and may hold the alcoholic employee to the same qualification standards for employment, or job performance and behavior as other employees. *See* Johnson v. Babbitt EEOC Appeal No. 03940100 (March 28, 1996); Kimble v. Navy, 70 MSPR 617(1996). *But see* Humphrey v. Dept. of Army (While agencies are no longer obligated by the ADA and the Rehabilitation Act Amendments of 1992 to provide accommodations formerly required for alcoholics, they may voluntarily do so because the wording of the law is that they "may" hold such employees to the same standards to which they hold others; moreover, where employee shows that he has a right to such accommodation under agency's own rules, collective bargaining agreements, or policy, and that such right has been denied, he has proven affirmative defense of harmful procedural error rather than disability discrimination. Rehabilitation Act of 1973, § 2 *et seq.*, as amended, 29 U.S.C.A. § 701 *et seq.*; Americans with Disabilities Act of 1990, § 104(c)(4), 42 U.S.C.A. § 12114(c)(4). 76 M.S.P.R. 519(1997)).

9.2 Complaint Processing.

EEOC regulations implementing Title VII are currently codified at 29 C.F.R., Part 1614. Every agency is required by 29 C.F.R. § 1614.102 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.

The first stop in the EEOC administrative complaints process is the equal employment opportunity (EEO) counselor, who works for the agency that allegedly discriminated and performs the counseling function either full-time or as a collateral duty. Counselors normally are not attorneys, and they have widely-varying degrees of training and expertise in employment discrimination law.

The counseling process resolves most discrimination cases before a formal complaint is ever filed. The counselor meets with the complainant to explain the complaints process and identify issues; meets with witnesses and gathers information; and attempts to resolve the employment dispute at the lowest level possible. Historically about 80 percent of all disputes are resolved during the counseling process.

The complainant generally must contact an EEO counselor within 45 days of the discriminatory act or the effective date of a discriminatory personnel action. The counselor then has 30 days to complete counseling unless the complainant agrees to an extension of up to 60 days, or the agency and the individual agree to pursue an alternative dispute resolution procedure. Agencies are now required to establish or make available an alternative dispute resolution program. See §1614.102(b)(2). The counselor provides the complainant a "notice of final interview" at the end of the counseling period, following which the complainant may file a formal discrimination complaint within 15 days.

The respondent agency determines whether to accept or dismiss the complaint. It *shall* dismiss when the complaint fails to state a claim upon which relief can be granted; the complaint states a claim already pending before the EEOC, or that has already been decided by the EEOC; the complainant fails to meet the deadlines described above (counselor contact within 45 days, formal complaint within 15 days of notice of final interview); or the claim is moot or not yet ripe. Partial dismissals will no longer be done. Under § 1614.107(b), if the agency believes that some, but not all of the claims in a complaint should be dismissed, it is required to notify the complainant that those claims will not be investigated. That determination is subject to review by an Administrative Judge if there is a hearing on the case, but the decision is not appealable until final action is taken on the rest of the complaint.

The process moves to the investigation stage if the agency accepts any allegation of discrimination. The agency investigates the complaint, developing "a complete and impartial factual record upon which to make findings on the matters raised by the written complaint." The agency must complete the investigation within 180 days from the date the complainant files the formal complaint, or from the date that the EEOC orders acceptance of the complaint, unless the parties agree to an extension of up to 90 days.

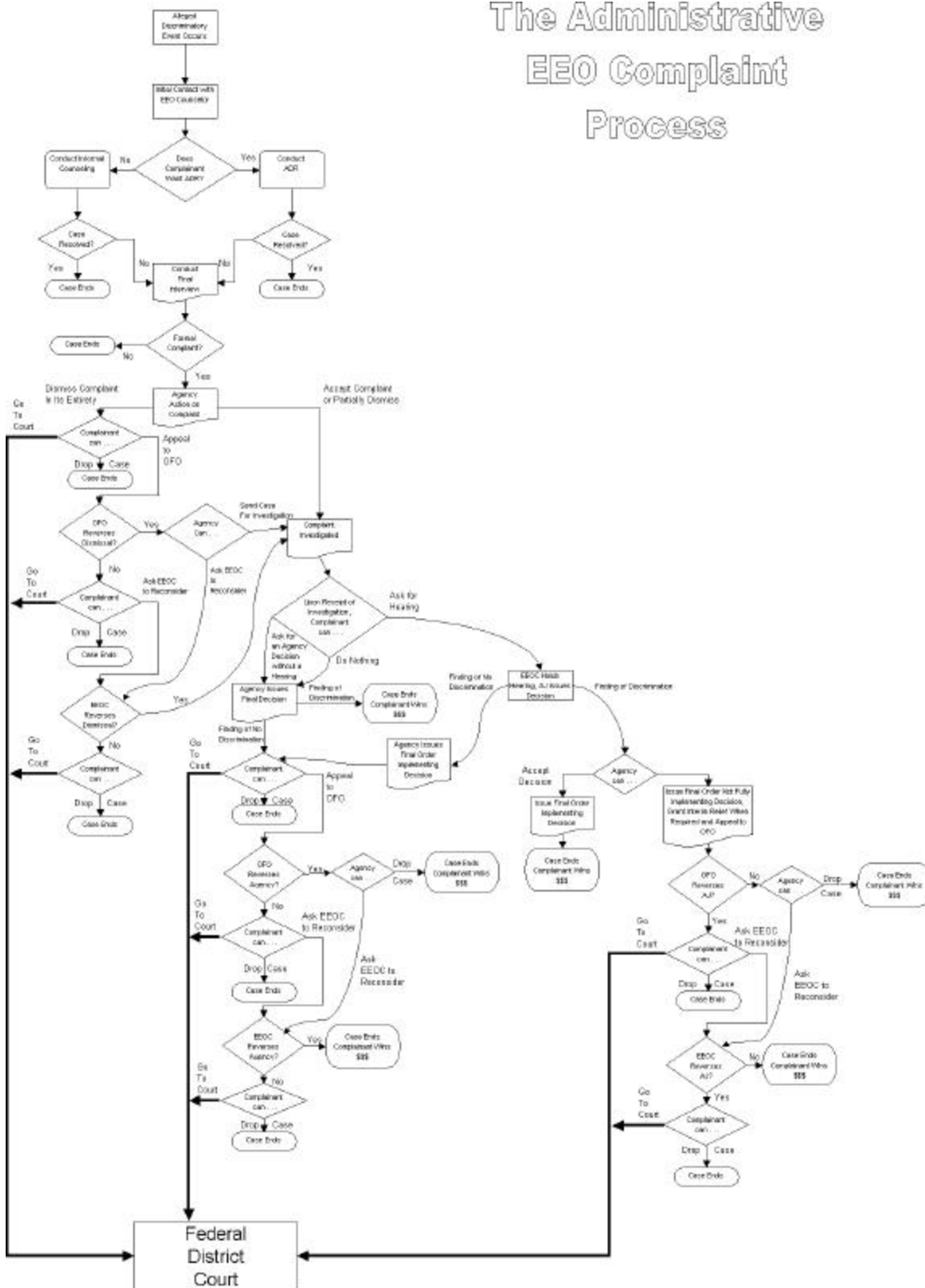
Within 180 days from the filing of the complaint, the agency is required to provide the complaint with a copy of the investigative file. The agency must inform the complainant that he has 30 days to request either a hearing before an EEOC administrative judge or a final agency decision without a hearing. The agency head makes the decision based on the administrative record if the complainant elects a final agency decision without a hearing. The complainant then has 30 days to appeal to the EEOC if the agency head finds no discrimination, or grants less than all the relief requested. See §1614.108(f). The complainant can also file a civil action in Federal District Court within 90 days of the final agency decision if he chooses not to appeal to the EEOC.

If the complainant requests a hearing, the EEOC Regional Office assigns an administrative judge who then permits discovery, holds a closed hearing, issues findings of fact and conclusions of law on the merits of the complaint, and "order[s] appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint." The administrative judge's decision, however, is merely a recommendation to the agency. The agency head has 40 days to

issue a final order implementing the decision in full; or if it does not want to implement in full, it must appeal to the EEOC. If the agency appeal is denied, the agency has 60 days to comply. A complainant has 90 days to file in Federal District Court if he disagrees with the decision.

The following chart illustrates how the individual complaint system currently works.

The Administrative EEO Complaint Process



**Developed by the Air Force Central Labor Law Office, March 2000
Version 5.0**

The EEOC has also published in 29 C.F.R. § 1614.204, special procedures for processing administrative class complaints of discrimination. These regulations 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. The general outline of the proceedings is then the same as those used in individual complaints: informal counseling, final interview, formal complaint, investigation, attempt at informal resolution, appeal to the Office of Federal Operations of the EEOC, and finally civil suit. An employee who wishes to file a class complaint must be counseled in accordance with § 1614.105. The employee may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. See §1614.204(b). Whether an individual or a class complaint is initiated, the complainant must be personally aggrieved by the personnel action that is the substance of the complaint to have "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).

9.3 Mixed Cases. The procedures discussed in sections 9.1 and 9.2 are applicable to discrimination cases that 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: file an appeal with the MSPB and later receive EEOC review; or file an EEOC administrative complaint and later receive an MSPB hearing on the personnel action.

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 1614, Subpart C.

9.4 Exclusivity of Title VII Remedy.

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. The Supreme Court reviewed the applicability of these laws to federal employees in the following case:

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, co-author 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 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 90-day limit on filing suit in Federal court.¹ 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. Since then, however, the Supreme Court has recognized a limited equitable tolling of many statutes of limitation, particularly those in title VII. In *Irwin v. Veterans Admin.*, 498 U.S. 89 (1990), the Court found that an attempted, but defective, pleading or affirmative deceit by the employer can be grounds for an appropriate equitable extension of the filing deadline in Title VII cases.

9.5 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

¹Complainants previously had 30 days to file a civil action in federal court; this was extended to 90 days by the Civil Rights Act of 1991, Pub. L. 102-166 (codified at 42 U.S.C. § 2000e-16). Many of the courts that previously considered the question concluded that the 30-day requirement was a jurisdictional prerequisite 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*, 498 U.S. 89 (1990).

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 *Chandler v. Roudebush*, 425 U.S. 840 (1976), where it found a right to trial *de novo* in district court.

When an employee seeks judicial review of a mixed case, the district court will hear the discrimination issues *de novo*, but 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); *Kirkland v. Runyon*, 876 F.Supp. 941 (S.D. Ohio, 1995); *Riehle v. Stone*, 41 F.3d 1507 (6th Cir.1994). This is a "mixed" case, which required the district court to review an appealable action from the MSPB and to also review Riehle's claim of handicap discrimination. See *Ballard v. Tennessee Valley Auth.*, 768 F.2d 756, 757 (6th Cir. 1985). In a mixed case a federal employee may seek review of a MSPB decision in a federal district court and have the facts regarding the discriminatory action reviewed *de novo*. 5 U.S.C. § 7703(b)(2); *Ballard*, 768 F.2d at 757. Nondiscrimination claims, however, are reviewed on the administrative record under 5 U.S.C. § 7703(c).

9.6 Analysis of EEO Litigation.

Seldom does a plaintiff alleging discrimination have the benefit of direct evidence of discrimination. Because of the difficulty of litigating cases of discrimination based on circumstantial evidence, the Supreme Court established a method of analysis for these cases. In a series of cases beginning with *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court developed an order of proof and allocation of burdens under a "shifting burdens test." The Court later redefined the test in *Texas Dep't of Community Affairs v. Burdine*, 420 U.S. 248 (1981). The combination of the two cases has given rise to the name often associated with the test; *McDonnell-Douglas/Burdine* test. Despite its name, however, the Court probably best explained the test in *U.S. Postal Service v. Aikens*, 460 U.S. 711 (1983).

The *McDonnell-Douglas/Burdine* test begins with the employee bearing the burden of proof to establish a "prima facie" case of discrimination. The elements of such a case vary based on the employment action involved. In a failure to hire case, for example, a black applicant alleging a racially discriminatory refusal to hire would show that (1) he was black, (2) he was qualified for the position for which he applied, (3) he was not offered the position, and (4) the position was filled with someone not black or the employer continued to seek persons who were not black while the position remained open. The burden then shifts to the employer to "articulate" a legitimate, nondiscriminatory reason for its actions. This is a burden of production, not persuasion. The stated reason must be one that, if true, would explain the employer's actions. If the employer fails to produce a facially valid reason for its actions, the employee wins.

After twenty years of litigation and three Supreme Court cases, the federal courts still disagreed over the proper application of the McDonnell-Douglas/Burdine test when the employer succeeded in presenting a facially legitimate, nondiscriminatory reason for its actions. The Court attempted to resolve the dispute in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), portions of which are reproduced below.

ST. MARY'S HONOR CENTER, et al., Petitioners

v.

Melvin HICKS.

509 U.S. 502 (1993)

Justice SCALIA delivered the opinion of the Court.

Petitioner St. Mary's Honor Center (St. Mary's) is a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). Respondent Melvin Hicks, a black man, was hired as a correctional officer at St. Mary's in August 1978 and was promoted to shift commander, one of six supervisory positions, in February 1980.

In 1983 MDCHR conducted an investigation of the administration of St. Mary's, which resulted in extensive supervisory changes in January 1984. Respondent retained his position, but John Powell became the new chief of custody (respondent's immediate supervisor) and petitioner Steve Long the new superintendent. Prior to these personnel changes respondent had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions. He was suspended for five days for violations of institutional rules by his subordinates on March 3, 1984. He received a letter of reprimand for alleged failure to conduct an adequate investigation of a brawl between inmates that occurred during his shift on March 21. He was later demoted from shift commander to correctional officer for his failure to ensure that his subordinates entered their use of a St. Mary's vehicle into the official logbook on March 19, 1984. Finally, on June 7, 1984, he was discharged for threatening Powell during an exchange of heated words on April 19.

Respondent brought this suit in the United States District Court for the Eastern District of Missouri, alleging that petitioner St. Mary's violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e- 2(a)(1), and that petitioner Long violated Rev.Stat. s 1979, 42 U.S.C. § 1983, by demoting and then discharging him

because of his race. After a full bench trial, the District Court found for petitioners. 756 F.Supp. 1244 (E.D.Mo.1991). The United States Court of Appeals for the Eighth Circuit reversed and remanded, 970 F.2d 487 (1992), and we granted certiorari, 506 U.S. ____, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993).

II

[1] Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

"It shall be an unlawful employment practice for an employer--
"(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a).

With the goal of "progressively sharpen[ing] the inquiry into the elusive factual question of intentional discrimination," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8, 101 S.Ct. 1089, 1094, n. 8, 67 L.Ed.2d 207 (1981), our opinion in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases. [FN1] The plaintiff in such a case, we said, must first establish, by a preponderance of the evidence, a "prima facie" case of racial discrimination. *Burdine*, supra, at 252-253, 101 S.Ct., at 1093-1094. Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a prima facie case (set out in *McDonnell Douglas*, supra, at 802, 93 S.Ct. at 1824 - 1825) by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man. 756 F.Supp., at 1249-1250.

. . . .

Under the *McDonnell Douglas* scheme, "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, supra, at 254, 101 S.Ct., at 1094. To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). 1 D. Louisell & C. Mueller, *Federal Evidence* s 67, p. 536 (1977). Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case--i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S., at 254, 101 S.Ct., at 1094. "[T]he

defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. *Id.*, at 254-255, and n. 8, 101 S.Ct., at 1094-1095, and n. 8. It is important to note, however, that although the McDonnell Douglas presumption shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *id.*, at 253, 101 S.Ct., at 1093. In this regard it operates like all presumptions, as described in Rule 301 of the Federal Rules of Evidence:

"In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

Respondent does not challenge the District Court's finding that petitioners sustained their burden of production by introducing evidence of two legitimate, nondiscriminatory reasons for their actions: the severity and the accumulation of rules violations committed by respondent. 756 F.Supp., at 1250. Our cases make clear that at that point the shifted burden of production became irrelevant: "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," *Burdine*, 450 U.S., at 255, 101 S.Ct., at 1094-1095, and "drops from the case," *id.*, at 255, n. 10, 101 S.Ct., at 1095, n. 10. The plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," *id.*, at 256, 101 S.Ct., at 1095, and that race was. He retains that "ultimate burden of persuading the [trier *2748 of fact] that [he] has been the victim of intentional discrimination." *Ibid.*

The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. It found that respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's coworkers were either disregarded or treated more leniently; and that Powell manufactured the final verbal confrontation in order to provoke respondent into threatening him. 756 F.Supp., at 1250-1251. It

nonetheless held that respondent had failed to carry his ultimate burden of proving that his race was the determining factor in petitioners' decision first to demote and then to dismiss him.

In short, the District Court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." *Id.*, at 1252.

....

The Court of Appeals set this determination aside on the ground that "[o]nce [respondent] proved all of [petitioners'] proffered reasons for the adverse employment actions to be pretextual, [respondent] was entitled to judgment as a matter of law." 970 F.2d, at 492. The Court of Appeals reasoned: "Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race." *Ibid.*

That is not so. By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a "better position than if they had remained silent."

If, on the other hand, the defendant has succeeded in carrying its burden of production, the McDonnell Douglas framework--with its presumptions and burdens--is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." 450 U.S., at 254, 101 S.Ct. at 1094. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. *Id.*, at 255, 101 S.Ct., at 1094-1095. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race, *id.*, at 253, 101 S.Ct., at 1093. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of

the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, [FN4] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required," 970 F.2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." See, e.g., *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (citing *Burdine*, supra, at 256, 101 S.Ct., at 1095); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187, 109 S.Ct. 2363, 2378, 105 L.Ed.2d 132 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245-246, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989) (plurality opinion of Brennan, J., joined by Marshall, BLACKMUN, and STEVENS, JJ.); id., at 260, 109 S.Ct., at 1795-1796 (WHITE, J., concurring in judgment); id., at 270, 109 S.Ct., at 1801 (O'CONNOR, J., concurring in judgment); id., at 286-288, *2750 109 S.Ct., at 1809-1810 (KENNEDY, J., joined by THE CHIEF JUSTICE and SCALIA, J., dissenting); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); cf. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659-660, 109 S.Ct. 2115, 2125-2126, 104 L.Ed.2d 733 (1989); id., at 668, 109 S.Ct., at 2130 (STEVENS, J., dissenting); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986, 108 S.Ct. 2777, 2784, 101 L.Ed.2d 827 (1988).

We reaffirm today what we said in *Aikens*:

"[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof,' *Burdine*, 450 U.S., at 252 [101 S.Ct., at 1093], in deciding this ultimate question." *Aikens*, 460 U.S., at 716, 103 S.Ct., at 1482.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justices Souter, White, Blackmun, and Stevens joined in a dissenting opinion to the *Hicks* majority. The dissent believed a plaintiff who shows pretext is entitled to judgment as a matter of law and supported its theory based on language from the original *McDonnell-Douglas* decision instead of its clarification in *Aikens* cited often by the majority. The dissent also argued policy grounds for focusing litigation on a specific reason stated by the employer for its actions and not every possible explanation for the personnel action. The dissent failed to address the majority's brief analysis of the applicability of Fed. R. Civ. Pro. 301 regarding proper application of presumptions.

Many civil rights groups criticized the *Hicks* decision as a degradation of employee rights and a distortion of the test previously applied, although a majority of the Circuits had applied the test as the Court interpreted in *Hicks*. Shortly after this decision, opponents in Congress proposed § 1776 to legislatively overrule *Hicks* and allow a discrimination plaintiff to prevail by simply rebutting the employer's stated reason for its actions. Although this bill never went through the required committees, the Department of Justice has announced its support for the proposal in future legislation. See Letter from Assistant Attorney General Sheila F. Anthony to Sen. Edward M. Kennedy on §. 1776, 1994 Daily Lab. Rep. 193 d37 (Oct. 7, 1993). This legislation, in effect, would allow a finding of discrimination without proof by a preponderance of the evidence that discrimination motivated the action.

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.

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, by and 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 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. 5

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

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