

1992 AREA SUMMARIES

SURVEY OF MSPB CASES IN 1991-1992: THEORETICAL CRITIQUE AND PRACTICAL APPLICATIONS

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INTRODUCTION

Now fourteen years old, the U.S. Merit Systems Protection Board (Board or MSPB) has developed a sufficient track record in adjudicating issues of federal employment law so that interested parties can define and even predict the Board's official policies and innate biases. One goal of this Article is to sketch some of the latest practical developments in federal employment law, while pausing to examine the underlying bases of certain documented trends in the

Board's approach to deciding these cases.¹ As a consequence, this Article should be helpful to the practitioner, as well as stimulating to the academician or the public policy pundit.²

Congress created the MSPB³ to guarantee compliance with federal merit systems principles by all federal governmental agencies.⁴ The Board's stated mission is to ensure that federal employees are protected against abuse by agency management, that Executive branch agencies make employment decisions in accordance with merit systems principles, and that federal agency personnel systems are kept free of prohibited personnel practices.⁵

1. This Article is limited by considerations of reasonable length. Therefore, although billed as a survey of recent cases, the Article can address only a small portion of the issues on the current menu at the MSPB. The authors have selected cases with the hope that others will also find them significant, relevant, and interesting.

2. For other articles concerning topics related to federal employment law at the MSPB prior to fiscal year 1991, see Symposium, *Project on the Merit Systems Protection Board: The Civil Service Reform Act of 1978*, 29 How. L.J. 279 (1986); Michael Bogdanow, *The Merit Systems Protection Board at Ten*, 35 FED. B. NEWS & J. 271 (1988); Bruce D. Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s*, 40 AM. U. L. REV. 1015 (1991); Ramon V. Gomez, *The Application of Collateral Estoppel in Proceedings Before the U.S. Merit Systems Protection Board*, 39 LAB. L.J. 3 (1988); Katherine A. Klos, *The Merit Systems Protection Board's Application of the Community Rate Principle in Its Awards of Reasonable Attorney Fees*, 39 LAB. L.J. 81 (1988); Andrew Rudyk, *The Relationship Between Federal Sector Arbitration and the Merit Systems Protection Board*, 37 LAB. L.J. 372 (1986); Robert G. Vaughn, *The Civil Service Reform Act of 1978 and Legal Regulation of Public Bureaucracies*, 31 How. L.J. 187 (1988); Beth R. Kramer, Note, *The Federal Circuit's Clarification of MSPB Jurisdiction: Thomas v. General Services Administration*, 35 AM. U. L. REV. 1233 (1986).

3. See Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, § 202, 92 Stat. 1111, 1121-31 (codified as amended at 5 U.S.C. §§ 1201-1206 (1988 & Supp. I 1989)) (amending title 5 of U.S. Code to create MSPB, which is composed of three members appointed by President by and with consent of Senate, and of which not more than two can be of same political party).

4. 5 C.F.R. § 1200.1 (1992). In order to ensure that the most effective civil service exists, civil servants are "hired and removed on the basis of merit" by a system that is accountable to the public through its elected leaders. S. REP. NO. 969, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2724-25. Federal merit systems focus on competence rather than on political or personal favoritism as the basis for selecting and advancing civil service employees. *Id.* at 2-3, reprinted in 1978 U.S.C.C.A.N. at 2725.

5. U.S. MERIT SYS. PROTECTION BD., ANNUAL REPORT FOR FISCAL YEAR 1991 7 [hereinafter 1991 ANNUAL REPORT]; see also 5 U.S.C. § 2301(b) (1988) (establishing merit system principles in areas of (a) recruitment, (b) fair and equitable treatment, (c) pay schedule, (d) conduct, (e) efficiency, (f) performance, (g) training, (h) personal and political behavior, and (i) whistleblowing); 1991 ANNUAL REPORT, *supra*, at 3 (summarizing MSPB fiscal year 1991 activities furthering Board's mission). The introductory letter of the 1991 Annual Report indicates:

[D]uring the fiscal year, administrative judges in the Board's regional offices issued almost 8400 decisions on appeals, stay requests, and addendum cases. The three-member bipartisan Board issued over 1800 decisions on review of administrative judges' decisions and in reopened cases.

1991 ANNUAL REPORT, *supra*, at 3.

It is worth noting that the MSPB has, according to 1991 figures, a total staff complement of 302 employees, including 132 attorneys. *Id.* at 50-51. The MSPB also performs important Office of Personnel Management (OPM) oversight functions and plays a significant role in reporting to Congress and the President on current issues in the federal employment and merit systems arenas. See *id.* at 16-17 (enumerating broad scope of Board's oversight function

Increasingly, disputed federal agency personnel actions not resolved prior to a hearing are upheld at virtually every stage of the appeals process, whether before an administrative judge (AJ), the full Board,⁶ or on review before the U.S. Court of Appeals for the Federal Circuit.⁷ Thus, attorneys representing federal employees before the MSPB may do well to heed one of the guiding principles of administrative law, which admonishes practitioners to win at the agency level or prepare for a difficult journey through the appeals gauntlet.⁸ It should be emphasized, however, that despite data indicating a prohibitively high rate of sustained agency decisions heard on appeal by the MSPB, the overwhelming majority of agency actions appealed to the MSPB are dismissed, settled, or mitigated without so much as a hearing.⁹ The Board understandably encourages its AJs to utilize a variety of alternative dispute resolution techniques¹⁰ to aid the efficient and timely disposition of appeals.¹¹

General MSPB deference to the personnel decisions of the various federal agencies produces, from one viewpoint, a pillar of prece-

with respect to OPM policies, regulations, and actions). For the benefit of the practicing attorney, however, this Article is limited to providing commentary and analysis regarding the most recent, significant cases and trends under the Board's adjudicative functions.

6. See 1991 ANNUAL REPORT, *supra* note 5, at 30-33 (reporting that of 2015 appeals adjudicated by Board's AJs, approximately 1592 or 79% of decisions upheld agency action). The number of agency actions upheld increased two percent from fiscal year 1990 to fiscal year 1991. See U.S. MERIT SYS. PROTECTION BD., ANNUAL REPORT FOR FISCAL YEAR 1990 30 [hereinafter 1990 ANNUAL REPORT] (reporting that of 2010 appeals adjudicated in fiscal year 1990, Board upheld 1542 or 77% of agency actions).

7. See 1991 ANNUAL REPORT, *supra* note 5, at 3 (stating in introductory letter to President that 95% of all final Board decisions reviewed by U.S. Court of Appeals for Federal Circuit remained unchanged in 1991); 1990 ANNUAL REPORT, *supra* note 6, at 3 (stating in introductory letter to President that U.S. Court of Appeals for Federal Circuit upheld 97% of Board's final decisions during fiscal year 1990).

8. See 5 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29:16, 29:27, at 399-404, 458-59 (2d ed. 1984) (discussing judicial deference for agencies' interpretation of law).

9. See 1991 ANNUAL REPORT, *supra* note 5, at 29-31 (reporting that in fiscal year 1991, 2033 appeals or 27% of all initial agency decisions appealed to MSPB were settled, 3477 appeals or 49% were dismissed, and 103 appeals or 1% were mitigated); see also *supra* note 7 and accompanying text (listing high percentage of MSPB decisions sustained on appeal to Federal Circuit).

10. See Daniel R. Levinson, *Quayle Law Reforms and the MSPB*, 1 FED. CIR. B.J. 1, 1-4 (1951) (discussing Board's attempts to reduce costs and delays in litigation at AJ and Board level through use of pretrial devices, effective case management, more effective trial procedures, and explicit encouragement of alternative dispute resolution techniques).

11. See 1991 ANNUAL REPORT, *supra* note 5, at 28-30 (listing various techniques, including use of prehearing conferences, to facilitate exchanges and suggest possible solutions between parties). The Board adds that "because these processes are voluntary, the parties surrender no rights if an agreement is not reached, and the case proceeds to adjudication." *Id.* at 30. Perhaps the "technique" most useful to the regular practitioner is simple awareness of the Board's AJs' willingness to dismiss appeals without prejudice in order to facilitate case organization and "exchanges" between parties while allowing appellants to refile at a later date. See *infra* notes 193-202 and accompanying text (discussing tendency of AJs to dismiss cases without prejudice, where employee may be disadvantaged by proceeding with hearing or granting continuance, to allow employee to refile when prepared to proceed).

dent after which a federal employee can model his or her conduct to avoid suffering adverse employment actions and to advance within the merit system.¹² The sum of these MSPB decisions also can be viewed as creating a framework, or a decisional "manager's handbook," from which supervisors may draw guidance to take lawful personnel actions to "promote the efficiency of the service."¹³ From the viewpoint of the employment law practitioner, however, who proposes to represent federal employees and, under certain circumstances, their supervisors, paradoxical situations arise despite the apparent and intended consistency of MSPB decisions.

I. WHISTLEBLOWER CASES

The Whistleblower Protection Act of 1989 (WPA)¹⁴ significantly expanded the Board's jurisdiction¹⁵ and, since its enactment, has increasingly provided opportunities for the practitioner in the government employment law field.¹⁶ Commentators expressed hope that passage of the Act would clarify the Board's approach to whistleblower cases and ease the burden on the federal employee

12. See *supra* notes 7-8, *infra* notes 58-61 and accompanying text (addressing general trend supporting agency personnel actions through appeals process and stating that MSPB will not scrutinize reasons motivating agency personnel actions applying interim relief).

13. See G. JERRY SHAW & WILLIAM L. BRANSFORD, *THE FEDERAL MANAGER'S HANDBOOK: A GUIDE TO REHABILITATING OR REMOVING THE PROBLEM EMPLOYEE* 4 (1992) (advising federal managers on ways to promote efficiency of agency service in cases involving employee misconduct and unacceptable employee performance). The "efficiency of the service" standard must be met by an agency manager to justify taking a personnel action based on employee misconduct under 5 U.S.C. §§ 7503, 7513 (1988). SHAW & BRANSFORD, *supra*, at 4. Sections 7503 and 7513 do not define "efficiency of the service," but the MSPB set forth definitional guidelines in *Burkswit v. Department of Transp.*, 26 M.S.P.R. 427, 428-30 (1985) (establishing that Board will uphold disciplinary action to ensure "efficiency of the service" where agency has shown nexus between employee's off-duty misconduct and his or her poor performance of job duties and responsibilities); see also SHAW & BRANSFORD, *supra*, at 11 (noting that agency seeking to justify adverse personnel action based on misconduct must show nexus between grounds for action and employee's ability to satisfactorily perform duties, agency's ability to fulfill its mission, or other legitimate governmental interest promoting "efficiency of the service"). Interested persons may order the *Federal Manager's Handbook: A Guide to Rehabilitating or Removing the Problem Employee* from MPC Publications, P.O. Box 66834, Washington, D.C., 20035-6834.

14. Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

15. See 5 U.S.C. § 1221 (Supp. III 1991) (creating additional "individual right of action" (IRA) appeal to allow current, former, or prospective employees to pursue claim before Board after first consulting with Office of Special Counsel (OSC) regarding any personnel action taken or proposed to be taken because of whistleblowing activity; right of action continues to exist despite fact that OSC may refuse to prosecute case); see also 1991 ANNUAL REPORT, *supra* note 5, at 28 (reporting that impact of additional IRA appeal route has been substantial, as evidenced by fact that of 471 whistleblower appeals decided by Board during fiscal year 1991, 196 were IRA cases).

16. See 1990 ANNUAL REPORT, *supra* note 6, at 15 (implying that opportunities for practitioners have increased and noting that Board decided 252 whistleblower appeals in fiscal year 1990); see also 1991 ANNUAL REPORT, *supra* note 5, at 28 (noting increase to 471 whistleblower appeals in fiscal year 1991).

who has been adversely affected because of making protected disclosures.¹⁷ While this was accomplished in part, it was not successful for all federal employees.

A. The Whistleblower Protection Act and Title 38 Employees: Will the Board Recognize Protection Under Title 38 Amendments?

1. Recent cases

Traditionally, the Board has refused to afford title 38 employees¹⁸ protection from whistleblower reprisal under the WPA.¹⁹ For example, in *Alvarez v. Department of Veterans Affairs*,²⁰ the Board reasoned that, because the title 38 personnel system provides its own procedures for appeals of adverse actions, appeals under the WPA would be inconsistent with this independent disciplinary and appellate scheme and therefore contrary to the express language of title 38.²¹ Practitioners should note, however, that an anomaly in the

17. See, e.g., Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b), 103 Stat. 16, 16 (reprinted at 5 U.S.C. § 1201 note (Supp. I 1989)) (declaring that purpose of WPA is to "strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government"); President Bush's Remarks on Signing the Whistleblower Protection Act of 1989, PUB. PAPERS 391, 391-92 (Apr. 10, 1989) (expressing determination shared with Congress that whistleblowers not be "fired or rebuked or suffer financially for their honesty and good judgment" and clarifying that whistleblowers may use WPA to take their cases to MSPB); see also Fong, *supra* note 2, at 1061-62. Fong characterizes the WPA as turning the clock back to 1979, when both the Civil Service Reform Act (CSRA) and reprisal law were in their earliest phase, as follows:

With the recent passage of the WPA amendments, the federal civil service begins its next decade under the CSRA with new standards designed to ease the burden on employees and the OSC to prove that employees have been disadvantaged by their whistleblowing. The congressional creators of whistleblower protection firmly rejected the law's development at the Board and in the courts during the first decade under the CSRA. The WPA returns us to 1979 when the law of reprisal began its development.

Fong, *supra* note 2, at 1062.

18. This Article will use the terms "title 5" and "title 5 employees" to refer to the vast majority of federal civil service employees who are appointed under the authority of title 5 of the U.S. Code. The Article will use "title 38" and "title 38 employees" to refer to those higher level employees employed in various medical occupations of the Department of Veterans Affairs (DVA) who are appointed under the authority of title 38 of the U.S. Code and have few procedural rights under the provisions of title 5.

19. See, e.g., *Alvarez v. Department of Veterans Affairs*, 49 M.S.P.R. 682, 687 (1991) (denying jurisdiction under WPA to hear appeal brought by title 38 physician); accord *McKay v. Veterans Admin.*, 23 M.S.P.R. 244, 245-46 (1984) (reconsidering and holding that MSPB lacks jurisdiction to hear pre-WPA whistleblower appeal by nurse appointed under title 38); *Gilbert v. Veterans Admin.*, 14 M.S.P.R. 152, 153-54 (1982) (concluding that physician appointed under title 38 had no right of appeal to MSPB under pre-WPA whistleblower provisions of title 5).

20. 49 M.S.P.R. 682 (1991).

21. See *Alvarez v. Department of Veterans Affairs*, 49 M.S.P.R. 682, 685 (1991) (holding that WPA does not modify or supplement title 38 appeals process for adverse personnel actions taken by DVA); see also 38 U.S.C.A. §§ 7421, 7422, 7425 (West 1991) (assigning power to determine personnel system practices and procedures of DVA's physicians to Secretary of Department).

system allows the MSPB to grant a stay at the request of the Office of Special Counsel (OSC) pending a full investigation into a proposed adverse action based on a title 38 employee's whistleblowing, despite the fact that the Board is precluded from hearing an appeal on the merits of such an action involving a title 38 employee.²²

In *Alvarez*, a title 38 physician alleged that his reassignment and proposed removal were consequences of his whistleblowing activities.²³ The physician brought an Individual Right of Action (IRA) appeal to the Board, which an AJ dismissed for lack of jurisdiction.²⁴ Curiously, the Department of Veterans Affairs (DVA) conceded limited jurisdiction to the Board to review the whistleblowing allegations.²⁵ The Board rejected this overture, however, holding that the AJ did not err in dismissing the appeal and that employees appointed under 38 U.S.C. § 4104(1)²⁶ are not covered by the provisions of the WPA.²⁷ The Board noted that no indications existed in the WPA's legislative history that Congress intended to "broaden the universe" of employees who are protected from whistleblower reprisal beyond those protected under title 5.²⁸

22. See *Special Counsel v. Department of Veterans Affairs*, 45 M.S.P.R. 41, 42-43 (1990) (granting stay of termination on behalf of Veteran's Administration medical employee). It is curious, given the MSPB's reputation for expedient resolution of disputes, see 1991 ANNUAL REPORT, *supra* note 5, at 15 (presenting statistics that underscore Board's emphasis on efficiency, both in its own operations and in operation of federal personnel merit systems), that under the WPA the OSC would be allowed (1) to expend the time, money, and effort of a full investigation into allegations of an adverse action based on a title 38 appointee's whistleblowing, and (2) to expend further time and effort to request a stay of the adverse action from the Board, only to find that at the end of the temporary stay period the DVA could continue pursuing the adverse action to its conclusion without fear of an appeal of such action under the WPA where corrective action might be ordered.

23. *Alvarez*, 49 M.S.P.R. at 683.

24. *Id.* at 684.

25. *Id.*

26. See 38 U.S.C. § 4104(1) (1988) (providing for appointment of physicians, dentists, podiatrists, optometrists, nurses, physician assistants, and expanded-function dental auxiliaries).

27. *Alvarez*, 49 M.S.P.R. at 685. Despite the fact that nothing in the WPA suggests that DVA employees are exempt from the WPA's provisions, the Board reasoned:

[The WPA's provisions apply] in light of Section 4119, which requires that other, inconsistent law must "specifically provide[]" for a new provision to supersede, override, or modify the Title 38 scheme. It would clearly be "inconsistent" for the Board to adjudicate personnel matters independently of the DMS [(Department of Medicine and Surgery)] scheme, perhaps ordering alternative corrective action based on the more stringent civil service requirements that Congress sought to avoid.

Id.; see also *Davis v. Department of Veterans Affairs*, 49 M.S.P.R. 679, 681 (1991) (holding that WPA does not cover nurses appointed under § 4104(1) because such employees are instead subject to less protective internal disciplinary rules of Department of Medicine and Surgery of DVA).

28. *Alvarez*, 49 M.S.P.R. at 686. The Board refused to extend title 5 protections to title 38 employees under the WPA in the absence of specific congressional direction to bring about such a result. *Id.* at 686 nn.5 & 6.

In *Chan v. Department of Veterans Affairs*,²⁹ the Board heard the compliance appeal of a part-time physician appointed to his position in the DVA under 38 U.S.C. § 4114(a)(1)(A).³⁰ The physician filed an IRA appeal of his termination, which he claimed was retaliation for whistleblowing.³¹ The parties reached a settlement agreement, but Dr. Chan later filed a petition for enforcement of the agreement when the agency allegedly did not comply with the agreement regarding the dissemination of peer review information.³² The AJ concluded that he could not enforce the agreement due to a lack of subject matter jurisdiction.³³ On appeal the Board found that, because the WPA makes no specific provision for the MSPB to adjudicate personnel matters independent of a DVA hospital's disciplinary scheme, employees appointed under 38 U.S.C. § 4114(a)(1)(A) are not protected under title 5 from whistleblower reprisal.³⁴ The Board recognized that title 38 had been amended recently, but did not apply the new statutory language to the facts of the *Chan* appeal.³⁵

29. 53 M.S.P.R. 617 (1992).

30. *Chan v. Department of Veterans Affairs*, 53 M.S.P.R. 617, 620 (1992). Congress repealed and reenacted in modified form the provision under which the appellant had received his appointment. See Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, § 401, 105 Stat. 187, 221 (codified at 38 U.S.C.A. § 7405 (West 1991)) [hereinafter DVA Health-Care Personnel Act]. Before the repeal and reenactment of § 4114 as § 7405, the Act had been interpreted to mean that civil service procedural protections did not apply to part-time physicians employed by the DVA. See *Orloff v. Cleland*, 708 F.2d 372, 376-77 (9th Cir. 1983) (reviewing legislative history of DVA Health-Care Personnel Act and personnel practices of DVA to find that part-time employees' appointments under § 4114 receive no protection).

31. *Chan*, 53 M.S.P.R. at 619.

32. *Id.*

33. *Id.*

34. See *Chan*, 53 M.S.P.R. at 620 (applying legal reasoning from *Alvarez v. Department of Veterans Affairs*, 49 M.S.P.R. 682, 685 (1991) (declining to adjudicate personnel matters independently from Department of Medicine and Surgery scheme)).

35. See *id.* at 620 n.3 (noting existence of changes in title 38 but finding such changes inapplicable to facts of case). It is important to note that, although the provisions of 38 U.S.C. § 4119 (1988) were basically reproduced in the new § 7425, a subtle change in the language of § 7425 distinguishes its coverage from that of former § 4119. Section 4119 stated:

[N]o provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of this subchapter shall be considered to supersede, override, or otherwise modify such provision of this subchapter except to the extent that such provision of title 5 or such other law specifically provides, by the specific reference to a provision of this subchapter, for such provision to be superseded, overridden, or otherwise modified.

38 U.S.C. § 4119 (1988). Section 7425(b) states:

[N]o provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of section 7306 of this title or this chapter shall be considered to supersede, override, or otherwise modify such provision of that section or this chapter except to the extent that such provision of title 5 or of such other law specifically provides, by specific reference to a provision of this chapter, [f] or such provision to be superseded, overridden, or otherwise modified.

38 U.S.C.A. § 7425(b) (West 1991) (emphasis added). This subtle change in the language

2. Title 38 amendments: Improving DVA recruitment and retention

When Congress recently undertook the revision of title 38, it was acutely aware that the less than ideal employment conditions of DVA medical personnel contributed to relatively high turnover rates and difficulties in replacing medical personnel lost through attrition.³⁶ To address this crisis, the Senate specifically intended that certain rights of title 5 employees be applied to title 38 employees with regard to hours and conditions of employment.³⁷ Congress expressly provided these rights in the Department of Veterans Affairs Health-Care Personnel Act of 1991.³⁸ The provisions of this statute still restrict the prescription of hours, conditions of employment, and leaves of absence for title 38 appointees by vesting exclusive authority over such items in the Secretary of the DVA.³⁹ Under the title 38 amendments, however, chapter 74 employees may engage in collective bargaining with regard to conditions of employment⁴⁰ not involving "professional conduct or competence," "peer review," or "the establishment, determination, or adjustment" of title 38 employee compensation.⁴¹ Matters not pertaining to any of these three categories are now subject to collective bargaining and presumably

becomes important when viewing the new § 7425 in light of the other new provisions of this chapter of title 38. See 38 U.S.C.A. §§ 7421-7423 (West 1991) (providing, in § 7421, authority for Veterans Administration Secretary to prescribe personnel regulations while limiting, in § 7422, Secretary's authority to interfere with employees' right of collective bargaining and defining in § 7423 hours of employment and obligations of full-time employees under title 38).

36. See H.R. REP. NO. 466, 101st Cong., 2d Sess. 13 (1990) (discussing proposed amendments to title 38 to improve medical personnel retention and patient care in hospitals managed by DVA). The House Report referred to a "crisis" in the veterans' health care system:

The . . . crisis is prospective in nature, reflected by findings about turnover rates, increasing delays in filling vacancies and decreasing qualifications of new hires. . . . [A]nalysis of turnover rates among DVA physicians reveals that retention beyond four years of service is problematic. For example, the turnover rate for physicians under 35 years of age with two to four years of DVA experience was 22 percent in 1987, a level that results in high administrative costs and, more importantly, that results in threats to the continuity of patient care.

Id.

37. See S. REP. NO. 379, 101st Cong., 2d Sess. 85 (1990) (seeking to apply labor-management rights under chapter 71 of title 5, which include general employee rights to organize, bargain collectively, and participate in labor organizations, to title 38 employees).

38. Pub. L. No. 102-40, 105 Stat. 187 (codified in scattered sections of 38 U.S.C.A. (West 1991)).

39. 38 U.S.C.A. § 7421(a) (West 1991).

40. See 38 U.S.C.A. § 7422 (West 1991) (restricting authority of DVA Secretary to prescribe regulations under § 7422 in conjunction with collective bargaining provisions of chapter 71 of title 5). Chapter 74 of title 38 permits the Veterans Health Administration, the former Department of Medicine and Surgery, to appoint its own employees. 38 U.S.C.A. § 7401 (West 1991). This chapter also provides for collective bargaining rights and special pay for certain classes of employees. *Id.* §§ 7422, 7431-7438.

41. 38 U.S.C.A. § 7422 (West 1991).

to review by external entities.⁴²

The argument thus arises that the 1991 amendments manifest Congress' desire to afford title 38 medical personnel more protective employment rights to address problems in recruitment and retention among this vital personnel group.⁴³ Therefore, it should no longer be considered "inconsistent" with title 38 or chapter 74⁴⁴ for personnel decisions not concerning professional conduct or competence, peer review, or employee compensation to be reviewed by an external entity or agency, including the MSPB.⁴⁵

B. *Interim Relief and Unbridled Agency Discretion*

The WPA made interim relief available to appellants who prevail between the date of an initial agency decision and the date that the full Board issues a final decision in any case before the MSPB.⁴⁶

42. This conclusion is negatively implied by the following statutory pronouncement, which delineates specific issues that remain exempt from detached scrutiny:

An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

38 U.S.C.A. § 7422(d) (West 1991).

43. The legislative process toward passage of the DVA Health-Care Personnel Act began in 1987. An early concern, expressed in the introduction of S. 9, the Omnibus Veterans' Benefits and Services Act of 1987, addressed the high turnover of medical employees. *See* S. REP. No. 215, 100th Cong., 1st Sess. 141-45 (1987) (reporting that Senate sought to create hybrid title 38-title 5 medical employees in order to make medical personnel salaries more competitive and to dissuade high turnover rates). Such hybrid employees should receive the same protection under the law in matters concerning adverse personnel actions, disciplinary actions, and grievance procedures as that received by employees appointed under title 5. *Id.*

44. Chapter 74 of title 38 provides for the hiring and personnel rights of DVA medical employees. 38 U.S.C.A. §§ 7401-7464 (West 1991). This chapter was included in the DVA Health-Care Personnel Act to specifically give these employees the same protections provided to title 5 employees of other governmental agencies. *See supra* notes 37, 43 and accompanying text (citing Senate report expressing congressional intent that hybrid employees receive same legal protections as title 5 employees); *see also supra* note 35 (discussing specific amendment to title 38 to provide title 5 protections to title 38 employees).

45. Such an approach would be in line with the Board's own findings regarding the title 38 personnel system. In 1991, the MSPB initiated a special study of the title 38 personnel system and arrived at some interesting conclusions. *See* U.S. MERIT SYS. PROTECTION BD., THE TITLE 38 PERSONNEL SYSTEM IN THE DEPARTMENT OF VETERANS AFFAIRS: AN ALTERNATE APPROACH 1-3 (1991) (examining title 38 personnel system and comparing title 5 system of personnel review, discipline, and adverse action to that used in title 38). The most notable finding in the report, for purposes of this Article, is the indication by title 38 personnel that the title 38 disciplinary process is frustrating, slow, and not subject to neutral, outside review by the Board. *Id.* at 43. One medical center director indicated that the title 5 adverse action system was preferable to the system available under title 38. *Id.* *But see id.* at 45-46 (concluding that market considerations such as shortfall in health care professional labor market serve to equalize title 5 and title 38 systems of making personnel decisions).

46. *See* 5 U.S.C. § 7701(b)(2)(A) (Supp. III 1991) (authorizing MSPB to order interim relief to appellants prevailing at "regional office level" between initial decision and final decision of petition for review); *see also* *Ginocchi v. Department of Treasury*, 53 M.S.P.R. 62, 67-68 (1992) (stating that AJ's order of interim relief properly addressed dispute in question and

Although "interim relief" is a new requirement introduced as part of the WPA, it applies to all appeals and protects whistleblowers as well as those employees who prevail but have not raised a specific defense of whistleblower reprisal.⁴⁷ Interim relief refers to the relief specified in an AJ's decision wherein the employee prevails. Such relief, subject to certain restrictions, may include returning the employee to his or her former work environment until a final Board decision has been rendered in the appeal.⁴⁸ Congress intended the interim relief provision to benefit the agency and the employee alike by limiting the waste of human and financial resources that often accompanies protracted personnel action appeals.⁴⁹

The Board's decision in *Ginocchi v. Department of Treasury*⁵⁰ was a case of first impression dealing with the question of whether an agency is obligated to return an employee to his or her former position under an order to provide interim relief.⁵¹ Under the WPA, an agency must provide interim relief when ordered unless it determines that the "return or presence" of the employee would be unduly disruptive to the work environment.⁵² In *Ginocchi*, the agency determined that the employee's return would indeed be unduly dis-

that MSPB would not "look behind" agency determination that returning employee would not unduly disrupt work environment).

47. See *Ginocchi*, 53 M.S.P.R. at 66-67 (interpreting language of 5 U.S.C. § 7701(b)(2)(A) to permit MSPB to order interim relief for appellants who prevail at regional level, effective during time period between date of initial decision and date of Board's final decision on appeal). The Board did indicate that interim relief may not be applicable in all cases in which an employee prevails, but the determination as to the appropriateness of such relief is left to the AJ. *Id.* at 67 n.3.

48. See 5 U.S.C. § 7701(b)(2)(B) (Supp. III 1991) (providing that during time period pending outcome of petition for review, interim relief comprised of pay, compensation, and all other benefits provided under terms and conditions of employment may be granted to employee); *id.* § 7701(b)(2)(C) (stipulating that no award of back pay or attorneys' fees may be paid as "interim relief" before final decision is entered).

49. See H. REP. No. 274, 100th Cong., 1st Sess. 28-29 (1984) (stating that MSPB AJ should have authority to grant interim relief to prevent unnecessary waste of human and financial resources in situations where employee will ultimately be reinstated); see also *Ginocchi*, 53 M.S.P.R. at 69 (interpreting interim relief as relief intended by Congress to benefit both agency and employee by limiting waste of human and financial resources).

50. 53 M.S.P.R. 62 (1992).

51. See *Ginocchi v. Department of Treasury*, 53 M.S.P.R. 62, 64 (1992) (addressing nonwhistleblower situation in which employee was notified that he would be demoted to auditor (GS-13) position for failure to perform effectively in his supervisory auditor (GM-14) position). The agency contended that the employee's appointment to the supervisory position was subject to a probationary period, and it consequently afforded him only the limited appeal rights due a probationary employee. *Id.* He appealed to the MSPB, and the AJ found that the employee was not a probationer and that the agency had not accorded him chapter 43 performance appraisal or chapter 75 adverse action procedures, as required under title 5. *Id.* at 64-65. The AJ ordered the agency to cancel the demotion and provide the employee with interim relief in accordance with the WPA. *Id.* at 74 (ordering agency to grant employee back pay with interest and to provide mechanism to return him to his former supervisory auditor position).

52. 5 U.S.C. § 7701(b)(2)(A)(ii)(II) (Supp. III 1991).

ruptive to the workplace.⁵³ The Board, however, found that it was within Congress' intent to allow the agency to place the employee in a lesser position than the one originally occupied, not only to avoid disruption, but also to utilize the employee in a productive manner while awaiting a final Board decision.⁵⁴

Two days after *Ginocchi* established this principle, the Board ruled on similar facts in *Ingram v. Department of Air Force*.⁵⁵ In *Ingram*, an employee who had been removed from her position because of illegal drug purchase and possession charges appealed the action to the Board.⁵⁶ The AJ mitigated the penalty to a sixty-day suspension and ordered interim relief, finding that the agency's deciding official had not given proper consideration to all the circumstances of the case.⁵⁷ The Board, citing *Ginocchi*, nevertheless held that it would not question the reasons supporting an agency's determination that returning an employee to his or her previous position would be unduly disruptive to the work environment.⁵⁸ The Board not only accepted the agency's determination that returning the appellant to her position on an interim basis would be unduly disruptive, but also approved the decision to keep the employee in an off-duty status.⁵⁹ The MSPB came to this conclusion because the agency assured the Board that the appellant would receive the pay and benefits to which she was entitled as a result of the interim relief order.⁶⁰

53. *Ginocchi*, 53 M.S.P.R. at 68-69. The MSPB draws a distinction between the terms "return," which is used to refer to an employee who is sent back to his or her former position, and "presence," which refers to an employee being present in the workplace in any capacity at all. *Id.*

54. *See id.* at 69-70 (reasoning that because agency is required to pay and provide full benefits of original position to employee under interim relief provision, employee may as well perform some useful function for agency instead of being placed in off-duty status, still receiving full pay and benefits). The Board noted that it would "hold the agency's decision to detail, assign, or restrict the duties of an employee for whom interim relief [is] ordered subject to a 'bad faith' standard of review." *Id.* at 70.

55. 53 M.S.P.R. 101 (1992).

56. *Ingram v. Department of Air Force*, 53 M.S.P.R. 101, 103 (1992).

57. *Id.* at 103. Specifically, the AJ found that: (1) the exact amount of marijuana discovered in the employee's purse was not ascertained, (2) the employee admitted that use of marijuana off base was not proper conduct for a government employee, (3) other employees charged with the same offense and whose charges were sustained were generally not removed, (4) the agency's explanation for distinguishing blue- and white-collar workers was capricious and did not justify differing treatment, and (5) the deciding official failed to consider appellant's capacity for rehabilitation in light of her entry into a drug rehabilitation program, her outstanding job performance, and her remorse. *Id.*

58. *Id.* at 104.

59. *Id.* The agency had decided, in effect, to keep paying the appellant her salary and providing her all the benefits of her former position, per the interim relief order, while keeping her in an off-duty status where she could provide no benefit whatsoever to the agency during the interim period. *Id.*

60. *Id.* Recent Office of Personnel Management (OPM) regulations interpret the interim relief provision as requiring an agency, under an order to provide interim relief, to place an

Thus, both *Ingram* and *Ginocchi* hold that "the Board will not look behind an agency determination that returning an employee to the position he [or she] encumbered will be unduly disruptive to the work environment."⁶¹ Furthermore, *Ingram* appears to extend this MSPB deference to include situations in which an agency forbids an employee, even on an interim basis, from returning to or being present in the workplace in a position different from the one he or she previously held.⁶²

C. Other Whistleblower Developments

1. Filing EEO complaints not protected by 5 U.S.C. § 2302(b)(8)

The Board recently focused its attention on the definition of whistleblowing for the purpose of determining whether an employee who suffered a retaliatory personnel action upon the filing of an Equal Employment Opportunity (EEO) complaint could obtain a stay of the personnel action. In *Williams v. Department of Defense (Williams II)*,⁶³ the Board considered the case of an employee removed from his position after filing an EEO complaint.⁶⁴ The Board held that such reprisal for filing an EEO complaint constituted a violation of 5 U.S.C. § 2302(b)(9) rather than of § 2302(b)(8).⁶⁵ The Board stated further that only the latter section is covered by the stay provision of 5 U.S.C. § 1221(c).⁶⁶

employee "in a paid duty status in the same or similar position," unless the agency "determines that the return or presence of the individual would be unduly disruptive to the work environment," whereupon the employee may be placed in a "paid non-duty status" during the pendency of the Board's review. 57 Fed. Reg. 3712, 3713 (1992) (to be codified at 5 C.F.R. § 772.102(d)). Unfortunately, the OPM regulations do not reflect the MSPB's distinction between "return" and "presence" of the employee in the work environment. See *supra* note 53 (explaining MSPB's distinction between two terms). The Board has noted that it is not bound by the OPM interpretation of the statutory interim relief provisions and that it alone is the exclusive authority for construing this section of title 5. *Ginocchi*, 55 M.S.P.R. at 71 n.7.

61. *Ingram*, 53 M.S.P.R. at 104; *Ginocchi*, 53 M.S.P.R. at 68.

62. See *Ingram*, 53 M.S.P.R. at 104 (holding that Board will not "look behind" agency action informing employee that he or she will be maintained in off-duty status during interim period and, by implication, extending MSPB deference for agency determinations under unduly disruptive analysis).

63. 46 M.S.P.R. 549 (1991).

64. *Williams v. Department of Defense (Williams II)*, 46 M.S.P.R. 549, 553-55 (1991).

65. *Id.* at 554. Compare 5 U.S.C. § 2302(b)(8) (Supp. II 1990) (protecting employees from reprisal for lawful disclosure of information relating to violations of any laws, rules, or regulations or relating to mismanagement, waste of funds, abuse of authority, or public health or safety dangers) with 5 U.S.C. § 2302(b)(9) (Supp. II 1990) (protecting employees from arbitrary action, retaliation for filing grievances, complaints, or appeals, personal favoritism, partisan political coercion, or prohibited uses of authority or attempts to influence elections).

66. See *Williams II*, 46 M.S.P.R. at 554 (holding that Congress intended to limit stays to specific cases of whistleblower reprisals and that EEO filings protected by 5 U.S.C. § 2302(b)(9) (Supp. II 1990) do not qualify for protection under 5 U.S.C. § 1221(c) (Supp. I 1989)); see also 5 U.S.C. § 1221(c) (Supp. II 1990) (providing that any employee, former em-

In subsequent cases, the Board extended its reasoning in *Williams II* to deny employees each of the safeguards of the WPA, including the stay, the clear and convincing evidence standard, and other procedures, in situations where an employee is the victim of retaliation for filing a grievance, filing a claim with the Office of Worker's Compensation Programs, or pursuing any similar complaint for personal relief now included under 5 U.S.C. § 2302(b)(9) rather than § 2302(b)(8).⁶⁷ As a result, an increasing number of activities related to federal employment are not protected specifically by the WPA, but are left instead to the ordinary, less protective provisions of title 5.⁶⁸

2. Prosecuting retaliatory acts by government supervisors

Whistleblower reprisal is not only an employee's affirmative defense to a proposed personnel action,⁶⁹ but also may be grounds for disciplinary action against a supervisor who has engaged in retaliatory activities. The WPA contains distinct provisions for processing "corrective actions," where an employee seeks to halt a personnel

ployee, or applicant for employment seeking individual right of action as result of prohibited personnel practice may request MSPB to order stay of personnel action).

The Federal Circuit recently examined this question in *Spruill v. Department of Veterans Affairs*, 978 F.2d 679 (Fed. Cir. 1992), where an employee of the DVA appealed a three-day suspension which, he alleged, resulted from his filing of an EEO complaint. *Id.* at 681. The AJ dismissed the case for lack of proper jurisdiction under 5 U.S.C. § 2302(b)(8) (Supp. II 1990) precisely because the employee had filed an EEO complaint. *Id.* at 682. The Federal Circuit affirmed the AJ's determination, ruling that a complaint about discriminatory behavior does not constitute whistleblowing for purposes of the WPA protections afforded in 5 U.S.C. § 2302(b)(8), and that an EEO complaint is best addressed by the Equal Employment Opportunity Commission (EEOC) and not the MSPB. *Id.* at 691-92.

67. See, e.g., *Santillan v. Department of Air Force*, 53 M.S.P.R. 487, 490-91 (1992) (finding that employee actions of filing EEO complaint to disclose personnel records falsification and filing Privacy Act request for correction of personnel record are covered under 5 U.S.C. § 2302(b)(9), and therefore MSPB does not have jurisdiction to reverse agency's termination of employee for these actions); *Marable v. Department of Army*, 52 M.S.P.R. 622, 630 (1992) (following *Williams II* by denying WPA protection for employee filing unfair labor practice EEO complaint and grievance and upholding agency decision to terminate employee for falsifying travel voucher and being absent without leave); *Buster v. Department of Veterans Affairs*, 52 M.S.P.R. 206, 209-10 (1992) (upholding agency decision to dismiss employee for fighting by refusing to extend WPA protections to cover employee asserting affirmative defense of removal as reprisal for initiating EEO complaint); *Von Kelsch v. Department of Labor*, 51 M.S.P.R. 378, 379-80 (1991) (following *Williams II* by denying IRA appeal of employee claiming that job reassignment resulted as reprisal for her filing of worker's compensation claim not arising under § 2302(b)(8)).

68. See *Santillan*, 53 M.S.P.R. at 491 (averring that legislative history of WPA indicates intent to refrain from broad protection and noting that protections from reprisal exist under 5 U.S.C. § 2302(b)(9) for employees filing grievances, EEO complaints, or appeals, and under 5 U.S.C. § 552a(g) (1988) for employees filing requests to amend personnel records).

69. See 5 U.S.C. § 1201(b) (Supp. I 1989) (stating that purpose of WPA is to provide whistleblowers with protection from adverse consequences that may result from coercive personnel practices used by employers).

action on the ground that it is retaliatory,⁷⁰ and “disciplinary actions,” where the OSC brings an action to punish a supervisor who is alleged to have engaged in reprisal.⁷¹ Corrective actions are processed under 5 U.S.C. § 1214, while disciplinary actions are processed under 5 U.S.C. § 1215. Surrounding each of these sections is a unique body of law.⁷²

In the landmark case of *Special Counsel v. Hathaway*,⁷³ the MSPB held that under 5 U.S.C. § 2302(b)(8), the WPA protected a federal employee who reported what he believed were improper discontinued service retirements to the Inspector General and the OSC.⁷⁴ The MSPB disciplined the employee’s supervisor for engaging in unlawful reprisal by threatening the employee with an unacceptable performance rating and removal.⁷⁵ The supervisor was so disci-

70. See 5 U.S.C. § 1214 (Supp. I 1989) (providing mechanism for Special Counsel to investigate prohibited personnel practices and to issue stays and orders for corrective action upon finding that agency would not have taken adverse action absent employee’s whistleblowing disclosure under 5 U.S.C. § 2302(b)(8)).

71. See 5 U.S.C. § 1215 (Supp. I 1989) (providing Special Counsel with authority to take disciplinary action against any employee who is determined to have committed prohibited personnel action, violated 5 U.S.C. § 1216, or refused to comply with order of MSPB). Section 1216 provides OSC with jurisdiction to investigate prohibited political activities, arbitrary or capricious withholdings of information, any activities prohibited by any civil service law, rule, or regulation, or involvement by any employee in prohibited discrimination. 5 U.S.C. § 1216 (Supp. I 1989). The section prevents OSC from investigating allegations that could more appropriately be resolved under administrative appeals processes. *Id.*

72. An agency defending its actions under § 1214 may raise an affirmative defense to an employee’s showing that his or her whistleblowing was a contributing factor leading to the agency’s personnel action. Under that affirmative defense, the agency will be exonerated if it can show by clear and convincing evidence that it would have taken the personnel action regardless of the employee’s alleged whistleblowing. The “contributing factor” standard of causation is derived from the explicit language of the statute. 5 U.S.C. § 1214(b)(4)(B)(i) (Supp. I 1989). The “clear and convincing evidence” standard of proof is also derived from the explicit language of the statute. 5 U.S.C. § 1214(b)(4)(B)(ii) (Supp. I 1989).

For a supervisor defending against disciplinary action under § 1215, however, it remains unclear whether such an affirmative defense exists that would permit the alleged retaliator to show that the employee’s whistleblowing was not a “significant factor” in the supervisor’s proposing the personnel action. See *Starret v. Special Counsel*, 792 F.2d 1246, 1253 n.12 (4th Cir. 1986) (declining to address whether “significant factor” test for causation adopted in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), should be applied in case not involving retaliation for constitutionally protected conduct). The “significant factor” standard of causation is *not* found in the language of § 1215, and neither is any affirmative defense. See 5 U.S.C. § 1215 (Supp. I 1989) (failing to supply affirmative defenses or assign burden of proof).

Without allowing supervisors to use an affirmative defense, the Board may occasionally achieve the anomalous result of simultaneously refusing to protect a whistleblower from reprisal under § 1214, while refusing to protect his or her supervisor from discipline under § 1215. Thus, both the whistleblower and the alleged retaliator could potentially lose their bids for protection.

73. 49 M.S.P.R. 595 (1991).

74. See *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 611-12 (1991) (finding that employee’s revelation of improper discontinued service retirements to IG constituted protected whistleblowing under 5 U.S.C. § 2302(b)(8)). *Hathaway* was the first complaint for disciplinary action filed by the OSC after enactment of the WPA.

75. See *id.* at 613 (finding that supervisor’s reprisal against whistleblower constituted seri-

plined because he could not prove, under the "contributing factor" test therein adopted by the Board,⁷⁶ that he would have taken the same adverse actions in the absence of the employee's protected disclosures.⁷⁷

Similarly, in *Special Counsel v. Eidmann*,⁷⁸ the Board found by a preponderance of the evidence that an employee's whistleblowing was a contributing factor in precipitating an adverse personnel action against that employee.⁷⁹ Because the employee's supervisor could not demonstrate by clear and convincing evidence that he would have taken the action in the absence of the disclosures,⁸⁰ the Board upheld an AJ's recommended sanction of the supervisor.⁸¹ On appeal to the U.S. Court of Appeals for the Federal Circuit, the court significantly altered the standard for imposing disciplinary sanctions under 5 U.S.C. § 1215 by requiring that the "whistleblowing activity be a 'significant factor' in the reprisal action."⁸² The court reasoned that Congress declined to change the Board's previously adopted causal standard when it codified that contributing factor standard in § 1214 but left § 1215 intact in the WPA amendments to title 5.⁸³ Despite the Board's error in applying the contributing factor rather

ous violation with adverse impact on agency's reputation and ordering supervisor suspended for 30 days).

76. See *supra* note 72 (explaining "contributing factor" test established in 5 U.S.C. § 1214(b)(4)(B)(i)).

77. See *Hathaway*, 49 M.S.P.R. at 601, 610 (using, inappropriately, same evidentiary standard in disciplinary action case as in corrective action cases to find that whistleblower reprisal can be shown by preponderance of evidence as contributing factor in adverse action). *But cf.* *Eidmann v. MSPB*, 976 F.2d 1400, 1404-06 (Fed. Cir. 1992) (adopting higher standard for showing validity of disciplinary action under § 1215 than standard for showing validity of corrective action under § 1214 because disciplinary actions are punitive in nature and thus merit more stringent standard of proof).

78. 49 M.S.P.R. 614 (1991), *aff'd*, *Eidmann v. MSPB*, 976 F.2d 1400 (Fed. Cir. 1992).

79. See *Special Counsel v. Eidmann*, 49 M.S.P.R. 614, 626 (1991) (holding that OSC met "contributing factor" test and thus found violation of WPA by showing that less than one month separated employee's disclosures and his receipt of termination notice from agency), *aff'd*, *Eidmann v. MSPB*, 976 F.2d 1400 (Fed. Cir. 1992). The employee had written letters to the agency's health and safety officer alleging violations of an agency smoking regulation and the terms of a collective bargaining agreement. *Id.* at 617-18. His supervisor recommended his termination, despite the fact that his performance was fully satisfactory, after the employee informed the supervisor that he had taken his complaints outside the office. *Id.* at 616-19, 622 (concluding that employee's conduct constituted whistleblowing under 5 U.S.C. § 2302(b)(8) for agency's violation of federal smoking regulations).

80. *Id.* at 626-27.

81. *Id.* at 628 (adopting AJ's recommendation of two-grade demotion of supervisor to nonsupervisory position for two years as appropriate penalty because seriousness of supervisor's retaliation against employee for making protected disclosures demanded "severe" sanction).

82. *Eidmann v. MSPB*, 976 F.2d 1400, 1405 (Fed. Cir. 1992).

83. *Id.* at 1405. Compare 5 U.S.C. § 1214(b)(4)(B) (Supp. III 1991) (requiring that OSC demonstrate that whistleblowing is contributing factor in adverse personnel action before Board will order corrective action) with 5 U.S.C. § 1215 (Supp. III 1991) (providing no specific standard for use by Board to find that employee deserves disciplinary action).

than significant factor test under § 1215, the court stated that “the Board found sufficient facts to permit this court to affirm its judgment.”⁸⁴

3. *The nexus requirement*

Under reprisal law prior to the WPA, an employee claiming to be aggrieved because of whistleblowing activities had to establish a causal connection or “nexus” between his or her protected conduct and the agency’s personnel action.⁸⁵ An early MSPB decision under the WPA held that, for the purpose of determining agency liability, an employee alleging agency retaliation need only show “closeness in time” between his or her protected disclosures and a subsequent adverse agency action to establish the required nexus between the two events.⁸⁶ In more recent cases, the Board has held that the nexus requirement still exists under the WPA, although the decisions suggest that the requirement has become somewhat attenuated.

For example, in the recent case of *Wagner v. EPA*,⁸⁷ an employee of the U.S. Environmental Protection Agency (EPA) filed an IRA appeal under the WPA to contest adverse actions taken by EPA regarding his job performance.⁸⁸ On appeal to the MSPB, the employee argued that the Board’s decision in *Williams v. Department*

84. *Eidmann*, 976 F.2d at 1408.

85. *See, e.g.*, *Haine v. Department of Navy*, 41 M.S.P.R. 462, 472-73 (1989) (establishing that employee can demonstrate existence of agency reprisal by showing that employee made protected disclosure, accused official knew of disclosure, adverse action could have been retaliation, and genuine nexus existed between agency’s adverse action, appellant’s protected disclosure, and deciding official’s motive for taking adverse action); *Cooney v. Department of Air Force*, 37 M.S.P.R. 240, 242 (1988) (requiring that employee show causal nexus between employee’s protected activity, adverse action, and superior’s motive for taking adverse action); *Oliver v. Department of Health & Human Servs.*, 34 M.S.P.R. 465, 469-70 (1987) (requiring that showing of agency reprisal entails demonstrating nexus between protected disclosure, knowledge of disclosure by official, adverse action by official, and official’s motive for taking adverse action).

86. *See Gergick v. General Servs. Admin.*, 43 M.S.P.R. 651, 661-62 (1990) (finding employee’s demonstration of connection between time he made protected disclosures and time agency took adverse personnel action to be sufficient proof that whistleblowing was contributing factor to adverse action).

87. 51 M.S.P.R. 337 (1991), *aff’d*, 972 F.2d 1355 (Fed. Cir. 1992).

88. *Wagner v. EPA*, 51 M.S.P.R. 337, 340 (1991), *aff’d*, 972 F.2d 1355 (Fed. Cir. 1992). The employee argued that his disclosures to the Federal Bureau of Investigation, the General Accounting Office, and the agency’s Inspector General alleging the misconduct of senior agency Inspector General officials caused his supervisor to reduce his performance rating. *Id.* at 340. The AJ determined that the officials involved in the preparation of the employee’s performance evaluation were aware of his disclosures when they prepared the appraisal. *Id.* Evidence showed that the employee’s supervisors knew that he had made disclosures on October 18 and October 26, 1989, and other evidence indicated that his performance appraisal was prepared in November 1989. *Id.* at 341. The AJ nevertheless determined that this temporal sequence was not circumstantial evidence of a causal connection because the employee’s performance appraisal period technically ended on September 30, 1989. *Id.* The AJ there-

of *Defense (Williams I)*⁸⁹ struck down the requirement that an appellant must demonstrate a nexus between his or her protected conduct and an agency's personnel action.⁹⁰ The MSPB found no merit in this contention, noting that its holding in *Williams I* was limited to the replacement of the old substantial factor test with the contributing factor test.⁹¹

In a second recent case, *Thompson v. Farm Credit Administration*,⁹² the Board allowed circumstantial evidence alone to establish the required nexus. In *Thompson*, the agency removed an employee for unacceptable performance in a critical element of his position after a designated performance improvement period had elapsed.⁹³ Despite the employee's demonstrated substandard performance during that period, an AJ reversed the agency's decision to remove him because the adverse action was initiated in reprisal for the employee's whistleblowing activities.⁹⁴ The Board agreed with the AJ, finding that circumstantial evidence provided the required nexus between the employee's protected activity and the agency's personnel action.⁹⁵

In a third recent case, *Duda v. Department of Veterans Affairs*,⁹⁶ the Board addressed the novel issue of whether the WPA prohibits an agency from taking a personnel action against an employee because of his or her relationship with another employee who has made protected disclosures.⁹⁷ The Board held that retaliation against one

fore found that the employee failed to show by direct or circumstantial evidence that his disclosures were a contributing factor in his performance evaluation. *Id.* at 341-42.

89. 45 M.S.P.R. 146 (1990), *rev'd*, *Williams v. Department of Defense (Williams II)*, 46 M.S.P.R. 549 (1991).

90. *Wagner*, 51 M.S.P.R. at 345.

91. *Id.*

92. 51 M.S.P.R. 569 (1991).

93. *Thompson v. Farm Credit Admin.*, 51 M.S.P.R. 569, 574 (1991).

94. *Id.* at 574-75. The employee's protected disclosures consisted of certain discussions with the Farm Credit Administration's chairperson and other officials in which the employee urged, contrary to the chairperson's wishes, that damaging information be divulged to Congress. *Id.* at 575. The damaging information had been generated by a task force, of which the employee was a member, that had prepared less-than-rosy financial projections for the Farm Credit System. *Id.* The AJ found that the employee reasonably believed that withholding this important financial information from Congress constituted mismanagement or abuse of authority and thus qualified as a protected disclosure under the WPA. *Id.* The AJ also found that even though the chairperson did not participate in the performance appraisal process, and even though the employee's recommendations may not have been intended as any of the classic whistleblowing disclosures of waste, fraud, or abuse, the agency nevertheless perceived the employee as a whistleblower and treated him negatively as a result. *Id.* at 583-84.

95. See *id.* at 584 (characterizing AJ's decision as "informed and reasoned" and agreeing with AJ's findings that intensity of agency's motive to retaliate outweighed inadequacy of performance of employee's duties).

96. 51 M.S.P.R. 444 (1991).

97. *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 445 (1991). The complaining employee in *Duda* was terminated during his probationary period as a file clerk at the DVA. *Id.* Both the employee and his fiancée worked for the DVA, and the employee alleged

employee because of another employee's whistleblowing falls within the plain language of the statutory prohibition and is consistent with the legislative intent and the construction of similar statutes.⁹⁸

The divergent outcomes in the three nexus cases discussed above are difficult to reconcile. In *Thompson*, the MSPB found a nexus between an employee's conduct and an agency's personnel action even where the employee was not a true whistleblower, but was only perceived by the agency to be a whistleblower.⁹⁹ Furthermore, in *Duda* the Board reversed the dismissal of an employee's appeal where the employee's fiancée, and not the employee himself, engaged in whistleblowing activity for which the employee claimed he suffered retaliation.¹⁰⁰ Yet in *Wagner*, the Board found no direct or circumstantial evidence of the required nexus where the employee's supervisors knew of his disclosures several weeks prior to the completion of his performance appraisal.¹⁰¹ Given the apparent inconsistency in these three decisions, it can be argued that the nexus requirement, although expressly retained by the Board in *Wagner*,¹⁰² is a requirement whose meaning has become attenuated through nonuniform application.¹⁰³

that his disclosures to a U.S. Senator regarding his supervisor's improper actions, along with his fiancée's whistleblowing activities concerning the same official, caused his termination. *Id.* In his IRA appeal, the employee withdrew the allegation of his own whistleblowing because his disclosures occurred after he received his notice of termination. *Id.* As a result, the AJ dismissed the appeal for lack of jurisdiction, noting that under the Board's regulations implementing the WPA, jurisdiction over IRA appeals is limited to personnel actions taken because of the appellant's whistleblowing activities. *Id.* at 444-45.

98. *Id.* at 447.

99. *Thompson v. Farm Credit Admin.*, 51 M.S.P.R. 569, 582 (1991).

100. *See Duda*, 51 M.S.P.R. at 447 (holding that failure to protect employee from retaliation based on relationship with whistleblower could result in thwarting of protected disclosures). In *Duda*, the key question involved the range of conduct the employee could assert as conduct causally connected with the personnel action, where the employee conceded that he had "blown the whistle" after receiving his notice of termination. *See Id.* at 445 (determining existence of causal relationship based on particular facts of case). Although the Board in *Duda* did not directly consider the nexus question, nexus is a consideration inherent to reprisal analysis under the WPA that the AJ will presumably have to confront on remand. *Cf.*, e.g., *Thompson*, 51 M.S.P.R. at 580 (noting appellant's burden to establish presence of reprisal). The Board in *Thompson* stated that an appellant must establish the existence of reprisal by showing through a preponderance of evidence standard that "(A) A protected disclosure was made; (B) the accused official knew of the disclosure; (C) the adverse action under review could, under the circumstances, have been retaliation; and (D) there was a genuine nexus between the retaliation and the removal." *Id.* (citing *Warren v. Department of Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986)).

101. *Wagner v. EPA*, 51 M.S.P.R. 337, 346 (1991), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992).

102. *Id.* at 347 (stating that "the requirement to show nexus in order to prove whistleblower retaliation was not abolished by the enactment of the WPA").

103. A possible explanation for the discrepancy involves the legislative history of the WPA, which may be interpreted as providing that where alleged whistleblowing and alleged reprisal occur closely together in time, the law will presume that whistleblowing was a contributing factor in the agency's personnel decision. *See, e.g.*, *Gergick v. General Servs. Admin.*, 43 M.S.P.R. 651, 661 (1990) (interpreting legislative history of WPA to find that whistleblowing must be presumed to be contributing factor in agencies' personnel decisions in cases where

4. *The constructive knowledge rule*

Beyond requiring a nexus between the protected activity and the agency action, the test for a prima facie reprisal case also includes the requirement that the accused official have "knowledge" of the employee's disclosures.¹⁰⁴ The MSPB decisions have required varying degrees of actual or constructive knowledge on the part of the supervisor, at times giving weight to the supervisor's denial of knowledge¹⁰⁵ and sometimes relying on the closeness in time between the disclosures and the adverse action to infer such knowledge.¹⁰⁶ Whether the supervisor knew that the disclosures were of the variety actually protected under the law, however, is not considered relevant.¹⁰⁷

whistleblowers' actions and alleged agency reprisals occur proximately in time). More recent cases, however, adopt such a presumption only under circumstances in which the alleged victim of retaliation suffers detrimental harm. *See, e.g., Thompson*, 51 M.S.P.R. at 582 (noting employee's detriment as rationale for adopting presumption); *Duda*, 51 M.S.P.R. at 447 (finding employee subject to negative consequences). On the other hand, where the alleged victim merely receives a "fully successful" job performance rating, as in *Wagner*, closeness in time to an alleged whistleblowing event does not give rise to a presumption of nexus. *Wagner*, 51 M.S.P.R. at 346.

104. *Warren v. Department of Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

105. *See Newberry v. United States Postal Serv.*, 49 M.S.P.R. 348, 354 (1991) (finding that employee did not show that his employer had actual or even constructive knowledge of employee's filing of EEO complaints and grievances or of his whistleblowing activities, and therefore sustaining agency's adverse personnel action against employee). The AJ made this finding despite circumstantial evidence showing that the employee identified himself in all but one instance while engaged in whistleblowing activities. *Id.* at 355. The AJ and the MSPB discounted this evidence by relying on the supervisor's testimony that he did not consider the employee's conversations with him as constituting whistleblowing. *Id.*

Similarly, in *Rychen v. Department of Army*, an Army employee brought an IRA appeal, showing by circumstantial evidence that the supervisors who proposed and approved the agency's adverse personnel action against her knew of her protected disclosures. *Rychen v. Department of Army*, 51 M.S.P.R. 179, 183-84 (1991). The closeness in time of the disclosures and the adverse action led to an inference of impropriety and showed the employee's disclosures to be a factor in the decision to suspend her. *Id.* at 183. The agency was able to prove by clear and convincing evidence, however, that the employee's suspension stemmed from her own misconduct and that it would have imposed the suspension even in the absence of the employee's disclosures. *Id.* at 184. For example, the agency supplied evidence that the employee received prior counseling for disruptive and unprofessional conduct, received written reprimands for unacceptable behavior, and was caught using agency property for personal business. *Id.*

106. *See McClellan v. Department of Defense*, 53 M.S.P.R. 139, 142 (1992) (ruling that agency possessed constructive knowledge of employee's whistleblowing). *McClellan* involved an employee who brought an IRA appeal based on his disclosures to a U.S. Representative regarding fraud and waste in his agency and the retaliatory nature of his assigned military detail. *Id.* at 140. In the initial decision, an AJ found that the agency's constructive knowledge of the employee's disclosures could be inferred from the closeness in time between the disclosures and the agency's adverse action, and from the deciding official's lack of credibility. *Id.* at 143. The Board affirmed, dismissing the agency's argument that the employee did not prove that anyone with actual knowledge of his disclosures influenced the deciding official. *Id.* at 145.

107. *See Eidmann v. MSPB*, 976 F.2d 1400, 1406 (Fed. Cir. 1992) (noting that WPA says nothing about any inquiry into whether supervisor knew of protected nature of employee's

II. ADVERSE ACTION CASES

The MSPB decisions discussed in this section highlight Board review of adverse personnel actions taken by federal agencies. As noted above, the likelihood of an agency having its personnel decisions overturned on review is small.¹⁰⁸ Yet the practitioner representing an appellant can use the principles in the following cases not only at the hearing level, but also in prehearing proceedings and negotiations to avoid what otherwise might lead to a Board affirmation of the agency's action. Note that performance cases and misconduct cases are treated under separate provisions of title 5 of the United States Code.¹⁰⁹ The two types of cases have different procedures, entail different forms of analysis, and require that the agency prove its case under different burdens of proof.

A. Performance Cases: *Progeny of Eibel v. Department of Navy*

Where an adverse action is proposed under chapter 43 of title 5 due to an employee's unacceptable performance, the employee must be given an opportunity to improve his or her performance, and the agency must then prove unacceptable performance by "substantial evidence."¹¹⁰ As a practical matter, where alleged unacceptable performance is challenged by an employee in an appeal, an AJ must determine the validity of the standards themselves before he or she may consider whether the employee's performance met the standards in question.¹¹¹ Thus, it is important to note the development of MSPB law regarding the minimum statutory requirements for an agency performance appraisal system.

disclosures). *But see* *Harvey v. MSPB*, 802 F.2d 537, 547 (D.C. Cir. 1986) (suggesting that OSC must prove that supervisor knew of protected nature of employee's disclosures).

108. *See supra* notes 6-8 and accompanying text (discussing percentages of agency actions upheld on appeal at Board and court of appeals levels, seemingly based on judicial deference to agency interpretation of law).

109. *See* 5 U.S.C. §§ 4301-4315 (1988 & Supp. III 1991) (setting forth procedures under chapter 43 for performance-based adverse personnel actions); *id.* §§ 7501-7543 (setting forth procedures under chapter 75 for misconduct-based adverse personnel actions). Only poor performance that can be shown, by a preponderance of the evidence, to impair the "efficiency of the service" can lead to removal under chapter 75 procedures. *See Lovshin v. Department of Navy*, 767 F.2d 826, 843 (Fed. Cir. 1985) (discussing removal pursuant to employee misconduct), *cert. denied*, 475 U.S. 1111 (1986).

110. *See* 5 C.F.R. § 1201.56(c)(1) (1991) (defining "substantial evidence" burden in performance case context as something less than preponderance of evidence standard). This burden of proof is minimal, and the agency's decision will be upheld on appeal as long as some evidence exists that would permit a reasonable person to reach the conclusion the agency reached, based on the record as a whole. *Id.* By contrast, in misconduct cases the agency must prove misconduct by a preponderance of the evidence, meaning that it is more likely than not that each element of the misconduct occurred. 5 C.F.R. § 1201.56(c)(2) (1991).

111. *See Eibel v. Department of Navy*, 857 F.2d 1439, 1440 (Fed. Cir. 1988) (discussing AJ's duties in cases involving performance evaluations).

*Eibel v. Department of Navy*¹¹² is a seminal case in this area, standing for the proposition that performance standards must set forth in objective terms the minimum level of performance that an employee must achieve to avoid a performance-based adverse personnel action.¹¹³ Such standards must, to the maximum extent feasible, permit the accurate evaluation of job performance.¹¹⁴ Further, agencies may not draft "backward" standards that describe unacceptable performance rather than acceptable performance.¹¹⁵ The Federal Circuit invalidated the performance standards in *Eibel* because the standards were susceptible to various interpretations, did not permit accurate measurement of performance, were not effectively communicated to employees, and were not capable of clarification short of total redrafting.¹¹⁶

More recent development of these principles by the MSPB indicates that otherwise inadequate standards can be augmented or clarified, and thus "saved," by supplemental written or oral materials or instructions that give "content" to the standards and are communicated to employees. For example, in *O'Neal v. Department of Army*,¹¹⁷ the Board ruled that an agency may give content to performance standards by informing employees of specific work requirements through written instructions, information concerning deficiencies and methods of improving performance, memoranda describing unacceptable performance, and responses to employees' specific questions concerning performance.¹¹⁸ The MSPB, however, found the

112. 857 F.2d 1439 (Fed. Cir. 1988).

113. See *Eibel*, 857 F.2d at 1444 (requiring publication of employee performance standards and supporting requirement by citing *Wilson v. Department of Health & Human Servs.*, 770 F.2d 1048, 1052 (Fed. Cir. 1985), which explains general need for employee-accessible listing of required performance criteria).

114. See *id.* at 1441 (citing need for objective evaluation criteria).

115. *Id.* at 1441-42.

116. *Id.* at 1443. The performance standards at issue in *Eibel* were as follows:

CRITICAL ELEMENT: ENERGY AWARENESS. ** *Highly Satisfactory Standard:* Coordinate and develop agenda for annual Energy Awareness Week. Initiate and write twelve or more energy conservation articles for the Marine Corps Development and Education Command base newspaper, without assistance, to be approved by the supervisor. ** *Marginal Standard:* No agenda for annual Energy Awareness Week is developed. No more than six energy conservation articles for the Marine Corps Development and Education Command base newspaper. Major assistance is required at least 50% of the time to complete articles.

CRITICAL ELEMENT: COMMUNICATE WRITTEN AND ORALLY. ** *Highly Satisfactory Standard:* Ability to communicate both orally and in written correspondence with military personnel, engineers, planners, technicians, and public officials without any difficulty. ** *Marginal Standard:* Requires assistance at least 50% of the time when communicating in written and oral correspondence with military personnel, engineers, planners, technicians, and public officials.

Id. at 1440.

117. 47 M.S.P.R. 433 (1991).

118. *O'Neal v. Department of Army*, 47 M.S.P.R. 433, 440 (1991).

standards at issue in *O'Neal* insufficiently objective to apprise the complaining employee of the standard against which her performance was to be measured, and found further that the employee's supervisor was unable to articulate the quantitative boundary between acceptable and unacceptable performance.¹¹⁹ Similarly, in *Chaggaris v. General Services Administration*,¹²⁰ an employee attacked an agency's standards as "absolute," arguing that they provided for no acceptable performance short of perfection. However, the MSPB upheld the standards as reasonable, especially in light of the fact that the agency supplied its employees with additional written information explaining the standards.¹²¹

Where standards are so vague or ambiguous as to require redrafting, they will be held invalid to the benefit of the employee-appellant. In *Smith v. Department of Energy*,¹²² the MSPB reversed an employee's demotion where the standard for "unacceptable" performance was defined as performance that failed to meet the level of "marginal" performance, and "marginal" in turn was defined as an employee "sometimes" having difficulty communicating.¹²³ The Board held that the word "sometimes" is too vague to be helpful in measuring performance without the addition of interpretive or supplemental instructions.¹²⁴ A different result obtained in *Sherrell v. Department of Air Force*.¹²⁵ In that case, an employee challenged the Air Force's performance standards for their failure to delineate a range of acceptable levels of performance and to identify marginal performance.¹²⁶ The MSPB upheld the standards, however, despite the fact that they contained only a three-level rating system and lacked any performance standard other than one labeled "fully successful."¹²⁷

B. Misconduct Cases

The following discussion highlights recent developments of inter-

119. *Id.* at 441.

120. 49 M.S.P.R. 249 (1991).

121. *See Chaggaris v. General Servs. Admin.*, 49 M.S.P.R. 249, 252 (1991) (determining that performance standards are "sufficiently detailed").

122. 49 M.S.P.R. 110 (1991).

123. *See Smith v. Department of Energy*, 49 M.S.P.R. 110, 115 (1991) (affirming AJ's findings that invalidated performance standard).

124. *See id.* at 116 (noting that "sometimes" is so "vague and inexact that it is impossible to apply in a verifiable fashion or to discover the level of proficiency which the [agency] actually intended by the phrase") (quoting *Wilson v. Department of Health & Human Servs.*, 770 F.2d 1048, 1053 (Fed. Cir. 1985)).

125. 47 M.S.P.R. 534 (1991), *aff'd*, 956 F.2d 1174 (Fed. Cir. 1992).

126. *Sherrell v. Department of Air Force*, 47 M.S.P.R. 534, 534-35 (1991), *aff'd*, 956 F.2d 1174 (Fed. Cir. 1992).

127. *See id.* at 540 (dismissing appellant's claim that performance standards were invalid).

est particularly to the employment law practitioner. Note that where an adverse personnel action is proposed under chapter 75 of title 5¹²⁸ due to an employee's alleged misconduct, the employing agency must prove the misconduct by a preponderance of the evidence.¹²⁹

1. *Sexual harassment*

Although its extensive procedural history is minimized in the Board's latest rendition of *Hillen v. Department of Army (Hillen IV)*,¹³⁰ the case has been proceeding between the full Board and an AJ for more than six years. A series of remands has produced an unlikely decision, considering the growing awareness in our country of the issue of sexual harassment in the workplace.¹³¹ Taken as a whole, however, the *Hillen* cases serve to trace the Board's evolving policy trend in its treatment of sexual harassment cases.

In *Hillen*, the Army removed a senior executive for his sexual harassment of a female employee.¹³² In its most recent decision in the case,¹³³ the Board held that where an agency alleges a violation of Equal Employment Opportunity Commission (EEOC) regulations¹³⁴ under title VII of the Civil Rights Act of 1964¹³⁵ and merely mentions agency policies or Office of Personnel Management

128. 5 U.S.C. §§ 7501-7543 (1988 & Supp. III 1991).

129. 5 C.F.R. § 1201.56(c)(2) (1992); see *supra* notes 109-10 and accompanying text (discussing adverse personnel action procedures and standards).

130. 54 M.S.P.R. 58 (1992), *aff'g as modified*, 50 M.S.P.R. 293 (1991), *vacating* 35 M.S.P.R. 453 (1987), *rev'g* 29 M.S.P.R. 690 (1986).

131. See, e.g., Michele Galen et al., *Sexual Harassment: Out of the Shadows*, Bus. Wk., Oct. 28, 1991, at 30 (examining reaction in American business community to Professor Anita Hill's testimony regarding sexual harassment in Supreme Court Justice Clarence Thomas' Senate confirmation hearings); *Sexual Harassment in the Ranks*, WASH. Post, July 25, 1992, at A20 (discussing instances of sexual harassment in U.S. Navy and inability of Naval leaders to eradicate problem).

132. *Hillen v. Department of Army*, 29 M.S.P.R. 690, 690 (1986) (*Hillen I*), *rev'd*, 35 M.S.P.R. 453 (1987), *vacated*, 50 M.S.P.R. 293 (1991), *aff'd as modified*, 54 M.S.P.R. 58 (1992). Five women alleged numerous incidents of sexual harassment by the executive, who was their supervisor, but the Board eventually considered only one woman's claims in *Hillen IV*. *Hillen IV*, 54 M.S.P.R. at 59. Those charges originally included touching the victim's breast while in an elevator, rubbing her buttocks and thigh while in her office, making suggestive comments to her over the telephone without identifying himself, and repeatedly looking at her in a sexually suggestive manner. *Hillen II*, 35 M.S.P.R. at 454-55. The supervisor responded that, by and large, the incidents described were examples of accidental or unintentional contact. *Id.* at 456-57. The Board sustained only one incident, the touching of the employee's buttocks and thigh as she was bending over at an office coffee pot, as sexual harassment. *Hillen IV*, 54 M.S.P.R. at 68 (concluding that supervisor's touching was of deliberate and sexual nature).

133. *Hillen IV*, 54 M.S.P.R. at 58.

134. See 29 C.F.R. § 1604.11 (1991) (defining sexual harassment for purposes of employment discrimination).

135. 42 U.S.C. §§ 2000 to 2000e-17 (1988) (defining equal employment for purposes of statute).

(OPM) regulations in the charges,¹³⁶ the employee has not received sufficient notice of alternative or secondary charges under those policies and regulations.¹³⁷ The Board corrected an earlier error in *Hillen III*,¹³⁸ holding that the title VII "hostile working environment" standard is conduct "sufficiently severe or pervasive" to "create an abusive working environment."¹³⁹ Applying that standard to the facts of the *Hillen* case, the Board found that the single instance of sexual harassment sustained by the AJ was not, by itself, severe enough to create a hostile and offensive environment.¹⁴⁰ The Board noted that the only case of single-incident harassment uncovered and relied on by the agency was a situation in which the victim manifested physical symptoms of psychological distress and required psychiatric counseling.¹⁴¹

The resulting sexual harassment standard is difficult to meet in a pure title VII case before the MSPB. Where the victim alleges or proves only a single incident of sexually harassing conduct, even if the incident is severe, the Board may not be able to offer that employee the protection of sustaining the removal of the harassing supervisor from the workplace. The agency can avoid this heavy burden of proof under title VII, however, if it additionally charges the harassing employee with an express violation of the agency's standards of employee conduct.¹⁴²

2. Indefinite suspensions

The indefinite suspension of an employee is often utilized in the

136. See *Hillen IV*, 54 M.S.P.R. at 64 (noting that agency alleged that appellant had created intimidating and offensive work environment as specifically prohibited by 29 C.F.R. § 1604.11 (1992)).

137. *Hillen IV*, 54 M.S.P.R. at 63.

138. *Hillen v. Department of Army*, 50 M.S.P.R. 293 (1991) (*Hillen III*), *aff'd as modified*, 54 M.S.P.R. 58 (1992).

139. *Hillen IV*, 54 M.S.P.R. at 65 (acknowledging MSPB's failure in *Hillen III* to follow standard enumerated in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), which established requirements for actionable sexual harassment charges under title VII).

140. *Id.* at 68-69. In applying a "reasonable woman" standard, the Board discounted the complainant's subjective conclusion that the single alleged incident was sufficiently offensive to create a hostile work environment. *Id.* The Board found significant the fact that "although [the victim] was upset at the time by the unwelcome touching, she was not greatly concerned by this or other incidents until she learned of the appellant's placement in her chain of command." *Id.* at 67. The Board's observation is rather peculiar because one might expect most victims to become more greatly concerned upon learning that they may be subjected to certain behavior on a continuing basis.

141. *Hillen IV*, 54 M.S.P.R. at 69 (citing *Campbell v. Kansas State Univ.*, 780 F. Supp. 755 (D. Kan. 1991)). The Board refused to apply the holding in *Campbell* to the case at bar because that case involved "aggravating circumstances" that the *Hillen* case did not. *Id.*

142. See *Hillen IV*, 54 M.S.P.R. at 63 (requiring that agency specifically charge employee with violation of agency's standard of conduct, in addition to title VII violation, to effectuate removal more easily).

interim period between the time an employee is suspected of committing a crime and the time a final disposition in the employee's criminal investigation or prosecution is reached. In 1991, the MSPB decided *Jones v. Department of Navy*,¹⁴³ a case in which the Navy suspended two employees' security clearances pending the agency's internal investigation of their alleged cocaine use and possession.¹⁴⁴ On remand to the Board from the Federal Circuit, the Board held that an indefinite suspension need not be reversed where the suspension was proper when effected.¹⁴⁵ That is, if a suspension is based on an indictment that is later rescinded or on a security clearance investigation that ultimately uncovers no detrimental evidence, the suspension will not necessarily be reversed.¹⁴⁶

The decision in *Jones* departs significantly from prior cases in which employees who have been indicted and are being prosecuted can be suspended indefinitely without pay pending the outcome of the criminal process.¹⁴⁷ In *Jones*, no indictment or prosecution oc-

143. 48 M.S.P.R. 680 (1991).

144. *Jones v. Department of Navy*, 48 M.S.P.R. 680, 682 (1991). Without security clearances, the employees could not perform their duties, so the Navy placed them on leave with pay. *Id.* at 683. The employees then received an agency proposal for their indefinite suspension, without pay, and they appealed that adverse action. *Id.* at 683-84. The AJ sustained the agency's proposal, and the MSPB held that the agency could invoke an indefinite suspension with "reasonable cause" that a crime has been committed for which imprisonment may be imposed. *Id.* at 689. The AJ noted that an agency may order or continue an employee's indefinite suspension for possible criminal misconduct that could result in imprisonment, even though no criminal proceedings are ongoing. *Id.*

145. See *Jones v. Department of Navy*, 51 M.S.P.R. 607, 609 (1991) (denying award of back pay because indefinite suspension based on indictment that is later dismissed does not have to be rescinded), *on remand from* No. 91-3530 (Fed. Cir. Nov. 5, 1991). Note, however, that in an indictment, a grand jury makes a factual determination based on evidence presented by the Government regarding whether sufficient evidence exists to put a defendant on trial. See *United States v. R. Enterprise, Inc.*, 111 S. Ct. 722, 726 (1991) (explaining that role of grand jury is to examine all information that may help its investigation of whether or not crime has occurred). In *Jones*, the Naval Investigative Service presented the only evidence against the employees, which consisted of indications that the employees were merely suspected of drug use and possession. *Jones*, 51 M.S.P.R. at 609. In essence, therefore, the two employees were deprived of pay for the suspension period by being targeted for an investigation that turned up no wrongdoing.

146. *Jones*, 51 M.S.P.R. at 609. The employees in *Jones* sought back pay by virtue of the reversal of their indefinite suspensions. *Id.* The Board noted, however, that although it eventually cleared the employees of the alleged wrongdoing and reinstated their security clearances, the existence of an agency security clearance investigation justified the agency's action and its denial of back pay for the suspension period. See *id.* (stating that employees' clearance of drug use and possession charges "merely reinforces . . . prior determination [by Board in *Jones*, 48 M.S.P.R. at 682], that the agency proved the existence of a bona-fide security clearance investigation").

147. Cf., e.g., *Wiemers v. MSPB*, 792 F.2d 1113, 1115 (Fed. Cir. 1986) (rejecting argument that because employee's suspension was based solely on indictment and removal was based in part on conviction, reversal of conviction entitles reversal of removal and reinstatement with backpay); *Brown v. Department of Justice*, 715 F.2d 662, 669 (D.C. Cir. 1983) (noting it is well settled that acquittal does not entitle employee to reinstatement because agency may be able to justify termination by proving employee's actual misconduct by preponderance of evidence).

curred and yet the employees' security clearances, which were necessary for their work, were suspended indefinitely.¹⁴⁸ Such a holding could negatively affect employees whose security clearance eligibility is under investigation for reasons completely unrelated to any criminal process.¹⁴⁹ A remarkable feature of security clearance cases and the factor that makes *Jones* a powerful tool for agencies is the Supreme Court's position that an agency decision to suspend a security clearance indefinitely is essentially nonreviewable.¹⁵⁰

3. Theft

It is permissible for an agency wishing to discipline or remove an employee who has not violated any *specific* rule or policy to nevertheless effect discipline or removal under chapter 75 of title 5 for such cause as will "promote the efficiency of the [agency's] service."¹⁵¹ Where the agency chooses to charge an employee with specific misconduct that constitutes a criminal offense, however, it must allege and prove the substantive elements of that criminal misconduct. A recent case illustrates this point.

In *Nazelrod v. Department of Justice*,¹⁵² the managers of a federal correctional institution in Kentucky demoted an employee on charges of theft because the employee allegedly failed to post money to certain inmates' accounts and instead used the funds for personal purposes.¹⁵³ Contrary to the AJ's finding, the MSPB held that the agency did not prove the "specific intent" element of the crime of theft because it had not shown that the employee intended to permanently deprive the owners of the possession or use of the money.¹⁵⁴ This holding specifically overruled the MSPB's prior decisions in *Joy v. Department of Navy*¹⁵⁵ and *Major v. Department of Navy*¹⁵⁶ and brought the Board squarely in line with the Supreme

148. *Jones*, 48 M.S.P.R. at 682-85.

149. For example, it now seems possible that an employee undergoing a background check because he or she has relatives living in a former Soviet-bloc country could see his or her security clearance withheld indefinitely.

150. See *Department of Navy v. Egan*, 484 U.S. 518, 524 (1988) (holding that MSPB lacks authority to review underlying reasons for agencies' denial of employee security clearances).

151. See 5 U.S.C. § 7513 (1988) (specifying basis for disciplinary action and termination).

152. 50 M.S.P.R. 456 (1991).

153. *Nazelrod v. Department of Justice*, 50 M.S.P.R. 456, 458 (1991). An AJ upheld the demotion, finding that the penalty imposed by the agency did not exceed the bounds of reasonableness and that the employee's use of inmates' money to buy her lunch constituted theft. *Id.* Further, the AJ concluded that the employee's intent to appropriate the property to a use inconsistent with the owners' rights and benefits was sufficient to establish criminal intent. *Id.*

154. *Id.* at 460.

155. 24 M.S.P.R. 652, 654-55 (1984) (holding that intent to permanently deprive is not requisite element of theft from agency), *aff'd*, 785 F.2d 322 (Fed. Cir. 1985).

156. 31 M.S.P.R. 283, 285-86 (1986) (finding that criminal intent is not diminished by intent to replace stolen property).

Court's decisions on this subject.¹⁵⁷

4. *Prior records*

An agency has considerable discretion in determining the appropriate penalty in a particular case. This discretion manifests itself not only in the agency's decision to take disciplinary action in the first place, but also in the type of information the agency consults in deciding to implement a particular adverse personnel action. The following case is illustrative of this point.

In *Lewis v. Department of Air Force*,¹⁵⁸ the Air Force removed an employee for failing to request leave in accordance with standard procedures and for incurring one day of "absent without leave" status.¹⁵⁹ The AJ mitigated the removal to a thirty-day suspension, finding that the agency erred in considering the employee's past leave and disciplinary record.¹⁶⁰ The MSPB ruled, however, that despite the fact that a prior disciplinary action is unrelated to the facts of a present disciplinary action, the prior action may not be discounted by the trier of fact in the present action.¹⁶¹ Thus, the practitioner should be aware of an employee's past disciplinary record when representing that employee before an agency or the Board, because an agency may lawfully consider unrelated, seemingly insignificant past disciplinary actions in its present disciplinary action determinations.

C. *Affirmative Defense of "Not in Accordance with Law"*

An agency disciplinary action that is not in accordance with law

157. See *Nazelrod*, 50 M.S.P.R. at 460 (following *Morrisette v. United States*, 342 U.S. 246, 271-72 (1952), which clarified distinction between stealing and knowing conversion). The practitioner should be aware, however, of the "crime exception" under MSPB regulations. See 5 C.F.R. § 752.404(b)(3)(iii) (1992) (specifying agency's rights and authority where criminal activity is suspected). Where an agency reasonably believes that an employee has committed an act for which a sentence of imprisonment may be imposed, the usual 30-day notice period is shortened to only seven days. *Id.* This allows the agency to preserve the integrity of the workplace, but also greatly limits the employee's time to respond to charges before he or she may be removed from the work environment.

158. 51 M.S.P.R. 475 (1991).

159. *Lewis v. Department of Air Force*, 51 M.S.P.R. 475, 475 (1991).

160. *Id.* at 485 (characterizing removal penalty as "unduly harsh"). The employee's past record included a five-day Air Force suspension for a falsification that had occurred four years earlier and a subsequent reprimand for quarreling. *Id.* at 484. Clearly, both charges were unrelated to the present improper leave charges. See *id.* at 480 (discussing effect of employee's previous disciplinary record on agency's decision to remove him).

161. *Id.* at 483-84 (finding that employee's past disciplinary record is relevant to assessment of current penalty). In addition, the Board held that "[a] prior action that is challenged by the appellant will be discounted only if the prior action is clearly erroneous in the sense that it leaves the Board with a definite and firm conviction that a mistake has been committed." *Id.* at 484.

may be successfully challenged by an aggrieved employee.¹⁶² This type of action is distinguishable from a harmful procedural mistake and instead involves an inquiry into whether the agency's decision is unlawful in its entirety, or in other words, whether the agency's action lacks legal authority. The burden of showing that an action is not in accordance with law lies with the employee.¹⁶³

The first of the very few MSPB cases decided under this "not in accordance with law" standard was *Cuellar v. United States Postal Service*.¹⁶⁴ In *Cuellar*, the Board held that an OPM regulation permitting an agency to place an employee on "emergency suspension" without any procedural rights during the advance-notice period of a removal action was invalid, and thus the "suspension" was not in accordance with law and had to be reversed on the ground of "harmful error."¹⁶⁵ The Federal Circuit further developed the not in accordance with law standard in *Handy v. United States Postal Service*.¹⁶⁶ In *Handy*, the court stated that the standard "is directed to the [agency] decision itself" and looks to whether "the decision in its entirety [is] in accordance with law."¹⁶⁷

The MSPB's most recent decision under the not in accordance with law standard is *Stephen v. Department of Air Force*.¹⁶⁸ This case dealt with the attempted termination of a probationary employee on the date the employee would have completed one year of service, but the Air Force failed to specify whether the termination was to be effective prior to the end of the employee's one-year tour of duty.¹⁶⁹ The Board held that it could not assume that the agency intended the termination to take effect prior to the time that the employee's

162. See *Stephen v. Department of Air Force*, 47 M.S.P.R. 672, 684 (1991) (discussing affirmative defense of "not in accordance with law" and holding that action should be reversed where no legal authority can sustain it). The affirmative defenses allowed on appeal are enumerated at 5 U.S.C. § 7701(e)(2) (1988) (specifying that defenses of "harmful error," "not in accordance with law," and "contrary to personnel practice" are sufficient to sustain charge of wrongful personnel action by employee against employer-agency) and 5 C.F.R. § 1201.56(5) (1992) (listing circumstances that prevent agencies from effectuating adverse personnel actions).

163. *Stephen*, 47 M.S.P.R. at 684.

164. 8 M.S.P.R. 624 (1981).

165. *Cuellar v. United States Postal Serv.*, 8 M.S.P.R. 624, 632 (1981) (reasoning that 30-day notice requirement cannot be circumvented by unlawful emergency suspension action).

166. 754 F.2d 335 (Fed. Cir. 1985).

167. *Handy v. United States Postal Serv.*, 754 F.2d 335, 337-38 (Fed. Cir. 1985).

168. 47 M.S.P.R. 672.

169. *Stephen v. Department of Air Force*, 47 M.S.P.R. 672, 674 (1991). The one-year anniversary date is highly significant because a Federal employee terminated prior to the end of one year is still on "probation" and is entitled to very few of the procedural rights afforded post-probationary federal employees under title 5. See 5 U.S.C. § 7501(1) (1988) (defining "employee" for purposes of procedural protections under chapter 75 of title 5 as excluding probationary employees).

one-year probationary period ended.¹⁷⁰ As a result, the agency had violated the notice and opportunity to respond requirements for termination of nonprobationary employees.¹⁷¹ The Board went on to find, however, that had the agency provided the employee with minimal due process, the agency's action still would have been unlawful in its entirety because no legal authority existed for the agency's action.¹⁷²

III. RETIREMENT CASES

Annuitants have certain protected rights under the Spouse Equity Act¹⁷³ and the disability retirement provisions of title 5.¹⁷⁴ These protections include the election to provide a spouse or any other individual with a survivor annuity and other related benefits.¹⁷⁵ As a rule, the OPM prefers to rely on strict construction of time limits and the concepts of estoppel and waiver to prevent potential beneficiaries from obtaining annuity rights.¹⁷⁶ Most often, the MSPB and the Federal Circuit acquiesce in the OPM's determination. This is particularly true of Spouse Equity Act cases.¹⁷⁷ On occasion, how-

170. *Stephen*, 47 M.S.P.R. at 679-80.

171. *Id.* at 688 (concluding that employee must be afforded 30-day notice of pending personnel action and be given opportunity to counter alleged wrongdoing, as required by 5 U.S.C. § 7513(b)(1), (2) (1988)).

172. *See Stephen*, 47 M.S.P.R. at 684 (holding that agency's impermissible action constitutes harmful error even where other safeguards are met). In *Stephen*, the Board discussed, as a second example of illegal agency action, the similar fact patterns found in *Cuellar v. United States Postal Service*, 8 M.S.P.R. 624 (1981), and *Littlejohn v. United States Postal Service*, 25 M.S.P.R. 478 (1984). *Stephen*, 47 M.S.P.R. at 685. These cases involved situations in which indefinite suspensions were effected during the advance-notice periods of removal actions, followed by removals for the same acts of misconduct that led to the suspensions. Under this fact pattern, the Postal Service improperly advanced employees' removals to the effective date of their suspensions. *Littlejohn*, 25 M.S.P.R. at 479; *Cuellar*, 8 M.S.P.R. at 626. The remedy in *Littlejohn* was to cancel the suspension and award back pay and benefits to the employee for the period of time that he should have been working during the illegal suspension until his lawful removal. *Littlejohn*, 25 M.S.P.R. at 485.

173. *See* 5 U.S.C. §§ 8339(j)-(k) (1988 & Supp. III 1991) (enumerating retirement benefits due surviving spouses of former agency employees); 5 C.F.R. § 831.612(a)(2) (1992) (providing for transfer of retirement benefits accrued by deceased federal employees to their surviving spouses).

174. *See* 5 U.S.C. §§ 8451-8456 (1988 & Supp. III 1991) (addressing rights of agency employees who retire due to job-related disabilities).

175. *See* 5 U.S.C. §§ 8339(j)-(k) (1988 & Supp. III 1991) (permitting payment of pension benefits to surviving spouse or designated beneficiary of deceased agency employee).

176. *See infra* notes 177-80 and accompanying text (discussing application of OPM time limits and interpretation of estoppel and waiver principles).

177. *See, e.g.*, *Grunewald v. Office of Personnel Management*, 49 M.S.P.R. 579, 582 (1991) (holding that erroneous advice from OPM does not estop OPM from enforcing strict filing deadline); *Nones v. Office of Personnel Management*, 47 M.S.P.R. 481, 485 (1991) (denying annuity because of failure to comply with strict OPM one-year filing deadline), *aff'd*, 954 F.2d 734 (Fed. Cir. 1992); *Bohannon v. Office of Personnel Management*, 47 M.S.P.R. 114, 117 (1991) (stating that there is no OPM duty to advise former spouse of deadline and denying OPM discretion to waive deadline); *Kearby v. Office of Personnel Management*, 47 M.S.P.R.

ever, minor exceptions will be formulated, usually where the OPM has failed to afford the beneficiary certain rights and the intent of the parties is clearly at odds with the OPM's interpretation.¹⁷⁸ Under the disability retirement provisions of title 5,¹⁷⁹ one can expect similar strict treatment from OPM, MSPB, and the Federal Circuit, generally based on the same issues of timeliness, waiver, and estoppel.¹⁸⁰

IV. LACHES

The affirmative defense of laches is a classic agency defense when dealing with employees, especially *pro se* employees, who appear to have slept on their rights. The status of this doctrine is illustrated in *Cornetta v. United States*.¹⁸¹ The Federal Circuit held in *Cornetta* that an agency not only must show the employee's unreasonable and inexcusable delay in pursuing an action, but also a resulting prejudice to the agency's case.¹⁸²

A more recent decision by the Federal Circuit, which overturned the Board's use of laches as a bar to an appeal, is not only illustrative of the longevity of this doctrine's utilization at the Board, but is also instructive on the practical difficulties in proving the elements of the laches defense. In *Hoover v. Department of Navy*,¹⁸³ an employee appealed a Board decision dismissing his petition for review

34, 38 (1991) (holding that OPM failure to notify spouse of deadline and resultant loss of annuity are not actionable).

178. See, e.g., *Harris v. Office of Personnel Management*, 888 F.2d 121, 125 (Fed. Cir. 1989) (stating that although OPM cannot be estopped from denying annuity to survivor, failure to provide annual notice to retirees regarding elections available under 5 U.S.C. § 8339(j) and (k) may constitute waiver of one-year time limit); *Kolbe v. Office of Personnel Management*, 32 M.S.P.R. 626, 631 (1987) (ruling that OPM failure to provide required notice of elections under 5 U.S.C. § 8339(j) constitutes waiver of statutory limits, thus permitting clear intent of decedent to be honored).

179. 5 U.S.C. §§ 8451-8456 (1988 & Supp. III 1991).

180. See, e.g., *Stevenson-Phillips v. Office of Personnel Management*, 48 M.S.P.R. 527, 532 (1991) (deciding that employee's filing of application with agency did not constitute filing with OPM and thus was untimely and OPM was not equitably estopped from enforcing strict one-year deadline); *Schulz v. Office of Personnel Management*, 48 M.S.P.R. 520, 524-25 (1991) (holding that neither erroneous advice from employing agency nor agency's failure to forward application in timely fashion could estop OPM from denying annuity); *Logan v. Office of Personnel Management*, 48 M.S.P.R. 381, 385-86 (1991) (raising issues of timeliness and estoppel); *Campbell v. Office of Personnel Management*, 48 M.S.P.R. 365, 370 (1991) (allowing OPM to deny benefits to worker whose application was timely yet erroneously filed with agency instead of OPM); *Brennan v. Office of Personnel Management*, 48 M.S.P.R. 359, 365 (1991) (disallowing disability benefits where application was received by employing agency within one-year statutory period but was not received by OPM until 14 months had elapsed).

181. 851 F.2d 1372 (Fed. Cir. 1988).

182. See *Cornetta v. United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988) (discussing manifestations of prejudice to agency as including either "economic" or "defense" prejudice caused by inevitable loss of records, destruction of evidence, fading memories, or unavailability of witnesses due to passage of time).

183. 957 F.2d 861 (Fed. Cir. 1992).

on the ground of laches.¹⁸⁴ The agency asserted that the employee's unreasonable delay of nearly five years prejudiced its ability to raise a defense on the merits.¹⁸⁵ The court ruled, however, that an agency's showing that important witnesses have merely retired does not satisfy the agency's burden of showing defense prejudice¹⁸⁶ and that the agency's personnel expert was able to reconstruct the events and prior agency organization so well that his affidavit ironically helped to negate any claim of defense prejudice by the agency.¹⁸⁷

The practitioner should be aware of the laches defense as an agency tool for seeking dismissal of appeals to the MSPB. The practitioner should encourage employees to press their claims in a timely fashion because the Board appears receptive to use of the laches argument by agencies.¹⁸⁸ One caveat highlighted by the *Hoover* case is that, on the issue of defense prejudice, it is possible for an agency to go too far in attempting to prove its inability to defend a case.¹⁸⁹

184. *Hoover v. Department of Navy*, 957 F.2d 861, 862-63 (Fed. Cir. 1992).

185. *Id.* at 863. The agency claimed that certain key witnesses were unavailable due to the passage of time, and that it was impossible to reconstruct the complex personnel and organizational evolution of the agency since the occurrence of the events in question in 1985. *Id.* The agency supplied the affidavit of a personnel expert to illustrate the complex structural changes within the agency that would supposedly hinder an accurate reconstruction of the events and agency organization existing at that time. *Id.*

186. *Id.* at 863-64.

187. *Id.* at 864. The court explained the significance of the affidavit of the Navy's personnel expert as follows:

As evidence of the reorganization and growth of the agency since 1985, the agency submitted the affidavit of Otis Sanders, an agency personnel employee since 1979 familiar with the organization of the agency, setting forth the history of the positions occupied by Hoover [the appellant-employee] prior to the RIF [Reduction in Force], and subsequent evolution of the post-RIF positions. Although the agency maintains that reconstruction of the relevant events is burdensome, there was no assertion that the information is not available. Mr. Sanders averred personal knowledge of the positions involved as well as the restructuring of the agency. The Sanders affidavit that was submitted by the agency to support its assertions of substantial growth belies the agency's assertion that reconstruction is so difficult that the defense is prejudiced.

Id.

188. *See, e.g., id.* at 863 (upholding agency's argument of laches in spite of Board's own observation that, at the time of its 1985 decision, "Board regulations provided no time frame for filing a petition for enforcement"). Even though no time limit existed, the Board invoked the doctrine of laches and dismissed the petition. *Id.*

189. *See id.* at 864 (finding that affidavit of agency employee demonstrated availability of additional information to agency). In *Hoover*, the agency contended that it lacked the resources and knowledge to provide information on previous employment positions. *Id.* To bolster this assertion, the agency made use of a retired employee's affidavit, in which the retiree stated that the agency had experienced substantial growth. *Id.* The court found instead that the retiree's familiarity with the number and nature of agency employment positions before and after the growth detailed in the affidavit was indicative of the fact that the agency could, albeit with some difficulty, provide the necessary information. *Id.*

V. DISMISSAL WITHOUT PREJUDICE: THE AJ'S TOOL TO DELAY ADJUDICATION

In its reports to Congress, the MSPB has long emphasized the efficiency and speed with which it adjudicates federal employee appeals under the strict time limits imposed by title 5.¹⁹⁰ The MSPB has a policy of adjudicating at least an initial decision on its cases within 120 days of the date an appeal is filed.¹⁹¹ Because the MSPB answers to Congress, and because the AJs employed by the MSPB answer to the Board, it is logical to conclude that timeliness is a dominant concern in the minds of most AJs. Although not all appeals are capable of fair and adequate treatment in 120 days, AJs are understandably hesitant to grant motions for continuances that would delay adjudication, thus jeopardizing the Board's reputation for speedy justice.¹⁹²

This fact of life at the MSPB provides AJs with a clear incentive to find alternative ways to handle those cases that defy quick resolution. For example, if an AJ encounters a particularly complex case with numerous items of documentary evidence, the AJ may wish to dismiss the case without prejudice to the employee's refiling in the near future to give both parties sufficient time to analyze and prepare the case.¹⁹³

While not all cases before the MSPB are so complicated or voluminous, the fact is that any case that taxes an appellant's ability to become fully prepared in a timely manner automatically favors the Government. Generally, an agency, when preparing to take an adverse action against an employee, has the opportunity to organize

190. See, e.g., 1991 ANNUAL REPORT, *supra* note 5, at 28 (noting that more than 98% of initial appeals are processed within 120 days of filing); 1990 ANNUAL REPORT, *supra* note 6, at 15 (noting that more than 99% of initial appeals are handled within 120 days).

191. See 1991 ANNUAL REPORT, *supra* note 5, at 28 (indicating that MSPB is successful in meeting 120-day deadline in vast majority of appeals).

192. The procedural distinction between a "continuance" and a "dismissal without prejudice to refiling" is crucial. The former delays adjudication but leaves the clock running, while the latter eliminates the case from the docket indefinitely, thereby halting the adjudication clock and preserving the Board's record on timeliness. See 33 FEDERAL PROCEDURE, LAWYERS EDITION § 77:31 (Law. Co-op. 1981) (defining "continuance" as "adjournment of a cause to a future date"); 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 41.05[2], at 41.66 (2d ed. 1992) (defining "dismissed without prejudice" as "leav[ing] the situation so far as procedures therein are concerned the same as though the suit had never been brought").

193. See, e.g., *Neubeiser v. FERC*, 47 M.S.P.R. 125, 127 (1991) (commenting that AJ properly dismissed case without prejudice to avoid exceeding 120-day time limit for processing appeals). This practice may already be commonplace, although neither the Board's Annual Reports nor the MSPB Office of Management Analysis has published the actual number or percentage of cases resolved by this device. Depending on how widespread the use of this technique is or becomes, one might reasonably expect its utilization to have some influence on the relatively low average time of disposition of appeals filed with the Board, which currently stands at 74 days. 1991 ANNUAL REPORT, *supra* note 5, at 28.

and analyze all relevant materials before proposing the adverse action. Once the action is proposed, the employee and his or her attorney must expend a great deal of energy to become as prepared as the agency. Therefore, dismissal of the case without prejudice to the employee's refiling is a tool that AJs can use to protect employees and their representatives from succumbing to this inherent disadvantage built into the MSPB appeal system.

Recently, the Board decided appeals regarding the propriety of granting dismissals without prejudice. In *Thomas v. Department of Veterans Affairs*,¹⁹⁴ the Board considered whether an AJ may dismiss a case without prejudice for the convenience of the agency.¹⁹⁵ As a rule, the MSPB found that the employee's financial burden of refiling, the agency's ability to anticipate delay and preserve testimony, and the availability of alternative sources of proof should be considered in deciding whether to grant an agency's request for a postponement or continuance.¹⁹⁶

In early 1992, the Board again confronted this issue in *Moore v. Department of Treasury*.¹⁹⁷ In that case, the Treasury Department indefinitely suspended an employee based on a federal criminal indictment of the employee for unlawfully disclosing tax return information.¹⁹⁸ The employee filed an appeal, but prior to the hearing he was incarcerated for evaluation of his mental competency and for threatening a public official.¹⁹⁹ The full Board was disinclined to allow a dismissal without prejudice and instead urged the AJ to explore the possibility of holding a hearing, despite the appellant's ap-

194. 51 M.S.P.R. 218 (1991).

195. *Thomas v. Department of Veterans Affairs*, 51 M.S.P.R. 218, 221 (1991) (considering whether dismissal without prejudice is appropriate where agency is party that caused delay). The agency removed an employee, a pipefitter's helper, for sleeping and being intoxicated on duty. *Id.* at 218. The employee appealed his removal to the Board, but at a prehearing conference the AJ granted the agency's motion to dismiss the case without prejudice. *Id.* at 219. The agency filed its motion for dismissal because one of its primary witnesses was scheduled for open heart surgery that week. *Id.* at 219-20. The employee objected to the agency's motion and appealed the AJ's decision to the Board. *Id.* The MSPB held that an agency's motion to dismiss should not be granted under circumstances such as these and that the appellant should not face the additional financial burden of refiling an appeal.

196. *Id.* at 221.

197. 52 M.S.P.R. 362 (1992).

198. *Moore v. Department of Treasury*, 52 M.S.P.R. 362, 362 (1992).

199. *Id.* at 362-63. Thereafter, the employee refused to participate in a hearing either at the prison or by telephone, declined an invitation to request a dismissal without prejudice, and was made temporarily inaccessible by virtue of his relocation within the prison system. *Id.* The AJ issued an initial decision dismissing the employee's *pro se* appeal without prejudice based on the temporary unavailability of the employee and the general propriety of suspending administrative proceedings pending resolution of concurrent criminal proceedings. *Id.* at 363. The Board disagreed, however, ruling that the AJ must take additional steps to schedule a hearing for the employee. *Id.*

parent unavailability.²⁰⁰ The Board also urged the AJ to inform the appellant that an unreasonable refusal to participate could be viewed as a waiver of his right to a hearing, meaning that a continuance might be preferable to dismissal without prejudice.²⁰¹

In the future, as AJs' caseloads increase, particularly troublesome or complex cases may routinely be dismissed without prejudice. Also, cases in which pressing concerns arise, such as the appellant's health or other personal circumstances, may warrant dismissal without prejudice. It is important, however, to recognize the burden that refiling may place on an appellant and to minimize the use of this tool in situations where, for example, the appellant prefers a continuance.²⁰²

VI. ATTORNEY'S FEES

Attorney's fees are available only under limited circumstances, as set forth by statute. Prominent examples of statutes that allow prevailing employees to be reimbursed by the Government for their attorneys' fees are provisions of the Back Pay Act,²⁰³ the Equal Access to Justice Act,²⁰⁴ the Civil Rights Act of 1964,²⁰⁵ and the Whistleblower Protection Act.²⁰⁶ These so called "fee shifting"

200. *Id.* at 363-64.

201. *Id.*

202. For example, where a case is dismissed pending the judicial determination of related issues, the appellant may be held to strict refiling deadlines following the final disposition of the related matters. *See, e.g.,* Neubeiser v. FERC, 47 M.S.P.R. 125, 127 (1991) (dismissing employee's claim to allow time for final disposition of related issue by agency, but requiring employee to refile no sooner than 46 days and no later than 65 days after date of issuance of initial decision on related issue).

203. *See* 5 U.S.C. § 5596(b) (1988) (providing that MSPB may award attorney's fees under this provision, pursuant to 5 U.S.C. § 7701(g)(1) (1988)). When an employee of an agency has lost pay due to an unjustified or unwarranted personnel action by an agency, he or she is entitled to recover previously withheld salary, benefits, and attorney's fees. *Id.* The employee is entitled to this recovery "on correction of the personnel action," or, in other words, when the agency's personnel action is reversed. *Id.* Section 7701(g)(1) illustrates the point that an employee must show that the Government did not prevail in order to collect attorney's fees. 5 U.S.C. § 7701(g)(1) (1988). The employee must show that he or she is the prevailing party, and it must be determined by the Board or an AJ that payment is warranted by the "interest of justice." *Id.* The latter point includes cases in which the agency's action was "clearly without merit." *Id.* The Board has implemented the Back Pay Act through regulations at 5 C.F.R. § 1201.37 (1992).

204. *See* 5 U.S.C. § 504 (1988) (providing for attorney's fees to be paid to prevailing party, other than U.S. Government, arising from adverse proceedings brought by agency); 28 U.S.C. § 2412 (1988) (providing award of attorney's fees to prevailing parties who are subject to suit at Government's initiative to same extent that prevailing parties would recover under common law or by statute).

205. *See* 42 U.S.C.A. § 1988 (West Supp. 1992) (addressing payment of attorney's fees in cases of civil rights violations).

206. *See* 5 U.S.C. § 1221(g) (Supp. III 1991) (awarding attorney's fees to employees who suffer adverse personnel actions on basis of making protected statements to authorities about improper actions or activities of regulatory agency or its officials).

statutes alter the normal course of attorney's fee payment, which in the United States requires each side to pay its own fees.²⁰⁷ In order to qualify for reimbursement under these various statutes, an employee must show either that the Government did not prevail or that the Government's position was, to one degree or another, unjustified.²⁰⁸

A. Recent MSPB Cases

In *Mitchell v. Department of Navy*,²⁰⁹ the Navy placed an employee on enforced leave for his physical inability to perform his job assignments.²¹⁰ The same day that he was placed on leave, the agency proposed that the employee be removed for other, unrelated reasons.²¹¹ When the agency effected his removal the employee appealed, but was later able to reach a settlement with the agency.²¹² The employee filed a motion for attorney's fees, but the AJ concluded that because the agency attempted to accommodate the employee, a fee award was not warranted in the interest of justice.²¹³ The MSPB held that the determination as to whether a fee award is warranted in the interest of justice should be made on the basis of the existing record, even where that record is incomplete.²¹⁴

207. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1974) (stating that American rule with respect to attorney's fees is that such fees are generally not recoverable by prevailing party in lawsuit).

208. See, e.g., 42 U.S.C.A. § 1988 (West Supp. 1992) (positing that for violations of Civil Rights Act of 1964, employee need only "substantially prevail" in order to receive attorney's fees). Under the Back Pay Act, an employee must be awarded a reversal of the agency's personnel action, along with his or her previously withheld salary, in order to receive attorney's fees. 5 U.S.C. § 5596(b) (1988). Under the Equal Access to Justice Act, the employee must show that the Government's position was "not substantially justified" in order to receive attorney's fees. 28 U.S.C. § 2412 (1988). Finally, in order to receive attorney's fees related to an MSPB appeal, an employee must show that the "interest of justice" warrants such an award. See 5 U.S.C. § 7701(g)(1) (1988) (requiring agency to pay employee's reasonable attorney's fees where agency engaged in prohibited personnel practice that was without merit).

209. 51 M.S.P.R. 103 (1991).

210. *Mitchell v. Department of Navy*, 51 M.S.P.R. 103, 108 (1991) (noting existence of injury to employee's arm that impeded his performance of his duties).

211. See *id.* (noting that employee was removed, not because of his arm injury, but because employee had refused rehabilitation assistance for drug dependency as well as attendance problems caused by dependency).

212. See *id.* (discussing agreement by agency to retroactively restore appellant to his previously held position).

213. See *id.* at 110 (finding no evidence of discrimination and hence no basis for award of attorney's fees). It is noteworthy that there was no hearing and no opportunity for the presentation of bipartisan evidence. The AJ relied instead on a transcript of an investigatory interview with the employee during which the employee had first notified the agency of his drug dependency. *Id.*

214. *Id.* at 112. The Board rationalized that the employee relinquished his right to a hearing on the fee award by settling the case without submitting evidence of agency error, and that a new trial should not ensue from a fee award. See *id.* at 111 (noting that request for attorney's fees "should not result in a second major litigation") (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

In *Jones v. Department of Navy*,²¹⁵ the Navy denied an employee a recurrence of disability determination and placed him on leave without pay status between 1986 and 1990, at which time the employee finally returned to work.²¹⁶ The employee appealed this "constructive suspension," and the AJ overturned the agency's action, awarding the employee attorney's fees but denying his fee enhancement request despite the existence of a contingency fee agreement.²¹⁷ On appeal to the MSPB, the Board found that if the unavailability of an enhanced fee would cause an appellant to experience substantial difficulty in obtaining counsel to represent him or her in an employment case, such an enhancement may be granted.²¹⁸ The Board held, however, that in the case before it, the employee did not submit the kind of detailed evidence necessary to support the requested enhancement.²¹⁹

In *Rothschild v. Department of Housing & Urban Development*,²²⁰ an employee appealed a number of issues to the Board, but only prevailed on some of his claims for relief.²²¹ In determining whether the employee's representatives were entitled to recover attorneys' fees, the Board discussed a third factor, the ultimate results of the attorneys' efforts, along with the two factors normally considered in awarding attorney's fees, which are the number of hours expended and the reasonableness of the hourly rate.²²² Finally, the Board remanded the issue of whether an enhanced fee could be awarded due to the contingent nature of the fee agreement, where the attorney sought an enhancement of 100%.²²³

215. 51 M.S.P.R. 542 (1991).

216. *Jones v. Department of Navy*, 51 M.S.P.R. 542, 544-45 (1991).

217. *Id.*

218. *See id.* (holding that employee also must demonstrate that contingency fee arrangement is present in relevant action).

219. *Id.* at 548. As a result, the Board remanded the case to develop the record with regard to the fee enhancement and for issuance of a new initial decision. *Id.*

220. 54 M.S.P.R. 238 (1992).

221. *Rothschild v. Department of Hous. & Urban Dev.*, 54 M.S.P.R. 238, 242 (1992). The Board held that the employee could recover attorney's fees for efforts in seeking a mandamus order because those efforts led to the employee's ultimate victory on the underlying issues. *Id.* at 242 (noting relationship between mandamus order and reinstatement of employee). On the other hand, the Board held that the employee could not recover attorney's fees for the work done in applying for a stay where the stay was denied, even though the request for a stay was nonfrivolous and appeared directly related to the issues on which the employee prevailed. *Id.* at 242-43.

222. *Id.* at 242.

223. *Id.* at 244-45. At the time *Rothschild* was heard, the Board had only dealt with standard contingency fee enhancement involving cases in the Seattle, Washington area. *Id.* at 244. There, the standard enhancement was 20%. *Id.* On remand in *Rothschild*, the employee's counsel would be permitted to introduce evidence showing the unavailability of federal employment lawyers in Washington, D.C., where jurisdiction had been set in *Rothschild*, at the 20% enhancement rate. *Id.* at 244-45.

B. *Attorney's Fee Appeals Outside the MSPB*

Because not all adverse personnel actions are appealable to the MSPB,²²⁴ not all attorney's fee issues are eligible to be heard by the MSPB. Where an underlying personnel action is not appealable to the MSPB, an agency's decision to deny attorney's fee reimbursement is also not appealable to the MSPB.²²⁵ Take the example of an employee who files a grievance based on a five-day suspension and subsequently receives a favorable agency decision rescinding the suspension. While the employee may win an award of backpay for the five days of missed work, he or she may nevertheless encounter the unwillingness of the agency to reimburse his or her attorney's fees. The employee has three avenues of recourse.

First, if the amount of attorney's fees is considerable, the employee may consider filing suit in the U.S. Court of Federal Claims.²²⁶ This strategy only makes sense from a monetary standpoint if the employee can afford to pay the additional attorney's fees required to file suit at the Court of Federal Claims.²²⁷ The employee risks a loss before that court, whereupon he or she would not be entitled to attorney's fees for either the initial grievance or the Court of Federal Claims efforts.²²⁸

Second, in cases where the Court of Federal Claims' jurisdiction may be questionable, the refusal of an agency to pay attorney's fees pursuant to a grievance may be litigated in federal district court. In *Maney v. Department of Health & Human Services*,²²⁹ the U.S. District Court for the District of Columbia ordered a federal agency to pay an employee's attorney's fees under the Back Pay Act after the em-

224. See, e.g., 5 U.S.C. § 7503 (1988) (denying employee who is suspended for less than 14 days right of appeal to MSPB).

225. The MSPB, the EEOC, and the courts entertain both substantive and attorney's fee issues on appeal, generally dealing with the merits of a case before reaching the issue of whether reimbursement for attorney's fees may be obtained in a given case.

226. See 28 U.S.C. § 1491(a)(1) (1988) (establishing Court of Federal Claims' authority to hear attorney's fee suits).

227. See *id.* (failing to specify jurisdictional minimum in size of claim that may be brought). The effort required in a Court of Federal Claims action to recover fees is only economically feasible, however, if the amount of fees at stake is large.

228. See, e.g., *Cuthbertson v. Secretary of Health & Human Servs.*, No. 91-0863, 1992 WL 174634, at *1-2 (Cl. Ct. July 6, 1992) (denying attorney's fees where Court of Federal Claims lacked jurisdiction to hear underlying substantive claim). Because the Court of Federal Claims lacks jurisdiction to hear federal employment issues or enforce federal employment claims, see 28 U.S.C. § 1491 (1988) (establishing cases over which Court of Federal Claims exercises jurisdiction), it is possible that the Court of Federal Claims would decline to hear an attorney's fee case on the ground that it lacked subject matter jurisdiction. But see *Aijo v. United States*, 26 Cl. Ct. 432, 436 (1992) (holding that Federal Bureau of Engraving and Printing conceded issue of liability for attorney's fees under Back Pay Act, 5 U.S.C. § 5596(b) (1988 & Supp. III 1991), by challenging only reasonable amount of fees owed).

229. 637 F. Supp. 1128 (D.D.C. 1986).

ployee prevailed in his grievance.²³⁰

Finally, if the amount of attorney's fees is worth pursuing but is not significant enough to warrant filing suit in the Court of Federal Claims or district court, the employee may appeal to the Comptroller General of the United States, who heads the enforcement mechanism of the General Accounting Office.²³¹ While the Comptroller General may not always be willing to order an agency to disburse funds for the payment of attorney's fees, such an order is not altogether unlikely.

CONCLUSION

During 1991 and 1992, the MSPB has continued its role of providing guidance to the practitioner in federal employment law. For most situations, sufficient precedent now exists that an agency should have clear knowledge about what types of actions will be sustained and should know when to consider withdrawing an adverse action against one of its employees. The Board continues to be generally supportive of the basic decisions made by agency management. In fact, the Board has even approved a new tool, that of indefinite suspension without pay during security clearance investigations, to give agencies greater authority than previously recognized.

The MSPB has handled its increased jurisdiction from the Whistleblower Protection Act in part by limiting the types of cases the Board considers to be protected by the Act. This issue is subject to review and final decision by the U.S. Court of Appeals for the Federal Circuit. Decisions on other whistleblower issues such as nexus and constructive knowledge appear to have not always been consistent.

The past two years have seen the Board provide clearer guidance in the areas of performance standards, misconduct cases, and attorney's fees. Increased attention to due process, as opposed to a narrow focus on being an efficient adjudicator of cases, has surfaced through the Board's decisions limiting dismissal without prejudice and requiring continuances in appropriate cases. This emphasis on

230. *Maney v. Department of Health & Human Servs.*, 637 F. Supp. 1128, 1133 (D.D.C. 1986).

231. The GAO, as an arm of Congress, is charged with oversight of all executive agencies. The enforcement arm of the GAO, the Office of the Comptroller General, publishes decisions that have precedential value and are binding on agencies. See 5 U.S.C. § 2304 (1988) ("General Accounting Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the executive branch . . . to assess the effectiveness and soundness of Federal personnel management.").

due process over efficiency appears unlikely to affect the Board's deserved reputation for prompt resolution of federal personnel cases.