ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

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Law of Federal Employment

The Judge Advocate General's Legal Center and School

United States Army

Table of Contents

CHAPTER A

INTRODUCTION TO THE LAW OF FEDERAL EMPLOYMENT

I. REFERENCES.

A. Office of Special Counsel (OSC): 5 C.F.R. Ch. VIII; http://www.opm.gov.

B. Merit Systems Protection Board (MSPB): 5 U.S.C. Ch. 12; http://www.mspb.gov.

C. Equal Employment Opportunity Commission (EEOC): 29 C.F.R. Ch. XIV (Part 1614 applies to federal sector EEO complaints processing); http://www.eeoc.gov.

D. Department of Defense (DOD): DODI 1400.25 (This instruction updates policy and assigns responsibility for civilian personnel management of the DOD civilian workforce); http://www.dtic.mil/whs/directives.

E. Department of the Army (DA): AR 690-xxx series.

F. Department of the Navy (DON): Human resource policies are issued through Secretary of the Navy Instructions (SECNAVINSTs) and guidance through Implementation Guides.

G. Department of the Air Force (AF): AFI 36-xxx series, AF Civilian Personnel Management Support System (PERMISS); http://www.afpc.af.mil.

H. U.S. Marine Corps. Marine Corps Orders (MCO) 12xxx.x series; http://www.hqmc.marines.mil/hrom.

I. U.S. Coast Guard. CH-3 Civilian Personnel Actions: Discipline, Performance, Adverse Actions, Appeals, and Grievances, COMDTINST M12750.4; http://www.uscg.mil/civilianHR/.

J. DOD Civilian Personnel Advisory Service (DCPAS): http://www.cpms.osd.mil.

K. DA Civilian Personnel Office: http://www.cpol.army.mil.

L. Other Resources.

1. U.S. Merit Systems Protection Board (MSPB) Reporter (M.S.P.R.).

2. Federal sector decisions of the EEOC (beginning July 2000).

3. A Guide to the Merit Systems Protection Board Law & Practice, Peter B. Broida, Dewey Publications, Inc., 1840 Wilson Blvd., Suite 203, Arlington, VA 22201; Tel. (703) 524-1355; email: deweypublications@gmail.com; website: www.deweypub.com (updated annually).

4. Representing Agencies and Complainants Before the EEOC, Hadley, Laws, and Riley, Dewey Publications, Inc., 1840 Wilson Blvd., Suite 203, Arlington, VA 22201; Tel. (703) 524-1355; email: deweypublications@gmail.com; website: www.deweypub.com (updated annually) (focus: hearing practice).

5. A Guide to Federal Sector Equal Employment Law & Practice, Ernest C. Hadley, Dewey Publications, Inc., P.O. Box 663, Arlington, VA 22216; Tel. (703) 524-1355; email: deweypublications@gmail.com; website: www.deweypub.com (updated annually) (focus: substantive law).

II. DEVELOPMENT AND EVOLUTION OF THE CIVIL SERVICE SYSTEM.

A. The Spoils System. For the better part of the 19th Century, the Federal civil service operated under a "spoils system" in which federal employees were hired or fired based upon their political affiliation. A major catalyst for reform of this system was the assassination of President James Garfield by Charles Guiteau in 1881. Guiteau believed his prior support of President Garfield's election campaign entitled him to a diplomatic post in France. After the Garfield administration denied Guiteau a position, he became disgruntled, stalked the President for several months, and ultimately shot him at a railroad station in Washington, D.C. President Garfield's assassination prompted widespread public calls for Congress to reform the federal civil service system.

B. Reform Toward a Merit System. Following President Garfield's assassination, Congress passed several laws to reform the federal civil service system, including:

1. The Pendleton Act of 1883, 22 Stat. 403 (1883). This Act established the Civil Service Commission (CSC), provided that federal jobs be awarded on the basis of merit, and that employees be selected through competitive exams. The Act also prohibited firing or demoting employees for political reasons.

2. The Lloyd-LaFollette Act of 1912, 37 Stat. 555 (1912). This Act codified the "just cause" standard for removals (terminations) of federal employees from federal service. Under this standard, which still exists today, a federal employee may not be removed except for cause that promotes the efficiency of the civil service.

3. The Veterans' Preference Act of 1944, 58 Stat. 387 (1944). This Act gave veterans preference in appointments for certain federal jobs.

C. The Current Merit System. Spearheaded by President James Carter, the Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1111 (1978), represents the last major overhaul of the federal civil service system. The CSRA abolished the CSC and created four new federal agencies: the Office of Personnel Management, the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority, and the Office of Special Counsel (OSC). NOTE: Although the CSRA originally established the OSC as an office of the MSPB, the Whistleblower Protection Act of 1989 made OSC an independent federal agency. The CSRA also transferred responsibility for adjudication of federal sector Equal Employment Opportunity complaints from the CSC to the Equal Employment Opportunity Commission. Finally, the CSRA established Merit System Principles and Prohibited Personnel Practices.

D. Merit System Principles. The CSRA established nine Merit System Principles codified at 5 U.S.C. § 2301(b). Although none create a cause of action, the principles serve as the foundation for civil service laws in Title 5 of the United States Code and regulations in Title 5 of the Code of Federal Regulations. The Merit System Principles are:

1. Recruit qualified individuals from all segments of society and select and advance employees on the basis of merit after fair and open competition.

2. Treat employees and applicants fairly and equitably, without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or disability.

3. Provide equal pay for equal work and reward excellent performance.

4. Maintain high standards of integrity, conduct, and concern for public interest.

5. Manage employees efficiently and effectively.

6. Retain or separate employees on the basis of their performance.

7. Educate and train employees when it will result in better organizational or individual performance.

8. Protect employees from improper political influence.

9. Protect employees against reprisal for the lawful disclosure of information in "whistleblower" situations.

E. Prohibited Personnel Practices (PPPs). The CSRA established thirteen (now fourteen) PPPs codified at 5 U.S.C. §§ 2302(b)(1-14). Employees shall not:

1. Discriminate against any applicant or employee on the basis of a protected class (race, color, religion, sex, national origin, age, disability) or on the basis of marital status or political affiliation.

2. Solicit or consider employment recommendations based on factors other than personal knowledge or records of job related abilities or characteristics.

3. Coerce the political activity of any person.

4. Deceive or willfully obstruct any person from competing for employment.

5. Influence any person to withdraw from competition.

6. Grant any unauthorized preference or advantage to any applicant or employee for the purpose of injuring the prospects of any particular person for employment.

7. Engage in nepotism.

8. Take, fail to take, or threaten to take or fail to take, any personnel action because of whistleblowing, i.e., any lawful disclosure of information by an employee or applicant which the individual reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

9. Take, fail to take, or threaten to take or fail to take, any personnel action because an employee or applicant:

    a. exercised any appeal, complaint, or grievance right granted by law, rule, or regulation;

    b. testified or otherwise lawfully assisted any individual in exercising an appeal, complaint, or grievance right granted by law, rule, or regulation;

    c. cooperated with or disclosed information to the Inspector General of an agency, or the Special Counsel; or

    d. refused to obey an order that would require the individual to violate a law.

10. Discriminate against an applicant or employee on the basis of conduct (typically off-duty) which does not adversely affect the performance of the applicant or employee.

11. Knowingly take or fail to take any personnel action in the violation of veterans' preference laws.

12. Take or fail to take any personnel action that violates any law, rule, or regulation implementing, or directly concerning, merit system principles.

13. Implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain a specific notification of whistleblower rights required by law.

14. Access medical records of another employee or an applicant for employment as part of, or otherwise in furtherance of, any conduct described above.

III. RECOGNIZED INTERESTS IN FEDERAL EMPLOYMENT.

A. Constitutional Due Process Requirements. "No person shall . . . be deprived of . . . liberty or property, without due process of law." U.S. Const. amend. V.

1. Property interests are not created by the U.S. Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Board of Regents v. Roth,* 408 U.S. 564 (1972).

2. Federal employees have a property right in continued employment; a reasonable expectation of continued employment. *Cleveland School Bd. v. Loudermill*, 470 U.S. 532 (1985).

B. Statutory sources of a protected property interest in federal employment.

1. The "cause" requirement of 5 U.S.C. §§ 7503(a) and 7513(a) vests non-probationary competitive service and non-probationary excepted service employees with a protected property interest.

2. The CSRA (5 U.S.C. §§ 4303(b), 7503(b), and 7513(b)) grants pre- and post-decisional procedural rights to federal civilian employees. *Bush v. Lucas,* 462 U.S. 367 (1983) (holding civil service protections are "clearly constitutionally adequate").

C. Liberty interests. Two separate liberty interests exist and the manner in which a public employee is terminated may deprive him or her of one or both of these interests:

1. Protection of one's good name, reputation, honor, and integrity, and

2. Freedom to take advantage of other employment opportunities.

IV. KEY FEDERAL AGENCIES IN THE CIVIL SERVICE SYSTEM.

A. Office of Personnel Management (OPM): https://www.opm.gov.

1. Function: The human resource (HR) agency for the federal government; manage federal job announcements on USAJOBs.gov and set policy on government-wide hiring procedures; conduct background investigations and security clearance inquiries for prospective and current employees; manage pension benefits for retirees; and provide training and HR resources for federal employees and agencies.

2. Authority: 5 U.S.C. §§ 1101-1105; 5 C.F.R. Ch. I.

B. Merit Systems Protection Board (MSPB, the Board): http://www.mspb.gov.

1. Function: An independent, quasi-judicial agency whose mission is to protect the Merit System Principles and promote an effective federal workforce free of PPPs.

2. Authority: 5 U.S.C. §§ 1201-1206; 5 C.F.R. Ch. II.

3. Composition: Three members appointed by the President, with the advice and consent of the Senate; not more than two of whom may be adherents of the same political party.

4. Jurisdiction: Hear appeals of various federal agency actions including adverse actions (removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or fewer) pursuant to 5 U.S.C. Ch. 75; performance-based actions pursuant to 5 U.S.C. Ch. 43; denials of within-grade increases, reduction-in-force (RIF) actions, certain terminations of probationary employees, and Uniformed Services Employment and Re-employment Rights (USERRA) cases. The Board also hears certain cases involving alleged PPPs brought by the OSC or, in limited cases, by current or former employees.

C. Equal Employment Opportunity Commission (EEOC, Commission): http://www.eeoc.gov/.

1. Function: Responsible for enforcing federal laws that prohibit discrimination against applicants or employees because of their race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, genetic information, or protected EEO activity (reprisal). The EEOC also provides leadership, guidance, and oversight to federal agencies on all aspects of the federal government's EEO programs. The EEOC's Administrative Judges (AJs) conduct hearings on EEO complaints, and adjudicate appeals from administrative decisions made by

federal agencies on EEO complaints. The EEOC Office of Federal Operations (EEOC-OFO) writes appellate decisions on behalf of the Commission.

2. Authority: Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), however, the Act did not originally apply to the federal sector. The EEO Act of 1972 (Public Law 92-261) made Title VII applicable to the federal workplace. Responsibility for federal sector EEO was previously vested in the CSC. Presidential Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978), transferred enforcement power for federal sector EEO complaints from the CSC to the EEOC.

3. Composition: Five members, each appointed by the President with the advice and consent of the Senate for a term of five years. No more than three of the members can be from the same political party.

D. Federal Labor Relations Authority (FLRA, the Authority): https://www.flra.gov/.

1. Function: Promote stable, constructive labor relations that contribute to a more effective and efficient government. The FLRA has the following primary statutory responsibilities: resolve complaints of unfair labor practices, determine the appropriateness of units of labor organization representation, adjudicate exceptions to arbitrators' awards, adjudicate legal issues relating to the duty to bargain, and resolve impasses during negotiations.

2. Authority: Title VII of the CSRA, also known as the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135.

3. Composition: Three members, each appointed by the President and confirmed by the Senate for a term of five years. No more than two members can be from the same political party.

E. Office of Special Counsel (OSC): https://osc.gov.

1. Function: An independent federal agency responsible for investigating and prosecuting PPPs, providing a safe channel for federal employees to disclose wrongdoing (especially reprisal for whistleblowing); protecting the integrity of the federal government from prohibited political activity; protecting employment and reemployment rights of service members and veterans; and providing training to federal agencies.

2. Authority: The Whistleblower Protection Act of 1989, as amended by the Whistleblower Protection Enhancement Act of 2012; the Hatch Act; and the USERRA; 5 U.S.C. §§ 1211-19; 5 C.F.R. Part 1800.

3. Composition: Headed by The Special Counsel who is appointed by the President and confirmed by the Senate for a term of five years.

V. KEY INSTALLATION PLAYERS.

A. Labor Counselor. Advises commanders, managers, and supervisors on labor and employment law issues, and represents the agency before third parties, including the MSPB, the EEOC, the FLRA, and arbitrators. Ensures command programs are in compliance with federal law and regulation.

B. Civilian Personnel Advisory Center (CPAC). Provides expertise in recruitment and placement strategy plans, classification, position management, compensation and benefits, conduct and performance management, labor relations, workers compensation, and personnel issues related to reductions in force, base realignment, civilian deployments, and Voluntary Early Retirement Authority/Voluntary Separation Incentive Pay. The CPAC HR Specialists include Labor Management-Employee Relations Specialists and HR Generalists.

C. EEO Office. Administers a comprehensive EEO program for all serviced commanders or equivalent officials on the installation. In accordance with AR 690-600, the EEO Officer serves on the commander's staff as the principal advisor on all matters pertaining to EEO program operations; manages the EEO complaints processing program; administers an Alternative Dispute Resolution (ADR) Program for EEO disputes; and supervises EEO counselors. Finally, after coordination with the labor counselor, the EEO Officer accepts or dismisses formal complaints.

VI. CLASSIFICATIONS OF FEDERAL EMPLOYEES.

A. Statutory Definition of "Employee." Under 5 U.S.C. § 2105(a), a federal employee is an defined as an individual who is appointed in the civil service by one of several designated officials, including, the President, a Member or Members of Congress, or the Congress, a member of a uniformed service, an individual who is an employee under this section, the head of a Government controlled corporation, or an adjutant general designated by the Secretary concerned under 32 U.S.C. § 709(c); engaged in the performance of a federal function; and subject to the supervision of a federal official or employee.

B. Exclusion of Non-appropriated Fund (NAF) employees. Under 5 U.S.C. § 2105(c), NAF employees are not considered federal employees for the purpose of laws administered by OPM. However, 5 U.S.C. § 2105(c)(1) outlines several exceptions to this rule.

C. Classification by Type of Appointment. As of 2018, the Department of Defense (DOD) has approximately 715,597 federal employees; more than one-third are employed by the Department of the Army. Like other federal agencies, DOD

employees have appointments in the Competitive Service, the Excepted Service, and the Senior Executive Service.

1. Competitive Service (CS). The CS consists of all civilian positions in the executive branch of the federal government not specifically excepted from CS examination procedures laws by statute, by the President, or by OPM. 5 C.F.R. § 212.101(a). The vast majority of federal employees are in the CS, including approximately 80% of DOD's civilian workforce.

    a. Competitive Examination Process. To enter the CS, applicants generally must complete a competitive examination process administered by OPM or by a Delegated Examining Unit (e.g., an installation CPAC). Although traditionally the competitive examination was a written or practical civil service exam, now it is primarily an online application review by an HR office. Typically, the HR office evaluates an applicant's knowledge, skill, and experience by reviewing the applicant's resume, responses to a questionnaire on usajobs.gov, and any other supporting documents. 5 U.S.C. § 1104; 5 C.F.R. § 332.101.

    b. Category Rating. Replacing the traditional "rule of three" method (also referred to as "numerical ranking"), category rating is now the primary method for evaluating eligible applicants for CS vacancies. Under category rating, agencies establish criteria for a job and related quality categories (e.g. "best qualified," "well-qualified"); announce the position on USAjobs.gov; evaluate the applications; and place qualified applicants into the predetermined quality categories. The selecting official may select any applicant in the highest quality category. However, generally a selecting official may not pass over a veterans' preference eligible for a non-preference eligible in the same quality category. 5 U.S.C. § 3319, 5 C.F.R. Part 337, Subpart C.

2. Excepted Service (ES). The ES consists of all positions in the executive branch of the federal government that are specifically excepted from the CS examination procedures by statute, by the President, or by OPM, and which are not in the Senior Executive Service. Approximately 19% of DOD's civilian workforce are in the ES. Pursuant to OPM's authority to except positions from the CS, OPM has established a list of excepted hiring authorities (Schedules A-D) that apply government-wide. 5 C.F.R. Part 213.

3. Senior Executive Service (SES). Less than one percent of federal employees are in the SES. Established by the CSRA, the SES is comprised of employees who administer at the top levels of the federal government, including managerial, supervisory, and policy positions classified above General

Schedule (GS)-15. The SES appointments can be career (based on merit), non-career, limited term, or limited emergency.

D. Classification by Status as an "Employee." Only an individual who satisfies one of the two alternative statutory definitions for "employee" qualifies for full MSPB appeal rights: (1) Pursuant to 5 U.S.C. § 7701(a) "an employee … may submit an appeal to the [MSPB] from any action which is appealable to the Board under any law, rule, or regulation," (2) An employee is an individual who has completed his probationary period, or an individual who has sufficient current continuous service.

1. The Statute. An individual who is an "employee" under 5 U.S.C. § 7511(a) has the statutory right to appeal adverse actions to the MSPB. Section 7511(a) of 5 U.S.C. defines "employee" as (1) an individual in the CS who is not serving a probationary or trial period under an initial appointment; or except as provided in 10 U.S.C. § 1599e who has completed one year of *current continuous service* under other than a temporary appointment limited to one year or less; (2) a preference eligible in the ES who has completed one year of *current continuous service* in the same or similar positions in an executive agency, in the U.S. Postal Service or Postal Regulatory Commission; and an individual in the ES (other than a preference eligible) who is not serving a probationary or trial period under an initial appointment pending conversion to the CS; or who has completed two years of *current continuous service* in the same or similar positions in an executive agency under other than a temporary appointment limited to 2 years or less."

2. Statutory Terms. 5 C.F.R. § 752.402 defines key terms from 5 U.S.C. § 7511(a), including:

   a. "Current continuous service": a period of employment immediately preceding an adverse action without a break in Federal civilian employment of a workday.

   b. "Day": a calendar day.

   c. "Similar positions": positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work.

3. The Probationary Period.

   a. Critical Assessment Period. This is the final step in the selection process for job applicants. The purpose of the probationary period is to give managers and supervisors an opportunity to evaluate a new employee's conduct and performance "to determine if [the

individual's] appointment to the civil service should become final. The Probationary Perod: A Critical Assessment Opportunity, MSPB Report (Aug. 2005). During this period, a supervisor can remove a probationer with limited appeal rights. 5 C.F.R. § 315.804.

b. When Required.

(1) First Year of Service: An employee who is given a career or career-conditional appointment when appointed from a competitive list of eligible established under 5 C.F.R. Part 315, Subpart C.

(2) Reemployment Priority List (RPL). An employee reinstated from RPL to a position in the same agency and same commuting area does not have to serve new probationary period, unless the employee did not complete the probationary period in the employee's last job. 5 C.F.R. § 315.801(c).

(3) Part-Time Employees. Computed on the basis of calendar time, in the same manner as for full-time employees. For intermittent employees, i.e., those who do not have regularly scheduled tours of duty, each day or part of a day in pay status counts as 1 day of credit toward the 260 days in a pay status required for completion of probation. 5 C.F.R. § 315.802(d).

(4) New Supervisors. Employees assigned or promoted to supervisory positions who do not satisfactorily complete their probationary period shall be returned to a position of no lower grade and pay than the last position. 5 U.S.C. § 3321(b). If an agency returns a probationary supervisor to his non-supervisory position under 5 C.F.R. § 315.908, the employee has no appeal right to the Board unless he alleges that the action was based on partisan political affiliation or marital status. *De Cleene v. Dep't of Educ.*, No. DC-315I-95-0251-I-2, 1996 WL 625889 (MSPB Oct. 18, 1996).

(5) SES Employees. If a career SES is removed during probationary period, there are no MSPB appeal rights. 5 C.F.R. § 359.407; 5 U.S.C. § 7701.

c. Duration. The National Defense Authorization Act for Fiscal Year 2016, expanded the probationary period for DOD employees in the CS and SES career appointees from one year to two years. 10 U.S.C. § 1599e. For covered DOD employees, this new law trumps the federal regulations which subject competitive service employees in other

agencies to a one-year probationary period. See 5 C.F.R. § 315.801. On or after 26 November 2015, a new hire in the DOD competitive service must complete a two year probationary period, unless the individual has prior service that counts toward completion of the probationary period under 5 C.F.R. § 315.802 (commonly referred to as the "Tacking Rule").

d. The Tacking Rule.

(1) For CS employees, in accordance with 5 C.F.R. § 315.802, prior Federal civilian service (not prior military service), including NAF service, counts toward completion of an employee's probationary period in the CS when the prior service satisfies the following three criteria:

(a) Is in the same agency. For purposes of the tacking rule, the Services are not "the same agency." *Perez v. Dept. of the Navy*, 193 F.3d 1371, 1374 (Fed. Cir. 1999).

(b) Is in the same line of work (determined by the employee's actual duties and responsibilities); and

(c) Contains or is followed by no more than a single break in service that does not exceed 30 calendar days.

(2) For ES employees, tacking applies in determining whether prior service counts toward the completion of a probationary period. *McCrary v. Dep't of Army*, No. AT-315H-06-0120-I-1, 2006 WL 2547797 (MSPB Aug. 30, 2006).

e. Limited Due Process.

(1) Standard for Separation. In contrast to the stricter standards for removing a non-probationary employee, a probationary employee can be separated for failing to demonstrate fitness or qualifications for continued employment. 5 C.F.R. § 315.804. An agency must show that the employee's performance was unacceptable in at least one critical job element after providing the employee with an opportunity to improve. *Diprizio v. Dep't of Transp.,* No. SE-0432-98-0331-I-1, 2001 WL 288447 (MSPB Mar. 19, 2001).

(2) Appeal Rights. Probationary employees generally have no statutory rights to appeal a removal to the MSPB, except when the basis for removal is alleged to have been based on his political affiliation, marital status, or pre-appointment reasons.

Separately, a probationary employee has a right to appeal to the MSPB if he alleges that his removal was due to his race, color, religion, sex, national origin, age, or disability, but only if the employee also alleges that his removal was based upon his political affiliation, marital status, or pre-appointment reasons. 5 C.F.R. § 315.806(d).

(3) Separation Procedure. Generally, the agency's only procedural requirement is to give the employee notice "in writing as to why he is being separated and the effective date of the action." *Id*. The merits of an agency's decision in this situation are not within the MSPB's jurisdiction, however, agency's failure to comply with procedures for terminating such an employee is subject to a harmful error analysis. *Keller v. Dep't of Navy*, 69 M.S.P.R. 183 (1996). Under 5 C.F.R. § 315.805, the probationary employee is entitled to:

(a) advance written notice stating the reasons for the action;

(b) a reasonable time to file a written answer;

(c) written notice of the agency's decision, the reasons for it, and

(d) the right to appeal to the MSPB and request a hearing.

f. No right to grieve. Even if a probationary employee is a bargaining unit member, an agency can summarily remove the employee for misconduct or poor performance, and the employee has no right to file a grievance. 5 U.S.C. §§ 3321, 7121.

E. Classification by Eligibility for Veterans' Preference.

1. Background. Since the Civil War, the Federal Government has given preference to military veterans in civil service appointments in order to recognize the sacrifices of veterans to the country and to ensure they are not disadvantaged because of their military service. Federal law gives veterans preference in the hiring process for most federal positions, but does not guarantee a job, nor does it apply to internal agency actions such as promotions, transfers, reassignments and reinstatements. *Brown v. Dep't of Veterans Affairs*, 247 F.3d 1222 (Fed. Cir. 2001).

2. Types of Veterans' Preference. Under the Veterans' Preference Act of 1944, as amended at 5 U.S.C. § 2108, there are basically three types of preference eligibles:

a. Disabled (10-point preference). The most common type is a "disabled veteran," meaning someone who has served at any time, has an honorable or general discharge; and has a service-connected disability or a Purple Heart.

b. Non-disabled (5-point preference). An individual must have served on active duty in one of the following ways outlined in *Perez v. Merit Systems Protection Bd*., 85 F.3d 591 (Fed. Cir. 1996):

(1) For more than 180 consecutive days, other than for training, any part of which occurred during the period beginning Sept. 11, 2001, and ending on Aug. 31, 2010, the last day of Operation Iraqi Freedom;

(2) Between Aug. 2, 1990 and Jan. 2, 1992,

(3) For more than 180 consecutive days, other than for training, any part of which occurred after Jan. 31, 1955 and before Oct. 15, 1976, or

(4) In a war, campaign or expedition for which a campaign badge has been authorized or between Apr. 28, 1952 and July 1, 1955.

c. Sole survivorship preference (0-point preference).

d. Ineligible Military Retirees. Military retirees at rank of major (O-4) or higher are not eligible for preference unless they are disabled veterans. This does not apply to Reservists who will not begin drawing military retired pay until age 60.

3. Application of Veterans' Preference.

a. Background. Pursuant to President Obama's Memorandum (14 May 2010), federal agencies now use a category rating method, rather than the old "rule of three" approach ("numerical ranking") for selecting applicants for jobs. This allows managers to select from a larger pool of qualified applicants.

b. Category Rating: the process by which hiring officials assess applicants for jobs using quality categories. 5 U.S.C. § 3319; 5 C.F.R. Part 337, Subpart C. Agencies typically predefine three quality categories (e.g. qualified, highly qualified, and best qualified). After assessing the relative knowledge, skills, and abilities of the applicants for a job, the agency's HR office categorizes candidates based upon the criteria for each quality category.

c. Applying Category Rating to Preference Eligibles (PE). These principal rules apply to external announcements (for all U.S. citizens).

(1) Under 5 U.S.C. § 3319, an agency may not pass over a PE for a non-PE within the same quality category, unless it follows certain pass-over procedures set forth in 5 U.S.C. § 3318 (non-applicable for a Schedule A attorney).

(a) At a minimum, the agency must file its written reasons for passing over the PE with OPM, and OPM must approve those reasons. The PE is entitled, upon request, to a copy of the agency's reasons and OPM's findings.

(b) An agency that proposes to pass over a PE with a compensable service-connected disability of 30 % or more must notify the PE candidate of the proposed pass-over, the reasons, and the right to respond within 15 days of notification. OPM will then notify the agency and the PE of its binding decision.

(2) PE with a 10% or greater service-connected disability are automatically placed in the highest quality category if they are at least minimally qualified for the job. *See* OPM's DEO Handbook (2007).

F. Classification of Positions by Method of Payment.

1. GS Employees. Salaries are based on substantially equal pay for substantially equal work within each local pay area. Differences in pay are based on differences in work and performance and comparability to the salaries that non-Federal employers pay for work at the same level of difficulty and responsibility. 5 U.S.C. Ch. 51, 53.

2. Prevailing Rate Employees (wage system). This applies to Wage Grade worker, leader, and supervisor. Pay system covers trade, craft, labor, and other blue-collar jobs. Pay is based on the prevailing rates in a given local wage area. These hourly rate employees receive annual wage adjustments. 5 U.S.C. §§ 5341-49.

3. Within Grade Step Increases. GS employees have 15 grades with 10 pay steps within each grade. Employees periodically receive a step increase in pay so long as their performance is at least fully successful. In accordance with 5 C.F.R. § 531.405, step increases are as follows: 52 calendar weeks for steps 2 to 4; 104 calendar weeks for steps 5 to 7; and 156 calendar weeks for steps 8 to 10.

4. SES Employees. President sets pay rate. Minimum may not be below 120% of lowest rate for GS-15. 5 U.S.C. §§ 5381-5385.

CHAPTER B

PERFORMANCE-BASED ACTIONS

I. REFERENCES.

A. Department of Defense (DOD).

1. 5 U.S.C. § 4303, Actions based on unacceptable performance.

2. 5 C.F.R. Part 432, Performance Based Reduction in Grade and Removal Actions.

3. DoDI 1400.25, Volume 430, Performance Management.

4. DODI 1400.25, Volume 431, Department of Defense Performance Management and Appraisal Program (DPMAP).

B. Service Regulations and Guidance.

1. Air Force Instruction (AFI) 36-1203, Administrative Grievance System, 1 May 1996.

2. AFI 36-704, Discipline and Adverse Actions, 22 July 1994.

3. AFI 36-1201, Discrimination Complaints, 12 February 2007.

4. Secretray of the Navy Instruction (SECNAVINST) 12410.25, Civilian Employee Training and Career Development, 5 July 2011.

5. Department of the Navy (DON) Civilian Human Resources Manual (CHRM), 17 January 2003.

6. Marine Corps Order (MCO) 12430.2, Performance Management Program, 29 December 1998.

7. Coast Guard COMMANDANT INSTRUCTION M12430.6B, 10 August 1998.

II. INTRODUCTION.

A. Removing Poor Performing Employees. A common myth in the civil service is that it is extremely difficult, if not, impossible to discharge federal employees for poor performance or misconduct. According to a Merit Systems Protection Board (MSPB) report, from Fiscal Year 2000-2014, federal agencies discharged

more than 77,000 employees for performance or misconduct issues. According to the MSPB Annual Report for Fiscal Year 2019, 85% of the cases that were heard, and not settled, resulted in the agency actions being upheld or left undisturbed.

B. Agency Must Support Its Removal Actions. To take a performance-based action (e.g. a removal or reduction) against an employee under 5 U.S.C. Chapter 43, an agency must show that the employee's performance was unacceptable in at least one critical element of the employee's position after the employee was given a meaningful opportunity to improve. However, the agency must first warn the employee about their inadequate performance and give the employee a reasonable opportunity to improve. The Agency will also need to show that the Office of Personnel Management (OPM) approved the agency's performance appraisal system.

C. The burden of proof for such an action is substantial evidence, which is defined as evidence as that a reasonable person might accept as adequate to support the action, even though other reasonable persons might disagree. 5 C.F.R. § 1210.41. This is a lower burden of proof than exists in disciplinary actions for misconduct or in most civil lawsuits.

D. Performance Expectations Must Be Reasonable. The most critical element of a performance-based action—and of performance management in general—is ensuring that each employee has an effective performance plan, which sets forth the critical elements of the employee's position and management's expectations of the employee's standards of performance. If an employee appeals a performance-based action, the agency must show that the employee's performance standards were reasonable. The critical job elements that an employee failed to meet must be reasonable, realistic, attainable, and to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria. 5 U.S.C. § 4302(b)(1). Performance standards must be measurable, e.g., in terms of quality, quantity, timeliness, or manner of performance. Deference is given to the agency on development of performance standards. An agency is entitled to use its managerial discretion in establishing the performance standards that measure an employee's performance. *Thomas v. Dept. of Defense*, 95 M.S.P.R. 123, 125-126 para. 6 (2003).

E. Agencies should be aware that Sec. 2(h) of Executive Order (EO) 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, provides that Chapter 75 removal procedures should be used in appropriate cases to address instances of unacceptable performance. In addition, Section 4(b) prohibits agencies from making any agreement, including a collective bargaining agreement, that limits an agency's discretion to employ Chapter 75 procedures to address unacceptable performance of an employee or that requires the use of Chapter 43 (including

any performance assistance period or similar informal period to demonstrate improved performance prior to the initiation of an opportunity period under 5 U.S.C. § 4302 (c)(6)), before removing an employee for unacceptable performance.

III. ACTIONS FOR UNACCEPTABLE PERFORMANCE UNDER CHAPTER 43.

A. Employees Covered. 5 U.S.C. § 4301(2); 5 C.F.R. § 432.102. Nonprobationary competitive service (CS) employees and nonprobationary preference eligible (PE) excepted service (ES) employees who have completed one year of current continuous employment in the same or similar positions or nonprobationary ES employees who have completed two years of current continuous employment in the same or similar positions.

B. Employees Not Covered. See 5 C.F.R. § 432.102(f).

1. An employee in the CS who is serving a probationary or trial period under an initial appointment;

2. An employee in the CS serving in an appointment that requires no probationary or trial period, who has not completed one year of current continuous employment in the same or similar positions under other than a temporary appointment limited to one year or less;

3. An employee in the ES who has not completed one year of current continuous employment in the same or similar positions;

4. Senior Executive Service (SES). See 5 C.F.R § 359.501-504 for a discussion of performance-based actions involving career SES appointees who have completed their probationary period. Note that such actions are not appealable to MSPB under 5 C.F.R. §359.504. A career appointee being removed from the SES under this section shall, at least 15 days before the effective date of the removal, be entitled, upon request, to an informal hearing before an official designated by the MSPB. The informal hearing shall be conducted in accordance with the regulations and procedures established by the Board. See 5 C.F.R. § 1201.141.

5. National Guard Technicians. A technician in the National Guard described in 5 U.S.C. § 8337(h)(1), employed under § 709(b) of Title 32; 5 C.F.R. § 432.102(f)(12). See also 32 U.S.C. § 709.

6. An employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

7. An individual in the Foreign Service of the United States;

8. An employee who holds a position with the Veterans Health Administration which has been excluded from the CS by or under a provision of 38 U.S.C., unless such employee was appointed to such a position under section 7401(3) of Title 38;

9. An administrative law judge appointed under 5 U.S.C. § 3105;

10. An individual in the SES;

11. An individual appointed by the President;

12. An employee occupying a position in Schedule C as authorized under Part 213 of this chapter;

13. A reemployed annuitant;

14. An individual occupying a position in the ES for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12 month period; and

15. A manager or supervisor returned to his or her previously held grade pursuant to 5 U.S.C. § 3321(a)(2) and (b).

C. Performance-Based Actions. A performance-based action is the reduction in grade or removal of an employee based solely on performance at the unacceptable level. 5 U.S.C. § 4303, 5 C.F.R. Part 432.

1. Once an employee's performance has been determined to be unacceptable in one or more critical elements, the employee must be given an opportunity to improve performance on that element(s) to an acceptable level. The acceptable level of performance must be achieved and maintained on the critical element(s) for one year from the start of the opportunity period or the agency can take a performance-based action against the employee.

2. Reduction in Grade. An agency can reduce in grade or remove an employee whose performance fails to meet the established performance standards in one or more critical elements of his position. Gonzalez v. Dep't of Transportation, 109 M.S.P.R. 250 (2008).

3. Removal. Failure to demonstrate acceptable performance under a single critical element will support a removal under Chapter 43. Shuman v. Dep't of the Treasury, 23 M.S.P.R. 620 (1984); *Hancock v. Internal Revenue Serv.*, 24 M.S.P.R. 263 (1984).

IV. PROOF REQUIREMENTS IN CHAPTER 43 UNACCEPTABLE PERFORMANCE CASES.

A. Proof Requirements Generally. For the MSPB to sustain an agency's action in a Chapter 43 case, the agency must demonstrate by ***substantial evidence*** that:

1. OPM approved its performance appraisal system;

2. The agency communicated to the appellant the performance standards and critical elements of his position;

3. The appellant's performance standards are valid under 5 U.S.C. § 4302(c)(1);

4. The agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him a reasonable opportunity to improve;

5. The appellant's performance remained unacceptable in at least one critical element. *White v. Dep't of Veterans Affairs*, 113 LRP 50625, 120 M.S.P.R. 405 (MSPB 2013), citing *Henderson v. National Aeronautics and Space Administration*, 111 LRP 7619, 116 M.S.P.R. 96 (MSPB 2011); *Lee v. Environmental Protection Agency*, 110 LRP 72158, 115 M.S.P.R. 533 (MSPB 2010).

6. Agency followed proper procedures associated with the removal action.

B. Substantial Evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence. 5 C.F.R. § 1201.4.

C. Demonstrating OPM approval of agency performance appraisal system.

1. Appraisal system must be approved by OPM prior to its implementation and prior to taking any actions against employees under Chapter 43.

2. If an agency significantly alters a previously OPM-approved performance appraisal system, OPM's review of the agency's modification is necessary to achieve compliance with the basic purpose underlying the OPM-approval requirement. *Adamsen v. Dep't of Agriculture*, 109 LRP 22890, 563 F.3d 1326 (Fed. Cir. 2009), *revised*, 109 LRP 42918 (Fed. Cir. 2009).

3. The agency submitted, in the record a copy of its Performance Management Plan, as well as copies of OPM's approval letters. Those

letters specifically state that OPM had approved the agency's performance management system plan including subsequent changes. The agency thus has satisfied its burden of showing affirmatively, by substantial evidence, that it had received OPM approval before undertaking this personnel action. *Saitlin v. Dep't of Veterans Affairs*, 60 M.S.P.R. 218, 222 (1993).

4. Statement in the regulation. *Chennault v. Dep't of Army*, 796 F.2d 465 (Fed. Cir. 1986) (Agency regulation, citing OPM approval of its performance appraisal system, is sufficient proof of approval to sustain agency action).

5. Agency Affidavit. *Wood v. Dep't of Navy*, 27 M.S.P.R. 659 (1985); *Sloane v. Defense Logistics Agency*, 834 F.2d 1006, 1007-08 (Fed. Cir. 1987).

6. OPM Letter. *Renshaw v. Dep't of Army*, 28 M.S.P.R. 638 (1985).

7. Stipulation. *Sloane v. Defense Logistics Agency*, 834 F.2d 1006 (Fed. Cir. 1987).

D. Proving agency took all required actions <u>before</u> proposing performance-based action.

1. Employee was informed in writing of the applicable critical elements and standards of performance. Introduce signed and dated copy of performance plan.

   a. Substantive right to be advised at beginning of appraisal period. 5 U.S.C. § 4303(b)(2); 5 C.F.R. § 430.204(b)(1)(ii); *Weirauch v. Dep't of Army*, 782 F.2d 1560 (Fed. Cir. 1986); *Vines v. Dep't of Defense*, 67 M.S.P.R. 667 (1995); *Cross v. Dep't of Air Force*, 25 M.S.P.R. 353 (1984).

   b. Notice need not be provided on first date of annual appraisal period. *Weirauch v. Dep't of Army*, 782 F.2d at 1563. Performance plans should be in place within 30 days from beginning of each rating period. AR 690-400, para. 1-5.

   c. Required standards. 5 C.F.R. § 430.206(b)(8). For critical elements, at least two levels for appraisal shall be used (e.g., fully successful, unacceptable) with standards written at the "fully successful" level. 5 C.F.R. § 430.206(b)(8)(i).

d. Standards must set forth in objective terms the minimum level of performance that an employee must achieve to avoid removal. *Eibel v. Dep't of Navy*, 857 F.2d 1439 (Fed. Cir. 1988).

e. Agency must show that the standards were reasonable, sufficient under the circumstances to permit accurate measurement of performance, and adequate to inform the employee of what was necessary to achieve a satisfactory or acceptable rating. *Dobson v. Dep't of Navy*, 283 Fed. Appx. 818 (2008); *Guillebeau v. Dep't of Navy*, 362 F.3d 1329, 1339 (Fed. Cir. 2004); *Wilson v. Dep't of Health and Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985).

f. The agency may make the required showing through the standards themselves, or by giving content to the standards by informing the employee of specific work requirements through other methods, including while placing the employee on a Performance Improvement Plan (PIP) and even during the course of a PIP. *Cumberbatch v. Dep't of Labor*, 2006 MSPB LEXIS 4137 (2006); *Thompson v. Dep't of Navy*, 89 M.S.P.R. 188, 195-96 (2001); *Papritz v. Dep't of Justice*, 31 M.S.P.R. 495, 497-98 (1986).

g. Employee participation in preparing performance requirements is encouraged, however final authority for establishing performance standards rests with the supervisor. 5 C.F.R. § 430.204(c).

h. Absolute Standards should not be used because they do not provide any room for error or improvement before performance is deemed "unacceptable." An absolute standard is one under which a single incident of poor performance will result in an unsatisfactory rating as to a critical element of a position. Statute requiring the use of objective job-related criteria in performance standards does not prohibit an absolute performance standard, so long as the standard is objective and tailored to the specific requirements of the position. *Jackson v. Dep't of Veterans Affairs*, 97 M.S.P.R. 13 (2004); 5 U.S.C. § 4302(b)(1).

i. Standards requiring near perfection in a critical element can be an abuse of discretion. *Walker v. Dep't of Treasury*, 28 M.S.P.R. 227 (1985) overruled in part by *Jackson v. Dep't of Veterans Affairs*, 97 M.S.P.R. 13 (A performance standard that required an accounting clerk to achieve a 99.5% accuracy rate in the screening, logging, and distribution of correspondence was unreasonable).

j. Performance standard applied to Navy human resources specialist in his PIP allowing only two errors was not an unreasonable error rate or unobtainable. Appellant presented no specific argument as to why that number of errors, although small, represented an unreasonable error rate, nor provided any reason to believe that the required level of performance was unobtainable. *Dobson v. Dep't of Navy*, 283 Fed. Appx. 818 (2008).

k. Backward Standards. Writing minimally acceptable standards in terms that describe unacceptable performance is improper. *Jackson-Francis v. Dep't of Gov't Ethics*, 2006 M.S.P.B. 255 (2006); *Eibel v. Dep't of Navy*, 857 F.2d 1439 (Fed. Cir. 1988).

l. Vague standards. Standards containing measurement devices such as "sometimes" are so vague as to render the standards invalid. *Smith v. Dep't of Energy*, 49 M.S.P.R. 110 (1991); *Wilson v. Dep't of Health and Human Services*, 770 F.2d 1048 (Fed. Cir. 1985). The standards in *Wilson* that were expressed in terms of minimally satisfactory performance were, essentially, measures of unacceptable performance. The court found the standards impermissibly vague because they could not be applied in a verifiable fashion and because they did not indicate the level of proficiency that the agency actually intended the phrases to mean. *Duggan v. Dep't of Health and Human Services*, 33 M.S.P.R. 568, 571 (1987) (the same result as to similar standards for an employee development specialist).

m. An agency may give content to performance standards by informing the employee of specific work requirements through written instructions, information concerning deficiencies and methods of improving performance, memoranda describing unacceptable performance, and responses to the employee's questions concerning performance. *Baker v. Defense Logistics Agency*, 25 M.S.P.R. 614, 617 (1985), aff'd 782 F.2d 1579 (Fed. Cir. 1986); *Thompson v. Dep't of Navy*, 89 M.S.P.R. 188, 195 (2001).

n. Fleshing out of a standard in a PIP may not amount to rewriting the standard. *Eibel v. Dep't of Navy*, 857 F.2d 1439, 1443 (Fed. Cir. 1988).

o. Generic performance standards. Standing alone, generic performance standards do not, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of

objective criteria. 5 U.S.C. § 4302 (b)(1). The standards are not sufficiently precise and specific as to invoke a general consensus as to their meaning and content; and do not allow a supervisor to make a verifiable decision regarding an employee. *Wilson v. Dep't of Health and Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985).

2. Employee was informed of the specific performance deficiencies.

   a. Can be done in the PIP, if not earlier. *Bustamante v. Dep't of Air Force*, 2000 U.S. App. LEXIS 16057 (Fed. Cir. July 10, 2000) (unpublished).

   b. Notice of the performance action must inform employee of the performance level required to be acceptable. *Smallwood v. Dep't of Navy*, 52 M.S.P.R. 678 (1992) (By informing the appellant at the beginning of the PIP that his task for the 90-day period was under component 4E and that he could be removed if his performance did not improve to a minimally acceptable level, the agency sufficiently notified the appellant that his unacceptable performance of component 4E would warrant a rating of unacceptable performance of Critical Element 4 as a whole).

   c. Notice that performance is marginal is insufficient. *Colgan v. Dep't of Navy*, 28 M.S.P.R. 116 (1985). An agency may not take an unacceptable performance action until it has warned the employee of unsatisfactory performance and given him a chance to improve. It is insufficient to warn the employee of marginal performance, look for improvement, and, not finding it, take an unacceptable performance action. *Wilson, Jr. v. Interstate Commerce Commission*, 85 FMSR 5289, 28 M.S.P.R. 198 (MSPB 1985).

3. Employee given reasonable amount of time to demonstrate acceptable performance.

   a. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance. 5 C.F.R. § 432.104.

b. A PIP must provide a meaningful opportunity to improve. *Goodwin v. Dep't of Air Force,* 75 M.S.P.R. 204 (1997).

4. Length of PIP. What is reasonable depends on the circumstances of the case. *Diprizio v. Dep't of Transp.*, 88 M.S.P.R. 73 (2001). In rating an employee's performance during the PIP, the agency may use proportional or pro-rated standards to assess performance of annual numerical standards. *Brown v. Veterans Admin.*, 44 M.S.P.R. 635, 644-645 (1990). Example: If annual numerical standard is for "no more than 12 errors per annual rating period," during the 90-day PIP it may be appropriate in some cases to pro- rate the standard to "no more than 3 errors."

5. Impact of employee improvement during this period. *Zoltowski v. Dep't of Army*, 26 M.S.P.R. 525 (1985) (Acceptable performance assessment at end of employee's improvement period demonstrated that employee met established minimum performance standards for critical elements of his job, thus precluding agency from proposing and taking a performance-based action without providing notice of poor performance and some opportunity to improve).

6. The PIP is "good for one year."

   a. Employee must maintain acceptable performance for one year from the beginning of PIP or no new PIP is required. 5 C.F.R. § 432.105(a)(2).

   b. An agency may not propose a second Chapter 43 action without providing a new notice period, where the employee was once deficient but then demonstrated acceptable performance within the PIP timeline. If the deficiency is identified again, outside of the one year period, a new opportunity to demonstrate acceptable performance must be provided. 5 C.F.R. § 432.105(a).

7. Employee's performance in a critical element continued to be unacceptable despite management assistance.

   a. Show substantial evidence that performance was unacceptable in at least one critical element. *Luscri v. Dep't of Army*, 39 M.S.P.R. 482, 490, aff'd 887 F.2d 1094.

   b. Numerical Standards. If an agency utilizes numerical standards, it must be prepared to demonstrate the reasonableness of the standard. Agency must show that the standard was realistic and reasonably attainable, and that the agency did not abuse its discretion in establishing the standard. *Rocheleau v. SEC*, 29

M.S.P.R. 193 (1985). Where a percentage of errors is allowed, the Board has not required a 100 percent review of the employee's work or an accounting of every item of work, but has allowed a representative sampling of the work. *Dep't of Army*, 47 M.S.P.R. 379 (1991); *Johnson v. Veteran Admin*, 32 M.S.P.R. 443 (1987).

8. Thirty days advanced written notice of the proposed action that identifies both specific instances of unacceptable performance by the employee on which the proposed action is based and critical element(s) of the employee's position involved in each instance of unacceptable performance. Although 5 U.S.C. § 4303(c) requires an agency to make its decision on a performance action under Chapter 43 within 30 days of the expiration of the notice period, the agency's failure to do so is procedural error, but may not be harmful error requiring reversal of the action. *Diaz v. Dep't of the Air Force*, 63 F.3d 1107 (Fed. Cir. 1995).

9. Opportunity to Reply. The agency shall afford the employee a reasonable time to answer the agency's notice of proposed action orally or in writing.

10. Representation. The agency shall allow the employee to be represented by an attorney or other representative.

11. Consideration of medical condition. The agency shall allow an employee who wishes to raise a medical condition that may have contributed to his or her unacceptable performance to furnish medical documentation of the condition for the agency's consideration.

12. Final written decision. The agency shall make its final decision within 30 days after expiration of the advance notice period. Unless proposed by the head of the agency, such written decision shall be concurred in by an employee who is in a higher position than the person who proposed the action.

V. ROLE OF MERIT SYSTEMS PROTECTION BOARD IN CHAPTER 43 UNACCEPTABLE PERFORMANCE CASES.

A. The MSPB (and arbitrators if employee proceeds under negotiated grievance procedures) cannot mitigate agency action under Chapter 43. *Horner v. Bell*, 825 F.2d 382 (Fed. Cir. 1987); *Lisiecki v. Merit Systems Protection Bd.*, 769 F.2d 1558 (Fed. Cir. 1985); *Davis v. Dep't of Health and Human Services*, 58 M.S.P.R. 538 (1993); *Cook v. Equal Employment Opportunity Comm'n*, 50 M.S.P.R. 660 (1991).

B. Alternative to Chapter 43 performance problem: Use Chapter 75.

1. Agencies may take adverse action based on unacceptable performance using Chapter 43 or Chapter 75 procedures. *Lovshin v. Dep't of Navy*, 767 F.2d 826 (Fed. Cir. 1985); *Mahaffey v. Dep't of Agric.*, 105 M.S.P.R. 347 (MSPB 2007); *Fairall v. Veterans Admin.*, 844 F.2d 775, 76 (Fed. Cir. 1987) (A Chapter 75 action can be entirely or partially performance-based).

2. An agency may not process an action under Chapter 43 and then change the theory of its case to Chapter 75 after hearing, by which point it has determined that it has not complied with all Chapter 43 requirements. *Shorey v. Dep't of Army*, 77 M.S.P.R. 239 (1998), citing *Ortiz v. U.S. Marine Corps*, 37 M.S.P.R. 359 (1988).

3. Chapter 43 standards cannot be applied to a Chapter 75 case. A specific standard of performance need not be established and identified in advance for the appellant in a performance action brought under Chapter 75. Rather, when an agency takes such an action under Chapter 75, it must simply prove that its measurement of the appellant's performance was both accurate and reasonable. *Shorey v. Dep't of Army*, 77 M.S.P.R. 239 (1998), citing *Moore v. Dep't of Army*, 59 M.S.P.R. 261, *appeal dismissed*, 16 F.3d 422 (Fed. Cir. 1993).

C. Whistleblower allegations. *Jones v. Dep't of Health and Human Services*, 15 Fed. Appx. 896 (2001) (unpublished) (Employee performing at unacceptable level in at least two critical elements; therefore, agency would have removed him absent any disclosures protected by Whistleblower Protection Act).

D. Court of Appeals for the Federal Circuit (CAFC). The CAFC has limited scope of review of MSPB decisions. The CAFC will affirm unless agency decision is (1) arbitrary, capricious, or an abuse of discretion, (2) obtained without procedure required by law, rule, or regulation, or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c); *Cleland v. Office of Pers. Mgmt.*, 984 F.2d 1193, 1194 (Fed. Cir. 1993). The court does not review the facts anew. *Bevans v. Office of Pers. Mgmt.*, 900 F.2d 1558, 1565 (Fed. Cir. 1990).

VI. OTHER PERFORMANCE BASED ACTIONS.

A. Employee performance may impact other personnel actions.

B. DPMAP links the following employee personnel actions to performance appraisals for employees:

1. Promotion. To be eligible for a promotion under a merit promotion plan pursuant to 5 C.F.R. § 335.103, an employee must meet minimum

qualification standards and other promotion criteria. Due weight will be given to performance appraisals and incentive awards. To be eligible for a career ladder promotion under a merit promotion plan pursuant to 5 C.F.R. § 335.104, an employee must be performing at the "Fully Successful" level or higher. However, the fact that employees are rated "Fully Successful" or higher at the time they are eligible for promotion does not mean promotions are automatic.

2. Within-Grade Increase (WGI). A WGI or periodic step increase is an increase in an employee's rate of basic pay from one step of the grade of his/her position to the next higher step of that grade pursuant to 5 C.F.R. §§ 531.404, 532.417, and 5 U.S.C. § 5335.

    a. A supervisor will discuss an upcoming WGI with an employee and may document the date of this conversation in the section designated for progress reviews in the MyPerformance Appraisal Tool.

    b. The decision to grant or deny a WGI is based on the employee's most recent rating of record issued within the WGI waiting period. To receive a WGI, the employee must be performing at the "Fully Successful" level or higher with a rating of record of "3" or higher. When a WGI decision is not consistent with the employee's most recent rating of record, a more current rating of record must be prepared. When considering denying a WGI, a supervisor should contact their servicing human resources office for further information and assistance in following the requirements in 5 C.F.R. §§ 531.409, 531.411.

3. Quality Step Increase (QSI). The purpose of a QSI is to recognize excellence in performance by granting an accelerated step increase. A QSI is a permanent salary increase for General Schedule employees only, and careful consideration should be given before granting a QSI. QSIs must be limited to those cases where exceptional performance has extended over a significant period of time and is expected to continue into the future. To be eligible for a QSI, an employee must:

    a. Currently be paid below step 10 of his or her grade.

    b. Have a most recent rating of record of Level 5 ("Outstanding").

    c. Have demonstrated sustained performance of high quality for a significant period of time.

d. Have not received a QSI (or QSI-equivalent under a personnel system other than the General Schedule) within the preceding 52 consecutive calendar weeks.

4. MSPB (and Arbitrator) Review.

a. Agency failure to provide employee access to documents forming basis for negative acceptable level of competence determination is harmful procedural error. *Fagan v. Dep't of Navy*, 25 M.S.P.R. 87 (1984).

b. Standard of Review of denial of WGI - Substantial Evidence. *Romane v. Defense Contract Audit Agency*, 760 F.2d 1286 (Fed. Cir. 1985); *Harvey v. Dep't of Navy*, 65 M.S.P.R. 120 (1994).

VII. PERFORMANCE ACTIONS AND EXECUTIVE ORDER 13839.

A. On May 25, 2018, President Trump issued Executive Order (EO) 13839, Promoting Accountability and the Streamlining Removal Procedures Consistent With Merit System Principles. After litigation for over a year, in October 2019, EO 13839 (as well as EO 13836 and EO 13837) became fully implemented.

B. This EO intends to "advance the ability of supervisors…to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections."

C. Principles for accountability in the Federal Workplace.

1. The President's E.O. reinforces that managers should recognize and reward good employees, while taking the necessary steps to remove unacceptable performers if they do not improve and should promptly address employee misconduct.

2. It establishes principles reshaping how DOD addresses employee performance and conduct. Further, DOD agencies must take into account these principles when revising their policies and renegotiating collective bargaining agreements consistent with the requirements in Section 7. These principles are:

a. Limit the opportunity period under 5 U.S.C. §4302(c)(6) to only the amount of time sufficient to demonstrate acceptable performance.

b. To the extent practicable, issue decisions on proposed removals within 15 business days after the employee's reply period ended, to include any extensions.

c. To the extent practicable, limit the advance written notice to 30 days of an adverse action proposed under 5 U.S.C. §7513(b)(1).

d. In appropriate cases, use Chapter 75 procedures to address instances of unacceptable performance.

e. Use the probationary period to assess how well an appointee can perform the duties of a job before the appointment becomes final.

CHAPTER C

EMPLOYEE DISCIPLINE FOR MISCONDUCT

I. REFERENCES.

A. Title 5, United States Code, §§ 7501-7514.

B. Title 5, Code of Federal Regulations, Part 752.

C. Army Regulation (AR) 690-700, Ch. 751.

D. Air Force Instruction (AFI) 36-704.

E. Secretary of the Navy Instruction (SECNAVINST) 12752.1.

F. Marine Corps Order (MCO) 12000 series (Civilian Personnel).

G. Executive Order 13839, Promoting Accountability and Streamling Removal Procedures Consistent with Merit System Principles (May 25, 2018).

II. INTRODUCTION.

A. Both 5 U.S.C. § 7512 and 5 U.S.C. § 7513(d) place within the jurisdiction of the Merit System Protection Board (MSPB) an employee's removal, suspension for more than 14 days, reduction in grade, reduction in pay, and a furlough of 30 days or less. For actions excluded *see* 5 C.F.R. § 752.401(b).

1. Although we will refer to adverse actions as disciplinary cases within the MSPB's ordinary appellate jurisdiction, Chapter 75 of 5 U.S.C. is entitled "Adverse Actions," and within Chapter 75 are: Subchapter I which defines procedures to be followed for suspensions of 14 days or less; Subchapter III which involves actions against administrative law judges; Chapter IV which concerns actions taken against employees for reasons of national security; and Subchapter V which covers actions involving members of the Senior Executive Service (SES).

2. Office of Personnel Management (OPM) regulations, 5 C.F.R. §§ 752.201-03, refers to "actions covered," while the regulations describe the more severe disciplinary actions within the MSPB's jurisdiction, 5 C.F.R. §§ 752.401-06 , refers to "adverse actions" covered. Nuance and linguistics aside, references to adverse actions in this chapter will be to the several actions specifically placed within the MSPB's jurisdiction by statute.

B. A decision to discipline a federal employee through an adverse action must have a rational basis. *Kmiecz v. Dep't of Army*, 29 M.S.P.R. 673, 676 (1986). There must also be an actual adverse decision. On occasion, an agency may take steps to remove an employee, but then separate the employee through other means, e.g., a Reduction-in-Force (RIF). The MSPB may need to sort through the chronology of events and the attendant paperwork and circumstances to determine the ultimate basis, if any, of its jurisdiction over the employee's appeal. *Martin v. Dep't of Navy*, 61 M.S.P.R. 21, 25 (1994) (a removal for physical inability to perform work was superseded by a RIF).

1. To sustain an adverse action, the agency must prove by preponderant evidence that the charged conduct occurred, that a nexus exists between the conduct and service efficiency, and that the penalty is reasonable. *Pope v. U.S.P.S.*, 114 F.3d 1144, 1147 (Fed. Cir. 1997); *Sarratt v. U.S.P.S.*, 90 M.S.P.R. 405 (2001) (restating the rule and adding that once the agency learns that employee is fit for duty, the employee must be restored immediately to active duty status).

2. When the agency proves its charge and shows a nexus between the charge and *service effi*ciency, the Board makes a separate determination concerning the penalty. *Gregory v. Dep't of Educ.*, 16 M.S.P.R. 144, 146 (1983); *Williams v. U.S.P.S.*, 5 M.S.P.R. 5, 7 ("In every appeal from an adverse action, this Board is mandated to determine both that the alleged employee misconduct has in fact occurred, and that the disciplinary action taken against the employee will promote the efficiency of the service").

III. DISCIPLINARY ACTIONS FOR MISCONDUCT.

A. Types of actions.

1. Informal Actions. Used to correct minor misconduct or delinquency. Normally the first step in progressive discipline for behavioral offenses. However, federal law and Exeuctive Order (EO) 13839, Section 2(b) states "Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances."

   a. Examples include oral admonitions, written warnings, and oral reprimands.

   b. Supervisors should document informal actions (e.g., in a Memorandum for Record), and notify the employee.

2. Formal Actions. Range from letters of reprimand to removal from service.

   a. Written reprimands. Formal disciplinary letter used to correct significant misconduct or delinquency and repeated lesser offenses.

b. Suspension. Action that places an employee in a non-duty/non-pay temporary status for disciplinary reasons.

(1) Suspension for 14 days or less is nonappealable to the MSPB. Days are counted in calendar days, not workdays. 5 C.F.R. §§ 752.201(d)(1), 752.402.

(2) Suspensions of greater than 14 days are discussed below.

3. Appealable adverse actions. 5 U.S.C. § 7512; 5 C.F.R. §§ 752.301-406.

a. Suspension for more than 14 days.

b. Removal from federal service.

c. Reduction in grade or pay.

d. Furloughs for 30 days or less are adverse actions, but are used for nondisciplinary reasons. Furloughs for more than 30 days are governed by RIF procedures.

B. Procedural requirements in misconduct actions.

1. Informal Actions. AR 690-700, Ch. 751, ¶ 1-3a.

a. Applicability. Procedural requirements apply to all employees regardless of status.

b. Procedures. The supervisor will advise the employee of the specific infraction or breach of conduct and when and where it occurred. The employee should be allowed to explain his or her side of the incident. The supervisor will then advise the employee that continued violations may result in formal disciplinary action.

c. Process is oral, but document in Memorandum for Record.

d. No record is place in the employee's official personnel file (OPF).

2. Letters of Reprimand.

a. Applicability. Procedural requirements apply to all employees regardless of status.

b. Procedures.

(1) Pre-reprimand. Supervisor obtains all reasonably available and relevant information to determine if a reprimand is warranted and appropriate. Supervisor may interview employee but does not have to.

(2) No right to counsel.

(3) Written decision. In accordance with AR 690-700, ¶ 3-2, the written reprimand normally contains the following information (not all apply in every case):

(a) Sufficiently detailed description of the conduct or offense (basis for the reprimand) to provide notice. Specifics like time, place, date, and description of the incident should be included;

(b) Statement that the reprimand will be made a matter of record and incorporated in the employee's OPF.

(c) Provide specific period of time that disciplinary action will remain in OPF (not to exceed 3 years);

(d) Summary of previous offenses (if any);

(e) A warning that future misconduct may result in more severe disciplinary action;

(f) Advice regarding services or assistance (such as the Employee Assistance Program available to help the employee overcome the deficiency and avoid future recurrences. Employee will be informed regarding any specific action require on his or her part; and

(g) Information on the appropriate grievance channel the employee may use to contest the reprimand.

(4) The Civilian Personnel Advisory Center (Human Resources Office or Civilian Personnel Office) and labor counselor should provide support with drafting of reprimand and a legal review.

(5) Filing determination. Reprimand is placed in employee's OPF for a period determined by imposing official, but tno to exceed 3 years. AR 690-700, Ch. 751, ¶ 3-2(c).

3. Suspensions of 14 days or less.

a. Applicability. Predecisional procedural protections apply to nonprobationary competitive service (CS) employees, nonprobationary excepted service (ES) employees, and nonprobationary preference eligible (PE) ES employees. 5 U.S.C. § 7511(a)(1)(B)&(C).

b. Procedures. 5 U.S.C. § 7503(b); 5 C.F.R. § 752.203.

(1) Advance written notice stating specific reasons for proposed suspension.

(2) Right to review material relied on by management to support the action.

(3) Reasonable time to submit written and oral reply (not less than 24 hours).

(4) Right to representation (not provided by agency).

(a) Attorney or other representative.

(b) Agency may disallow a representative if the representation would cause a conflict of interest with the representative's duties or if representation would interfere with the representative's official duties.

(5) Final written decision that considers the employee's response.

c. Substantive Standard. Suspend "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7503(a).

d. Not appealable to the MSPB. Employee may use grievance procedure to challenge the suspension. 5 C.F.R. § 752.203(f).

e. Consecutive suspensions. There is no MSPB jurisdiction if an employee is suspended for two consecutive periods totaling more than 14 days, so long as the suspensions arise out of separate events and circumstances. They cannot be combined to constitute a single suspension for determining jurisdiction. *Jennings v. MSPB*, 59 F.3d 159 (Fed. Cir. 1995).

4. Appealable Adverse Actions. Reductions in pay or grade, suspensions for more than 14 days, furlough for 30 days or less, and removals. 5 U.S.C. §§ 7511-7514.

a. Applicability. Predecisional procedural protections apply only to:

(1) Nonprobationary CS employees, and

(2) Nonprobationary-equivalent ES employees. ES employees are nonprobationary-equivalent if they are PE and have completed one year of continuous service or are nonpreference eligible and have completed two years of continuous service.

(a) The Civil Service Due Process Act, 104 Stat. 461 (1990), amended the statutory definition of "employee" (5 U.S.C. § 7511(a)(1)) to include ES, non-PE employees who have completed two years of current continuous service in the same or similar position.

(b) Note: Some civilian intelligence personnel are excluded and do not get certain pre-decisional and post-decisional rights. 5 C.F.R. § 752.401(d)(9) (Non-PE with an intelligence activity of a military department covered under 10 U.S.C. § 1601, et seq.).

b. Procedures. 5 U.S.C. § 7513; 5 C.F.R. § 752.404.

(1) 30 days' advance written notice. (Unless "Crime Exception" applies, discussed below).

(2) Right to review material relied on by management to support the action.

(3) At least seven days to submit written and oral reply.

(4) Optional agency hearing.

(5) Right to representation (attorney or other) (not paid for by the agency).

(6) Final written decision that considers employee's response.

c. Substantive Standard. Management takes the action "for such cause as will promote the efficiency of the service" (nexus). 5 U.S.C. § 7513(a).

d. Notice of Proposed Removal.

(1) Must include all charges, all specifications, penalty factors, and allow for the employee to make an informed reply. Before an agency may terminate an employee, it must give the employee advanced written notice stating the specific reason(s) for the

proposed action. The notice must be sufficient to place the employee on notice of "the claims with which he is being charged so that he may adequately prepare and present a defense before the agency." *Burroughs v. U.S. Dep't of Army*, 96 F.3d 1451, 1451 (9th Cir. 1996).

(2) Harmful Error. *Brown v. U.S.P.S.*, 47 M.S.P.R. 50, 57 (1991) (Agency committed harmful procedural error when the notice of proposed removal and letter of decision failed to provide employee with specific and timely notice of charge of contributing to delinquency of a craft employee, which charge agency raised on day before hearing, depriving employee of opportunity to defend himself against charge).

e. Advance written notice and opportunity to respond are fundamental procedural due process rights. *Howarth v. U.S.P.S.*, 77 M.S.P.R. 1 (1997).

f. Postdecisional Rights. Nonprobationary CS and nonprobationary-equivalent ES employees can appeal adverse actions to the MSPB under Chapter 75. 5 U.S.C. § 7513(d); 5 C.F.R. § 752.405. Non appealable actions under Ch. 75 include:

(1) Suspension or removal under 5 U.S.C. § 7532 in the interests of national security;

(2) RIF under 5 U.S.C. § 3502;

(3) Reduction in grade of supervisor or manager who has not completed the one-year supervisory probationary period, if such reduction is to the grade held immediately before becoming supervisor/manager under 5 U.S.C. § 3321(a)(2); or

(4) Reduction in grade or removal for unacceptable performance under Chapter 43 (5 U.S.C. § 4303).

g. Limited procedural and substantive due process for probationary and probationary-equivalent employees.

(1) Probationary CS and probationary PE ES employees.

(a) Only entitled to written notice stating the reasons for removal and the effective date of the separation (5 C.F.R. § 315.804) *unless* the action is based on incidents arising before appointment to civil service (e.g., lied on

job application), in which case the employee is entitled to advance written notice, an opportunity to respond in writing, and a final written decision. 5 C.F.R. § 315.805; *Milanak v. Dep't of Transp.*, 90 M.S.P.R. 219 (2001).

(b) MSPB Appeals.

(i) Probationary employees terminated based on incidents arising before or after their appointment may appeal their removal to the MSPB if the removal was based on partisan political reasons or marital status. 5 C.F.R. § 315.806(b); *Hunter v. Dep't of Justice*, 73 M.S.P.R. 290, 293 (1997).

(ii) Probationary employees terminated based on incidents arising before their appointment may also appeal to the MSPB for defects in the procedures required by 5 C.F.R. § 315.805:

a. advance written notice of the proposed adverse action including the reasons for the action;

b. a reasonable time to respond to the notice in writing and to have the response considered by the agency in making its decision; and

c. written notice of the decision at or before the effective date of the action, informing the employee of the reasons for the decision and providing information about appeal rights.

(2) Probationary-equivalent ES employees (those who are not PE and have less than two years of continuous service).

(a) Not entitled to predecisional rights.

(b) MSPB Appeals. Like probationary employees, probationary-equivalent ES employees can only appeal their removal to the MSPB if the removal was based on partisan political reasons or marital status. *Polite v. Dep't of Navy*, 49 M.S.P.R. 653 (1991).

(3) National Guard Technicians. No MSPB jurisdiction to hear appeals of adverse actions. MSPB also does not have

authority to hear National Guard Technician whistleblower reprisal cases under 5 U.S.C. § 1221. *Singleton v. Merit Systems Protection Bd.,* 244 F.3d 1331 (Fed. Cir. 2001).

(4) Term Employment. An agency may make a term appointment for a period of more than one year but not more than four years to positions where the need for an employee's services is not permanent. 5 C.F.R. § 316.301. The first year of service of a term employee is a "trial period" regardless of method of appointment. The Agency may terminate a term employee at any time during the trial period. The term employee is entitled to the same procedures set forth for "probationary" employees as discussed in 5 C.F.R. § 315.804 and § 315.805.

IV. SELECTED ISSUES REGARDING PREDECISIONAL PROCEDURAL RIGHTS.

A. Duty status during the advance notice and reply period.

1. General Rule. Under ordinary circumstances, an employee whose removal or suspension, including indefinite suspension, has been proposed shall remain in a duty status in his or her regular position during the advance notice period. 5 C.F.R. § 752.404(b)(3).

2. In rare circumstances where the agency determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the agency may elect one or a combination of the following alternatives:

a. Assign employee to duties for which employee does not pose a threat to safety, the agency mission, or Government property;

b. Place employee on annual leave (with employee's consent);

c. Place employee on sick leave (only if there is medical documentation of physical or mental incapacitation);

d. Place employee on leave without pay or in an absent without leave status, if the employee is absent for reasons not originating with the agency;

e. Invoke the shorter notice period, if the Crime Exception is applicable (see below); or

f. Place employee on paid nonduty status for the whole notice period.

B. Shortening the 30-day advance notice/reply period in adverse actions—the Crime Exception. 5 U.S.C. § 7513(b)(1); 5 C.F.R. § 752.404(d)(1).

1. Basis: Reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. Statute does *not* require agency to prove the criminal charge prior to invoking the shortened, 7-day notice period. *Littlejohn v. U.S.P.S.*, 25 M.S.P.R. 478, 482 (1984).

2. Reasonable Cause. The information relied upon by the agency at the time it invokes a shortened notice period controls the validity of the action. If the agency did not have reasonable cause at the time it imposed the discipline, later conviction of the employee for criminal conduct does not retroactively validate the shortened notice period. *Benton v. Dept. of the Army*, 13 M.S.P.R. 357, 359 (1982).

a. Indictment is sufficient for agency's reasonable cause. *Smith v. Government Printing Office*, 60 M.S.P.R. 450 (1994); *Pararas-Carayannis v. Dep't of Commerce*, 9 F.3d 955 (Fed. Cir. 1993); *Dalton v. Dep't of Justice*, 66 M.S.P.R. 429 (1995).

b. Investigation. Indefinite suspension actions may properly be based upon sufficient evidence of reasonable cause that is adduced in agency investigations. *Bell v. Dep't of Treasury*, 54 M.S.P.R. 619 (1992); *Canevari v. Dep't of the Treasury*, 50 M.S.P.R. 311 (1991) (The agency could place an employee on indefinite suspension pending completion of its own investigation into possible criminal misconduct, and could then proceed with an adverse action after termination of an investigation by a law enforcement agency).

c. Arrest. An arrest, by itself, does not provide a valid basis reasonable cause. *Dunnington v. Dep't of Justice*, 956 F.2d 1151 (Fed. Cir. 1992). Like investigation, arrest alone is insufficient. *Ellis v. Dep't of Veterans Affairs*, 60 M.S.P.R. 681 (1994); *Reid v. U.S.P.S.*, 54 M.S.P.R. 648 (1992); *Dunnington v. Dep't of Justice*, 956 F.2d 1151, 1157 (Fed. Cir. 1992) (Where an arrest warrant was issued based on a magistrate's finding of probable cause, the agency still must assure itself that the surrounding facts are sufficient to justify the summary action by the agency).

d. Warrant. A warrant for an employee's arrest, standing alone, is not a valid basis for reasonable cause. *Barresi v. U.S.P.S.*, 65 M.S.P.R. 656 (1994).

e. Combination of circumstances giving rise to reasonable cause. *Honeycutt v. Dep't of Labor*, 22 M.S.P.R. 491 (1984); *Backus v. Office of Personnel Mgmt.*, 22 M.S.P.R. 457 (1984), but see *Ellis v. Dep't of Veterans Affairs*, 60 M.S.P.R. 681 (1994) (Employee's arrest for murder after he shot and killed a customer in his bar, newspaper article reporting the arrest, and the employee's admission to his supervisor that he killed someone did not give the agency reasonable cause to believe the employee committed a crime for which sentence of imprisonment could be imposed when newspaper article provided few details of underlying incident, and it was unclear whether employee confessed or simply stated that he acted in self-defense).

f. Duty status: Employee may be placed in a nonduty status for time necessary to complete action. Practically, the supervisor may place the employee in administrative leave to effectuate the action.

g. Indefinite suspension. See below.

C. Indefinite suspension pending disposition of criminal charges.

1. Indefinite suspension means placing an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action that may include the completion of any subsequent administrative action. 5 C.F.R. § 752.402(e).

2. OPM regulations (5 C.F.R. § 752.402(e)) permits agency to place employee on indefinite suspension pending completion of investigation or criminal proceedings when the agency has reasonable cause to believe the employee has committed a crime for which the employee could be imprisoned. Agencies must meet the reasonable cause standard imposed by the MSPB and courts, and must terminate the suspension promptly upon completion of the event it identified when imposing the suspension; i.e., usually its own investigation or a criminal proceeding.

3. Due Process Rights. The employee is entitled to the same predecisional rights as in any disciplinary action. 5 U.S.C. § 7513.

4. Agency may suspend employee indefinitely to allow examination of criminal misconduct if:

a. The agency has reasonable cause to believe employee has committed a crime for which imprisonment may be imposed;

b. There is a nexus between the criminal charge and the efficiency of the service. Nexus: there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest; and

c. The suspension has an ascertainable end ("a determinable condition subsequent that will bring the suspension to a conclusion"). 5 U.S.C. §§ 7513(a), (b)(1); *Cooper v. Dep't of Health and Human Services*, 80 M.S.P.R. 612 (1999).

5. Nature of Indefinite Suspension Action.

a. Temporary—to allow examination of alleged criminal misconduct. 5 C.F.R. § 752.402(e).

b. Suspension must state a valid condition subsequent that will terminate the suspension (completion of criminal trial or completion of agency investigation). *Jones v. Dep't of the Army*, 68 M.S.P.R. 398 (1995); *Johnson v. U.S.P.S.*, 37 M.S.P.R. 388 (1988); *Dunnington v. Dep't of Justice*, 956 F.2d 1151, 1156 (Fed. Cir. 1992) (Suspension must be terminated within a reasonable time following resolution of criminal charge).

c. A valid indefinite suspension has an ascertainable end, which is a condition subsequent that can be determined and will bring the suspension to a conclusion. The suspension can extend through the completion of both a pending investigation and any subsequent administrative action. The passage of one year, by itself, does not render an otherwise properly effected indefinite suspension improper. *Drain v. Dep't of Justice*, 108 M.S.P.R. 562 (2008).

(1) In cases where there are two conditions subsequent, i.e., the resolution of the criminal charges and the resolution of any further proposed adverse action deemed appropriate, the MSPB has recognized that an indefinite suspension may continue when the employing agency moves expeditiously to initiate an adverse action as of the date of the indictment's dismissal. *Hernandez v. Dep't. of Justice*, 35 M.S.P.R. 669, 671-72 (1987).

(2) If a condition subsequent is completion of agency investigation, suspension is not appropriate if investigation of misconduct is

completed before suspension is imposed. *Giacobbi v. U.S.P.S.*, 30 M.S.P.R. 39 (1986); *Littlejohn v. U.S.P.S.*, 25 M.S.P.R. 478 (1984).

6. Action when criminal charges resolved (or agency investigation is terminated). Agency must take prompt action to:

a. Reinstate the employee.

(1) The indefinite suspension should be terminated, and the employee reinstated, as of the date of the indictment's dismissal because there is simply no basis for continuation of the suspension as of that time, in the absence of any decision by the agency to initiate an additional adverse action. *Jarvis v. Dep't of Justice,* 45 M.S.P.R. 104, 112 (1990); *Lund v. Dep't of Defense,* 41 M.S.P.R. 115, 119 (1989); *Hernandez v. Dep't of Justice,* 35 M.S.P.R. 669, 671-72 (1987).

(2) Where agency suspended employee pending disposition of criminal charges against him or resolution of any further proposed adverse action deemed appropriate, but agency waited 60 calendar days from date on which criminal charge was dismissed to date on which it issued its notice of proposal to remove employee based on misconduct underlying the charge, agency failed to prove that it terminated suspension promptly, and thus employee was entitled reversal of suspension as of date of dismissal of criminal charge. *Hernandez v. Dep't of Justice*, 35 M.S.P.R. 669 (1987).

(3) Effect of reinstatement on the indefinite suspension—Back Pay issue. *Richardson v. U.S. Customs Serv*., 47 F.3d 415 (Fed. Cir. 1995) (Holding that agency has discretion to award *or not award back pay* upon reinstatement from indefinite suspension); *Jones v. Dep't of Navy*, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992).

b. Initiate action to remove the employee.

(1) Agency may proceed with removal action based on underlying misconduct even if employee is acquitted.

(a) It is not necessary for petitioner to be convicted of a criminal offense for the agency's removal to be sustained. *Smith v. U.S.P.S.*, 789 F.2d 1540 (Fed. Cir. 1986) (stating that dismissal of criminal charges does not weaken an

agency's case of removal); *Serrano v. United States*, 222 Ct.Cl. 52, 612 F.2d 525, 530, (1979) (noting that an acquittal of charges at court martial did not preclude agency from independently determining whether an employee acted improperly).

(b) The agency is in no way estopped from imposing an adverse employment action solely because criminal proceedings resulted in no conviction. *Wilson v. Dep't of Homeland Sec.*, 208 Fed. Appx. 876 (C.A. Fed. 2006).

(2) If the conviction is overturned, the MSPB will reverse a removal if it is based *solely* on the conviction. *Payne v. U.S.P.S.*, 69 M.S.P.R. 503 (1996).

(3) The indefinite suspension may continue while the removal action is pending. *Engdahl v. Dep't of Navy*, 900 F.2d 1572 (Fed. Cir. 1990).

7. Conditions required for extending indefinite suspension through notice period of a subsequent removal action:

a. Resolution of criminal charges;

b. Notice to employee when indefinite suspension is proposed, that it may continue pending resolution of any further adverse action deemed appropriate; and

c. Action by the agency to initiate further action within a reasonable period of time after resolution of the criminal charges.

8. Proper role of proposing and deciding officials.

a. Although unusual, there is no *per se* prohibition on proposing and deciding official being the same person. *Hanley v. Gen. Serv. Admin.*, 829 F.2d 23 (Fed. Cir. 1987); *Franco v. Health and Human Servs.*, 32 M.S.P.R. 653 (1987), *aff'd*, 852 F.2d 1292 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).

b. In a performance action taken under Chapter 43, the proposing and deciding official can be the same person, but a higher-level official must approve the decision. 5 U.S.C. § 4303(b)(1)(D)(ii); *DeSarno v. Dep't of Commerce*, 761 F.2d 657 (Fed. Cir. 1985).

c. Practical consideration: Require that proposing nad deciding officials be different management offiicals to ensure objectivity in the action.

D. Ex-parte communications between deciding official and other agency officials does not constitute error *per se*. *Stone v. Fed. Deposit Insurance Corp*., 179 F.3d 1368 (1999) (No due process violation if ex parte communication did not introduce new and material information to the deciding official); *Blank v. Dep't of Army*, 247 F.3d 1225 (Fed. Cir. 2001); *Freeman v. Dep't of Navy*, 88 M.S.P.R. 659 (2001).

E. Emergency Furloughs: A furlough due to unforeseen circumstances, e.g., sudden breakdown in equipment, may be taken without an advance notice period. 5 C.F.R. § 752.404(d)(2).

V. PROOF REQUIREMENTS IN MISCONDUCT ACTIONS.

A. Proof requirements generally. In every formal disciplinary action for misconduct, the agency must prove by a preponderance of evidence that:

1. The employee committed the misconduct (*King v. Frazier*, 77 F.3d 1361, 1363 (Fed. Cir. 1996));

2. There is a nexus or connection between the misconduct and the efficiency of the service (*Id*.); and

3. The penalty was appropriate and reasonable. *Webster v. Dep't of Army*, 911 F.2d 679, 685-86 (Fed. Cir. 1990)).

B. Proving the employee committed the misconduct.

1. When charging employee misconduct, only charge what you can prove. Draft charges with great care. The MSPBmay not split a single charge into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original charge. "If the agency fails to prove one of the elements of its charge, then the entire charge must fail." *LaChance v. Merit Systems Protection Bd.*, 147 F.3d 1367 (Fed. Cir. 1998); *King v. Nazelrod*, 43 F.3d 663 (1994); *Burroughs v. Dep't of Army*, 918 F.2d 170 (Fed. Cir. 1990).

2. Independent evidence of act of misconduct.

a. An agency must prove all elements of offense charged by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B)); *Jacobs v. Dep't of Justice*, 35 F.3d 1543 (Fed. Cir. 1994); *Perez v. Railroad Retirement Bd.*, 65 M.S.P.R. 287 (1994); *Nazelrod v. Dep't of Justice*, 50 M.S.P.R. 456 (1991).

b. A charge citing a violation of a specific criminal statute must be proven by the elements of that law. *Heath v. Dep't of Transportation*, 64 M.S.P.R. 638 (1994); *Larry v. Dep't of Justice*, 76 M.S.P.R. 348, 355 (1997) (Explaining distinction between a charge based upon criminal proceedings and a charge based on underlying misconduct).

c. In proving *insubordination*, an agency must prove intent (a willful and intentional refusal to obey a direct order of a superior officer that the officer is entitled to give and have obeyed). With a charge of *failure to follow supervisory instructions*, the agency need only prove that the instructions were given and that the employee failed to follow them, without regard to whether the failure was intentional or unintentional. *Hamilton v. U.S.P.S.*, 71 M.S.P.R. 547 (1996); *Bryant v. Dep't of Army*, 84 M.S.P.R. 202 (1999).

3. Evidence of conviction—Collateral Estoppel.

a. General. *Fisher v. Dep't of Defense*, 64 M.S.P.R. 509 (1994).

b. In *Chisolm*, the MSPB was entitled to use the criminal conviction to collaterally estop employee from denying he committed those acts which led to his removal; however, proceeding was remanded for determination of whether precise issue on which Board sought to estop employee was in fact litigated and necessarily decided adversely to him in the criminal prosecution). *Chisolm v. DLA*, 656 F.2d 42 (3d Cir. 1981).

c. The MSPB will carefully examine the basis of a criminal conviction and compare it with the charges leading to the adverse action. *Owens v. U.S.P.S.*, 57 M.S.P.R. 63 (1993).

d. Alford "nolo contendere" pleas. *Loveland v. Dep't of Air Force*, 34 M.S.P.R. 484 (1987) (Appellant before the Board may be collaterally estopped from denying that he is guilty of crimes for which he was convicted pursuant to an *Alford* plea); *Fitzgerald v. Dep't of Army*, 61 M.S.P.R. 426 (1994) (Proof that the appellant pled nolo contendere was insufficient; agency was required to prove that the appellant pled guilty because its charge in the removal action was based upon the fact of the pleas, rather than the effect of the pleas or the underlying misconduct).

4. Evidence of indictment, arrest, or deferred prosecution insufficient to prove underlying misconduct, but it may justify an indefinite suspension, *O'Connor v. Dep't of Veterans Affairs*, 59 M.S.P.R. 653 (1993); *Roby v. Dep't of Justice*, 59 M.S.P.R. 426 (1993); *Crespo v. U.S.P.S.*, 53 M.S.P.R. 125 (1992).

C. Proving the nexus between the misconduct and the efficiency of the service.

1. An agency may only take an adverse action against an employee for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). This applies to both on- and off-duty misconduct. *White v. U.S.P.S.*, 768 F.2d 334, 335-36 (Fed.Cir.1985) (off-duty misconduct).

2. Three methods by which the agency may meet its burden (by a preponderance of evidence) of establishing a nexus linking an employee's off-duty misconduct are:

   a. A rebuttable presumption of nexus may arise in certain egregious circumstances;

   b. The misconduct at issue has adversely affected the employee's or co-workers' job performance, or the agency's trust and confidence in the employee's job performance; and

   c. The misconduct interfered with or adversely affected the agency's mission. *Beasley v. Dep't of Defense*, 52 M.S.P.R. 272, 274 (1992); *Johnson v. Dep't of Health and Human Services*, 86 M.S.P.R. 501, 509 (2000).

      (1) Notoriety/adverse publicity surrounding the incident is likely to provoke public indignation and reflect adversely on the agency. *Sherman v. Alexander*, 684 F.2d 464 (7th Cir. 1982), *cert. denied*, 459 U.S. 1116 (1983) (Counselor's sexual indecency with a teenage female and associated publicity); *White v. U.S.P.S.*, 768 F.2d 334, 336 (Fed. Cir. 1985) (Extensive publicity surrounding misconduct of federal employee can have severe repercussions on the mission of the agency).

      (2) Misconduct antithetical to agency's mission. *Royster v. Dep't of Justice*, 58 M.S.P.R. 495 (1993) (threatening and abusive conduct toward females while off-duty when employee was correctional officer in female prison); *Scofield v. Dep't of Treasury*, 53 M.S.P.R. 179 (1992); *Thompson v. Dep't of Justice*, 51 M.S.P.R. 43 (1991).

3. Rebuttable presumption of nexus arising in certain egregious circumstances based on the nature and gravity of the misconduct. *Graybill v. U.S.P.S.*, 782 F.2d 1567, 1574 (Fed. Cir. 1986); *Hayes v. Dep't of Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984).

a. Application of presumption. *Johnson v. HHS*, 22 M.S.P.R. 521 (1984); *Williams v. General Serv. Admin.*, 22 M.S.P.R. 476 (1984).

b. On-duty misconduct.

(1) Serious on-duty misconduct raises presumption of nexus. *Dalton v. Dep't of Justice*, 66 M.S.P.R. 429 (1995) (Corrections officer having sexual contact with inmates); *McClaskey v. Dep't of Energy*, 720 F.2d 583 (9th Cir. 1983) (Employee participated in plan to prevent government investigators from discovering his friends' theft of wire valued at $418 from the government facility where they worked).

(2) Minor on-the-job misconduct. *Coleman v. U.S.P.S.*, 57 M.S.P.R. 537 (1993) (drinking on job, AWOL); *Sternberg v. Dep't of Defense*, 52 M.S.P.R. 547 (1992) (failure to comply with orders and unauthorized use of government property).

c. Off-duty misconduct.

(1) *Graham v. U.S.P.S.*, 49 M.S.P.R. 364 (1991) (Off-duty sexual abuse of minor raised rebuttable presumption of nexus).

(2) Morale problems in office caused by employee's conduct (other employees are uncomfortable working with/around the employee). *Beasley v. Dep't of Defense*, 52 M.S.P.R. 272 (1992).

(3) Atmosphyere of fear and mistrust was disruptive to office morale. *Sherman v. Alexander*, 684 F.2d 464 (7th Cir. 1982).

(4) Impairment of office operation (Other employees have to pick up workload for problem employee). *Id.* at 469.

(5) Co-workers' apprehension about employee. *Walsh v. U.S.P.S.*, 53 M.S.P.R. 478 (1992) (Misappropriation of postal funds); *Backus v. Office of Pers. Mgmt.*, 22 M.S.P.R. 457 (1984) (Employee shot fiancée while off-duty).

(6) Supervisor's lack of confidence in employee. *Dunnington v. Dep't of Justice*, 956 F.2d 1151, 1158 (Fed. Cir. 1992).

(7) Misconduct created distrust by supervisors. *Brown v. Dep't. of Navy*, 229 F.3d 1356, 1359-61 (Fed. Cir. 2000) (MWR

employee engaged in affair with wife of a deployed Marine, a member of the unit employee was supposed to serve).

(8) Fiduciary duties and "shoplifting." *Stuhlmacher v. U.S.P.S.*, 89 M.S.P.R. 272 (2001) (Agency proved nexus when employee, who held a high-level management position with fiduciary responsibilities, switched price tags on merchandise while shopping; employee compromised the agency's trust in her ability to function in the supervisory position).

d. Employee rebuttal of presumption. *Abrams v. Dep't of Navy*, 714 F.2d 1219 (3d Cir. 1983) (Not sufficient for employee, who committed violent crime during off-duty hours, to introduce evidence that his conviction did not adversely affect his ability to perform his job, but rather he also had to show that his conviction did not affect the ability of his fellow employees to perform their work); *Johnson v. Dep't of Health and Human Services*, 86 M.S.P.R. 501 (2000).

D. Demonstrating penalty choice is appropriate (reasonable).

1. General Rule. *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). Relevant considerations for proposing and deciding officials may include:

a. Nature and seriousness of offense;

b. Employee's job level and type of employment (supervisor, public contact, prominence);

c. Employee's past disciplinary record;

d. Employee's past work record (length of service, job performance, dependability);

e. Effect of offense on employee's ability to perform job and effect upon supervisor's confidence in employee;

f. Consistency with penalties to other employees for similar offenses;

g. Consistency with agency's table of penalties;

h. Notoriety of the offense or its impact on the agency's reputation;

i. Clarity of notice to employee that conduct not acceptable;

j. Potential for employee's rehabilitation;

k. Mitigating circumstances; and

l. Adequacy of alternative sanctions to deter misconduct by this employee and others.

2. Agency need consider only *Douglas* factors relevant to its decision. *Nagel v. Health and Human Services,* 707 F.2d 1384 (Fed. Cir. 1983); *Lewis v. General Services Admin.,* 82 M.S.P.R. 259, 263 (1999).

a. Agency must present evidence demonstrating consideration of the relevant *Douglas* factors even if employee does not contest the propriety of the penalty choice. *Parsons v. Dep't of Air Force,* 707 F.2d 1406 (D.C. Cir. 1983).

b. Where an agency policy provides for removal of an employee found to be stealing government property for petty amounts, and even for the first offense, the deciding official must still demonstrate that she considered the relevant *Douglas* factors prior to deciding that removal is the appropriate penalty for the misconduct. *Banez v. Dep't of Defense,* 69 M.S.P.R. 642 (1996) (De minimis nature of theft may be significant mitigating factor when appellant has satisfactory work and disciplinary record).

c. Zero Tolerance Policies. Deciding official must still apply *Douglas* factors when deciding the appropriate penalty for violations of agency "zero tolerance" policies. *Brown v. Dep't of Treasury,* 91 M.S.P.R. 60 (2002) (IRS supervisor who accessed subordinate's tax account information without authorization); *Omites v.U.S.P.S.*, 87 M.S.P.R. 223 (2000) (Deciding official failed to weigh the relevant *Douglas* factors in taking the position that removal was the proper penalty for any violation of agency's zero tolerance policy toward violence and threats of violence).

3. Consistency with Table of Penalties. A table of penalties listing specific offenses and penalties for first, second, and further offenses is a guide for the deciding official to consider in determining the appropriateness of a penalty. *Davis v. Dep't of Army,* 56 M.S.P.R. 583 (1993); *Padilla v. Dep't of Justice,* 64 M.S.P.R. 416 (1994).

a. An agency may deviate from the guidelines where a more severe penalty is reasonable. *Chatman v. Dep't of Army,* 73 M.S.P.R. 582 (1997); *Basquez v. Dep't of the Air Force,* 48 M.S.P.R. 215, 218 (1991).

b. Agencies' intent to be bound. When agency's table of penalties did not specifically provide for the penalty imposed upon the employee (demotion for conduct unbecoming an officer), the agency was not bound by the table because the agency did not intend for the table to be binding. *Farrell v. Dep't of Interior*, 314 F.3d 584 (Fed. Cir. 2002).

c. To establish disparate penalties, an appellant must show that the charges and circumstances surrounding the charged behavior are substantially similar. This requires proof that the proffered comparator was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline. *Williams v. Social Security Administration,* 586 F.3d 1365 (Fed. Cir. 2009).

4. How much deference does the MSPB give agency penalty selection?

a. General Rule.

(1) The Board will give deference to an agency's decision regarding a penalty unless that penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Parker v. U.S.P.S.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987); *Lachance v. Devall*, 178 F.3d 1246, 1251-52, 1258 (Fed. Cir. 1999).

(2) Choice of maximum penalty not necessarily abuse of discretion. *Stump v. Dep't of Transp*., 761 F.2d 680 (Fed. Cir. 1985).

b. Deference Granted When All Charges and Specifications Sustained. Where all of the charges are sustained, the Board will modify an agency's chosen penalty only if the agency failed to weigh the relevant factors or if the agency's decision clearly exceeded the limits of reasonableness. *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 305-06 (1981), *Woebcke v. Dep't of Homeland Security*, 114 M.S.P.R. 100 (2010) (The administrative judge properly analyzed the applicable *Douglas* factors in determining that the removal penalty exceeded the bounds of reasonableness, including the judge's determination that the agency treated the appellant disparately compared to other similarly-situated employees. Although the fact that a comparator was supervised by a different individual may sometimes justify different penalties, an agency must explain why differing chains of command would justify different penalties.)

c. Deference Granted When All Charges Sustained, But Not All Specifications Sustained.

(1) Where the Board sustains the charge, but not all the specifications of the charge, it will review the agency- imposed penalty to determine whether it is within the parameters of reasonableness. *Dunn v. Dep't of Air Force,* 96 M.S.P.R. 166 (2004); *Payne v. U.S.P.S.*, 72 M.S.P.R. 646, 650-51 (1996).

(2) The Board's "function is not to displace management's responsibility or to decide what penalty it would impose, but to assure that management's judgment has been properly exercised and that the penalty selected by the agency does not exceed the maximum limits of reasonableness." *Dunn v. Dep't of the Air Force,* 96 M.S.P.R. 166 (2004); *Stuhlmacher v. U.S.P.S.,* 89 M.S.P.R. 272 (2001).

(3) "The Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of reasonableness in determining the penalty." *Cameron v. Dep't of Justice,* 100 M.S.P.R. 477 (2005).

d. Deference Granted When Only Some Charges Sustained.

(1) "When the Board sustains fewer than all of the agency's charges, the Board may also mitigate the agency's penalty to the maximum reasonable penalty as long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges." *Cameron v. Dep't of Justice,* 100 M.S.P.R. 477 (2005); *Lachance v. Devall*, 178 F.3d 1246 (Fed.Cir. 1999); *Modrowski v. Dep't of Veteran Affairs,* 252 F.3d 1344 (Fed. Cir. 2001).

(2) When the MSPB agrees with the penalty assessment, yet declines to affirm all charges, the Board must "precisely articulate the basis for upholding the agency's action." *Blank v. Dep't of Army,* 247 F.3d 1225 (Fed. Cir. 2001).

e. Zero Deference Granted When Relevant *Douglas* Factors Not Considered. If the deciding official failed to properly consider the relevant factors set forth in *Douglas,* the Board need not defer to the agency's penalty determination. *Stuhlmacher v. U.S.P.S.*, 89 M.S.P.R. 272 (2001).

5. When mitigation is deemed appropriate by the MSPB, the Board will correct the agency's penalty only to the extent necessary to bring it to the maximum

penalty or the outermost boundary of the range of reasonable penalties. *Jacoby v. U.S.P.S.*, 85 M.S.P.R. 554 (2000); *Lachance v. Devall,* 178 F.3d 1246, 1260 (Fed.Cir.1999).

6. Use of previous disciplinary actions to enhance punishment in current action. AR 690-700, Subch. 751; AFI 36-704, ¶ 37.

a. General Rule. The agency may use past discipline to enhance the punishment in the current misconduct provided the employee was given adequate due process in the previous action and the prior misconduct is adequately detailed to permit an informed reply. *Bolling v. Dep't. of Air Force*, 9 M.S.P.R. 335 (1981); *Guzman- Muelling v. Social Sec. Admin.*, 91 M.S.P.R. 601, 606 (2002).

b. Adequate detail of prior misconduct. The record must contain documentary evidence showing that the appellant was informed of the prior actions in writing, that the actions were a matter of record, and that the appellant was permitted to dispute the charges before an authority different from the authority that took the actions against him. *Holland v. Dep't of Defense*, 83 M.S.P.R. 317(1999); *Thomas v. Dep't of Defense*, 66 M.S.P.R. 546 (1995), *aff'd,* 64 F.3d 677 (Fed. Cir. 1995) (Table); *Covington v. Dep't of Army,* 85 M.S.P.R. 612 (2000).

(1) If one of these protections is absent, the MSPB undertakes a full *de novo* review of the earlier action as part of its review of the later disciplinary action. *Bolling v. Dep't. of Air Force*, 9 M.S.P.R. 335, 659 (1981).

(2) If all three safeguards are present, the MSPB will disregard the prior action for purpose of enhancing the punishment only if the employee can show, based upon the existing record from the earlier proceeding, that the earlier action was clearly erroneous. *Id.* at 660.

(3) When employee does not challenge the validity of the prior disciplinary action relied upon in determining penalty, the administrative judge need only verify the occurrence of that action. *Holland v. Dep't of Defense*, 83 M.S.P.R. 317, 321-22 (1999).

c. Past discipline time barred. An agency may not rely on disciplinary actions that have expired by their terms or because of an agency regulation. *Gardner v. U.S.P.S.*, 44 M.S.P.R. 565 (1990); *Spearman v. U.S.P.S.*, 44 M.S.P.R. 135 (1990) (time barred discipline could not be

used to support more severe penalty, but could be used to rebut argument of past good performance).

(1) Army: In assessing penalties, consideration should be given to the freshness of the previous offense in relation to the current infraction. AR 690-700, Ch. 751, ¶ 1- 4(c).

(2) Air Force: Prior suspensions may be used only if the effective date is within three years of the date of the proposed action for the current offense. AFI 36-704, ¶ 37.1. Oral admonishments and reprimands may be used only if effective date is within two years of the date of the proposed action for the current offense. AFI 36-704, ¶ 37.2.

d. Dissimilarity in offenses may be relevant to weight accorded prior discipline in determining an appropriate penalty. *Skates v. Dep't of Army*, 69 M.S.P.R. 366 (1996); *Jackson v. Veterans Admin*., 768 F.2d 1325 (Fed. Cir. 1985). *Lewis v. Dep't of Air Force*, 51 M.S.P.R. 475 (1991).

e. A canceled action may still be used as proof that the employee was warned of misconduct. *Rush v. Dep't of Air Force*, 69 M.S.P.R. 416 (1996).

f. Nondisciplinary sanctions. An agency may consider nondisciplinary counseling as a basis for an enhanced penalty, but employee must be on notice of use. *Thomas v. Dep't of Defense*, 66 M.S.P.R. 546 (1995), *aff'd*, 64 F.3d 677 (Fed.Cir. 1995) (Table); *Lovenduski v. Dep't of Army*, 64 M.S.P.R. 612 (1994); *Brown v. Dep't. of Treasury*, 91 M.S.P.R. 60 (2002).

7. Use of pending disciplinary actions to support penalty.

a. When disciplining or removing an employee for misconduct, agency may take into account prior disciplinary actions that are the subject of *pending* grievance proceedings when determining the appropriate penalty in the current disciplinary or removal action. *U.S.P.S. v. Gregory*, 534 U.S. 1 (2001).

b. The MSPB may review independently prior disciplinary actions pending in grievance proceedings when reviewing termination and other serious disciplinary actions. When termination is based on a series of disciplinary actions, some of which are minor, the MSPB's authority to review the termination must also include the authority to review each of the prior disciplinary actions to establish the penalty's reasonableness.

If the MSPB's independent review is adequate, the review that employee receives is fair. Although that procedure's fairness was not before the Court, a presumption of regularity attaches to agency actions, and some deference to agency disciplinary actions is appropriate. *Bartram v. U.S.P.S.*, 93 M.S.P.R. 74 (2002).

E. Harmful procedural error. The employee (appellant) has the burden of proving by preponderance that the agency committed a "harmful procedural error" in arriving at its decision. This is error likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence of the error. 5 U.S.C. § 7701(c)(2); 5 C.F.R. § 1201.56; *Scott v. Dep't of Justice*, 69 M.S.P.R. 211, 242 (1995), *aff'd,* 99 F.3d 1160 (Fed.Cir. 1996).

VI. CONDUCT ACTIONS AND EXECUTIVE ORDER 13839.

A. On May 25, 2018, the President issued Executive Order (EO) 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit Principles. The EO intends to "advance the ability of supervisors…to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections."

B. Principles for accountability in the Federal Workplace. This establishes principles reshaping how DOD addresses employee performance and conduct. Further, DOD agencies must take into account these principles when revising their policies and renegotiating collective bargaining agreements consistent with the requirements in § 7 of EO 13839. These principles are:

1. Progressive discipline should not be required. Penalties for misconduct should be tailored to individual facts and circumstances.

2. Supervisors should not be prohibited from issuing a different penalty to an employee simply because it would differ from how another employee was disciplined for similar misconduct or poor performance.

3. Supervisors should not be required to impose a suspension prior to proposing to removal of an employee, except as may be appropriate under the applicable facts.

4. An employee's entire past work and disciplinary records should be taken into account when taking disciplinary action, including all past and not just similar past misconduct.

5. To the extent practicable, issue decisions on proposed removals within fifteen business days after the employee's reply period ended, to include any extensions.

6. To the extent practicable, limit the advance written notice to 30 days of an adverse action proposed under 5 U.S.C. §7513(b)(1).

7. In appropriate cases, use Chapter 75 procedures to address instances of unacceptable performance.

8. Use the probationary period to assess how well an appointee can perform the duties of a job before the appointment becomes final.

VII. SPECIAL DISCIPLINARY SITUATIONS.

A. Adverse action based on revocation of security clearance. *Dep't of Navy v. Egan*, 108 S. Ct. 818 (1988); *Drumheller v. Dep't of Army*, 49 F.3d 1566 (Fed. Cir. 1995) (courts have no authority to review the merits of an agency security clearance decision); *Brockmann v. Dep't of Air Force*, 27 F.3d 544 (Fed. Cir. 1994) (the MSPB and courts may have jurisdiction over security clearance determinations that involve colorable constitutional claims); *Hesse v. Dep't of State*, 217 F.3d 1372, 1375-80 (Fed. Cir. 2000) (MSPB lacks jurisdiction to review employee's claim his security clearance was suspended in retaliation for whistleblowing). The MSPB may review only procedural steps of removal in security clearance cases; neither the MSPB nor the courts can review the merits of an executive agency's denial or revocation of a security clearance of a civilian employee.

1. The Supreme Court held in *Egan* that, in an appeal under 5 U.S.C. § 7513, based on the denial or revocation of a security clearance, the MSPB does not have authority to review the substance of the underlying security clearance determination. The grant of a security clearance to a particular employee is a sensitive matter and that the denial of access to classified information and areas is entrusted to the sole discretion of the agency. *Dep't of Navy v. Egan*, 108 S. Ct. 818, 824 (1988).

2. The MSPB review is limited to determining that:

   a. Agency has established requirement of security clearance for position in question;

   b. Employee has lost or been denied a security clearance; and

   c. Agency has provided minimal due process protections to employee:

      (1) notice of denial or revocation,

      (2) statement of reasons upon which negative determination was based, and

(3) opportunity to respond.

3. An employee who loses his security clearance has no substantive right to consideration for alternative employment in nonsensitive positions, unless such right is provided by agency regulation. *Griffin v. Defense Mapping Agency*, 864 F.2d 1579 (Fed. Cir. 1989); *Hesse v. Dep't of State*, 217 F.3d 1372, 1381 (Fed. Cir. 2000).

4. Employee cannot challenge agency's requirement of security clearance for position in question. *Skees v. Dep't of Navy*, 864 F.2d 1576 (Fed. Cir. 1989).

5. The *Egan* defense does not apply by analogy to loss of certifications other than security clearances. *Jacobs v. Dep't of Army*, 62 M.S.P.R. 688 (1994) (finding *Egan* inapplicable to revocation of chemical munitions access. The appellant held a certification necessary for employees who worked with or around chemical agents and weapons. The appellant lost his certification and as a result, his job, when he allegedly "verbally assaulted" another officer. The Board held that the certification was not the equivalent of a security clearance and that the Board could review the agency action.); *McGillivray v. Fed. Emergency Management Agency*, 58 M.S.P.R. 398 (1993) (revocation of procurement authority); *Siegert v. Dep't of Army*, 38 M.S.P.R. 684 (1988) (revocation of psychologist's clinical privileges).

B. Involuntary resignation/retirement.

1. A decision to resign or retire is presumed voluntary. *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Staats v. U.S.P.S.*, 99 F.3d 1120, 1123 (Fed. Cir. 1996).

2. An employee who voluntarily resigns or retires has no right to appeal to the MSPB. *Id*. at 1123–24.

3. The MSPB possesses jurisdiction over an appeal filed by an employee who has resigned or retired if the employee proves, by a preponderance of the evidence, that his or her resignation or retirement was involuntary and thus tantamount to forced removal. *Id*. at 1124; *Braun v. Dep't of Veterans Affairs*, 50 F.3d 1005, 1008 (Fed. Cir. 1995).

4. An involuntary resignation constitutes a constructive removal appealable to the MSPB. *Mintzmyer v. Dep't of the Interior*, 84 F.3d 419, 423 (Fed. Cir. 1996).

5. An employee is entitled to a jurisdictional hearing to establish whether his disability retirement was involuntary (appealed as a constructive removal). *Atkins v. Dep't of Commerce*, 81 M.S.P.R. 246 (1999).

C. Involuntary Downgrading. Although an employee's acceptance of a lower–graded position, like a resignation, is generally considered voluntary and not subject to the jurisdiction of the Board, the coerced acceptance of the position is appealable. The MSPB looks to involuntary acceptance of the employer's terms, conditions permitting no alternative, and action resulting from coercive acts. *Cohn v. Dep't of Transp.*, 5 M.S.P.R. 365, 369 (1981).

1. Withdrawal of downgrade request. An involuntary downgrading may also occur when the agency improperly refuses to permit the employee to withdraw a requested downgrade prior to its effective date. The employee prevails because the agency violates the employee's right to the minimum due process required in an adverse action. *Rivas v. U.S.P.S.*, 57 M.S.P.R. 489, 493–94 (1993); *cf. Ricci v. Veterans Admin.*, 40 M.S.P.R. 113, 116 (1989) (applying an involuntariness analysis to challenges to changes from full–time to part– time employment).

2. Unpleasant alternatives. Under *Lee v. Office of Personnel Mgmt.*, 23 M.S.P.R. 403, 406 (1984), a choice between unpleasant alternatives does not render the downgrading involuntary. In *Lee*, the appellant need not have taken a downgrade as he could have allowed himself to be removed for unsatisfactory performance and challenged the action, or he could have applied for leave without pay.

3. Constructive Demotions. The jurisdictional issue is not whether the demotion was voluntary, but whether the employee presents nonfrivolous allegations of involuntariness. *Ragland v. Internal Revenue Serv.*, 1 M.S.P.R. 758, 759 (1980) ("When an employee presents a nonfrivolous argument that his acceptance of a reassignment to a lower grade was coerced, and this argument is based on more than mere conclusory allegations, the employee is entitled to a hearing on the allegation."). *Dvorin v. Dep't of Air Force*, 70 M.S.P.R. 407, 410–11 (1996).

D. Involuntary Transfers.

1. An involuntary transfer between agencies may be considered tantamount to removal and appealable to the Board. *Colburn v. Dep't of Justice*, 80 M.S.P.R. 257, 259–60 (1998).

2. In *Yaksich v. Dep't of Air Force*, 71 M.S.P.R. 355 (1996), the Board found that an employee–initiated action, such as a transfer between agencies, is presumed voluntary unless appellant presents sufficient evidence to establish that the action was obtained through duress or coercion, or was otherwise involuntary, and that an appellant is entitled to a hearing on the issue of Board jurisdiction over an appeal of an allegedly involuntary action if she makes a nonfrivolous allegation casting doubt on the presumption of voluntariness. Although

Yaksich does not specifically state the relationship between the grades of the position the appellant left at her former agency and the position into which she transferred at the new agency, its holding is not limited to transfers to lower–graded positions, and instead finds that "a transfer between agencies" can be appealable if it is involuntary. *Id*.

E. No Right To Lie. In *LaChance v. Erickson*, 522 U.S. 262 (1998), the Court held that an agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct. If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment right to remain silent. It may well be that an agency, in ascertaining the truth or falsity of the charge, would take into consideration the failure of the employee to respond. *Baxter* v. *Palmigiano*, 425 U.S. 308, 318, (1976) (discussing the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify").

F. Uniformed Services Employment and Reemployment Rights Act (USERRA).

1. The USERRA requires employers to place employees returning from military leave into the position they would have held if they had been continuously employed. Pursuant to 38 U.S.C. § 4324(b), a person who claims that a Federal executive agency has failed to comply with USERRA may submit a complaint directly to the MSPB if at least one of several listed conditions is met. The Board must adjudicate the complaint. 38 U.S.C. § 4324(c)(1). Under § 4324, an adverse determination of the Board in connection with a USERRA complaint may be the subject of a petition for review to the U.S. Court of Appeals for the Federal Circuit in accordance with the procedures set forth in 5 U.S.C.S. § 7703.

2. In challenging an adverse action before the Board, an employee of a federal executive agency may assert, as an affirmative defense, a violation of USERRA by the agency. *Yates v. Merit Systems Protection Bd.*, 145 F.3d 1480 (1998).

3. Burden of Proof in USERRA cases. Given the liberal construction afforded to USERRA … in cases in which the appellant either explicitly or implicitly raises USERRA as an affirmative defense, the administrative judge must inform the appellant of the burden of proof, the burden of going forward with the evidence, and the type of evidence necessary to prove the affirmative defense. *Fox v. U.S.P.S.*, 88 M.S.P.R. 381 (2001); . *Sheehan v. Dep't of Navy*, 240 F.3d 1009 (Fed. Cir. 2001) (Employee's military status was a substantial or motivating factor in the adverse employment action ("but-for" test)).

VIII. **AVENUES EMPLOYEE MAY PURSUE OTHER THAN MSPB.**

A. Equal Employment Opportunity (EEO) complaint ("mixed case complaint").

1. A mixed case occurs when an employee contests an action appealable to the MSPB and alleges that the action was taken as the result of discrimination based on race, color, religion, sex, national origin, age or disability. The employee can elect to contest the case either through the MSPB or the EEO Commission (EEOC). *See* 29 C.F.R. § 1614.302, 5 C.F.R. § 1201.151, and 5 U.S.C. § 7702.

2. A mixed case filed with the EEOC is known as a mixed complaint. 29 C.F.R. § 1614.302.

3. A mixed case filed with the MSPB is known as a mixed appeal. 5 C.F.R. § 1201.157.

B. Office of Special Counsel (OSC): whistleblower retaliation; prohibited personnel practice (PPP).

1. The Whistleblower Protection Act prohibits agencies from retaliating against employees and applicants because they disclosed information that they believed evidenced violation of law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; or substantial and specific danger to public health or safety.

2. Whistleblower reprisal refers to the actual or threatened taking or withholding of a personnel decision in retaliation for a protected disclosure of fraud, waste or abuse under 5 U.S.C. § 2302(b)(8).

3. The OSC or an employing agency can initiate a charge of reprisal for whistleblower activity. The agency can bring the charge as a PPP under 5 U.S.C. § 2302 or as a violation of agency standards of conduct.

4. A claim of whistleblower reprisal is also an affirmative defense to an adverse agency action.

C. Grievance. May be pursued in accordance with a collective bargaining agreement or pursuant to agency administrative grievance procedure.

CHAPTER D

MERIT SYSTEMS PROTECTION BOARD PRACTICE AND PROCEDURE

I. REFERENCES.

A. Primary.

1. 5 U.S.C. §§ 1201-1209.

2. 5 C.F.R. Part 772 (Interim Relief).

3. 5 C.F.R. Part 1201 (Practices and Procedures).

4. 5 C.F.R. Part 1209 (Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing or Other Protected Activity).

5. http://www.mspb.gov.

B. Secondary.

1. Winning at the Merit Systems Protection Board: A Step-By-Step Handbook for Federal Agency Supervisors, Managers, Lawyers, and Personnel Officials; www.deweypub.com.

2. U.S. Merit Systems Protection Board (MSPB) Reporter (M.S.P.R.).

3. A Guide to the Merit Systems Protection Board Law & Practice, Peter B. Broida, Dewey Publications, Inc., 1840 Wilson Blvd., Suite 203, Arlington, VA 22201; Tel. (703) 524-1355; email: deweypublications@gmail.com; website: www.deweypub.com (updated annually).

II. JURISDICTION.

A. Original Jurisdiction. 5 C.F.R. § 1201.2.

1. Actions brought by the Special Counsel.

2. Certain actions against Senior Executive Service employees.

3. Actions against administrative law judges.

B. Appellate Jurisdiction. 5 U.S.C. §§ 7701-7703; 5 C.F.R. § 1201.3.

1. Statutory.

   a. Removal or reduction in grade for unacceptable performance**.** 5 U.S.C. § 4303(e).

   b. Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. 5 U.S.C. § 7512.

   c. Mixed cases. 5 U.S.C. § 7702.

   d. Individual right of action (IRA) appeals. A personnel action that the appellant alleges was threatened, proposed**,** taken, or not taken because of the appellant's whistleblowing activities. 5 U.S.C. § 1221(a).

2. Regulatory.

   a. Termination of a competitive service (CS) probationary employee. A very limited right of appeal. MSPB has jurisdiction only if the probationer makes a non-frivolous allegation that removal was based on discrimination because of marital status or partisan political affiliation. 5 C.F.R. § 315.806.

   b. Assignment of probationary managers and supervisors to nonmanagerial or nonsupervisory positions. A very limited appeal right. MSPB has jurisdiction only if the probationary supervisor demonstrates the reason for returning the employee to nonsupervisory status was discrimination based on marital status or partisan political affiliation. 5 C.F.R. § 315.908(b).

   c. Reductions in force (RIF). Employee has MSPB appeal rights when reemployment priority rights have been violated. 5 C.F.R. §§ 351.901, 330.209.

   d. Denials of reconsideration of withholding within-grade (WIGI, step) increases. 5 C.F.R. § 531.410.

   e. Denial of restoration rights (military duty and recovery from compensable injury). 5 C.F.R. § 353.401.

3. Scope of review under 5 U.S.C. § 7703(c) is review of the administrative record. No *de novo* consideration of the evidence.

4. Standards of review under 5 U.S.C. § 7703(c) is:

a. Arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with the law;

b. Obtained without procedures required by law, rule, or regulation having been followed;

c. Unsupported by substantial evidence.

d. The test requires only that the agency decision have a rational basis. *Grasso v. Internal Revenue Serv.*, 657 F.2d 224, 225 (8th Cir. 1981).

C. Agency Challenges to Jurisdiction.

1. Action challenged is not an appealable action.

a. Placing employee in absent without leave status. *Perez v. Merit Sys. Protection Bd.*, 931 F.2d 853 (Fed. Cir. 1991).

b. Voluntary resignation or retirement. *Cruz v. Dep't of Navy*, 934 F.2d 1240 (Fed. Cir. 1991) (presumption of voluntariness in retirement or resignation). But see 5 U.S.C. §§ 1221(j), 7701(j); 5 C.F.R. § 1201.3(d) (disability retirement issues).

c. Classification. *Pavlopoulos v. Office of Personnel Management*, 58 M.S.P.R. 620 (1993).

d. Failure to promote. *Williams v. Dep't of Army*, 651 F.2d 243 (4th Cir. 1981).

e. Reassignments without loss of grade or pay. *Wilson v. Merit Sys. Protection Bd.*, 807 F.2d 1577 (Fed. Cir. 1986).

f. Valid negotiated settlement agreement. *Smitherman v. Defense Logistics Agency*, 56 M.S.P.R. 626 (1993).

g. Whistleblower exception. *Kochanoff v. Dep't of Treasury*, 54 M.S.P.R. 517 (1992).

(1) Unless the action challenged is otherwise appealable to the MSPB, the employee must first seek corrective action from the Office of Special Counsel (OSC) and exhaust those proceedings before bringing an IRA.

(2) The Board has, in limited circumstances, jurisdiction over all personnel actions allegedly based on appellant's whistleblowing under an IRA.

h. The Board has held that a jurisdictional determination is not required when the Board, by assuming *arguendo* it has jurisdiction, finds that the appeal can be properly dismissed on timeliness or other grounds. *Gaydon v. U.S. Postal Serv.*, 62 M.S.P.R. 198 (1994).

i. Actions not specified by law or regulation.

2. Employee challenging action does not have appeal rights.

a. Probationary or term employee has limited appeal rights or demonstrates a limited basis for appeal. Must first determine when a probationary period is required. *See* LOFE Deskbook, Ch. A § IV(D)(3)(b).

b. Excepted service (ES) employee. Only preference eligible (PE) with more than one year of service and (after Aug. 17, 1990) most non-PE with two or more years of current continuous service (non-probationary equivalent) have appeal rights. *Pennington v. Dep't of Veterans Affairs*, 57 M.S.P.R. 8 (1993); *Coradeschi v. DHS*, 439 F.3d 1329 (Fed. Cir. 2006).

c. Non-appropriated fund (NAF) employee. *Perez v. AAFES*, 680 F.2d 779 (D.C. Cir. 1982).

d. National Guard (NG) technician. In 1991, the Board held that NG technicians are employees who have MSPB appeal rights only for matters outside the sole authority of the state adjutant general. *Ockerhausen v. New Jersey Dep't of Military and Veterans Affairs*, 52 M.S.P.R. 484 (1992).

3. Appeal precluded by exercise of grievance/arbitration rights under the negotiated grievance procedure (NGP).

a. Appealable action involving discrimination under 5 U.S.C. § 2302(b)(1) that is a mixed case. The employee elects the forum but the MSPB may review grievance/arbitration decision. *Capriles v. Panarna Canal Comm'n*, 65 M.S.P.R. 221 (1994).

b. Adverse actions under 5 U.S.C. § 7512 and performance-based actions under 5 U.S.C. § 4304 for non-mixed cases. The employee elects the forum; election is <u>binding</u>. 5 C.F.R. § 1201.3(c*).*

c. Other actions are grievable under the NGP and provide no MSPB jurisdiction. *Sirkin v. Dep't of Labor*, 16 M.S.P.R. 432 (1983) (RIF).

4. Appeal precluded by election of the Equal Employment Opportunity Commission (EEOC) complaint process. 5 C.F.R. § 1201.151-161.

III. PROCESSING AN APPELLATE CASE.

A. Agency Notice of Decision. 5 C.F.R. § 1201.21.

1. Contains notice of time limits, effect of missing time limits, and address for appeal.

2. A copy (or access to a copy) of MSPB regulations.

3. Appeal form (or online reference to MSPB form or e-filing).

4. Notice of grievance rights (if any), outlining whether election of the grievance procedure results in waiver to file with the Board, and timelines for doing so.

5. Notice of any right to file a complaint with the EEOC or grieve allegations of unlawful discrimination consistent with 5 U.S.C. § 7121(d) and 29 C.F.R. §§ 1614.301, 302.

6. The name or title and contact information for the agency official to whim the Board should send the Acknowledgement Order and cop of the appeal in the event the employee files an appeal with the Board.

B. Due Process Rights. With the exception of probationary employees who have limited due process rights (see LOFE Deskbook, Ch. A, § V(D)(3)), non-probationary competitive service federal employees are entitled to:

1. Performance-based removal or reduction in grade under 5 U.S.C. § 4303(b): thirty days advance written notice, right to representation, a reasonable opportunity (no less than 7 days) to make a written and oral reply, and a written notice of decision.

2. Appealable adverse actions under 5 U.S.C. § 7513(b): thirty days advance written notice, right to representation, right to review material relied upon, at least 7 days to submit a written and oral reply, and a written notice of decision.

NOTE: The only recognized exception to the thirty days advance written notice is for the "crime exception", when there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. *Littlejohn v. USPS,* 25 M.S.P.R. 478, 482 (1984); 5 C.F.R. § 752.404(d)(1).

3. Suspension for 14 days or less under 5 U.S.C. § 7503(b): advance written notice, right to representation, right to review material relied upon, a reasonable opportunity (no less than 7 days) to make a written and oral reply, and a written notice of decision.

C. Employee Appeal. 5 C.F.R. § 1201.22. NOTE: the following rules of filing apply to all submissions to the Board, regardless of whether filed by the appellant or the agency.

1. Methods of filing: personal or commercial delivery, FAX, mail, or e-filing. 5 C.F.R. § 1201.22(d).

2. Date of filing.

a. Personal delivery: date of receipt by MSPB. *Cohen v. Dep't of Commerce*, 56 M.S.P.R. 578 (1993).

b. FAX: date of receipt (as recorded on machine transmission). *Jude v. Dep't of Treasury*, 52 M.S.P.R. 5 (1991).

c. Mail: postmark (or presumption of five business days before receipt if no legible postmark). *Jordan v. Dep't of Treasury*, 64 M.S.P.R. 242 (1994); *Zicht v. Health and Human Servs.*, 56 M.S.P.R. 9 (1992).

d. Delivery by private express companies: Amended rules now treat these deliveries similar to mail: filing is completed when the pleading is given to the delivery company. *McDavid v. Dep't of Labor*, 64 M.S.P.R. 304 (1994).

e. Internet filing: https://e-appeal.mspb.gov/.

3. Time for filing: no later than 30 days after the effective date of receipt.

a. Waiver of time requirement for good cause. 5 C.F.R. § 1201.22(c).

(1) Appellant has the burden of demonstrating good cause.

(2) Appellant must show due diligence or ordinary prudence under the circumstances of the case.

(3) The only relevant factor is whether there is a "reasonable excuse"–any doubt should be resolved in favor of the appellant. *Calfee v. OPM*, 64 M.S.P.R. 309 (1994).

b. Discretion to grant evidentiary hearing on timeliness issue.

4. Contents of appeal. 5 C.F.R. § 1201.24.

D. Acknowledgment Order is provided on a standard form. Show Cause Orders are jurisdictional issues.

E. Agency Response.

1. Time: must be submitted within 20 days of the date of the Board's acknowledgement order. 5 C.F.R. § 1201.22(b). See *Johnson v. Dist. of Columbia Bd. of Education,* 7 M.S.P.R. 652 (1981) (consequences of late filing).

2. Content: identity of parties, narrative response stating reasons for the action, the agency record of the action, designation of the agency representative, and other documents or responses requested by the Board. 5 C.F.R. § 1201.25.

F. Motion Practice. 5 C.F.R. § 1201.55.

1. Form: Must be in writing. Must include a statement of the reasons supporting them.

2. Served: Must be filed with the judge or the Board and, as appropriate, must be served upon all parties.

3. Coordination with opposing party required before filing procedural motions, including extensions of time and postponing hearing.

4. Opposition to motions must be filed within 10 days from the date of service of the motion.

G. Discovery. 5 C.F.R. §§ 1201.71-75.

1. Purposes. Obtain relevant information needed to prepare the party's case. "Relevant" means information that appears reasonably calculated to lead to the discovery of admissible evidence. NOTE: Parties are expected to start and complete discovery with a minimum of Board intervention.

2. Scope. Non-privileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts.

3. Methods. Any methods provided for in Federal Rules of Civil Procedure (FRCP) (noting that the FRCP are instructive): written interrogatories, requests

for production of documents, requests for admission, and depositions. NOTE: Beware of timeframes involved.

4. Procedures.

a. Discovery from a party. 5 C.F.R. § 1201.73.

(1) Initial request within 25 days of receipt of acknowledgment order.

(2) Responses or objections are due within 20 days of service of request.

(3) Follow up requests are due within 10 days of service of prior response.

b. Discovery from a nonparty.

(1) Voluntary discovery when possible.

(2) Motion and order for discovery from nonparty.

(3) Response or objection is within 20 days of service of request (voluntary) or 20 days from order for discovery.

(4) Follow up request is within 10 days of service of prior response.

c. Motion to compel discovery.

(1) Filed within 10 days of date of service or objections (or 10 days after time limit for response expires).

(2) Content of motion to compel.

(a) Original request.

(b) Response and objections (or affidavit or declaration under 28 U.S.C. § 1746 that no response has been received).

(c) Statement showing that information sought is relevant and material.

(3) Opposition to motion to compel 10 days from date of service of motion.

d. Motion for protective order. 5 C.F.R. § 1201.55(d). Agency counsel will frequently request the administrative judge (AJ) to delay discovery going to the merits of the case until after a jurisdictional issue has been resolved. *Kostan v. Arizona Nat'l Guard*, 45 M.S.P.R. 173 (1990).

e. Sanctions for noncompliance with order compelling discovery include adverse inference, excluding evidence and testimony, permitting use of secondary evidence, and a ruling againg noncomplainant party on the issue. 5 C.F.R. §§ 1201.43, 1201.74(c).

5. Case Suspension.

a. Either party may submit a request for additional time to pursue discovery. Parties may submit a joint request for additional time to pursue discovery or settlement.

b. Upon receipt, the AJ will suspend case processing for up to 30 days. The parties can jointly request an extension for up to an additional 30 days. 5 C.F.R. § 1201.28.

c. The suspension period may be terminated prior to the end of the agreed upon period if the parties request the AJ's assistance relative to discovery or settlement during the suspension period and the AJ's involvement pursuant to that request is likely to be extensive.

H. Prehearing Submissions and Prehearing Conference(s).

1. Prehearing submissions include statement of facts and issues (including affirmative defenses), stipulations, witness lists with summary of expected testimony, and exhibits.

2. Prehearing conference(s) are designed to facilitate discovery, focus issues for resolutions, obtain stipulations, rulings on witnesses and exhibits, and discuss settlement.

I. Hearing.

1. Employee has a statutory right to a hearing so long as made timely. 5 U.S.C. § 7701(a). Employee may also submit a waiver.

2. Agency has no right to a hearing. *Walker v. Veterans Admin.*, 4 M.S.P.R. 78 (1980).

3. Scheduling occurs not earlier than 15 days after notice. 5 C.F.R. § 1201.51.

4. Location. 5 C.F.R. § 1201.51(d). Parties may file a motion seeking change of location if a different location would be more advantageos to all parties and the Board. The standard of review is prejudice. *Pope v. Dep't of Transportation*, 12 M.S.P.R. 93 (1982).

5. Order of hearing and burdens of proof. 5 C.F.R. §§ 1201.56-57.

   a. Jurisdiction and timeliness of appeal.

      (1) Employee has burden of proof (except when alleging a violation of right to reemployment following military duty under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

      (2) Standard: preponderance of the evidence.

   b. Performance-based and misconduct actions.

      (1) Agency has burden.

      (2) Performance-based action: substantial evidence.

      (3) Misconduct-based action: preponderance of evidence.

   c. Affirmative defenses: employee has the burden of proof by preponderance of evidence.

      (1) Harmful procedural error in application of the agency's procedures in arriving at its decision (statutory, Collective Bargaining Agreement (CBA), or failure to follow basic procedures).

      (2) Prohibited personnel practice (PPP).

      (3) Not in accordance with law.

      (4) Special Counsel actions. *Eidmann v. Merit Sys. Protection Bd.*, 976 F.2d 1400 (Fed. Cir. 1992) regarding corrective action on behalf of employee (5 U.S.C. § 1214) or disciplinary action against supervisor (5 U.S.C. § 1215).

J. Record includes pleadings, orders and decisions, exhibits, and a verbatim record of testimony (tape recording or transcript). 5 C.F.R. § 1201.53.

K. Initial Decision by AJ. 5 C.F.R. § 1201.111.

1. Content includes:

   a. Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;

   b. The reasons for those findings and conclusions;

   c. An order making final disposition of the case, including appropriate relief;

   d. A statement, if the appellant is the prevailing party, as to whether interim relief is provided effective upon the date of the decision, pending the outcome of any petition for review (PFR) filed by another party;

   e. The date upon which the decision will become final (35 days after issuance of the initial decision)

   f. Review and appeal rights.

2. Interim relief. 5 U.S.C. § 7701(b)(2); 5 C.F.R. § 1201.111(c).

   a. Agency options.

      (1) Grant ordered relief.

      (2) Place employee in paid, nonduty status if agency determines that employee's presence at worksite would be unduly disruptive. *Scofield v. Dep't of Treasury*, 53 M.S.P.R. 179 (1992) (MSPB has no authority to review determination that reinstatement would be unduly disruptive).

      (3) Detail or assign the employee to a position other than the former position, or return him to the former position with restricted duties. The employee must receive the same pay and benefits as in the former position. The agency decision is NOT subject to review for bad faith. *King v. Jerome*, 42 F.3d 1371 (Fed. Cir. 1994), rev'ing *Jerome v. Small Business Admin.*, 56 M.S.P.R. 181 (1993).

      (4) The agency may reinstate employee under interim relief order by temporary appointment pending outcome of PFR. *Avant v. Dep't of Navy*, 60 M.S.P.R. 467 (1994).

b. Failure to produce evidence of compliance with the agency options above before the date that the PFR is due will result in dismissal of the agency's PFR. 5 C.F.R. § 1201.115(b)(4).

c. An employee may challenge the agency's compliance with an interim relief order by moving to dismiss the agency's PFR. *Ginocchi v. Dep't of Treasury*, 53 M.S.P.R. 62 (1992).

d. KEY POINT - Do not cancel the underlying action if the AJ orders interim relief. The appeal then becomes moot! *Cain v. Defense Commissary Agency*, 60 M.S.P.R. 629 (1994).

3. Initial decisions lack precedential value. 5 C.F.R. § 1201.113.

L. Petition requesting review. 5 C.F.R. §§ 1201.114-117.

1. Petition for review. Pleading in which a party contends that an initial decision was incorrectly decided in whole or in part.

a. Time limit to file: 35 days after initial decision issued. *Hall v. Dep't of Army*, 59 M.S.P.R. 161 (1993).

b. Grounds for granting relief: new and material evidence, erroneous interpretation of law or regulation. 5 C.F.R. § 1201.115(c).

2. Cross-PFR. A pleading used to describe a pleading that is filed by a party when another party has already filed a timely PFR. A cross-PFR may contain a response to a PFR. Time limit to file: 25 days after service of PFR.

3. Response to PFR is limited to the factual and legal issues raised by another party in the response to the PFR. It may not raise new allegations. Time limit to file: 25 days after service of PFR or cross-petition.

M. Compliance with Orders for Interim Relief. 5 C.F.R. § 1201.116.

1. If a challenge is made by appellant that the agency failed to comply with an interim relief order, the agency must submit evidence that it has provided the interim relief requested or that it has satisfied the requirements of 5 U.S.C. § 7701(d)(2)(A)(ii) and (B).

2. Failure to certify compliance may result in dismissal of the agency's PFR. Nothing shall be construed to require payment of back pay for the period preceding the date of the judge's inital decision or attorney fees before the decision of the Board becomes final.

3. After a final decision is issued, if the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition within 20 days of learning of the agency's failure to comply.

N. Board Reopening of Final Decisions. The Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law. The Board will exercise its discretion to reopen an appeal only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final. 5 C.F.R. § 1201.118**.**

IV. PROCESSING A MIXED CASE.

A. Scope. These rules apply to any case in which an employee or applicant for employment alleges that a personnel action appealable to the Board was based, in whole or in part, on prohibited discrimination. 5 C.F.R. § 1201.151.

B. Contents. An appeal raising issues of prohibited discrimination must comply with § 1201.24 of this part, except that the appeal must state specifically how the agency discriminated against the appellant and must state whether the appellant has filed a grievance under the NGP or a formal discrimination complaint with any agency regarding the matter being appealed to the Board.

C. Time for Filing Appeal: 30 days after the effective date, if any, of the action being appealed. 5 C.F.R. § 1201.154(a).

D. Time for Processing Appeal: 120 days after the appeal is filed. 5 C.F.R. § 1201.156.

E. Review of MSPB Decision by EEOC: within 30 days after the date of the PFR. 5 C.F.R. § 1201.161.

F. MSPB Action on EEOC Decision will either reaffirm the original decision or concur and adopt in whole the EEOC decision. 5 C.F.R. § 1201.162.

G. Referral to Special Panel. If the Board reaffirms its decision it will certify the matter immediately to a Special Panel. Within five days, will transmit the administrative record in the proceedings to the Chairman of the Special Panel and to the EEOC. 5 C.F.R. § 1201.171.

H. Judicial Review. The appropriate U.S. district court is authorized to conduct all judicial review of cases decided under 5 U.S.C. § 7702. Requests for review must be filed within 30 days after the appellant received notice of the judicially reviewable action. 5 § 1201.175. There is a de novo review of discrimination issues and a record review of nondiscrimination issues.

V. SETTLEMENT.

A. The judge may initiate attempts to settle the appeal informally at any time. 5 C.F.R. § 1201.41(c).

B. The parties may waive prohibitions against ex parte communications during settlement discussions.

C. If the parties agree to settle their dispute, the settlement agreement is the final and biding resolutions of the appeal,a nd the judge will dismiss the appeal with prejudice.

D. The Board will retain jurisdiction to ensure compliance with the agreement.

E. Grounds to set aside a settlement include: coercion, lack of authority of representative, fraud, mutual mistake. *Gorelick v. OPM,* 45 M.S.P.R. 81 (1990).

VI. **RELIEF.**

A. MSPB Authority. 5 U.S.C. § 1204(a)(2).

1. Affirm or overturn agency decision. *Burroughs v. Dep't of Army*, 918 F.2d 170 (Fed. Cir. 1990).

2. Mitigation of penalty in Chapter 75 cases. *Kirk v. Defense Logistics Agency*, 59 M.S.P.R. 523 (1993).

B. Traditional Remedies - Status Quo Ante.

C. Stay of Personnel Action.

D. Interim Relief. 5 C.F.R. Part 772.

E. Attorney Fees. 5 U.S.C. § 7701(g)(1); 5 C.F.R. § 1201.37.

1. Entitlement criteria under 5 U.S.C. § 7701(g): prevailing party obtained an enforceable judgment or relief by settlement; relief is significantly due to initiation of an MSPB proceeding; attorney fees were incurred, and amount of fees is reasonable. There is an interest of justice standard. *Rose v. Dep't of Navy,* 36 M.S.P.R. 352 (1988).

2. Entitlement criteria under 42 U.S.C. § 2000e-5(k): prevailing party obtained a decision based on finding of discrimination. There is no interest of justice standard.

3. Entitlement criteria under 5 U.S.C. § 1221(g): prevailing party obtained a decision based on a finding of a PPP. There is no interest of justice standard.

4. Entitlement criteria under 5 U.S.C. § 1204(m): prevailing party obtained a

decision in disciplinary action brought by OSC. Fees are warranted in the interests of justice or charges clearly without merit.

5. Reasonable fees.

   a. General rule: Lodestar (customary rate or prevailing market rate x number of hours reasonably expended). *Heath v. Dep't of Transportation*, 66 M.S.P.R. 101 (1995); *Blum v. Stenson*, 465 U.S. 886 (1984); *Montreuil v. Dep't of Air Force*, 55 M.S.P.R. 685 (1992).

   b. Fees for union attorneys. *Goodrich v. Dep't of Navy*, 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). *But cf. AFGE, Local 3882 v. FLRA*, 944 F.2d 922 (D.C. Cir. 1991) (market rate for union attorney in FLRA proceeding).

   c. No enhancement for contingent fee arrangements. *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992).

   d. Travel expenses are recoverable as part of an attorney fees award. *Wilson v. U.S. Postal Serv.*, 58 M.S.P.R. 653 (1993).

6. Fee petition.

   a. Time for filing: 20 days after initial decision becomes final; or 25 days after issuance of final decision if PFR filed.

   b. Contents: Statement of why entitled to fees; contemporaneous time records; terms of fee agreement (if any); and evidence of customary or market rate.

   c. Opposition to petition. The timeline is set by the judge.

   d. PFR on decision on fee petition must be filed within 35 days.

CHAPTER E

INTRODUCTION TO FEDERAL LABOR MANAGEMENT RELATIONS

Congress finds that [union participation]safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment . . . Therefore, labor organizations and collective bargaining in the civil service are in the public interest. (5 U.S.C. § 7101).

I. REFERENCES.

A. Title VII of the Civil Service Reform Act (Federal Service Labor-Management and Employee Relations Statute), 5 U.S.C. § 7101, *et seq.*

B. Executive Order 13836, Developing Efficient, Effective, and Cost-Reducing Approaches To Federal Sector Collective Bargaining (May, 25, 2018).

C. 5 C.F.R. Ch. XIV, Federal Labor Relations Authority and Federal Services Impasse Panel.

D. DoD Instruction 1400.25, Subchapter 711, Labor-Management Relations, July 2012.

E. Government Reporting Services.

1. Reports of the Federal Labor Relations Council/Authority (published by U.S. Government Printing Office).

2. Releases of the Federal Service Impasses Panel (published by U.S. Government Printing Office).

3. *The Army Lawyer*, Labor and Employment Law Notes.

4. Peter. B. Broida, A Guide to Federal Labor Relations Authority Law and Practice (Dewey Publications, Inc.).

F. *cyber*FEDS® Federal Employment research service, www.cyberfeds.com.

II. WHAT CONSTITUTES A BARGAINING UNIT?

A. The purpose of a federal labor union is to represent the collective interests of a community of *employees* within an *agency of the federal sector*. The Federal Labor Relations Authority (FLRA, the Authority), under 5 U.S.C. § 7112, considers three factors in determining what constitutes a bargaining unit.

1. Employee, for this context, is defined by 5 U.S.C. § 7103(a)(2) as:

   a. A person employed in an agency, or person whose employment has terminated because of an Unfair Labor Practice (ULP). A ULP is A violation of the Federal Labor Management Relations Statute (5 U.S.C. §§ 7101-7135; the Statute) by either management or labor. The regional director, on behalf of the FLRA general counsel, investigates a ULP charge.

   b. Statutory exclusions:

      (1) Alien or noncitizen of the United States who occupies a position outside the United States;

      (2) Member of the uniform services;

      (3) Supervisor or a management official;

      (4) An officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the U.S. International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

      (5) Any person who participates in a strike in violation of 5 U.S.C. § 7311.

2. Agency of the federal sector is defined as any executive branch agency, the Library of Congress, and the Government Printing Office. It excludes most federal agencies with law enforcement and national security missions.

   a. Agencies *specifically excluded* by 5 U.S.C. § 7103(a)(3) are: the General Accounting Office, the Federal Bureau of Investigaiton, the Central Intelligence Agency, the National Security Agency, the Tennessee Valley Authority, the FLRA, the Federal Services Impasses Panel (FSIP), and the U.S. Secret Service and the U.S. Secret Service Uniformed Division.

   b. The President may issue an order excluding an agency or subdivision of any agency from the coverage of the Statute if the President determines that:

      (1) The agency or subdivision has a primary function of intelligence, counterintelligence, investigative, or national security work, and

(2) The provision of the Statute cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

3. The unit must ensure a clear and identifiable *community of interest* among the employees in the unit:

   a. The FLRA examines such factors as, whether the employees in the unit:

      (1) are part of the same organizational component of the agency;

      (2) support the same mission;

      (3) are subject to the same chain of command;

      (4) have similar or related duties, job titles and work assignments;

      (5) are subject to the same general working conditions; and

      (6) are governed by the same personnel and labor relations policies that are administered by the same personnel office. *Securities and Exchange Commission*, 56 FLRA 312 (2000).

   b. The FLRA considers these factors on a case-by-case basis. *Letterkenny Army Depot*, 47 FLRA 969 (1993). No one factor is dispositive.

4. The unit must promote effective dealings with the agency involved.

   a. Will there be authority at the level of organization to make decisions for the group?

   b. The FLRA considers these factors:

      (1) the level at which negotiations will take place,

      (2) at what point grievances will be processed, and

      (3) whether substantial authority exists at the level of the unit sought, and bargaining history. *U.S. DOD, National Guard Bureau and Association of Civilian Technicians*, 55 FLRA 657 (1999).

   c. Reducing and preventing unit fragmentation tends to promote effective dealings. *Library of Congress*, 16 FLRA 429 (1984).

5. The unit must promote efficiency of the operations of the agency involved.

a. Is the size and make-up of the unit appropriate to allow for necessary interactions without duplication of effort and excessive disruption of the mission?

b. The FLRA considers these factors:

(1) relationship of the bargaining unit to the agency's organizational and operational structure;

(2) the degree to which there is interchange outside the unit sought;

(3) the extent of differences with other groups of employees outside the unit sought;

(4) whether negotiations would cover problems common to employees in the unit; and

(5) bargaining history. *U.S. DoD, Nat'l Guard Bureau and Association of Civilian Technicians*, 55 FLRA 657 (1999).

B. Bargaining unit determinations are made based on duties actually performed at the time of the hearing. *Pentagon Force Protection Agency,* 62 FLRA 164 (2007). However, duties that have not actually been assigned to an employee will be considered assigned duties where it can be shown that, apart from the position description, the employee has been informed the duties will be assigned, the nature of the job clearly requires the duties, and the employee is not performing the duties solely because of a lack of experience. *Food Safety and Inspection Service*, 61 FLRA 397 (2005).

C. Mandatory Exclusions from the bargaining unit. A unit cannot include any of the following categories of employees:

1. Management officials or supervisors, unless they have been historically included in the unit.

a. Supervisors. Under 5 U.S.C. §§ 7103(a)(10), 7112(b)(1), an employee will be considered a supervisor if the employee consistently exercises independent judgment with regard to one or more of the supervisory indicia set forth in the Statute. *National Mediation Board,* 56 FLRA 1 (2000). The determination of supervisory status depends upon actual duties performed along with the consistent exercise of independent judgment, not on the classification of the position. *Army and Air Force Exchange Service, Base Exchange, Fort Carson, Colo*, 3 FLRA 595 (1980).

(1) Can they hire, fire, assign work, promote, suspend, or recommend any of the above in more than just a clerical capacity?

(2) Must supervise "employees" as defined in 5 U.S.C. § 7103. This definition does not include an alien or noncitizen who occupies a position outside the United States or a member of the uniformed services. *National Guard Bureau, State of New York*, 9 FLRA 16 (1982).

(3) Team Leads. Employees designated as team leaders may be supervisors for unit exclusion purposes if they exercise independent judgment in the performance of one or more indicia of supervisory authority. *Army Aviation Systems Command*, 36 FLRA 587 (1990). A team lead may include one who considers a number of factors when assigning work to team members, such as employee expertise, workload availability, and work priorities, and exercises independent judgment in doing so. *Western Area Power Administration*, 60 FLRA 6 (2004).

(4) Firefighters and Nurses qualify as supervisors only if they devote a preponderance of their time to the performance of supervisory duties.

b. Management officials. Under 5 U.S.C. §§ 7103(a)(11), 7112(b)(1), an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency.

(1) An individual who only effectuates policy is not a management official. *Executive Office of Immigration Review*, 56 FLRA 616 (2000).

(2) Although military personnel are not "employees" as defined in the Statute, a civilian who develops policy applicable only to military personnel may be a management official. *8th Coast Guard District*, 35 FLRA 84 (1990).

(3) Individuals whose advice is considered authoritative and whose recommendations are accepted, but who did not have the authority to commit the agency to a course of action or to authorize the expenditure of funds, were not management officials. *Fed. Crop Insurance Corp.*, 46 FLRA 1457 (1993).

c. Confidential employee. Under 5 U.S.C. §§ 7103(a)(13), 7112(b)(2), an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations. *GSA National Archives and Records Service*, 8 FLRA 333 (1982) (member of management negotiating team); *SSA and AFGE*, 56 FLRA 1015 (2000) (holding that legal assistants are not confidential employees).

d. Employees engaged in personnel work in other than a purely clerical capacity. 5 U.S.C. § 7112(b)(3). *See U.S. Dep't of Veterans Affairs and AFGE*, 70 FLRA 465 (2018).

(1) The Authority held that advising management regarding "the development of employee policies and procedures" falls within the category of federal personnel work. *Dep't of Health and Human Services, Seattle, WA*, 9 FLRA 518 (1982).

(2) The Authority held that human resources specialists, GS-0201, grades 5 thru 13, working in classification, recruitment and placement, compensation, benefits, and information technology did not use independent judgment or discretion rising above the routine, and were therefore performing purely clerical work. *Forest Service*, 64 FLRA 239 (2009).

e. Employees engaged in administering the provisions of the Statute. Section 7112(c) of the Statute sets forth conditions under which an employee engaged in administering provisions of law relating to labor-management may not be represented by a labor organization. Defining the term "administering," the Authority determined that employees who are not responsible for managing, carrying-out, or otherwise executing a provision of law relating to labor-management relations may be included in an appropriate bargaining unit.

f. Professional employees are not in the same unit as other employees unless a majority of the professional employees votes for inclusion in the unit. 5 U.S.C. §§ 7103(a)(15), 7112(b)(5).

(1) A professional employee is defined as one who engages in the performance of work:

(a) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged

course of specialized intellectual instruction and study in an institution of higher learning or hospital;

(b) Requiring the consistent exercise of discretion and judgment in its performance;

(c) Which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work);

(d) Which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(2) An employee who has completed the courses of a specialized intellectual instruction and study prescribed above, and is performing related work under an appropriate direction or guidance to qualify the employee as a professional employee.

g. Employees engaged in intelligence, counterintelligence, investigative, or security work that directly affects national security. 5 U.S.C. § 7112(b)(6). Security works "directly affects" national security when it has a straight bearing or unbroken connection that produces a material influence on or alteration of national security. *Social Security Administration, Baltimore*, 59 FLRA 137 (2003).

h. Temporary employees. A unit including temporary employees is appropriate if the temporary employees have a reasonable expectation of continued employment and the appropriate unit criteria in § 7112(a) of the Statute is otherwise met. *Dep't of the Air Force, Lackland Air Force Base, San Antonio, Tex.*, 59 FLRA 739 (2004). Temporary employees have a reasonable expectation of continued employment where there was no specific term limitation on their employment and they were converted with some frequency to regular appointments. *Dep't of the Air Force, 90th Missile Wing (SAC), F.E. Warren Air Force Base, Cheyenne, Wyo.*, 48 FLRA 650 (1993).

D. Federally recognized labor unions representing Army employees include:

1. AFGE – American Federation of Government Employees.

2. NTEU – National Treasury Employees Union.

3. NAGE – National Association of Government Employees.

4. ACT – Association of Civilian Technicians.

5. IFPTE – International Federation of Professional and Technical Engineers.

E. Exclusive Representation. Any federal labor organization which is certified under the Statute as the sole representative of employees in an appropriate unit, or that was recognized as such immediately before the effective date of the Statute and continues to be so recognized. 5 U.S.C. § 7103(a)(16).

1. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

2. An exclusive representative must adopt and subscribe to standards of conduct that assure it will maintain democratic principles and a system of financial responsibility. 5 U.S.C. § 7120.

a. The Assistant Secretary of Labor for Labor Management Relations is responsible for establishing the standards of conduct for labor organizations.

b. Criteria. Under 5 U.S.C. § 7103(a)(4), a labor organization cannot:

(1) Deny membership because of race, color, creed, national origin, sex, age, civil service status, political affiliation, marital status, or handicapping condition;

(2) Advocate the overthrow of the U.S. government;

(3) Be sponsored by the agency; or

(4) Participate in a strike.

F. Role of the Labor Counselor with regard to labor unions.

1. Aid in making policies and procedures for the administration of labor-management relations.

2. Participate in contacts with the exclusive representative.

3. Represent management in third-party proceedings.

4. Render legal advice to the management team when it is negotiating a collective bargaining agreement (CBA).

5. Render legal advice on the interpretation and application of the CBA.

NOTE: A CBA is a contract, an agreement negotiated by management and the exclusive representative.

III. HOW A LABOR UNION IS ORGANIZED.

A. Elections. Under 5 U.S.C. § 7111(a), a union that desires a secret ballot election to determine whether employees desire it as their exclusive representative must file a petition seeking election.

1. Timeliness Requirements.

a. Election Bar. 5 U.S.C. § 7111(b); 5 C.F.R. § 2422.12(a).

(1) The Rule: An election is not permitted within 12 months of a previous election in which the union failed to obtain the requisite number of votes.

(2) For the rule to apply, the bargaining unit must be the same unit or a subdivision thereof.

b. Certification Bar. 5 U.S.C. § 7111(f)(4); 5 C.F.R. § 2422.12(b). An election is not permitted within 12 months of certification of a labor organization as the exclusive representative for the bargaining unit. This rule is designed to give activities and newly certified unions time to negotiate their first CBA and to develop a bargaining relationship.

c. Contract/Agreement Bar. 5 U.S.C. § 7111(f)(3); 5 C.F.R. § 2422.12(d) & (e).

(1) The Rule: A labor organization that desires to displace an incumbent as exclusive representative may file a petition:

(a) Upon termination of the CBA, if the CBA has been in existence for 3 years or less, or

(b) If the CBA has existed for more than 3 years, at the 3 year point.

(c) If filed not more than 105 days and not less than 60 days before the expiration date of the CBA.

d. Bar During Agency Head Review. 5 U.S.C. § 7114; 5 C.F.R. § 2422.12(c). Bar expires after:

(1) Thirty days, or

(2) Agency head takes action on the CBA.

2. Regional Director Conducts or Supervises the Election.

a. Showing of Interest.

(1) Under 5 U.S.C. § 7111(b)(1)(A); 5 C.F.R. § 2421.16, a showing of interest is evidenced by employees indicating a desire to be represented by the petitioning labor organization, such as with authorization cards or affidavits or dues allotment forms or records.

(2) Minimum interest requirements are set forth in 5 C.F.R. §§ 2422.9, 2422.10:

(a) Thirty percent for original representation petition.

(b) Intervening unions: Any labor organization may intervene in representation proceedings with a ten percent showing of interest within ten days of posting notice of an upcoming election.

(c) Incumbent is automatically included.

(3) Equivalent Status is achieved when the Regional Director determines the showing of interest is adequate and notifies parties. *DoD and Education Association of Panama*, 44 FLRA 419 (1992).

(a) It is an ULP to assist a labor organization lacking equivalent status. 5 U.S.C. § 7116(a)(3).

(b) Unions with equivalent status are entitled to "customary and routine" services and facilities. *U.S. Army Air Defense Center, Fort Bliss, Texas,* 29 FLRA 362 (1987).

(c) Any party may challenge the validity of a petitioner's showing of interest by filing a challenge with the Regional Director before the adequacy hearing opens or, if there is no hearing, prior to the Regional Director taking action on the petition. 5 C.F.R. § 2422.10(c).

b. Notice of election is posted. 5 C.F.R. § 2422.23(b).

c. Consent agreement is negotiated.

d. Observers are appointed. 5 C.F.R. § 2422.23(h).

e. Challenged ballots are impounded. 5 C.F.R. § 2422.24.

3. Labor organization needs the vote of a majority of eligible employees who vote in order to win. 5 U.S.C. § 7111(a).

a. Run-off Election is conducted when there are at least three choices on the ballot (at least two unions and a "no union" choice) and none of the choices receives a majority of the votes. The runoff will be between the two choices that received the most votes in the original election. 5 C.F.R. § 2422.28.

b. Inconclusive Election. When there are three or more choices on the ballot and none gets a majority of the valid votes cast, and all are tied or all are tied except one who has a greater number (but not majority) of votes. When all of the choices received the same number of votes, or two choices received the same number of votes and the third received more votes, but not a majority, a new election is held. A new election is also held if there is a tie in a runoff election. 5 C.F.R. § 2422.29.

4. Objections to Election. Under 5 C.F.R. § 2422.26, parties may object to an election and may move that the election be set aside if the parties believe *improper conduct unfairly* influenced it.

a. Regional Director will conduct a preliminary investigation. A hearing will be held if there is a relevant issue of fact at issue. The Regional Director then issues a decision, which may be appealed to the Authority. 5 C.F.R. § 2422.31.

b. After the hearing, the Authority decides the case using the report and recommendation of an administrative ;aw judge. 5 C.F.R. § 2422.20(i).

5. Certification. If a union receives a majority of the votes cast, it is certified as the exclusive representative for the bargaining unit. If no union receives a majority of the valid votes cast, an exclusive representative will not be certified. The Regional Director, however, will certify the results of the election. 5 C.F.R. § 2422.32.

B. Nonemployee Access on the Installation.

1. No right to access. An activity is not required to grant unions and their nonemployee organizers access to the activity's facilities, unless a union demonstrates that its reasonable attempts to communicate with the activity's

employees by other means have failed because the employees were inaccessible.

a. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (holding an employer may deny access to property by nonemployee union organizers so long as (1) the union is reasonably able to communicate with the employees by other means, and (2) the employer's denial does not discriminate against the union by permitting other unions with equal status to solicit or distribute literature).

b. First Amendment Issue. *National Treasury Employees Union v. King*, 798 F.Supp. 780 (D.D.C. 1992) (the NTEU successfully raised a constitutional challenge to the limitation of outside union solicitation in public areas under the control of a federal agency, when that agency has treated the location as a public forum).

c. In *NTEU v. FLRA*, 139 F.3d 214 (D.C. Cir. 1998), the D.C. Circuit held that the FLRA's reliance on the *Babcock* framework was appropriate in deciding whether a violation of 5 U.S.C. § 7116(a)(1) had occurred. The court, however, disagreed with the FLRA's application of *Babcock* and held that the Social Security Administartion violated 5 U.S.C. § 7116(a)(1). *Id.* at 219. The decision was upheld on remand.

2. Inaccessible Employees. In *Barksdale*, the Authority held it was a ULP to allow nonemployee representative access unless the union can show that despite diligent efforts, it has been unable to reach the agency's employees through reasonable, alternative means of communication. *Barksdale Air Force Base and NFFE*, 45 FLRA 659 (1992). Reasonable means include mailings, TV and radio ads, billboards, information booths at shopping centers or commuter stations, and/or employee organizer(s).

C. Employees' Right to Solicit Union Membership on the Installation.

1. Any activities performed by an employee relating to the internal business of a labor organization, including the solicitation of membership, elections of labor organization officials, and collection of dues, "shall be performed during the time the employee is in a non-duty status." 5 U.S.C. § 7131(b).

2. Generally, cannot prohibit solicitation on the installation in non-work areas during non-work time. *Dep't of Commerce and Hanlon*, 26 FLRA 311 (1987).

3. May restrict solicitation on the installation. *GSA and NFFE, Local 1705*, 9 FLRA 213 (1982) (to prohibit desk-to-desk distribution of union leaflets in work area).

4. May restrict wearing of union paraphernalia while on duty. *Dep't of Justice v. FLRA*, 955 F.2d 998 (5th Cir. 1992).

5. Treat exclusive representative equal to private organizations operating on the activity. *IRS and NTEU*, 42 FLRA 1034 (1991).

D. Management Neutrality. Management may not aid, nor hinder, the union organization effort. The test for determining whether an action or statement by a management official violated neutrality is whether, under the circumstances of the case, the agency's conduct may reasonably tend to coerce or intimidate an employee or whether an employee could reasonably have drawn a coercive inference from an agency statement. *Arizona Air National Guard and AFGE Local 2924*, 18 FLRA 583 (1985); 5 U.S.C. §§ 7116 (a)(1)-(a)(3), 7102.

IV. **COLLECTIVE BARGAINING.**

"Agencies should secure CBAs that: promote an effective and efficient means of accomplishing agency missions; encourage the higest levels of employee performance and ethical conduct; ensure employees are accountable for their conduct and performance on the job; expand agency flexibility to address operational needs; reduce the cost of agency operations, including with respect to the use of taxpayer-funded union time; are consistent with applicable laws, rules, and regulations; do not cover matters that are not by law, subject to bargaining; and preserve management rights under section 7106(a) of title 5, United states Code." (Executive Order 13836.)

A. Executive Order (EO) 13836 was signed by President Trump on May 25, 2018 and after judicial review, became effective in full on October 2, 2019. Section 5 of this EO outlines the following procedures with regard to collective bargaining:

1. Use best efforts to negotiate ground rules that minimize delay, set reasonable time limits for good-faith negotiations, call for Federal Mediation Conciliation Service (FMCS) mediation of disputed issues not resolved within those time limits, and as appropriate, promptly bring remaining unresolved issues to the Panel for resolution.

2. Implement a negotiation period of six weeks or less to achieve ground rules, and a negotiation period of between four and six months for a term CBA under those ground rules, should ordinarly be considered reasonable and to satisfy the "effective and efficient" goal set forth in section 1 of this EO.

3. Negotiate in good faith to reach agreement on a term CBA, memorandum of understanding, or any other type of binding agreement that promotes the policies outlined in section 1 of this EO.

4. Upon the conclusion of the sixth month of any negotiation, the agency head shall receive notice from appropriate agency staff and shall receive monthly

notifications thereafter regarding the status of negotiations until they are complete. The agency head shall notify the President through the Office of Personnel Management (OPM) of any negotiations that have lasted longer than nine months, in which the assistance of the FMCS either has not been requested or, if requested, has not resulted in agreement or advancement to the Panel.

5. If commencement or any other stage of bargaining is delayed or impeded because of a collective bargaining representative's failure to comply with the duty to negotiate in good faith, the agency shall:

   a. File a ULP complaint after considering evidence of bad-faith negotiating, including:

      (1) Refusal to meet to bargain,

      (2) Refusal to meet as frequently as necessary,

      (3) Refusal to submit proposals or counterproposals,

      (4) Undue delays in bargaining,

      (5) Undue delays in submission of proposals or counterproposals,

      (6) Inadequate preparation for bargaining, and

      (7) Other conduct that constitutes bad-faith negotiating, or

   b. Propose a new contract, memorandum, or other charge in agency policy and implement that proposal if the collective bargaining representative does not offer counterproposals in a timely manner.

6. The agency head shall review all binding agreements with collective bargaining representatives to ensure that all provisions are consistent with applicable laws, rules, and regulations.

   a. Agency head review should ascertain whether the CBA contains any provisions concerning subjects that are non-negotiable.

   b. If a CBA contains any such provision, the agency head shall disapprove such provisions, consistent with applicable law.

   c. The agency head shall take all practicable steps to render a determination within thirty days of the date the agreement was executed.

B. "The agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purpose of arriving at a [CBA]. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist any negotiation." 5 U.S.C. § 7114(a)(4).

1. The refusal (of management or the union) to negotiate in good faith is an ULP. 5 U.S.C. § 7116.

2. Under 5 U.S.C. § 7714, bargaining in good faith includes the obligations to:

   a. Approach negotiations with a sincere resolve to reach a CBA,

   b. Be represented at negotiations by duly authorized representatives prepared to discuss and negotiate conditions of employment,

   c. Meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays,

   d. Furnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law*, data which is normally maintained by the agency in the regular course of business; which is *reasonably available* and *necessary* for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

      (1) To the extent not prohibited by law.

         (a) This applies mainly to Privacy Act concerns. The Privacy Act applies to all union requests for information. *FAA, New York TRACON, Westbury, NY and National Air Traffic Controllers Association,* 50 FLRA 338 (1995).

         (b) If sanitized information serves the purpose and protects Privacy Act concerns, that information must be provided. *Dep't of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota v. FLRA*, 144 F.3d 90 (D.C. Cir. 1998).

      (2) Reasonably Available.

(a) Request cannot be excessive or outrageous, *Dep't of Justice v. FLRA*, 991 F.2d 285 (5th Cir. 1993), or available only through "extreme or excessive means." *Social Security Administration and AFGE Local 3302*, 36 FLRA 943 (1990).

(b) Destroying requested information can be a ULP. *SSA, Dallas and AFGE, AFL-CIO, Local 1336*, 51 FLRA 1219, 1224-1226 (1996).

(c) Failure to inform union that information no longer exists is an ULP. *SSA, Dallas and AFGE, AFL-CIO, Local 1336*, 51 FLRA 1219, 1226-1227 (1996).

(d) Failure to provide the information in a timely manner is a ULP.

(3) Necessary.

(a) The union must show a particularized need for the information. This is a link between the information sought and the duties of representation. *IRS, Kansas City and NTEU*, 50 FLRA 661 (1995).

(b) To make a showing of particularized need, a union must articulate specifically why it needs the information and how it intends to use the information. It must establish a connection between the requested information and its representational duties. *Federal Bureau of Prisons, FCI Fort Dix, N.J.*, 64 FLRA 106 (2009).

(c) A particularized need statement need not be so specific as to require a union to reveal its strategy or the identity of potential grievant. *Internal Revenue Service, Kansas City and NTEU*, 50 FLRA 661 (1995).

(d) When an agency makes a reasonable request for additional justification for information requested, the union must provide explanations that extend beyond mere conclusions. If the union fails to respond to an agency's request for an explanation of particularized need, the FLRA will not find an apparent need for some of the information. *Kirtland AFB and AFGE Local 2263*, 60 FLRA 791 (2005).

e. The agency's statutory duty to furnish information extends to the full range of representational activity, not just in the context of pending negotiations between labor and management. *FAA and National Air Traffic Controllers*, 55 FLRA 254 (1999).

2. If an agreement is reached, a written document embodying the agreed upon terms will be established, and steps will be taken to implement such agreement. 5 U.S.C. § 7114(b)(5).

C. When to Bargain.

1. New. Management must negotiate with a new exclusive representative at the inception of a new CBA and before renewal of an existing CBA.

2. Mid-cycle. When appropriate, management must negotiate during the life of the CBA.

a. Either party may refuse to bargain over issues covered by the CBA. *Health and Human Services and AFGE*, 47 FLRA 1004 (1993). This is referred to as the "Covered by Doctrine." In assessing whether a matter is "covered by" a CBA, the Authority applies a two-pronged test. *Internal Revenue Service, National Distribution Center, Bloomington, Ill.*, 64 FLRA 586 (2010):

(1) First, the Authority assesses whether the subject matter is expressly contained in the CBA. *Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004 (1993).

(2) If not, then the Authority applies the second prong whereby the Authority examines whether the matter is "inseparably bound up with and ... thus [is] plainly an aspect of ... a subject expressly covered by the contract." *Id.*

b. Both sides must negotiate over management-initiated midterm proposals.

c. Union's right to initiate midterm bargaining.

(1) Depends on statutory interpretation by the FLRA.

(2) Unions have a statutory right to initiate midterm bargaining. *Dep't of Interior and NFFE, Local 1309*, 56 FLRA 45 (2000).

(3) Midterm bargaining is only required with the exclusive representative. *AFGE, Local 2366, AFL-CIO v. FLRA,* 114 F.3d 1214 (D.C. Cir. 1997).

D. What to Bargain.

1. Conditions of Employment Are Negotiable.

a. Conditions of employment are defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14).

b. Conditions of employment do not include policies, practices, and matters:

(1) relating to political activities prohibited under subchapter III of Chapter 73;

(2) relating to the classification of any position; or

(3) specifically provided for by Federal statute.

c. In determining whether a proposal concerns a condition of employment, the Authority applies the two-prong test under *Antilles Consolidated Education Assoc. and Antilles Consolidated School System*, 22 FLRA 235 (1986). Under this test, the Authority determines:

(1) whether the proposal pertains to bargaining unit employees; and

(2) whether the record establishes a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees.

d. Examples of negotiable topics include:

(1) Wages and Benefits. *Fort Stewart Schools v. FLRA*, 110 S.Ct. 2043 (1990) (mileage reimbursement for teachers); *Dep't of the Army v. FLRA*, 914 F.2d 1291 (9th Cir. 1990) (holiday and disability insurance for NAFI employees).

(2) Amount charged for food served in agency cafeteria. *Marine Corps Logistics Base, Barstow and AFGE Local 1482*, 46 FLRA 782 (1992) (price of soda in vending machines).

(3) Removal of vending machines and microwave oven from break area. *Dep't of Veterans Affairs and NAGE,* 44 FLRA 179 (1992).

(4) Subscription to the Federal Times Newspaper. *SSA and AFGE,* 37 FLRA 880 (1990).

(5) Office with a view. *Pension Benefit Guaranty Corp.*, 59 FLRA 48 (2003); *NFFE and EPA,* 39 FLRA 291 (1991).

(6) Childcare facilities of bargaining unit employees. *GSA, Region 10, Auburn, Wash. and AFGE*, 47 FLRA 585 (1993).

(7) Past Practices: clear, consistent, long-standing policies that are known about and accepted by both parties. *SSA and AFGE, Local 1336*, 9 FLRA 229 (1981)

(a) Preventing something from becoming a past practice. See *IRS and NTEU,* 3 FLRA 655 (1980) (management prevented union use of office machines from becoming a past practice).

(b) Changing past practices:

(i) Agency must give union notice of proposed change and the opportunity to bargain. *Patents and Trademark Office and Patent Office Professional Association*, 39 FLRA 1477 (1991) (Cannot change a past practice without notice and an opportunity to bargiani even if it conflicts with contract).

(ii) If the union does not respond to the agency's notice within a reasonable time, the agency may implement the change. *Castle AFB and NAGE,* 18 FLRA 642 (1985) (union may waits its rights if it never requests bargaining).

(c) An agency can stop a past practice immediately if it conflicts with a statute. *Dep't of Navy and AFGE,* 34 FLRA 635 (1990).

(d) Arbitrators may look to a parties' past practices when interpreting an ambiguous contract provision, but they cannot rely on past practices to create a new contract

provision. *U.S. Dep't of the Navy, Puget Sound Naval Shipyard and Intermediate Maintenance Facility, Bremerton, WA and Bremerton Metal Trades Council,* 70 FLRA 754 (2018).

(e) Arbitrators cannot modify a collective bargainin agreement's unambiguous provisions based on past practices. *U.S. Small Business Administration and AFGE, Local 3841*, 70 FLRA 525 (2018).

e. Examples of non-negotiable topics (not conditions of employment) include:

(1) Matters concerning individuals not in the bargaining unit. *AFGE v. FLRA*, 110 F.3d 810 (D.C. Cir. 1997) (redefining reduction in force (RIF) competitive areas which included supervisors is outside the duty to bargain because supervisors are not members of the bargaining unit); *ACT and State of New York, Division of Military and Naval Affairs*, 11 FLRA 475 (1983) (filling military positions); *NAGE Local 2272 and Scott AFB*, 7 FLRA 710 (1982) (discipline of managers).

(2) Use of recreational facilities while on off-duty status. *NAGE, Local R5-168 and Dep't of Army*, 19 FLRA 552 (1985).

(3) Agency to forgive an outstanding debt owed to it by a NAFI employee. *IFPTE and Dep't of Navy*, 44 FLRA 302 (1992).

f. Proposal must rise to the level that creates a bargaining obligation. *GSA Region 9 and NFFE Local 81*, 52 FLRA 1107 (1997) (agency was not required to bargain over temporarily relocating a BU employee from one building to another because the effect was de minimis); *HHS and AFGE*, 24 FLRA 403 (1986) (change in employee's title, but not duties, did not create a duty to bargain).

2. Topics Precluded From Negotiation.

a. Proposals that conflict with federal statute. *AFGE, Local 1547 and 56th Fighter Wing, Luke Air Force Base*, 55 FLRA 684 (1999).

b. Proposals that conflict with government-wide rules or regulations. 5 U.S.C. § 7117(a)(2-3). Government-wide regulations are official declarations of policy that applies to the Federal civilian workforce as a whole and are binding on Federal agencies and officials to which they

apply. *Defense Contract Audit Agency, Central Region and AFGE*, 47 FLRA 512, 521 (1993).

c. Notice of government-wide regulations that conflict with CBA. *Fort Hood and AFGE*, 40 FLRA 636 (1991) (notice required before change in government-wide regulation is included in automatically reviewed contract).

d. Proposals that conflict with agency regulations.

(1) Procedures is set forth in 5 C.F.R. Part 2424. The proper forum to address the question is negotiability proceedings, not ULP hearing. *FLRA v. Aberdeen Proving Ground*, 485 U.S. 409 (1988).

(2) Compelling need criteria is set forth in 5 C.F.R. § 2424.50.

(a) The rule or regulation is essential to the accomplishment of the mission of the agency.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency under law or outside authority, which is essentially nondiscretionary in nature.

3. Matters contrary to statutory management rights are non-negotiable, however, exclusive representatives are entitled to negotiate the procedures which management officials will observe in exercising a management right or appropriate arrangements for employees adversely affected by the exercise a management right. 5 U.S.C. §§ 7106(a-b).

a. Mission, budget, organization, numbers of employees, and internal security practices.

(1) Mission. *NLRB Local 21 and NLRB*, 36 FLRA 82 (1990) (hours when open to public); *AFLC, Wright Patterson, AFB*, 2 FLRA 603 (1980) (what topics would be taught).

(2) Budget. *NTEU and NRC*, 47 FLRA 95 (1993) (pay increase had significant cost, minimal benefit).

(3) Organization. *NAGE and U.S. Dep't of Veterans Affairs, Johnson Medical Center*, 55 FLRA 679 (1999) (union proposal

that delayed agency from fully implementing its reorganization); *ACT, Pennsylvania State Council and Adjutant General of Pennsylvania*, 29 FLRA 1292 (1987) (union proposed rules for affiliation of military technicians).

(4) Number of employees. *Dep't of Defense, Defense Mapping Agency and NFFE*, 46 FLRA 298 (1992) (program for employees who lose security clearance).

(5) Internal security practices. *FOP and DVA Providence Medical Center*, 51 FLRA 143 (1995) (proposal that agency continues to assign guards to fixed schedule); *U.S. Air Force Academy*, 46 FLRA 199 (1992) (union proposal allowing radar detectors for safety); *NTEU and Bureau of Engraving and Printing*, 18 FLRA 405 (1985) (union proposal limiting searches).

b. Hire, assign, direct, layoff, and retain employees.

(1) Hire. *AFGE Local 3354 and U.S. Dep't of Agriculture Farm Services Agency, Kansas City*, 54 FLRA 807 (1998) (decision whether to fill vacant positions is encompassed within the agency's right to hire).

(2) Assign. *AFGE Local 3392 and GPO*, 52 FLRA 141 (1996) (union proposal that certain work would be done by supervisor); *AFGE Local 3354 and Dep't of Agriculture Farm Services Agency, Kansas City*, 54 FLRA 807 (1998) (fill vacant positions is encompassed within the agency's right to assign employees); *AFGE Local 695 and Denver Mint*, 3 FLRA 43 (1980) (rotation of work assignments).

(3) Direct. *AFGE v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982) (union proposal requiring employee participation in establishing performance standards), *cert. denied*, 461 U.S. 926 (1983). FLRA precedent holds that seniority-based assignments are within the duty to bargain and enforceable if the agency retains the right to determine employee qualifications and seniority is applied only to equally qualified employees. *AFGE, Local 1164*, 60 FLRA 785, 787 (2005).

(a) Decision to contract out. *AFGE v. Brown*, 680 F.2d 722 (11th Cir. 1982), *cert. denied*, 103 U.S. 728 (19983) (decision to contract out base operations is a management right).

(b) Filling positions by promotions and appointments. *NFFE, Local 1745 v. FLRA*, 828 F.2d 834 (D.C. Cir. 1987) (proposal for union membership on rating and ranking panels); *ACT, N.Y. State Council and New York, Div. of Military and Naval Affairs*, 11 FLRA 475 (1983) (proposals requiring the agency to select a technician for a trainee position is inconsistent with management's right to make selections for appointments from any appropriate source).

(4) Lay-off and retain. *Defense Distribution Depot, Susquehanna, PA.*, 56 FLRA 660 (2000) (decision to conduct a RIF and to decide which positions to retain).

c. Suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees. *Naval Aviation Depot, Cherry Point, N.C.*, 36 FLRA 28 (1990) (proposals which limit an agency's discretion to determine an appropriate disciplinary penalty to a minimum penalty are outside the duty to bargain because they directly interfere with management's right to discipline).

d. Emergency actions. *Army Corps of Engineers, St. Louis District, Mo.*, 55 FLRA 243 (1999) (a union proposal to define "emergency" is not nonnegotiable).

4. Permissive/Optional Areas of Negotiation.

a. The Rule: The rights set forth in § 7106(b)(1) of the Statute are outside the mandatory scope of bargaining, although management may elect to bargain over these subjects. *U.S. Dep't of Commerce, Patent and Trademark Office Professional Assn.*, 54 FLRA 360 (1998):

(1) Management may begin to negotiate a proposal then declare it non-negotiable. *National Park Service*, 24 FLRA 56 (1986).

(2) Once agreement is reached, proposal under § 7106(b)(1) may not be declared non-negotiable. *Id*.

(3) If the parties disagree over whether a proposal is permissive or a management right not subject to negotiation, the FLRA will first determine whether a proposal is within the duty to bargain, and then, if necessary, address claims that would determine whether a proposal is electively negotiable. *AFGE, Local 222 and HUD*, 54 FLRA 171 (1998).

b. An agency may elect to negotiate the number, type, and grade of employees or positions assigned to any organizational subdivision, work project, tour of duty, or on the technology, methods, and means of performing work (also known as "staffing patterns"). 5 U.S.C. § 7106(b)(1).

(1) Number of Employees or Positions refers to a specific number of employees or positions that management proposes to assign to a specific organizational subdivision, work project, or tour of duty.

(a) Work-hour changes relate to tours of duty and are permissive. *NAGE Local R5-184 and Veterans Affairs Medical Center, Lexington*, 51 FLRA 386 (1995).

(b) A proposal requiring an agency to fill an existing vacant position at an organizational subdivision concerns the number of employees assigned to that subdivision because such a proposal would effectively increase the number of employees assigned to the organizational subdivision. *NAGE, Local R5-184 and Veteran's Affairs*, 55 FLRA 549 (1999).

(c) The number of employees necessary to have on duty for a specific shift is a permissive topic. *AFGE, Local 2145 and Veterans Affairs*, 48 FLRA 53 (1993).

(2) Type of Employees or Positions refers to management's right to make determinations based on work or job-related differences between employees assigned to perform certain work in organizational subdivisions, on work projects or tours of duty.

(a) Type refers to distinguishable classes, kinds, groups or categories of employees or positions relevant to the establishment of staffing patterns. *NAGE, Local R5-184 and Veteran's Affairs*, 55 FLRA 549 (1999).

(b) Proposals that assign particular duties to specific employees do not encompass "type" of employees or positions. *AFGE, Local 3529 and Dep't of Defense, DCAA, Central Region*, 47 FLRA 512 (1993).

(c) "Bridge positions" are types of positions since bridge positions have different job requirements (ie., experience or qualifications) than regular positions in the same job

series. *AFGE, Local 1293 and HHS*, 44 FLRA 1405 (1992).

(3) Grade of Employees or Positions. While the FLRA has not given a specific definition of this area, a general understanding is possible by looking at what is not considered a "grade of employees or positions."

(a) The grade levels for specific employees or positions. This falls outside the duty to bargain because it deals with classification of positions. *AFGE, Local 1978 and Dep't of Interior*, 51 FLRA 637 (1995).

(b) The title, job series, and grade of a position are the essence of the classification of a position. However, this does not make negotiable a union proposal that simply requires a position or employee of a certain grade to be assigned to an organizational subdivision, work project, or tour of duty.

(c) Once the agency has determined the classification and grade level structure of employees and positions in the organization, the agency may choose to negotiate over which employees or positions, identified by previously established grade, are assigned to subdivisions, work projects, or tours of duty in the organization. *NAGE, Local R1-109 and Dep't of Veterans Affairs*, 38 FLRA 211 (1990).

(4) Organizational Subdivision is a section of an agency that will perform a specific agency function, and where employees performing that function will be assigned. *NAGE, Local R14-23 and Dep't of Defense Commissary Agency*, 54 FLRA 1302 (1998).

(5) Tour of Duty is the hours of a day and the days of an administrative workweek that constitute an employee's regularly scheduled workweek. 5 C.F.R. § 610.102(h); *AFGE, Local 2366 and Dep't of Justice, INS*, 47 FLRA 225 (1993).

(6) Work Project is a particular job or task. *AFGE, Local 1345 and Dep't of Army, Fort Carson*, 48 FLRA 168 (1993) (a union proposal requiring the assignment of at least two employees when work is performed in enclosed areas).

(7) Technology, Methods and Means of Performing Work.

(a) Technology is the technical method used to accomplish or further the performance of the agency's work. *AFGE, NBPC, Local 2544 and Justice, INS*, 46 FLRA 930 (1992) (union proposal that each employee be provided a computer terminal at his/her workstation concerned the technology and means of performing work).

(b) Means is any instrumentality including an agent, tool, device, measure, plan or policy used by the agency to accomplish or further the performance of its work. *AFGE, NBPC, Local 2544 and Justice, INS*, 46 FLRA 930 (1992).

c. EO 13836, § 6 states "the heads of agencies subject to the provisions of chapter 71 of title 5, United States Code, may not negotiate over the subjstance of the subjects set forth in section 7106(b)(1) of title 5, United States Code, and shall instruct subordinate officials that they must not negotiate over those same subjects."

5. Intersection between Management Rights (§ 7106(a)) and Permissive Topics (§ 7106(b)(1)). *NAGE and DVA Medical Center, Lexington, Kentucky*, 51 FLRA 386 (1995) (finding permissive topics are exceptions to management rights).

a. The Authority first determines if the proposal concerns matters under § 7106(b)(1). If it does, the complaint will be dismissed under 5 C.F.R. § 2424.10(b) (noting the duty to bargain is at the election of the Agency).

b. If the proposal does not concern matters under § 7106(b)(1), the Authority will then analyze the proposal under § 7106(a).

c. If the proposal concerns matters governed by both § 7106(a) and § 7106(b)(1), and the proposal's provisions or requirements are inseparable, the FLRA will determine which requirement is dominant. Negotiability is determined based on the dominant requirement. *AFGE, Local 1336 and SSA, Mid-America Program Service Center*, 52 FLRA 794 (1996).

d. Once agreement is reached on a proposal that is both a prohibited topic of negotiation and a permissive topic, the rules governing permissive topics will control and the proposal may not be declared non-negotiable. *Assoc. of Civilian Technicians, Montana Air Chapter No. 27 v. FLRA*, 22 F.3d 1150 (D.C. Cir. 1994).

6. Impact and Implementation (I&I) Bargaining. 5 U.S.C. §§ 7106(b)(2) and (3).

a. Management must usually negotiate I&I of a non-negotiable management right decision.

b. The "Impact" area of negotiation: proposals concerning arrangements.

(1) Union proposals concerning appropriate arrangements for employees adversely affected by the exercise of management rights under § 7106(a) are negotiable.

(2) The arrangement must reduce the impact of the adverse effects of the exercise of a management right. *Dep't of the Treasury, Office of the Chief Counsel, Internal Revenue Service v. FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992).

(a) There must be a clearly articulated adverse effect. *IRS v. FLRA*, 960 F.2d 1068 (D.C. Cir. 1992) (proposal to prevent management from making temporary details for less than one pay period to avoid contractual benefits was not negotiable).

(b) Proposal must narrowly tailor the arrangement to redress only the employees affected. *Interior Minerals Mgm't Service v. FLRA*, 969 F.2d 1158 (D.C. Cir. 1992) (proposal concerning new drug testing program were not negotiable.

c. The "Implementation" area of negotiation" proposals concerning procedures.

(1) Union proposals concerning procedures which management officials observe in exercising management rights under § 7106(a) are negotiable. *Dep't of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) (proposal that no removals will be effected until all grievances completed was negotiable).

(2) The problem lies in determining which proposals deal with procedures affecting the exercise of a management right and which are substantive infringements on management rights.

(3) EO 13836, § 7(b) states "agencies that engage in bargaining over procedures pursuant to section 7106(b)(2) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute

procedures associated with the exercise of management rights, which do not include measures that *excessively interfere* with the exercise of such rights."

V. IMPASSE RESOLUTION.

A. The FMCS, established under 29 C.F.R. Part 1403, consists of a Director located in Washington, D.C., and commissioners/mediators located in FMCS regional/district offices across the country.

1. Notification to FMCS occurs prior to CBA expiration or upon impasse during renegotiation.

2. Functions of the FMCS.

a. Mediation. The FMCS will send a mediator to an installation who will attempt to get the parties to reach agreement. The mediator will meet with both parties, offer recommendations, and send the parties back to the negotiation table to further discuss the matter and try and reach agreement.

b. If the parties cannot reach agreement with the assistance of the mediator, the mediator and/or the parties may request the assistance of the Federal Service Impasses Panel (FSIP, the Panel).

B. The Panel is a suborganization of the FLRA, established under 5 U.S.C. § 7119(b)(5); composed of a Chairman and six other members appointed by the President.

1. The Panel shall consider the impasse and take "whatever action is necessary and not inconsistent with this chapter to resolve the impasse."

2. Issues considered. Impasse issues, not negotiability issues.

3. Available courses of action, include:

a. Resumption of negotiations,

b. Resumption of negotiations with mediation assistance,

c. Make recommendations,

d. Make a decision and issue an order,

e. Authorize or direct mediation or arbitration, and

f. Final-offer selection.

4. No direct appeal of FSIP decision to FLRA. *Council on Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984) (union petition for review of allegedly illegal FSIP decision was precluded absent extraordinary circumstances).

VI. THE THREE UNION REPRESENTATIONAL RIGHTS.

A. Formal Discussions. An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance, personnel policy or practices, or other general condition of employment..." 5 U.S.C. § 7114(a)(2)(A).

1. Management must give the exclusive representative (1) advance notice and (2) an opportunity to be represented at a formal discussion.

   a. Mere presence of union officials is insufficient; advance notice must be given. *Dep't of Treasury*, 29 FLRA 610 (1987) (union steward was present and participated in monthly meeting).

   b. Union representative has the right to speak and comment. *Nuclear Regulatory Commission*, 21 FLRA 765 (1986) (ULP when management interrupted union representative whenever he spoke).

2. What constitutes "formal"? Formality is determined by the totality of the circumstances. *Marine Corps Logistics Base, Bastow, CA., and AFGE*, 45 FLRA 1332 (1992).

   a. Whether the person who held the discussion was merely a first level supervisor or higher in the management hierarchy;

   b. Whether another management representative attended. In *Davis-Monthan Air Force Base*, 64 FLRA 845 (FLRA 2010), the Authority found the Agency committed a ULP when it honored an employee's request that the union not be present at an EEO mediation session since there was no evidence that the union's presence was in direct conflict with an employee's right.

   c. Where the meeting took place;

   d. How long the meeting lasted;

   e. If scheduled, how was the meeting scheduled. Impromptu and employee-initiated meetings to discuss settlement of the employee's EEO complaint were not formal discussions pursuant to §

7114(a)(2)(A). *Dep't of Energy, Rocky Flats Field Office, Golden, Colo. and AFGE*, 57 FLRA 754 (2002).

f. Whether there was a formal agenda for the meeting.

(1) A discussion. *VA, Washington D.C. and VA Medical Center Brockton, MA.*, 37 FLRA 747 (1990 (two meetings were found to be formal discussions even though there was no discussion or dialogue).

(2) When the agency meeting with the bargaining unit employee was held for the purpose of mediating an employee's formal EEO complaint, the FLRA deemed this a formal discussion pursuant to § 7114(a)(2)(A). *Dep't of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Del. & AFGE*, 57 FLRA 304 (2001).

(3) Interviewing a bargaining unit member in preparation for an arbitratration or a ULP hearing is a formal discussion. *Dep't of Veterans Affairs v. FLRA*, 3 F.3d 1386 (10th Cir. 1993); *F.E. Warren AFB*, 31 FLRA 541 (1988).

(4) General rules applicable to agency personnel, not discrete actions taken with respect to individual employees. *GSA and Bobbie J. Brunning*, 50 FLRA 401 (1995 (case involving meeting with witnesses in MSPB case involving supervior).

g. Were notes kept of the meeting;

h. Whether attendance was mandatory or optional;

i. How the meeting was conducted.

3. A meeting can turn into a formal discussion, even if it does not begin as one. *Defense Logistics Agency, Defense Depot Tracy, CA and Laborers International Union*, 37 FLRA 952 (1990) (meeting with employees on how to fill out forms became formal when questions were asked). Except:

a. "On the spot" job counseling and counseling sessions are not formal discussions.

b. Pre-disciplinary oral reply. Critical factors:

(1) The meeting arose under 5 U.S.C. § 7513(b);

(2) The employee did not request union representative;

(3) The meeting did not involve a matter covered by 5 U.S.C. § 7114(a)(2)(A); and

(4) The meeting did not involve an application of the parties' contract grievance procedure. *Dep't of Justice v. AFGE,* 29 FLRA 584 (1987) (Union filed ULP over meeting with employee and employee's attorney for oral reply to proposed suspension).

B. Investigatory Examinations ("Weingarten Rights"). An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee; and the employee requests union representation. 5 U.S.C. § 7114(a)(2)(B); *NLRB v. Weingarten*, 420 U.S. 251 (1975).

1. Management must permit a bargaining unit employee to notify the union and allow a union representative an opportunity to attend interviews with employees when: (*must meet all four requirements):*

a. There is an examination of a bargaining unit employee in connection with an investigation.

(1) Examination. *AFGE Local 1941 v. FLRA*, 837 F. 2d 495 (D.C. Cir. 1988) (credentials committee meeting for a doctor was an examination).

(2) Includes written memos. *U.S. Border patrol, Del Rio, TX and AFGE 2366,* 46 FLRA 363 (1992) (agents required to provide written statements about escape of a suspect).

b. By an agency representative.

(1) Inspectors General are agency representatives when conducting an employee examination under § 7114(a). *NASA v. FLRA*, 119 S. Ct. 1979 (1999) (finding that while Congress intends that OIG's would enjoy a great deal of autonomy, the OIG investigative office still performs on behalf o the particular agency in which it is stationed and therefore acts as an agency representative when conducting exmainaitons here).

(2) The Statute does not entitle employee's to have union representatives present during questioning by IG agents on

matters within the *bona fide* functions of the IG Act and outside the scope of collective bargaining.

c. Employee reasonably believes disciplinary action may result. *IRS v. FLRA*, 671 F.2d 560 (D.C. Cir. 1982) (whether there are reasonable grounds to believe that discipline may result from the interview is an objective standard).

d. Employee requests representation.

e. No magic language required. In *Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and AFGE, Council of Prison Locals*, 55 FLRA 388 (1999), the FLRA held that a bargaining unit employee's statement, "I want somebody to talk to" was sufficient to put the agency on notice that the employee desired representation.

2. Management Options:

a. Allow representative to attend.

(1) Union representative may choose not to attend. *INS and AFGE Local 1917*, 46 FLRA 1210 (1993) (agency proceeded when union representative refused to attend after the agency made repeated efforts).

(2) No right for employee and union representative to consult outside of interview room. *Bureau of Prisons, Office of Internal Affairs and AFGE, AFL-CIO Local 171*, 52 FLRA 421 (1996).

b. End the interview, or

c. Give employee the option of either answering the questions without a union representative or having no interview at all. *Federal Bureau of Prisons, Leavenworth*, 46 FLRA 820 (1992).

3. Employees must be reminded of their rights under this section annually. *Sears v. Dep't of Navy,* 680 F.2d 863 (1st Cir. 1992). Practically, this is accomplished through an annual posting or through an organization-wide email. Individual notification or notification before questioning is not required.

4. Not a "right to remain silent." *Navy Public Works Center v. FLRA*, 678 F.2d 97 (9th Cir. 1982) (proposal to give right to remain silent was a violation of managaement right to discipline and assign work).

5. Union Representative—Employee Privilege. *NTEU and Customs,* 38 FLRA 1300 (1991) (it was a ULP for an investigator to order a union representative to divulge what members said to him while he was acting in his representative capacity).

6. Fact-Gathering Sessions and Brookhaven Warnings.

   a. A "fact-gathering session" is an interview between an agency representative and a bargaining unit employee to ascertain necessary facts in preparation for third party proceedings. *Sacramento Air Logistics Center and AFGE,* 29 FLRA 594 (1987) (management met with union witness in an arbitration case).

   b. Fact-gathering sessions may also be formal discussions that require notice and an opportunity to be present. *GSA Region 2, New York and AFGE Local 2431,* 54 FLRA 864 (1998).

   c. Brookhaven Warnings.

      (1) Must be given even if the discussion is formal and the union has been given advance notice and an opportunity to be present. *Veterans Administration and AFGE,* 41 FLRA 1370 (1991).

      (2) In *Internal Revenue Service and Brookhaven Service Center*, 9 FLRA 930 (1982), the FLRA held that management must:

         (a) inform the employee who is to be questioned of the purpose of the questioning;

         (b) assure the employee that no reprisal will take place if he or she refuses;

         (c) obtain the employee's participation on a voluntary basis;

         (d) the questioning must occur in a context that is not coercive in nature, and

         (e) the questioning must not exceed the scope of the legitimate purpose of the inquiry.

      (3) Brookhaven warnings must be given even if the discussion is formal and the union has been given advance notice and an opportunity to be present. *Veterans Administration and AFGE*, 41 FLRA 1370 (1991).

(4) The warnings must be given at each fact-gathering session.

C. Changes to Conditions of Employment.

1. Under 5 U.S.C. § 7103(a)(14), a condition of employment is defined as a personnel policy, practice, or matter (whether established by rule, regulation, etc.) that affects an employee's working conditions. Excluded from this definition:

(1) Policies, practices, and matters relating to prohibited political activities,

(2) The classification of any position, and

(3) Matters specifically provided for by federal statute.

2. Working conditions are generally environmental (ie., office moving, parking lot repair) or administrative (ie., a new performance management program or new leave policy).

3. Until recently, the FLRA viewed "conditions of employment" and "working conditions" as synonymous. *355th MSG/CC, Davis Monthan Air Force Base and AFGE Local 2924*, 64 FLRA 85 (FLRA 2009). However, in *Dep't of Homeland Security, Customs and Border Protection, El Paso, Texas,* 70 FLRA 501 (FLRA 2018), the Authority distinguished the two. "...Federal courts have described working conditions as the day-to-day circumstances under which an employee performs his or her job. The FLRA observed that such day-to-day circumstances are related to, but different from, the personnel policies or practices that creates [conditions of employment]." *Id.*

4. Management is required to provide union representatives with advanced notice of the proposed change and allow for an opportunity to negotiate.

5. *See also* III(C)(1) for discussion of how changes to conditions of employment are negotiable during collective bargaining.

VII. THE FEDERAL LABOR RELATIONS AUTHORITY.

A. The FLRA (the Authority), under 5 U.S.C. § 7104, is composed of three members, not more than two of who may be adherents from the same political party. Each member is appointed by the President, confirmed by the Senate, for a term of five years.

B. Responsibilities include:

1. Overall program administration;

2. Supervise or conduct elections to determine exclusive recognition of labor organizations;

3. Make negotiability determinations;

4. Render final decisions in ULPs;

5. Resolve exceptions to arbitration awards; and

6. Resolve disputes concerning appropriateness of bargaining units.

C. All FLRA decisions, except those involving unit determinations and arbitration awards not involving ULPs, are subject to judicial review. 5 U.S.C. § 7123(a).

D. The Authority may seek court enforcement of its orders and temporary restraining orders in ULPs.

E. The FLRA General Counsel is appointed by, and serves the President for a five-year term. 5 U.S.C. § 7104(f). Responsibilities of the General Counsel include:

1. Prosecutes complaints of unfair labor practices.

2. Supervises the Regional Directors.

3. Determines appropriate bargaining units.

4. Investigates ULPs.

5. Supervises elections.

F. Administrative Law Judges are appointed by the Authority to hear and recommend decisions in ULP cases and other matters as they may be assigned. 5 U.S.C. § 7105(e)(2); 5 C.F.R. § 2421.9.

VIII. **SUCCESSORSHIP AND ACCRETION.**

A. The FLRA establishes the framework for determining how accretion and successorship apply when an agency reorganizes. *AFGE and Navy Fleet and Industrial Supply Center*, 52 FLRA 950 (1997).

B. Process: Determine if the employees are in a new appropriate bargaining unit.

1. If they are, apply the successorship analysis.

2. If they are not, apply the accretion analysis.

C. Successorship following reorganization. *Naval Facilities Engineering Service Center, Port Hueneme, California and National Association of Government Employees*, 50 FLRA 363 (1995). The gaining entity is a successor, and the union retains its status as the exclusive representative of the employees who are transferred, when:

1. An entire recognized unit, or portion thereof, is transferred.

2. The transferred employees are:

   a. in an appropriate bargaining unit after the transfer, and

   b. constitute a majority of such employees in such unit.

3. The gaining entity has substantially the same organizational mission as the losing entity.

4. The employees are performing substantially the same duties.

5. No election is necessary to determine representation.

D. Accretion following reorganization. This applies when the transferred employees:

1. Are not in an appropriate bargaining unit.

2. Are functionally and administratively integrated into existing units.

3. Are appropriate to add to the bargaining unit.

E. Restructuring existing units. Chain of command reorganization. *Dep't of the Navy, Commander, Naval Base, Norfolk, Va. & NAGE, Local R4-1*, 56 FLRA 328 (2000).

1. A change in an agency's chain of command does not, by itself, render an existing unit inappropriate. Rather, the FLRA will evaluate how a change affected each of the three criteria for appropriate units, as applied to the existing unit and any proposed, new units.

2. If after reorganization, there are competing claims of successorship, the FLRA will first evaluate the proposed bargaining units that will most fully preserve the status quo in terms of bargaining unit structure and the relationship of employees to their chosen exclusive representative. If it finds the existing unit continues to be appropriate, the FLRA will not address any petitions that attempt to establish different unit structures.

3. An agreement between unions that would change the structure of existing bargaining units by removing employees from a unit represented by one union to a unit represented by the other is not valid because it interferes with the

fundamental right of employees to determine their exclusive representation, and thwarted the Authority's representation process. *NAGE/SEIU, Local 5000, and SEIU and Dep't of Veterans Affairs, Washington, D.C.*, 52 FLRA 1068 (1997).

CHAPTER F

UNFAIR LABOR PRACTICES

This chapter should be read in conjunction with Chapter E, which provides greater depth and explanation to many of the concepts outlined in this chapter.

I. REFERENCES.

A. 5 U.S.C. § 7116.

B. Unfair Labor Practice (ULP) Regulations. 5 C.F.R. §§ 2423, 2329.

C. Executive Order 13836, Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining (May 25, 2018).

D. Executive Order 13837, Ensuring Transparency, Accountabiliity, and Efficiency in Taxpayer-Funded Union Time Use (May 25, 2018).

E. Executive Order 13839, Promoting Accountability and Streamling Removal Procedures Consistent with Merit System Principles (May 25, 2018).

F. Unfair Labor Practice Case Handling Manual; *see* Office of Personnel (OPM) website.

II. MANAGEMENT VIOLATIONS.

A. Interference with Basic Employee Rights.

1. 5 U.S.C. §§ 7116(a)(1) provides that it is an ULP for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right which is protected under this Chapter."

2. Primary rights, assured by Title VII, are "the right to freely and without fear of penalty or reprisal, form, join, and assist a labor organization or to refrain from such. 5 U.S.C. § 7102.

B. Encourage or Discourage Union Membership. 5 U.S.C. § 7116(a)(2) provides that it is an ULP for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment."

C. Improper Assistance to a Labor Organization.

1. 5 U.S.C. § 7116(a)(3) provides that it is an ULP for an agency "to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status."

2. Executive Order 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use provides:

   a. Under Section 4(a)(iii) that "No employee, when acting on behalf of a federal labor organization, may be permitted the free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-federal organizations. Such property and resources include office or meeting space, reserved parking spaces, phones, computers, and computer systems."

   b. Under Section 6(a)(iii-iv) that "If the agency has allowed labor organizations or individuals on taxpayer funded union time the free or discounted use of government property, the total value of such free or discounted use; any expenses the agency paid for activities conducted on taxpayer union time; and the amount of any reimbursement paid by the labor organizations for the use of government property."

3. Retaliate Against an Employee for Filing a Complaint or Giving Information. 5 U.S.C. § 7116(a)(4) provides that it is an ULP for an agency "to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter."

4. Refuse to Negotiate in Good Faith.

   a. 5 U.S.C. § 7116(a)(5) provides that it is an ULP for an agency "to refuse to consult or negotiate in good faith with a labor organization as required by this chapter."

   b. Good faith means:

      (1) Sincere resolve to reach an agreement.

      (2) Be represented by duly authorized negotiators.

      (3) Meet at reasonable times and places.

      (4) Furnish data when appropriate.

(a) Statutory requirement. "Furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining..." 5 U.S.C. § 7114(b)(4).

(b) Failure to provide information in a timely manner is an ULP. *Bureau of Prisons, Lewisburg Penitentiary and AFGE Local 48*, 11 FLRA 639 (1983).

(c) It is a ULP to refuse to provide documentation when the union has shown a particularized need for the information and no countervailing interests outweighed that need. *AFGE Local 2343 v. FLRA*, 144 F.3d 85 (D.C. Cir. 1998).

(5) If agreement is reached, sign and implement the agreement.

c. *See* Executive Order 13836, Section 5(c) which outlines options to consider for when a collective bargaiing representative does not comply with the duty to negotiate in good faith.

5. Refuse to Cooperate at Impasse. 5 U.S.C. § 7116(a)(6) provides that it is an ULP for an agency "to fail or refuse to cooperate in impasse procedures and impasse decisions."

6. Enforce Rules in Conflict with Collective Bargaining Agreement (CBA). 5 U.S.C. § 7116(a)(7) provides that it is an ULP for an agency "to enforce any rule or regulation (other than a rule or regulation implementing § 2302 of this title) which is in conflict with any applicable CBA if the agreement was in effect before the date the rule or regulation was prescribed."

7. Fail or Refuse to Comply with Any Provision of This Chapter.

a. "Catch all provision" is discussed at 5 U.S.C. § 7116(a)(8).

b. This allows the Federal Labor Relations Authority (FLRA) to enforce all of the Statute's provisions through the ULP mechanism.

c. Bypassing the union.

(1) Surveying Bargaining Unit employes. See *Surveys, Questionnaires, and Bypassing the Union*, Labor Relations Bulletin, No. 411, July 20, 1999.

(a) An agency may question employees directly provided it does not do so in a way that amounts to attempting to negotiate directly with its employees concerning matters that are properly bargainable wih its employees' exclusive representative. *IRS and NTEU*, 19 LFRA 353 (1985) (finding no ULP when the agency gave copies of proposed employee questionnaires to its union before seeking input from the employees).

(b) An agency may not use surveys or questionaires to deal directly with unit employees on conditions of employment. *Beale Air Force Base and AFGE, Local 2025*, 43 FLRA 1173 (1992) (finding a ULP when agency issued a memo to unit employees asking them to propose an outside location for smokers that would provide necessary shelter during inclement weather).

(2) Agency improperly meeting with employee after being notified of union representation. *McGuire AFB and AFGE*, 28 FLRA 1112 (1987).

III. MANAGEMENT DEFENSES TO AN UNFAIR LABOR PRACTICE.

A. It constitutes a d*e minimis* change.

B. Dual Motive ULP Cases. Agency must show that it would have taken the same action in the absence of protected activity and that the action was legitimate. *Warner Robins Air Force Base and AFGE Local 987*, 52 FLRA 602 (1996) (denial of temporary promotion for union president not a ULP); *FEMA and AFGE, Local 4060*, 52 FLRA 486 (1996) (Agency failed to establish that its failure to act on union president's request for a personnel action was legitimate).

C. Wrong Appeal Route.

1. Issues which can be raised under a statutory appeals procedure may not be raised as a ULP. 5 U.S.C. § 7116(d).

2. Except for matters covered by a statutory appeals procedure (5 U.S.C. §§ 4303, 7512 or 2302(b)(1)), other problems involving conditions of employment that

are covered by the CBA may be raised by grievance/arbitration or ULP, but not both. 5 U.S.C. § 7116(d).

a. Parties must choose between ULP or grievance arbitration procedures.

b. If a party chose to file a grievance already, that party may not change its mind and the agency defense is that the ULP procedures are no longer available.

3. If an issue is one that requires contract interpretation, the FLRA will interpret the contract using the standards and principles applied by arbitrators to determine the express terms of the agereement and the intent of the parties. *U.S. Small Business Administration and AFGE*, 70 FLRA No. 107 (May 2, 2018); *U.S. Dep't of Navy and Bremerton Metal Trades Council*, 70 FLRA No. 152 (Aug. 13, 2018).

4. See Executive Order 13836 for further guidance regarding permissible and impermissible matters for bargaining.

D. Defense—Duty to Bargain.

1. No change to conditions of employment or subject matter is not a condition of employment (e.g., political activity, classification of position, etc.).

2. Covered by statute or government-wide regulation.

3. Management right.

4. Permissive topic. Executive Order 13836, Section 6 states "the heads of agencies subject to the provisions of title 5, United States Code, may not negotiate over the substance of the subjects set forth in section 7106(b)(1) of title 5, United States Code, and shall instruct subordinate officials that they may not negotiate over those same subjects."

5. Matter is covered by contract.

E. Defense—Duty to Furnish Requested Information.

1. Prohibited by law (e.g., Privacy Act, Rehabilitation Act, etc.).

2. Not normally maintained.

3. Not reasonably available.

4. Subject not within the scope of bargaining.

5. No particularized need.

F. Defense—Formal Discussions.

1. Not a formal discussion.

2. Does not satisfy the indicia of formality (e.g., shop meeting over productivity or work assignment).

3. Not a discussion over terms and conditions of employment, nor a grievance.

4. Not a representative of the agency.

G. Defense—Weingarten Rights.

1. Not an examination.

2. Not an agency representative.

3. Reasonable person would not believe that discipline could result.

4. Employee did not ask for representation.

IV. LABOR ORGANIZATION (UNION) VIOLATIONS.

A. Interference with Basic Employee Rights. 5 U.S.C. §§ 7116(b)(1) provides that it is an ULP for a labor organization "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right which is protected under this chapter."

1. All bargaining unit members are entitled to the same level and type of representation assistance. *NTEU and U.S. Dep't of Treasury,* 1 FLRA 909 (1979) (NTEU policy of providing attorneys only for dues paying members in work related situations constituted an ULP).

2. Duty of fair representation. *See* FLRA General Counsel Memorandum to Regional Directors, subject: *The Duty of Fair Representation,* January 27, 1997; *Karahalios v. NFFE,* 489 U.S. 527 (1989).

B. Cause or Attempt to Cause Discrimination. 5 U.S.C. § 7116(b)(2) provides that it is an ULP for a labor organization "to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter."

C. Hinderance in Performance of Duties. 5 U.S.C. § 7116(b)(3) provides that it is an ULP for a labor organization "to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or

impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee."

D. Discriminate Conditions of Membership. 5 U.S.C. § 7116(b)(4) provides that it is an ULP for a labor organization to "discriminate against an employee with regard to the terms or conditions of membership in thelabor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition."

E. Refuse to Negotiate in Good Faith. 5 U.S.C. § 7116(b)(5) provides that it is an ULP for a labor organization "to refuse to consult or negotiate in good faith with an agency as required by this chapter."

F. Refuse to Cooperate at Impasse. 5 U.S.C. § 7116(b)(6) provides that it is an ULP for a labor organization "to fail or refuse to cooperate in impasse procedures and impasse decisions."

G. Interference with Performance of Work. 5 U.S.C. § 7116(b)(7) provides that it is an ULP for a labor organization "to call, or participate in, a strike, work stoppage, or slowdown, or picketing of any agency in a labor-management dispute if such picketing interferes with an agency's operations."

1. Work stoppage. *PATCO and FAA,* 7 FLRA 34 (1981) (Union must take affirmative action to halt the work stoppage); *New York-New Jersey Council and Social Security Baltimonre,* 4 FLRA 126 (1980) (When employees walked off the job for three to six minutes to protest conditions it constituted a work slowdown).

2. Picketing. *AFGE Local 2369 and SSA, New York,* 22 FLRA 63 (1986) (May picket if it does not interfere with agency mission).

H. Fail or Refuse to Comply with Any Provision of This Chapter. 5 U.S.C. § 7116(b)(8).

V. UNFAIR LABOR PRACTICE REMEDIES.

A. See Enclosure 1, May 2000, FLRA General Counsel Guidance on Seeking Remedies for ULPs.

B. Cease and desist order. The order will describe what the wrongdoer has done wrong, along with an assertion that this wrong will not recur. It should be posted in the work areas of the bargaining unit employees for a period to be directed by the Authority, normally 60 days. *Dep't of Treasury and NTEU,* 37 FLRA 603 (1990).

C. Status quo ante (SQA).

1. This remedy may order corrective affirmative action, such as back pay.

   a. Need statutory authority to order backpay. *SSA v. FLRA*, 201 F.3d 465 (D.C. Cir. 2000) (reversing the FLRA determination that employees were entitled to interest on liquidated damages because liquidated damages, awarded employees through arbitration under the Fair Labor Standards Act (FLSA), were not "pay, allowances, or differentials" within the meaning of the Backpay Act).

   b. Backpay is limited to six years under the Backpay Act. *NTEU and Federal Deposit Ins. Corp*., 53 FLRA 1469 (1998) (reversing precedent, the FLRA concluded that arbitrators are bound by the statute of limitations set forth in the FLSA).

2. This remedy may order expunging personnel records. However, see Executive Order 13839, Section 5 which states "agencyies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's [OPF] and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action."

D. Retroactive Bargaining Order (RBO). The "retroactive bargaining order" requires parties to go back and bargain over the disputed issue as should have been done originally. If the respondent of an ULP "knew or should have known that its actions constituted a ULP, a RBO may be appropriate."

E. Order any remedial action necessary to carry out the purposes and policies of the statute.

VI. PROCEDURES FOR RESOLVING AN UNFAIR LABOR PRACTICE.

A. Authority. 5 C.F.R. §§ 2423.

B. Before filing the charge, parties are encouraged to meet and, in good faith, attempt to resolve ULP disputes. Attempts to resolve disputes informally do not toll statute of limitations for filing a charge.

C. After filing the charge, parties are encouraged to informally resolve ULP allegations before a determination on the merits by the Regional Director (RD).

D. The charge.

1. Who may file a charge? Any individual; any labor organization; or any agency.

2. Charges may be filed against an activity; an agency; or a labor organization.

3. Contents of the charge.

   a. Specific information about the charging party and the charged party.

   b. Clear and concise statement of the facts alleged to constitute an ULP.

   c. Supporting documents and evidence.

   d. Charging party msut serve the charge on the other parties and include a statement of service in the charge filed with the RD.

4. Time limits. 5 U.S.C. § 7118(a)(4). Generally, must be filed within six months of the wrong, unless:

   a. There was a failure of the charged agency to perform a duty owed to the person, or

   b. There was any concealment that prevented discovery of the alleged ULP during the six-month period.

   c. If one of the exceptions occurs, the General Counsel may issue a complaint based on a charge filed in the six months after discovery.

5. Investigation by RD.

   a. All parties are required to cooperate with the RD.

   b. If a person declines to cooperate with the investigation, the RD may recommend to the GC to issue a subpoena under 5 U.S.C. § 7132.

   c. An agency is not required to disclose intramanagement guidance, advice, counsel, or training within an agency.

   d. During its investigation, the GC will protect the identity of persons who submit statements and information.

   e. This confidentiality policy helps ensure that the GC obtains all relevant information.

   f. Witness names and a summary of their expected testimony and proposed evidence will be released after issuance of a complaint and in preparation for a hearing.

E. Regional Director's Actions.

1. Approve a request to withdraw a charge.

2. Issue a complaint.

    a. Decision to issue a complaint is not subject to review.

    b. Answer. Respondent has twenty days from date of service of the complaint to file an answer with the Office of the Administrative Law Judge (ALJ).

    c. Amendments. The RD may amend the complaint any time before the answer is filed. After respondent answers, any request to amend a complaint must be filed with the Office of the ALJ.

3. Refuse to issue a complaint.

    a. If the RD refuses to issue a complaint and the charging party does not withdraw the charge, the RD may dismiss the charge.

    b. A charging party may appeal a dismissal decision from the RD to the GC within twenty five days after service of the RD dismissal letter. Charging party is not required to serve a copy of the appeal on the other parties.

4. Approve a settlement agreement.

    a. The settlement may be between the charged and charging parties or between the RD and the charged party.

    b. The RD must approve settelement agreements.

    c. Where there is a settlement between the RD and the charged party, the charging party may appeal to the General Counsel.

F. Settlement Judge Program.

1. Voluntary.

2. Not the ALJ who will hear the case.

3. All matters are confidential and cannot be used at an ULP hearing.

4. Prepare your position.

    a. Theory.

b. Facts.

c. Have your witnesses present.

G. Prehearing Conference.

1. The ALJ hearing the case will conduct at least one conference no less than seven days before the hearing.

2. Typically, the conference is telephonic.

3. Notice for the prehearing conference usually directs that prehearing witness list and an index of exhibits be provided before the meeting.

H. Hearing is Conducted by ALJ.

1. All pleadings, motions, conferences, and hearings (including prehearing documents) are administered by the ALJ.

2. The ALJ has the authority to sanction any party that fails to comply with orders.

3. Rules of evidence are not strictly followed.

4. Burden of proof.

a. The GC has the burden of proving the allegations of the complaint.

b. Respondent has the burden of proving any affirmative defenses it raises.

c. Standard is preponderance of the evidence.

5. Post-hearing briefs may be filed. Must be filed within 30 days of the close of the hearing.

6. ALJ Decision and Exceptions.

a. ALJ issues recommended decision containing finds of fact and conclusions of law.

b. ALJ transfers the case to the Authority for decision and order.

c. Either party may file exceptios to the recommendations.

d. Exceptions to the recommendations must be filed within 25 days of service of the recommendation.

(1) If exceptions are filed, the Authority will review the case on the merits and issue a decision affirming or reversing, in whole or in part, the ALJ's recommended decision.

(2) Exceptions cannot raise a matter not raised before the ALJ.

(3) If no exceptions are filed, the ALJs recommendations shall become the Authority's final decision.

e. Judicial review. 5 U.S.C. § 7123.

(1) Appeal must be filed within 60 days of the FLRA's decision to the appropriate U.S. Circuit Court of Appeals.

(2) Appeal may not raise issues not raised before the FLRA.

CHAPTER G

EQUAL EMPLOYMENT OPPORTUNITY SUBSTANTIVE LAW

I. REFERENCES.

A. Statutory. 29 C.F.R. Part 1614 (Equal Employment Opportunity Commission (EEOC) federal sector complaint processing).

B. Military Department Guidance.

1. Army Regulation (AR) 690-600.

2. Air Force Instruction 36-1201.

3. Secretary of the Navy Instruction (SECNAVINST) 12720.5A.

4. U.S. Marine Corps (MCO) 12713.6A.

C. Additional References.

1. EEOC Management Directive 110; http://www.eeoc.gov/federal/directives/md110.cfm.

2. Administrative Judge's Handbook; http://www.eeo.gov.

3. Representing Agencies and Complainants Before the EEOC, Ernest C. Hadley, Dewey Publications Inc., http://deweypub.com (focus: hearing practice).

4. A Guide to Federal Sector Equal Employment Law & Practice, Ernest C. Hadley, Dewey Publications Inc., http://deweypub.com. (updated annually) (focus: substantive law).

5. Job Accommodation Network: a service of the U.S. Department of Labor's Office of Disability Employment Policy that offers assistance when hiring, retaining or accommodating employees with disabilities; http://askjan.org

II. INTRODUCTION.

A. The Equal Employment Opportunity (EEO) Commission (EEOC or the Commission) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee (current or former) because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the

person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

B. The EEOC derives its authority and jurisdiction over federal sector discrimination complaints from two primary pieces of legislation: Title VII of the Civil Rights Act of 1964 (as amended) and the Rehabilitation Act of 1973 (as amended). On November 21, 1991, President Bush signed Public Law 102–166, the Civil Rights Act of 1991, which made several amendments to the 1964 Civil Rights Act, as well as some modifications to the Rehabilitation Act. On October 29, 1992, the Rehabilitation Act was amended through Public Law 102–569 which, among other things, made some requirements of the more stringent Americans with Disabilities Act of 1990, Public Law 101–336 (July 26, 1990) applicable to the federal government.

C. As explained more fully in this chapter, there are other pieces of legislation which either give the Commission additional authority or indirectly impact its own authority. However, Title VII and the Rehabilitation Act account for the vast majority of the EEOC caseload. The Commission also has significant responsibility and authority with respect to employment discrimination in the private sector. However, its role in the private sector should not be confused with its role in the federal sector. The processes in each sector are quite different.

III. EQUAL EMPLOYMENT OPPORTUNITY STATUTORY FRAMEWORK.

A. TITLE VII, CIVIL RIGHTS ACT OF 1964 (as amended), 42 U.S.C. §§ 2000e-2000e-17, prohibits discrimination on basis of race, color, religion, sex, or national origin in connection with any personnel action. Retaliation and reprisal for having engaged in protected activity are other bases recognized by the EEOC upon which a covered person can file a complaint for alleged discrimination.

B. THE EQUAL EMPLOYMENT OPPORTUNITY ACT of 1972 (EEOA), Public Law 92-261. Title VII of the Civil Rights Act of 1964, as originally passed applied only to employment discrimination in the private sector. The EEOA made Title VII applicable to employees or applicants for employment in the federal government. As amended by the EEOA, Title VII requires that "[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination based on ... sex." 42 U.S.C. § 2000e.

C. AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA), 29 U.S.C. § 633a, prohibits discrimination on the basis of age (40 and over) and retaliation or reprisal for having engaged in protected activity.

D. REHABILITATION ACT OF 1973 (as amended), 29 U.S.C. §§ 790-794 (modified by) the AMERICANS WITH DISABILITIES ACT (ADA), 42 U.S.C. §§ 12101-12213

prohibits discrimination on the basis of a qualifying disability and includes failure to reasonably accommodate on the basis of such disability. In 1992, the Rehabilitation Act was amended to make standards that apply under Title I of the ADA and the provisions of §§ 501, 504, and 510 of the ADA applicable in Rehabilitation Act cases to determine whether non-affirmative action employment discrimination occurred. These provisions primarily relate to discrimination based on disability and reasonable accommodation.

1. ADA Amendments Act of 2008 (ADAAA), Public Law No. 110-325. Through these amendments, Congress rejected a number of U.S. Supreme Court decisions that it viewed as improperly narrowing ADA coverage in a manner that excluded individuals who were meant to fall within the protections of the act. The amendments will have a significant impact on how "individual with a disability" is defined.

2. Under the ADAAA, the ADA's definition of disability remains the same: a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102.

3. The ADAAA provides that the definition of disability shall be construed in favor of broad coverage of individuals under the Act. The EEOC will, accordingly, revise the portion of its regulations that defines the term "substantially limits" as "significantly restricted," and instead make its regulations consistent with the congressional intent of broad coverage.

4. The amendments also state that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures."

E. THE EQUAL PAY ACT (EPA), 29 U.S.C. § 206(d), requires equal pay for substantially equal work. The EPA provides that an employer shall not discriminate "between employees on the basis of sex by paying wages to employees...at a rate less than the rate (paid)...to employees of the opposite sex...for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions..." 29 U.S.C. § 206(d)(1).

F. THE CIVIL RIGHTS ACT OF 1991, Public Law No. 102-166 (codified throughout Title 42, United States Code) provides for recovery of compensatory damages up to $300,000 from the federal government. Punitive damages are not recoverable from the federal government.

G. CIVIL SERVICE REFORM ACT OF 1978 (CSRA), Public Law No. 95-454 (codified as amended) at 5 U.S.C. §§ 1101-8913. The CSRA abolished the U.S. Civil Service Commission and distributes its functions primarily among four agencies: the Office of Personnel Management, the Merit Systems Protection Board, the Federal Labor

Relations Authority, and the EEOC. The Commission assumes responsibility for enforcing anti-discrimination laws applicable to the civilian federal workforce as well as coordinating all federal EEO programs.

IV. AVENUES UPON WHICH TO ASSERT A CASE.

A. Disparate Treatment Cases.

1. Initial Burden. The Plaintiff has the burden to establish, by a preponderance of evidence, that "the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

   a. A prima facie case creates an *inference* of discrimination. Proof of discriminatory motive is essential. *Palmer v. Shultz*, 815 F.2d 1544 (D.C. Cir. 1987), *remanded* 905 F.2d 84 (1990).

   b. One way to satisfy this burden is through a direct evidence showing that the plaintiff is a member of a protected class; is qualified for the job; was rejected/discharged; and the employer filled job with someone else or is still seeking similarly qualified applicants. *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1994).

   c. Direct evidence may be any written or verbal policy or statement made by a management official that, on its face, demonstrates a bias against a protected group and is linked to the complained of adverse action. Direct evidence of discrimination obviates the need for the traditional *McDonnell Douglas* analysis. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1984).

2. Burden Shift. The employer (agency) then bears the burden to articulate a legitimate, non-discriminatory reason for its decision. It merely "frame[s] the factual issue with sufficient clarity so that [appellant] will have a full and fair opportunity to demonstrate pretext." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Even if the trier of fact disbelieves the non-discriminatory reason articulated by the employer, the trier is not compelled to find that the real reason for the action was discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 147. The ultimate question is not whether the employer's explanation was false, but rather whether discrimination was the basis for the action taken.

3. Plaintiff's Rebuttal. If defendant carries the burden of production, the presumption raised by the prima facie case is rebutted. The plaintiff then has the opportunity to demonstrate that the the agency's explanation is mere

"pretext" for discrimination and in fact, a discriminatory reason for the action is more likely. *St. Mary's Honor Center v. Hicks*, 509 U.S 502 (1993); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). To ultimately prevail, the plaintiff must meet this burden by preponderance of the evidence.

a. Pretext can be proven by:

(1) Presenting evidence of disparate treatment (*Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 43-44 (1st Cir. 2001)), or

(2) Showing that the agency's proffered explanation is unworthy of credence (*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000)). The combination of suspicious timing with other significant evidence of pretext is noteworthy. *Rikabi v. Dep't of Veterans Affairs,* 268 Fed. Appx. 608 (5th Cir. 2008).

b. There is no mechanical formula for finding pretext. *Feliciano de la Cruz v. El Conquistador Resort and Country Club,* 218 F.3d 1, 6 (1st Cir. 2000).

c. In non-selection cases, the complainant may establish pretext by showing that their own qualifications were superior to those of the selectee. The Supreme Court did not identify the proper standard to be applied. *Ash v. Tyson Foods., Inc.* 546 U.S. 454 (2006).

B. Mixed Motive Discrimination Cases.

1. These cases involve employment decisions motivated in part by an unlawful discriminatory reason. Before enactment of the Civil Rights Act of 1991, the plaintiff must prove that the prohibited discrimination was a contributing factor in the decision and the agency can show by a preponderance of evidence that it would have taken the same employment action absent the prohibited discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (overruled).

2. Section 107 of the Civil Rights Act of 1991 modifies the "but for" test outlined in *Price Waterhouse*. Under current law, an employee who demonstrates that discrimination was "*a motivating factor"* for the employment decision has proven an unlawful employment practice. 42 U.S.C.§ 2000e-2(m).

3. Congress partially overruled *Price Waterhouse* in the Civil Rights Act of 1991 by allowing a finding of liability and limited relief to plaintiffs in mixed motive cases. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

a. First, § 107(a) of the Act, codified at 42 U.S.C. § 2000e-2(m), states an employment practice is unlawful even if there are legitimate, as well as illegitimate, motivations for it.

b. Second, § 107(b) of the Act, codified at 42 U.S.C. § 2000e-5(g)(2)(B), establishes that if the plaintiff proves a violation of § 107(a), but the agency demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor," the court may grant declaratory and injunctive relief as well as attorney's fees, although it cannot grant other damages, such as monetary relief or reinstatement.

c. Thus, where *Price Waterhouse* would have held there was no liability and would not have allowed any damages, the Civil Rights Act of 1991 enables an employee in at least some mixed motive cases to receive certain limited relief.

4. The agency can avoid full liability only by demonstrating by clear and convincing evidence that it would have taken the same action in the absence of discrimination. 42 U.S.C. § 2000e-5(g)(2)(B).

5. Direct evidence of discrimination is not required in order to obtain a mixed-motive jury instruction under Title VII. Plaintiff may rely on direct or circumstantial evidence. A plaintiff must "present sufficient evidence for a reasonable jury to conclude by a preponderance of evidence, that [a protected characteristic] was a motivating factor for any employment practice." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

C. Disparate Impact Cases.

1. These cases involve "employment practices that are facially neutral in their treatment of different groups but fall more harshly on one group than another and cannot be justified by business necessity." *International Brotherhood of Teamsters.*

a. Section 105 of the Civil Rights Act of 1991 overruled portions of the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), which held that a plaintiff in a disparate impact case must show the discriminatory effect of specific practices on protected group members.

b. The amendments provide that if the plaintiff demonstrates that "the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i).

2. Initial Burden. Plaintiff has the burden to establish (1) they are a member of a protected class, (2) they were rejected, discharged, segregated, etc. by facially neutral employment practice, and (3) demonstrate that each employment practice being challenged adversely affects the protected class in disproportionate numbers. NOTE: The intent of the employer is not dispositive. *Griggs v. Duke Power*, 401 U.S. 424 (1971).

3. Burden Shift. The agency then bears the burden of production and the burden of persuasion to demonstrate that the employment practice is job related for the position. *Lanning v SEPTA*, 181 F.3d 478 (3rd Cir. 1999). The employment practice must also be consistent with business necessity, which constitutes an affirmative defense. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

4. The business purpose must be sufficiently compelling to override any racial impact; must effectively carry out business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accommodate business purpose advanced, or accomplish it equally well with lesser or differential racial impact in action under 42 U.S.C. § 2000e-2. The agency can also rebut the underlying statistics (e.g., wrong labor market, incomplete data, and inadequate techniques) or show that other factors account for the discrepancy. 42 U.S.C. § 2000e-2(k)(1)(B)(2).

5. Plaintiff's Rebuttal. Even if defendant satisfies its burden of proof, a plaintiff can prevail by proving that an alternative business practice, which the agency refused to adopt, would have satisfied the agency's business needs without causing such an adverse impact. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

V. RETALIATION AND REPRISAL.

A. Unlawful business practice. Under 42 U.S.C. § 2000e-17, it shall be an unlawful employment practice for an agency to discriminate against an employee or applicant for employment for making charges, testifying, assisting, or participating in an investigation, hearing, or enforcement proceedings.

1. Opposition Clause. It is unlawful to retaliate against an individual for opposing any practice made unlawful under the employment discrimination statute. Depending on the facts, the same conduct may qualify for protection as both "participation" and "opposition." However, the opposition clause protects a broader range of conduct than the participation clause. *See* EEOC Enforcement Guide on Retaliation and Related Issues 2016.

a. Example 1: Complainant tells her manager that if he fails to raise her salary to that of a male coworker who performs the same job, she will

file a lawsuit under either the federal [EPA] or under her state's parallel law. This statement constitutes "opposition."

b. Example 2: Complainant complains to a co-worker about harassment of a disabled employee by a supervisor. This complaint constitutes "opposition."

c. Example 3: Statements to an investigator, describing sexual harassment in the workplace may fall under the opposition clause of Title VII, even though she did not initiate the complaint. *Crawford v. metropolitan Government of Nashville and Davidson County,* 555 U.S. 271 (2009).

2. Participation Clause. The provision prohibiting reprisal for participation in the EEO process extends to all stages of EEO complaints, including informal counseling. Protected activity under the participation clause is given a broad definition. The purpose of the participation clause is to insulate persons who take part in the EEO process from retaliation for their participation, because reprisal has a chilling effect on the exercise of protected rights.

B. Agency discriminates against the employee. The scope of anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable workfer from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Rwy. Co. v. White,* 548 U.S. 53 (2006).

C. Zone of interest. An employee is protected from retaliation that is based on his close association with another employee who engages in EEO activity. Therefore, someone who contends that his employment has been terminated by his employer in retaliation for another employee's complaint about discrimination may sue the employer under Title VII. *Thompson v. North American Stainless, LLP,* 562 U.S. 170 (2011); see also *Equal Employment Opportunity Comm'n v. Ohio Edison Co.,* 7 F.3d 541 (6th Cir. 1993) (a former employee was allegedly discriminated against by the withdrawal of an offer of reinstatement because a co-employee engaged in protected activity under Title VII).

D. Causal connection exists between protected activity and adverse employment action.

1. Motivating Factor Standard. In Title VII and ADEA cases against a federal employer, retaliation is prohibited if it was a motivating factor. EEOC Enforcement Guide on Retaliation and Related Issues (2016).

2. In order for the employee to prevail in demonstrating a violation, the evidence must show that it is more likely than not that thee retaliation occurred. It is not the employer's burden to disprove the claim. *Id.*

3. An inference of a causal connection can arise where the individual shows the agency was aware of the protected activity and the adverse action follows the protected activity close in time. *Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993).

4. Convincing Mosaic. While the causal connection may be proved directly by vidence that on its face shows or admits retaliatory motive, it is more typically demonstrated by what [has been] escribed as "convincing mosaic" of circumstantial evidence that would support the inference of retaliatory animus. The pieces of that mosaic may include suspicious timing, verbal or written statements, comparative evidence that a similarly situated employee was treated differently, falsity of the employer's proferred reason for the adverse action, or ay other "bits and pieces" from which an inference of retaliatory intent might be drawn. *Complainant v. Office of Personnel Management and Social Security Administration*, 114 FEOR 128 (2013).

E. Reprisal. While several allegations individually may not state a claim of reprisal, the Commission nevertheless found that the acts could be construed as demonstrating an intent to deter a reasonable person from pursuing the EEO process and thus state a claim of reprisal. The Commission specifically rejected the U.S. Postal Service's argument that complainant did not suffer any harm to a term, condition, or privilege of employment, citing to EEOC's Compliance Manual Section on Retaliation. *Stup v. United States Postal Serv.*, 100 FEOR 3162 (April 11, 2000).

F. Employer Defenses. Though the employer does not have the burden to disprove retaliation, the employer may have evidence supporting its proferred explanation for the challenged action, such as comparative evidence revealing like treatment of similarly situated individuals who did not engage in protected activity, or supporting documentary and/or witness testimony. EEOC Enforcement Guide on Retaliation and Related Issues. Employer defenses include:

1. Legitimate, non-retaliatory reasons for adverse action (*Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993));

2. Decision to take adverse action was made before the protected activity (*Newton v. Leggett*, 7 F.3d 1042 (8th Cir. 1993));

3. Lacking knowledge of prior protected activity (*Jackson v. Brown*, 5 F.3d 546 (10th Cir. 1993));

4. Prolonged period of time between protected activity and adverse action negates presumption of causal connection (*Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). There is no bright-line rule for temporal proximity. In general terms, if it is less than 12 months this element will be established.

G. For statements or actions to be protected opposition, however, they must be based on a reasonable good faith belief tat the conduct opposed violates the EEO laws, or could do so if repeated. *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 470 (6th Cir. 2012)(holding that complaints of sexual harassment were protected opposition even though there was insufficient evidence to prove the alleged harassment was based on sex, because "[a] plaintiff does not need to have an egg-shell skull in order to demonstrate a good faith belief that he was victimized."

VI. DISABILITY DISCRIMINATION.

A. General rule: No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

B. Three theories exist to support claim of disability discrimination:

1. Disparate treatment (treating disabled employees less favorably than non-disabled employees);

2. Disparate impact; and

3. Failure to reasonably accommodate in hiring, placement, or advancement opportunities.

C. Initial Burden. The plaintiff's burden in disability discrimination cases parallels Title VII disparate treatment analysis. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003). The plaintiff has the burden to establish:

1. That the employee or applicant is a disabled person;

2. Is otherwise qualified for the job; and

3. Was treated less favorably than non-disabled employees. 29 C.F.R. § 1614.203.

D. Burden Shift. The agency then bears the burden of production to establish a valid, non-discriminatory reason for its actions. The plaintiff ultimately bears the urden to show that the employer's proffered explanations are merely pretext.

E. Reasonable Accommodation (RA) factors.

1. The plaintiff must prove that he/she is a "qualified individual with a disability" meaning a physical or mental impairment (including those that are episodic or in remission) that substantially limits a major life activity or is regarded as

having such an impairment or has a *record* of such impairment. 42 U.S.C. § 12102(2); 29 C.F.R. § 1614.203.

a. This determination regarding disability is an individualized assessment. *Lowe v. Alabama Power Co.*, 244 F.3d 1305, 1308 (11th Cir. 2001).

b. Statutory exclusions include whether an impairment substantially limits a major life activity is to be determined without reference to the ameliorative effects of mitigating measures.

c. An individual with a disability is not "qualified" if they pose a direct threat to the health of themselves or others. 42 U.S.C. § 12113; 29 C.F.R. § 1630.15(b)(2).

d. "Regarded as": establish that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

2. Major Life Activities.

a. The 2008 ADAAA defines major life activities as functions that are of central importance to daily life, including caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

b. The impairment's impact must also be permanent or long-term.

c. Temporary or transitory medical conditions generally are not substantially limiting impairments (*Haralsen v. U.S. Postal Serv.*, 102 FEOR 30043 (March 1, 2002)) but chronic or episodic disorders that are substantially limiting when active *may* qualify.

3. Substantially limits means unable to perform a major life activity that the average person in the general population can perform, or martially restricted as to the condition, manner or duration of the impairment. 29 C.F.R. § 1630.2(j).

a. The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. It is not meant to be a demanding standard.

b. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.

c. Factors to consider in determining whether an individual is substantially limited in a major life activity include: nature and severity of the impairment; duration or expected duration of the impairment; and permanent or long term impact or the expected permanent or long term impact of the impairment.

4. Employee must prove he/she is otherwise qualified for the position. *Owens v. U.S. Postal Serv.*, 37 F.3d 1326 (8th Cir. 1994). This means the employee can perform the essential functions of the position, with or without reasonable accommodation. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). This is a very fact-specific determination made on case-by-case basis. *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994).

5. Undue Hardship. No accommodation required if it would impose an undue hardship on agency's operation. *Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) (Financial condition of an employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship).

6. Reassignment as RA. Agency is not obligated to assign employee to permanent light duty. *Bauman v. Dep't of Navy*, 55 M.S.P.R. 209 (1992). Offering the employee a reassignment to another position should be considered the accommodation of last resort. *Angin & Angin v. U.S. Postal Serv.*, 102 FEOR 3002 (August 22, 2001). On May 21, 2002, the EEOC amended the federal government's "reassignment rule" (29 C.F.R. § 1614.203) to align with the ADA standard (29 C.F.R. § 1630.2). This rule broadens the agency's job search requirement by eliminating the "same commuting area – same appointing authority" language. Reassignment to a "different component of the same department" may now be required, barring undue hardship. It is unclear whether this means our job search would have to be Army-wide or DoD-wide. *Reid v. U.S. Postal Service*, EEOC Appeal No. 01995610 (February 8, 2001).

   a. Vacancies. Complainant bears the burden to establish likely vacancies in RA cases involving reassignment. The Commission held that, in the reassignment context, an agency's failure to conduct either any search at all, or a broad enough search for a position, does not, by itself, result in a finding of discrimination. Instead, complainant must show that it is more likely than not that there were vacancies available, during the relevant time period, into which she could have been reassigned. *McIntosh v. U.S. Postal Service*, 103 FEOR 168 (January 13, 2003).

   b. Practical Advice. If a reassignment job search becomes necessary, start by asking the employee where they would be willing to move. If the employee freely states he would not move, there is no need to search

beyond the local area. Document all of this in writing so that we can properly defend the "failure to reasonably accommodate" claim.

7. Create New Position or Bump Other Employee. An agency is not required to establish a new position or accommodate a disabled employee by bumping another employee from his or her position. See generally *Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998).

8. Cooperation. Employees must cooperate with the RA process. The EEOC noted the process of identifying a RA is an interactive one, i.e., one in which petitioner and agency work together to identify petitioner's specific physical limitations, identify potential accommodations, and assess how effective each would be. *Medlock v. Dep't of Air Force*, 98 FEOR 1143 (1998). Agency's "good faith" attempts to accommodate will preclude recovery of compensatory damages. 42 U.S.C. § 1981a(a)(3).

9. Agency Delays or Non-Action. Ignoring a request for accommodation or putting off making a decision will be held to be the same as a denial of the request.

VII. **SEX DISCRIMINATION.**

A. Overview. Sex discrimination occurs when an employee or applicant for employment is treated adversely or disparately based on sex. "Sex" encompasses both the biological differences between men and women and gender, the cultural and social aspects associated with masculinity and femininity. *Macy v. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives*, 112 LRP 20796, EEOC No. 0120120821, 2012 WL 1435995 (EEOC 2012). Sex discrimination can occur in a variety of contexts, including sexual harassment, sexual stereotyping, sexual orientation, application of terms and conditions of employment.

B. Gender identity.

1. Executive Order 13672, signed on 21 July 2014, added gender identity as a protected class o the other prohibited forms of discrimination, and banned federal employers from discriminating based on sexual orientation.

2. The EEOC reasoned that "[i]f Title VII's proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employee prefers a man over a woman, or vice versa." *Macy*. The EEOC emphasized that a federal agency may not discriminate against an employee because the he or she expresses his or her gender in a non-stereotypical fashion. *Macy v. Dep't of Justice, Bureau of Alcohol, Tobacco,*

Firearms and Explosives, 112 LRP 20796, EEOC No. 0120120821, 2012 WL 1435995 (EEOC 2012).

3. "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort." *Lusardi v. Department of Defense, Dep't of the Army*, 115 LRP 14324, 2015 WL 1607756 (EEOC 2015) (holding "nothing in Title VII makes any medical procedure a prerequisite for equal opportunity," and "an agency may not condition access to facilities -- or to other terms, conditions, or privileges of employment -- on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity."

C. Sexual stereotyping.

1. Title VII protects against discrimination based on an individual's perceived failure to conform to gender-based expecations, stereoptypicl or otherwise. *Haywood, C., Complainant v. U.S. Postal Service*, 0120132452, 114 LRP 52253 (EEOC OFO 2014).

2. The use of offensive or derogatory terms related to sexual orientation and based on the perceiption that na individual does not conform to gender-based expectations can create a sex-based hostile work environment. *Id.*

3. Sexual discrimination when male employee was harassed because of his failure to conform to gender stereotypes, specifically with regard to masculinity. His coworkers allegedly stated that he did "women's work" and asked, "Why are you doing such feminine work?" Others commented that he would make a good wife one day and used a derogatory term in reference to him. *Hitchcock v. Dep't of Homeland Security, Transporation Security Administration*, 107 LRP 25984, EEOC No. 0120051461 (EEOC OFO 2007).

D. Sexual Orientation.

1. Title VII's prohibition of sex discrimination means that employers may not "rel[y] upon sex-based considerations" or take gender into account when making employment decisions. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 241-42 (1989).

2. "Sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin v. Dep't of Transportation, Federal Aviation Administration*, 0120133080, 115 LRP 31813, 2015 WL 4397641 (EEOC OFO July 15, 2015).

3. As with any other Title VII case involving allegations of sex discrimination, in claims of sexual orientation discrimination, the issue is whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.

4. The use of offensive or derogatory terms related to sexual orientation and based on the perception that an individual does not conform to gender-based expectations can create a sex-based hostile work environment. *Haywood, C., Complainant v. U.S. Postal Service*, 0120132452, 114 LRP 52253 (EEOC OFO 2014).

E. Sexual Harassment.

1. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when:

   a. Submission to such conduct is made either explicitly or implicity a term or condition of an individual's employment,

   b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

   c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a).

   Terminology: The Supreme Court appears to reject the traditional model of "quid pro quo" and "hostile environment" sexual harassment." In *Ellerth*, the Supreme Court held "the terms quid pro quo and hostile work environment are helpful, perhaps in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998).

2. The current labels for sexual harassment are "tangible employment action" harassment and "hostile work environment" harassment. In either context, sexual advances must be unwelcome. 29 C.F.R. § 1604.11(a).

   a. Tangible Employment Action harassment is a form of sexual harassment resulting in a negative tangible employment action, almost invariably involving harassment by the supervisor.

      (1) The action must constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment

with significantly different responsibilities, or a decision causing a significant change in benefits. *Id.*

(2) A tangible employment action would not include a bruised ego, a demotion without change in pay, benefits, duties, or prestige, or a reassignment to a more inconvenient job. *Id.*

(3) Although direct economic harm is an important indicator of a tangible adverse employment action, it is not the *sine qua non*. *Durham Life Insurance Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999) (holding "if [agency's] act substantially decreased employee's earning potential and caused significant disruption in his or her working conditions); *Sharp v. Houston*, 164 F.3d 923, 933 (5th Cir. 1999) (holding "job transfer was a tangible employment action, despite fact that no loss of pay occurred, where new position was "objectively worse—such as being less prestigious or less interesting or providing less room for advancement.")

(4) Examples include:

(a) Hiring and firing;

(b) Promotion and failure to promote;

(c) Demotion;

(d) Undesirable reassignment;

(e) Deciison causing a significant change in benefits or compensation;

(f) Significant change in assignments or duties; and

(g) Suspension or any disciplinary action that is part of a program of progressive discipline. *See* EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors.

b. Hostile Environment harassment is a form of sexual harassment that is so objectively offensive as to alter the conditions of employment even though the victim suffers no tangible employment action. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (holding "does not require the loss of job benefits or opportunities.")

(1) In order to prevail on a claim of sexual harassment, the complainant must show that:

(a) He or she was subjected to unwelcome conduct;

(b) The unwelcome conduct was related to their gender or sex;

(c) The harassment had the purpose or effect of unreasonably interfering with their work performance and/or creating an intimidating, hostile, or offensive work environment;

(d) The harassment was severe and pervasive; and

(e) Some basis exists to impute liability to the employer, e.g., supervisory employee knew or should have known of the conduct but failed to take corrective action. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

(2) To avoid liability for sexual harassment, the agency msut show one of the following:

(a) The acts or conduct complained of did not occur;

(b) The acts or conduct complainined of were not "unwelcome;"

(c) The alleged harassment was not sufficiently severe or pervasive to alter the condicitons of the complainant's employment and create an abusive working environment; or

(d) There is no basis for imputing liability to the employer. *Logsdon v. Dep't of Agriculture*, 106 LRP 13256, EEOC No. 07A40120 (EEOC OFO 2006); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

(3) The question is not whether a single act or pattern of harassment is required, but rather whether the requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.

(4) Do not measure the conduct in isolation. Look at all the circumstances, such as frequency of the discriminatory conduct, its severity, whether it is physically threatening or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

(5) "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998).

(6) Psychological and emotional work environment as a condition of employment. A violation can be shown either by evidence that the misconduct interfered with an employee's work or that the environment could "reasonably be perceived and is perceived as hostile or abusive." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

(7) "Reasonable person" and "reasonable victim" tests require both objective and subjective elements. *Id.* A "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Farragher v. Boca Raton*, 524 U.S. 775 (1998).

(8) Harassment need not necessarily be directed at the complainant. *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988) (holding "[In order to constitute an actionable claim], evidence of harassment directed at employees other than the plaintiff is relevant to show a hostile work environment.

(9) The harassing official need not be of the opposite sex as the complainant. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). Same-sex offensive conduct of a sexual nature is actionable if a complainant can prove exposure to disadvantageous conditions of employment to which members of the opposite sex are not exposed. *Brown v. Dep't of the Air Force*, 103 LRP 16840, EEOC No. 01A31163 (EEOC OFO 2003).

3. Agency Liability for Sexual Harassment by Supervisors.

a. In *Faragher* and *Ellerth*, the Supreme Court devised a special framework for imposing vicarious liability on employers in cases

involving harassment by supervisors. A showing that the behavior of the offending supervisor amounted to a tangible employment action results in the automatic imposition of liability on the employer.

b. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, consisting of two elements: (1) the agency exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-65.

4. Constructive Discharge. A person alleging constructive discharge in violation of Title VII, must generally prove "(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign . . . ; and (2) the employee's reaction to the workplace situation--that is, his or her decision to resign--was reasonable given the totality of circumstances . . . ." *Pennsylvania State Police v. Suders*, 524 U.S. 129 (2004) (holding "We conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action,' however, the defense is available to the employer whose supervisors are charged with harassment.")

5. Agency Liability for Sexual Harassment by Non-Supervisors and/or Co-Workers.

a. With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or shold have known of the conduct, unless it can show that it took immediate and appropriate corrective action. 29 C.F.R. § 1604.11(d).

b. Employer is liable only if the employee can demonstrate that the employer was negligent, i.e., knew or should have known of the sexual harassment and failed to take prompt and appropriate action. *Carr v. General Motors Corp*., 32 F.3d 1007 (7th Cir. 1994) (There are two issues in hostile environment analysis of employer liability: whether the employee was subjected to a hostile working environment and whether the employer's response or lack of response to the situation was negligent).

c. Once agency management is aware an employee is being harassed, it must take action to stop the harassment, even if the victim has not yet

directly reported it to management. *Complainant v. Dep't of the Navy*, 0120130704, 115 LRP 47241 (EEOC OFO 2015).

F. EQUAL PAY ACT (EPA) prohibits compensation discrimination based on sex and is applicable to both men and women. 29 C.F.R. Part 1620.

1. The equal work standard does not require that compared jobs be identical, only that they be substantially equal. 29 C.F.R. § 1620.13(a).

2. What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms, the broad remedial purpose of the law must be taken into consideration.

3. The terms constitute separate tests, each of which must be met in order for the equal pay standard to apply. Equal does not mean identical. Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. 29 C.F.R. § 1620.14(a).

a. Equal Skill. Skill includes consideration of such factors as experience, training, education, and ability. It must be measured in terms of the performance requirements of the job. 29 C.F.R. § 1620.15(a).

b. Equal Effort. Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job. Job factors which cause mental fatigue and stress, as well as those which alleviate fatigue are to be considered in determining the effort required by the job. Effort encompasses the total requirements of a job. 29 C.F.R. § 1620.16(a).

c. Equal Responsibility. Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. 29 C.F.R. § 1620.17(a).

d. Working Conditions. The term "similar working conditions" encompasses two sub-factors: surroundings and hazards. Surroundings measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity and their frequency. "Hazards" take into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. The phrase "working conditions" does not encompass shift differentials. 29 C.F.R. § 1620.18(a).

4. "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed,

between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

5. To establish a prima facie case, the complainant must show that she received less pay than an employee of the oppositye sex for equal work, that required equal skill, effort, and responsibility under similar working conditions." *Strag v. Board of Trustees,* 55 F.3d 943, 948 (4th Cir. 1995).

    a. The plaintiff must identify a particular comparator for purposes of the inquiry, and may not compare him/herself to a hypothetical or "composite" person of the opposite sex. *Id.*

    b. Conclusory allegations that s/he performed comparable work is insufficient to establish a prima facie claim. *Soble v. University of Md.*, 778 F.2d 164, 167 (4th Cir. 1985).

    c. To survive summary judgment, the complainant must be produced to create a genuine issue of material fact not only that s/he made lower wages than a comparator, but also that the work performed was substantially equal in skill, effort, and responsibility to the comparator under similar working conditions. *Strag*, 55 F.3d at 950.

6. The statute of limitations for filing an EPA case may be commenced within two years after the cause of action accrues except that a claim arising out of a willful violation may be commenced within three years. 29 U.S.C. § 255(a).

7. There is no requirement that complainant pursue an administrative remedy prior to filing in U.S. District Court. 29 U.S.C. § 255(a); 29 C.F.R. § 1614.408.

8. Where the jurisdictional prerequisites of both the EPA and Title VII are satisfied, any violation of the EPA is also a violation of Title VII. However, Title VII covers types of wage discrimination not actionable under the EPA. Therefore, an act or practice of an employer or labor organization that is not a violation of the EPA may nevertheless be a violation of Title VII. 29 C.F.R. § 1620.27(a).

9. National Security Exception. Notwithstanding any other provision of Title VII, it is not an unlawful employment practice for an employer to fail or refuse to hire and employ, or to discharge, or for an employment agency or labor organization to fail or refuse to refer any individual if the job in question, or access to any location in which the job duties are performed, is subject to any national security requirement imposed under any federal statute or executive order, and the applicant or employee does not meet or has ceased to fulfill that requirement. 12 A.L.R. Fed. 3d. 9.

   a. The respondent must affirmatively establish that the security clearance is required for the position under a national security program pursuant to statute or Executive Order. *See* EEOC's Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, *as amended* (1989).

   b. The Commission can review whether the grant, denial, or revocation of a security clearance was conducted in a discriminatory manner. Thus, the Commission can review whether procedural requirements in making security clearance determinations were followed without regard to an individual's protected status. However, the Commission is precluded from reviewing the substance of the security clearance determination or the security requirement under any of the EEO statutes. *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988).

VIII. AGE, RACE, COLOR, NATIONAL ORIGIN, AND RELIGION DISCRIMINATION CASES.

A. Age Discrimination in Employment Act (ADEA). The ADEA does not protect persons under age 40 from age discrimination however, they are protected from retaliation for engaging in protected activity. 29 C.F.R. Part 1625.

   1. Intra-class discrimination: In *Cline*, the Supreme Court rejected claims that favoritism toward older workers violated the ADEA. It concluded that such claims were outside the scope of the Act because Congress only intended "to protect a relatively older worker from discrimination that works to the advantage of the relatively young." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 586 (2004). Accordingly, the EEOC proposed an amendment to its regulations to reflect that "favoring an older individual over a younger individual because of age is not unlawful discrimination under the Act, even if the younger individual is at least 40 years old."

   2. Years of service: An employment action based solely on an individual's years of service constitutes "disparate treatment" under the ADEA where years of

service are a proxy for age. Such an action may also be unlawful if it has a "disparate impact" based on age.

3. Disparate Impact. A disparate impact claim can be maintained under the ADEA. 29 U.S.C. § 623(a)(1, 2). However, unlike claims raised under Title VII, an employer may avoid a finding of disparate impact age discrimination by showing its action was based on "a reasonable factor other than age." When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age"' exists factually. 29 C.F.R. § 1625.7(e). See also *Smith, et al. v. City of Jackson, Mississippi, et al.*, 544 U.S. 228 (2005).

    a. When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable. 29 C.F.R. § 1625.7(c).

    b. When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. 29 C.F.R. § 1625.7(d).

4. Disparate Treatment. To establish a disparate-treatment claim, a complainant msut show:

    a. That the complainant is a member of the protected group (ie. 40 or older);

    b. The complainant was the recipient of an adverse personnel action; and (3) A causal connection exists between the complainant's age andt he action. *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308 (1996).

5. Burden-Shifting. The plaintiff retains the burden of persuasion to establish the "but-for" cause of the employer's adverse action. Because Title VII is materially different with respect to the relevant burden of persuasion, interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse* and *Desert Palace*.

    a. The Supreme Court never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now.

    b. When conducting statutory interpretation, courts "must be careful not to apply rules applicable under one statute to a different statute without

careful and critical examination." *Fed. Express Corp. v. Holowecki*, 552 U.S. 128 (2008).

c. The language of 29 U.S.C. § 633a allows an agency employee to prevail under a mixed motive argument by proving that age was a factor in the employment decision. *Ford v. Mabus,* 628 F.3d 198 (D.C. Cir. 2010).

6. Special rules that apply to ADEA cases.

a. Plaintiff can bypass administrative EEO procedures by filing a notice of intent to sue with the EEOC, wait 30 days, and then file a civil action in U.S. District Court. 29 U.S.C. § 633a(c)(d); 29 C.F.R. § 1614.201(a).

b. Older Workers' Benefit Protection Act provides that individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary and meets several statutory requirements (i.e., settlement specifically refers to rights or claims arising under the ADEA, complainant advised in writing to consult attorney before signing agreement, etc.). 29 U.S.C. § 626(f).

c. No right to attorney fees for administrative processing phase of ADEA cases. 28 U.S.C. § 2412(b).

d. No right to jury trial and no compensatory damages. *Johnson v. Dep't of Defense,* 105 LRP 35769, EEOC No. 01A41134 (EEOC OFO 2005).

B. Race and Color Discrimination.

1. Race Discrimination. Title VII prohibits employer actions that discriminate by motivation or impact, against persons because of race. This encompasses ancestry, physical characteristics, race-linked illness, culture, perception, association, subgroups, and "reverse" race discrimination. *See* EEOC Compliance Manual, Section 15.

a. Physical characteristics: associated with a particular race, even where the charging party and the alleged discriminator are members of the same race.

b. Race-linked illness. If the employer applies facially neutral standards to exclude treatment for conditions or risks that disproportionately affect employees on the basis of race or ethnicity, the employer must show that the standards are based on generally accepted medical criteria. *See* EEOC Compliance Manual, Section 3.

c. Association with a protected individual. For example, it is unlawful to take an adverse employment action against a white employee because s/he is married to an individual who is Native American or because s/he has a mixed-race child. *Tetro v. Elliott Popham Pontiac,* 173 F.3d 988 (6th Cir. 1999).

d. Culture: often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, accent or manner of speech. *See* EEOC Compliance Manual, Section 15.

e. Perception. Employment discrimination against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies. *See* EEOC Compliance Manual, Section 15.

2. Color Discrimination. Title VII prohibits employment discrimination because of "color" – pigmentation, complexion, or skin shade or tone. *See* EEOC Compliance Manual, Section 15. Color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity. *Santiago v. Stryker Corp.* 10 F. Supp. 2d 93, 96, (D.P.R. 1998).

3. While Title VII prohibits both race and color discrimination, courts do not always distinguish them. *Ford v. Dep't of Army*, 102 FEOR 3013 (December 6, 2001). The EEOC finds it unnecessary to determine whether an adverse action was based on race or on color as long as the charging party alleges one or the other, or both.

4. Race and color discrimination may also overlap with national origin discrimination. Under these bases, discrimination may be alleged to be based upon the physical characteristics associated with a particular race, even where the charging party and the alleged discriminator are members of the same race. Discrimination under these bases may also be based on the shade of skin color. Furthermore, association with an individual of a particular race or color is also prohibited. For example, it is unlawful to take an adverse employment action against a white employee because s/he is married to an individual who is Native American or because s/he has a mixed-race child. *Tetro v. Elliott Popham Pontiac,* 173 F.3d 988 (6th Cir. 1999).

C. National Origin Discrimination includes discrimination based upon the place of origin or on the physical, cultural, or linguistic characteristics of a national origin group. 29 C.F.R. Part 1606.

1. Intersectional discrimination. Sometimes, national origin discrimination overlaps with race discrimination, and in such cases, the basis of discrimination can be categorized as both race and national origin. *Stone v. Dep't of*

Treasury, 102 FEOR 12080 (July 6, 2001) (Discrimination against a Native American may be race and/or national origin discrimination).

2. Accent/Language. Discrimination also includes discrimination based upon the accent, manner of speaking, or language fluency. *Carino v. University of Okla. Bd. of Regents,* 750 F.2d 815, 819 (10th Cir. 1984) (foreign accent that does not interfere with ability to perform position in question is not legitimate basis for adverse treatment).

3. A complainant may also raise an allegation of discrimination for association with an individual of a particular national origin.

4. This type of discrimination may include requiring multilingual employees to perform more work than unilingual colleagues without additional compensation. A ban on employees speaking their primary language in the workplace presumptively violates Title VII, however employees may be required to speak English if the rule is justified by business necessity. *Alvarez v. Dep't of Veterans Affairs*, 103 FEOR 279 (March 6, 2003) (holding "an agency policy preventing employees from speaking Spanish in the reception area where they serviced non-Spanish speaking customers, while permitting Spanish in private conversations in private offices did not constitute prohibited discrimination.")

5. The EEO statutes protect all employees who work in the United States for covered employers regardless of citizenship status or work authorization.

D. Religious Discrimination. The EEOC defines "religion" to include moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views. The Commission will not determine what is or is not a religion. Coverage is extended to atheists. 29 C.F.R. Part 1605.

1. Title VII prohibits covered employers, employment agencies, and unions from:

   a. Treating applicants or employees differently (disparate treatment) based on their religious beliefs or practices – or lack thereof – in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion, and benefits;

   b. Subjecting employees to harassment because of their religious beliefs or practices – or lack thereof – or because of the religious practices of beliefs of people with whom they associate (relatives, friends, etc.);

   c. Denying a requested reasonable accommodation of an applicant's or employee's sincerely held religious beliefs or practices – or lack thereof

– if an accommodation will not pose an undue hardsip on the conduct of the business.

2. Reasonable Accommodation (RA). Title VII requires agencies to provide reasonable accommodations for an individual's religious practices, such as leave to observe religious holidays, unless doing so would cause an undue hardship.

   a. An employer may be held liable if a religious accommodation need, such as wearing a headscarf, was a motivating factor in the decision not to hire an applicant, regardless of whether the employer had actual kowledge of the need for accommodation. *EEOC v. Abercrombie & Fitch Stores, Inc.* 135 S. Ct. 2028 (2015).

   b. The standards for RA and undue hardship for religious accommodation is different than disability accommodation. *Galera v. Dep't of Agric.*, EEOC Appeal No. 01992382 (September 6, 2001) (holding use of compensatory time off as an accommodation – "it is reasonable to conclude that permitting complainant to use compensatory time in observance of Holy Thursday would not have adversely affected the efficient accomplishment of the agency's mission").

IX. **REMEDIAL ACTIONS.**

A. Nondiscriminatory Placement. When it is found that an applicant or an employee has been discriminated against, the agency shall provide full relief which shall include…an unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position. 29 C.F.R. § 1614.201(a)(3).

B. Back Pay.

   1. When an appropriate authority has determined that an employee was affected by an unjustified or unwarranted personnel action, the employee shall be entitled to back pay under 5 U.S.C. § 5596 and this subpart only if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. 5 C.F.R. § 550.804.

   2. Back play excludes periods where the employee was not ready, willing, and able to perform duties, or any period where an employee was unavailable for the performance of duties for reasons other than those related to the unjustified or unwarranted personnel action. 5 C.F.R. § 550.805.

3. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. 29 C.F.R. § 1614.504(b)(1)(ii).

4. The employee has a duty to mitigate damages.

5. Back pay liability under Title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

C. Front Pay. Front pay is defined as the time between judgment and reinstatement. *Shore v. Federal Express Corp*., 42 F.3d 373 (6th Cir. 1994). As a general rule, reinstatement into an appropriate position is preferred to an award of front pay.

1. Three circumstances where front pay may be awarded in lieu of reinstatement:

a. Where no position is available,

b. Where subsequent working relationships would be antagonistic, or

c. Where the agency has a record of long-term resistance to anti-discrimination efforts. *Finlay v. Postmaster General*, 97 FEOR 3144 (April 29, 1997).

2. Front pay awards are not an element of compensatory damages within the meaning of the Civil Rights Act of 1991 and are not subject to the Act's statutory cap on compensatory damages. *Pollard v. E.I du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

D. Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling). 29 C.F.R. § 1614.501(c)(5).

E. Fees and costs. A finding of discrimination raises a presumption of entitlement to an award of attorney fees. Attorney fees or costs shall apply to allegations of discrimination prohibited by Title VII and the Rehabilitation Act.

1. Attorney fees are normally payable only for work beginning at formal complaint stage. However, attorney fees will be payable for work performed during *pre-complaint* process where the Commission affirms an administrative judge's finding that an agency has not implemented. 29 C.F.R. § 1614.501(e).

2. Attorney fees are not available in the administrative process for ADEA and EPA claims. 29 C.F.R. § 1614.501(e)(1)(i).

F. Compensatory damages are limited to $300,000 above other relief (cap does not include back pay, front pay, past pecuniary losses, attorney fees, or lost benefits). 42 U.S.C. §1981a(b)(3).

1. A properly payable compensatory damages award must meet two standards:

   a. It must not be "monstrously excessive" standing alone and

   b. It must be consistent with awards made in similar cases. *Winston v. Dep't of Agric.*, 100 FEOR 3145 (2000).

2. In any case where the plaintiff seeks compensatory damages and takes the case to U.S. District Court (except ADEA). Note: Compensatory damages are not payable in ADEA cases, Rehabilitation Act cases when the agency made good faith efforts to reasonably accommodate, or in disparate impact cases. 42 U.S.C. § 1981a(a)(1).

CHAPTER H

EQUAL EMPLOYMENT OPPORTUNITY PRACTICE AND PROCEDURE

I. REFERENCES.

A. Statutory.

1. Title VII, Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17.

2. Age Discrimination in Employment Act (ADEA); 29 U.S.C. § 633a.

3. Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 790-794, and modified by the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. In 1992, the Rehabilitation Act was amended to make standards that apply under Title I of the ADA and provisions of §§ 501, 504, and 510 of the ADA applicable in Rehabilitation Act cases to determine whether non-affirmative action employment discrimination occurred. These provisions primarily relate to discrimination based on disability and reasonable accommodation.

4. Equal Pay Act (EPA), 29 U.S.C. § 206(d).

5. Civil Rights Act of 1991, Pub. L. No. 102-166 (codified thru sections of 42 U.S.C.).

6. Civil Service Reform Act of 1978, 5 U.S.C. § 7702 [Merit Systems Protection Board "mixed cases"].

7. 29 C.F.R. Part 1614 (Equal Employment Opportunity Commission (EEOC) federal sector complaints processing).

B. Military Department Guidance.

1. Army Regulation (AR) 690-600.

2. Air Force Instruction (AFI) 36-1201.

3. Secretary of the Navy Instruction (SECNAVINST)12720.5A.

4. U.S. Marine Corps Order (MCO) 12713.6A.

C. Helpful Guidance Documents.

1. Representing Agencies and Complainants Before the EEOC, Hadley, Laws, and Riley; http://deweypub.com. (updated annually) (focus: hearing practice).

2. A Guide to Federal Sector Equal Employment Law & Practice, Ernest C. Hadley; http://deweypub.com. (updated annually) (focus: substantive law).

3. Effective Summary Judgment Motions, Hadley, Laws, and Murphy; http://deweypub.com. (updated annually) (focus: EEOC practice).

4. Motions Practice Before the MSPB and the EEOC, Hadley and Tuck, http://deweypub.com.

5. Compensatory Damages and Other Remedies in Federal Sector Employment Discrimination Cases, Gilbert, http://deweypub.com.

6. A Guide to Federal Sector Disability Discrimination Law and Practice, Hadley, Laws, and Broida, http://deweypub.com.

7. EEOC Management Directive 110.

8. EEOC Handbook for Administrative Judges.

II. INFORMAL STAGE: EMPLOYEE CONTACTS EQUAL EMPLOYMENT OPPORTUNITY COUNSELOR.

1. Timing.

   a. Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, physical or mental disability, and/or reprisal in an employment matter must initiate contact with an EEO Counselor within 45 days of the agency's alleged act of discrimination, or, if the claim involves a personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1), AR 690-600, Ch 3.

   b. Commencement of an event not constituting a personnel action is the date the individual knew or reasonably should have known of the discriminatory event.

   c. Administrative timeliness requirements are construed as statutes of limitations that are subject to waiver, estoppel, and equitable tolling.

   d. If initial contact occurs beyond 45 days it will be permitted only if the employee was (1) not notified of and was otherwise not aware of the 45-day limit; (2) did not know and reasonably should not have known that the discriminatory matter or personnel action occurred; or (3) that despite due diligence, the employee was prevented by circumstances beyond his control from contacting the EEO counselor within the time

limits, or for other reasons considered sufficient by the agency or the Commission. 29 C.F.R. § 1614.105(a)(2).

(1) Agency's Rebuttal. In order to rebut a claim that the complainant was unaware of the time limit, the agency must be prepared to provide specific evidence the complainant had actual or constructive notice of the time limit.

(a) Generally, this can be shown by establishing that, during the time period in question, there were EEO posters in the complainant's workplace outlining the proper procedure for contacting an EEO counselor. *Hendley v. Small Business Admin.*, 104 FEOR 22 (2003).

(b) Posting Requirement. The agency is required to make written materials available to all employees and applicants informing them of the agency EEO programs and administrative and judicial remedial procedures available to them by posting such written materials throughout the workplace. 29 C.F.R. § 1614.102(b)(5) & (7).

(2) Waiver of Time Limit. When an agency decides the merits of an EEO complaint during the administrative process and does not address the question of timeliness, the agency waives a timeliness defense in a subsequent lawsuit. *Ester v. Principi*, 250 F.3d 1068 (7th Cir. 2001).

(3) Continuing Violation Theory. This theory suspends the normal 45-day period for contacting an EEO counselor and allows complainants to assert otherwise untimely claims so long as they also allege discrimination occurring within the 45-day limitations period.

(a) Complainant's notice of discrimination outside the limitations period does not preclude the continuing violation theory.

(b) The running of the period for initiating a Title VII complaint starts from the most recent occurrence of the alleged discrimination and not from the first occurrence. *Anisman v. Dep't of Treasury,* 101 FEOR 3069 (April 12, 2001).

(c) Complainant must allege facts that are sufficient to indicate that s/he may have been subjected to an ongoing

unlawful employment practice which continued into the 45-day period for EEO counselor contact. *Redmon v. Office of Personnel Mgmt.*, 101 FEOR 3003 (August 25, 2000).

(d) In 2002, the Court distinguished between hostile work environment claims and claims involving discrete acts of discrimination (such as discharge, failure to promote, denial of transfer, or failure to hire). *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

(i) Discrete Acts. Title VII precludes recovery for discrete acts of discrimination that occur outside the statutory time period (the 45 days in which to contact an EEO counselor). "Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.*

(ii) Hostile Environment. Involves repeated conduct – "a series of separate acts that collectively constitute one unlawful employment practice." Hostile work environment claims do not turn on single acts but on an aggregation of hostile acts extending over a period of time. The unlawful employment practice that triggers the statute of limitations occurs not on any particular day, but over a series of days or perhaps years. Thus, the statute of limitations is satisfied as long as the plaintiff files a charge within [45 days] of one of the many acts that, taken together, created the hostile work environment.

2. Counselor Actions.

a. Initial Interview.

(1) Advise complainant.

(a) Counselors must advise individuals in writing of their rights and responsibilities including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with 29 C.F.R. § 1614.108(f).

(b) Counselors shall advise aggrieved persons that, where the agency agrees to offer Alternative Dispute Resolution (ADR) in the particular case, they may choose between participation in the ADR program and the counseling activities. 29 C.F.R. §1614.105(b)(2). Where complainant chooses to participate in ADR, the pre-complaint processing period shall be 90 days. 29 C.F.R. § 1614.105(f). The ADR election must be made in writing and the form will be attached to the EEO Counselor's report. The aggrieved person's election to proceed through counseling or ADR is final.

(2) Gather facts from complainant.

(3) Identify witnesses who may have direct knowledge of the alleged events.

(4) Counselor inquiry, including interview with alleged discriminating official.

(a) Counselor reviews applicable records and interviews the alleged discriminating officials or co-workers to find out the reasons for the action taken.

(b) Unless complainant waives their right to confidentiality at the pre-hearing stage, the EEO Counselor shall not reveal the identity of the complainant who consulted the Counselor, except when authorized to do so by the complainant, or until the agency has received a formal discrimination complaint from the complainant involving that same matter. 29 C.F.R. § 1614.105(g).

b. Final Interview.

(1) Timing. Within 30 days of initial contact with EEO. This period may be extended for up to an additional 60 days if both the employee and the agency agree.

(2) Counselor should discuss with the complainant what occurred during the EEO counseling process in terms of attempts at resolution. EEOC MD-110, § VI, ¶ D.

(3) Notice of right to file a formal complaint. Advise the complainant in writing of their right to file a formal complaint with the EEO Officer within 15 calendar days of receipt of the final interview notice. A postmark dated within the requisite 15

calendar days will be evidence of timely filing. EEOC MD-110, § VI, ¶ D.

(a) Counselor must not indicate whether s/he believes the discrimination complaint has merit. EEOC MD-110, § VI, ¶ D.

(b) The EEO Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. 29 C.F.R. § 1614.105(g).

c. Final Report.

(1) The EEO Counselor must submit written report within 15 calendar days after the formal complaint was filed to the EEO Officer and the aggrieved person concerning the issues discussed and actions taken during counseling. 29 C.F.R. § 1614.105(c).

(2) The EEO Counselor will submit a written report of all actions taken during the inquiry and of the information provided to the agency and the complainant to the EEO Officer within 5 days of completing formal counseling. AR 690-600, ¶ 3-9h.

B. Formal Stage.

1. Written complaint to EEO Officer.

a. Complaint must contain a signed statement from the complainant or their representative. This statement must be sufficiently precise to identify the complainant and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint.

b. Timing. Within 15 days of final interview with EEO Counselor the complaint must be filed.

c. Amendment. Complainant may amend complaint at any time prior to conclusion of investigation for like or related claims only or on motion to the Administrative Judge (AJ) after a request for a hearing is made. 29 C.F.R. § 1614.106(d).

d. Consolidation. Agencies must consolidate for joint processing two or more complaints of discrimination filed by the same complainant, after appropriate notification is provided to the parties. 29 C.F.R. § 1614.106. Section 1614.606 permits, but does not require, the consolidation of complaints filed by different complainants that consist

of substantially similar allegations or allegations related to the same matter.

e. Dismissal of complaint. Prior to complainant's request for a hearing, the agency can dismiss a complaint (in whole or in part) for the following reasons:

(1) Failure to state a claim under 29 C.F.R. § 1614.103. "The Commission has held that a remark or comment, unaccompanied by concrete action, is not a direct and personal deprivation sufficient to render an individual aggrieved." *Simon v. U.S. Postal Service*, EEOC Request No. 05900866 (October 3, 1990).

(2) Identical complaint. 29 C.F.R. § 1614.107(a)(1). Complaint is pending before or has been decided by the agency or EEOC.

(3) Not against the proper agency. 29 C.F.R. §§ 1614.107(a)(1), 1614.106(a).

(4) Untimely (at either formal or informal stage). 29 C.F.R. § 1614.107(a)(2).

(a) NOTE: Time spent on active military duty is excluded when computing time limit for contacting EEO counselor. *Ulmer v. U.S. Postal Service*, 105 FEOR 120 (November 16, 2004).

(b) Receipt of written notice of right to file a formal complaint triggers the 15 day time limit. Oral notice prior to that is immaterial. *Brown v. Dep't of Army*, EEOC Appeal No. 01A43465 (October 22, 2004).

(c) Time periods run from service on attorney of record when complainant is represented. *Blakemore v. Dep't of Navy*, EEOC Appeal No. 01A43465 (2004).

(5) Pending civil action in a U.S. District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint. 29 C.F.R. § 1614.107(a)(3).

(6) Raised in negotiated grievance procedure (NGP) that permits allegations of discrimination or in an appeal to the MSPB. 29 C.F.R. § 1614.107(a)(4)

(7) Issue is moot or issue is a proposal to take a personnel action or other preliminary step to taking a personnel action. 29 C.F.R. § 1614.107(a)(5). Complaint cannot be dismissed as moot where complainant has requested compensatory damages. *Anderson v. Dep't of Air Force*, EEOC Appeal No. 01A44943 (December 13, 2004).

(8) Complainant cannot be located. 29 C.F.R. § 1614.107(a)(6).

(9) Failure to cooperate where complainant failed to provide requested information to clarify complaint. 29 C.F.R. § 1614.107(a)(7). But see *McLain v. Dep't of Army*, 107 FEOR 182 (January 30, 2004) (dismissal improper where formal complaint and counselor's report contained sufficient information to process complaint).

(10) Spin-off complaints. Complaint alleges dissatisfaction with the processing of a previously filed complaint. 29 C.F.R. § 1614.107(a)(8).

(11) Clear pattern of abuse of the EEO process. 29 C.F.R. § 1614.107(a)(9).

f. Appeal of dismissal. A complaint dismissed in whole by the agency may be appealed, within 30 days of receipt, to the EEOC's Office of Federal Operations (EEOC-OFO). 29 C.F.R. § 1614.402(a).

(1) There is no interlocutory appeal right to the EEOC-OFO on partial dismissals. 29 C.F.R. § 1614.107(b).

(2) When an agency dismisses some but not all of the claims in a complaint, it must notify the complainant in writing, explain the rationale for the decision, and notify the complainant that those claims will not be investigated. This determination is reviewable by the AJ if a hearing is requested on the remainder of the complaint. The AJ may determine to supplement the file through testimony or other means if he determines the dismissed issues were dismissed in error.

g. Investigation. Section 1614.108(b) of Title 29 C.F.R. requires that "the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint." EEOC-MD-110, para. 6-1 (Aug. 2015).

(1) Purpose. "Gather facts upon which a reasonable fact finder may draw conclusions as to whether an agency subject to coverage

under the statutes that the Commission enforces in the federal sector has violated a provision of any of those statutes, and (2) if a violation os found, to have a sufficient factual basis from which to fashion an appropriate remedy." EEOC-MD-110, Ch. 6, § IV(B).

(2) Within the DoD, the Investigations and Resolutions Division (IRD) will provide an investigator to serve as the fact-finder and will be "officially designated and authorized to conduct inquiries into claims raised in EEO complaints." EEOC-MD-110, Ch. 6, § III(B).

(3) The IRD investigator does not make or recommend a finding of discrimination. Rather, the role of the investigator is to "collect and to discover factual information concerning the claims in the complaint under investigation and to prepare an investigative summary." EEOC-MD-110, Ch. 6, § V(A).

(4) The investigator has discretion to elect the form of investigation that will be conducted. This process may incorporate one or more forms, and may incorporate some features of a dispute resolution plan:

(a) Conduct interviews

(b) Conduct a fact-finding conference

(c) Issue requests for information, position statements

(d) Exchange letters or memoranda

(e) Request interrogatories

(f) Request affidavits. EEOC-MD-110, Ch. 6, § IV(A).

(5) Upon completion of the IRD investigation, the investigator compiles the record and provides an identical copy to the complainant and the agency representative.

(a) The complainant decides the course of action.

(b) The complainant must make their election of their desired course of action within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).

(c) The complainant may either request a final decision from the agency head based on the record or request an administrative hearing and decision from an EEOC AJ.

(6) Timeline. Agencies must complete the investigation within 180 days of the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.108(e)(f).

(7) Role of Agency Representative in the Investigative Process.

(a) Under 29 C.F.R. § 1614.108(c)(1) it states "the complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary."

(b) EEOC-MD-110 Ch. 1, § 4(D) states:

(i) "At a minimum, the agency representative in EEO complaints may not conduct legal sufficiency reviews of EEO matters."

(ii) "Impartiality or the appearance of impartiality is not ensured by simply rotating agency representatives within the same office."

(iii) "Impartiality or the appearance of impartiality is undermined where the agency representative's associates are assigned the legal sufficiency function in EEO cases from [their] caseload."

(iv) A firewall must exist between the EEO function and the agency's defensive function.

(c) Army Regulation 690-600, § 1-13 defines the role of the agency representative is to:

(i) "Provide legal advice on EEO matters to the serviced commander, EEO officials, managers, [and] appropriate civilian personnel officials."

(ii) "After a formal complaint is filed, serve as the agency representative and ensure appropriate

coordination with EEO and civilian personnel officials on all issues pertaining to a complaint."

(iii) "Act as the Army's representative in investigations and EEOC hearings in individual complaints and class action proceedings."

(d) Recent case law has also provided insight into the role of agency representatives during the investigative stage.

(i) In *Rucker*, "the complainant claimed that the agency's Office of General Counsel [OGC] had improperly interjected itself into the EEO investigation by reviewing and assisting in the development of management affidavits before submission to the EEO investigator. The Commission advised the agency that 'it should be careful to avoid even the appearance that it is interfering with the EEO process."' *Rucker v. Dep't of Treasury,* EEOC Appeal No. 0120082225 (Feb. 4, 2011), *reconsid. Denied*, EEOC Request No. 0520110343 (Apr. 26, 2011).

(ii) "After the EEO process becomes adversarial, i.e., once a request for a hearing is submitted or an appeal is filed with the Commission, an agency's ... legal representative has a duty to represent the interests of the agency." *Tammy S. v. Dep't of Defense*, EEOC Appeal No. 0120084008 (June 6, 2014), *reconsid. Denied*, EEOC Request No. 0520140438 (June 4, 2015). "However, during the informal counseling stage and the investigation into the accepted issues of the complaint, the agency representative should not have a role in shaping the testimony of the witnesses or the evidence gathered by the EEO investigator." *Id.*

(iii) "[The] Commission found Agency impermissibly interefed with the EEO investigation where its OGC reviewed Complainant's draft affidavit responses and provided him with feedback about his response before he submitted them to the investigator." *Josefina L. v. Social Security*

Administration, EEOC Appeal No. 0120161760 (July 10, 2018)

(iv) In *Annalee*, the complainant contends that the agency's OGC improperly injected itself into the EEO investigation by providing legal counsel and representation to witnesses, stating to a witness that he was "his representative, " and by contributing to the prearation of the witness' affidavit response for the IRD investigator. The agency maintains "that it is permissible to have OGC represent and assist management officials before the hearing stage because the agency is liable for the actions of its supervisors and managers." The court found that "the agency impermissibly encroached upon the investigative stage of the EEO process." *Annalee v. General Serv. Admin.*, EEOC Appeal No. 0120170991 (Oct. 15, 2018).

(v) The Agency timely requested that the EEOC reconsider into holding in *Annalee* that the agency improperly assisted management officials and other witnesses during the pre-hearing stages of the EEO process. Upon reconsideration, the EEOC agreed.

a. "Our [initial decision in *Annalee*] appears to set forth an absolute rule that prohibits agency defense counsel from participating in the pre-hearing stages of [EEO] matters."

b. "Nothing contained in MD-110 explicitly prohibits agency defense counsel from representing an agency manager during the counseling stage or bans agency defense counsel during the investigative stage from assisting an agency manager in preparing his or her affidavit or acting as a representative under the appropriate circumstnaces."

c. "There is no 'bright line' regarding the extent to which agency defense counsel

may be involved during the pre-hearing stages of the EEO process. Rather, the issue of utmost concern to the Commission is whether the actions of agency defense counsel improperly interfered with or negatively influenced the EEO process." *Annalee D. v. General Serv. Admin.*, EEOC Request No. 2019000778 (Nov. 27, 2019).

2. EEOC Hearing.

a. Prehearing Issues.

(1) Request for Hearing. Complainants make requests for a hearing directly to the regional EEOC office indicated in the agency's acknowledgment letter. The complainant must send a copy of the request for a hearing to the agency EEO office. 29 C.F.R. § 1614.108(g).

(2) Dismissals. 29 C.F.R. § 1614.109(b). AJ may dismiss complaint on own initiative or upon agency motion.

(3) Offer of Resolution. 29 C.F.R. § 1614.109(c).

(4) Discovery. 29 C.F.R. § 1614.109(d). The parties may (and are encouraged to) engage in discovery before the hearing. The AJ may limit the quantity and timing of discovery (interrogatories, depositions, requests for admissions, stipulations of fact, or production of documents). Grounds for Objection: irrelevant, over burdensome, repetitious, or privileged.

(5) Decisions Without A Hearing. Parties may limit the issues for hearing by filing a statement at least 15 days before the hearing showing there is no genuine dispute as to some or all material facts. If the AJ determines that material facts are not in genuine dispute, the AJ can decide to issue a decision without holding a hearing. 29 C.F.R. § 1614.109(g)(3).

b. Hearing Procedures.

(1) Evidence. The AJ shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly but the AJ shall exclude irrelevant or repetitious evidence. 29 C.F.R. § 1614.109(e).

(2) Witnesses. Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an AJ. 29 C.F.R. § 1614.109(e).

(3) Alternatives to testimony. Written statement are taken under penalty of perjury. 29 C.F.R. § 1614.109(f)(2).

(4) Record of hearing. The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. 29 C.F.R. § 1614.109(h).

(5) Decision. Within 180 days of receipt of the complaint file from the agency, the AJ will issue a decision on the complaint and will order appropriate remedies and relief where discrimination is found. 29 C.F.R. § 1614.109(i).

3. Final Agency Action After AJ Decision (With or Without Hearing). When an AJ has issued a decision, the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision.

   a. The final order will indicate whether the agency will implement the AJ's decision.

   b. The final order shall also contain notice of the right to appeal to the EEOC, notice of the right to file a civil action in U.S. District Court, and the applicable time limits for appeals and lawsuits. 29 C.F.R. § 1614.110(a).

   c. If the agency is not going to fully implement the AJ's decision, then it must simultaneously file an appeal to the EEOC-OFO. The agency's appeal brief in support of the appeal must be submitted to the EEOC-OFO within 20 days of filing the notice of appeal. 29 C.F.R. § 1614.403(d).

4. Final Agency Action When There is No AJ Decision.

   a. The agency will issue a final decision when it (1) dismisses an entire complaint under 29 C.F.R § 1614.107, or (2) receives a request from complainant for an immediate final decision or does not receive a reply to the notice issued under 29 C.F.R. 1614.108(f).

   b. The final decision will consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and when discrimination is found, appropriate remedies and relief.

c. The final decision shall also contain notice of the right to appeal to the EEOC, notice of the right to file a civil action in U.S. district court, and applicable time limits for appeals and lawsuits.

d. Agency must issue final decision within 60 days of receiving notice that a complainant has requested an immediate decision from the agency (e.g., a decision without an AJ hearing).

5. Complainant's Appeal of Final Agency Action. Must appeal to EEOC-OFO within 30 days of receipt of a dismissal, final action or decision. 29 C.F.R. § 1614.402(a).

6. Other Appeal Requirements. Agency must submit the complaint file to the EEOC-OFO within 30 days of notice of complainant's appeal or of filing agency appeal. Any statement or brief in opposition to an appeal must be submitted to the EEOC-OFO and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal. The EEOC-OFO will accept statements or briefs in support of or in opposition to an appeal by facsimile provided they are no more than 10 pages long. 29 C.F.R. § 1614.403(a)-(f).

7. Standard of Review on Appeal to EEOC-OFO. Decisions on appeal from agency's final action are based on *de novo* review, except factual findings in a decision by AJ are given *substantial evidence* standard of review.

8. Request for Reconsideration.

a. A decision issued by the EEOC-OFO is final unless the Commission reconsiders the case.

b. A party may request reconsideration within 30 days of receipt of a decision of the Commission.

c. There are two grounds for reconsideration: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law, or and (2) the decision will have a substantial impact on policies, practices, or operations of the agency. 29 C.F.R. § 1614.405.

III. ADMINISTRATIVE COMPLAINT PROCEDURES--MIXED CASES.

A. Initiating the process. Three possible options:

1. Negotiated Grievance Procedure (NGP). When a person is covered by a collective bargaining agreement (CBA) that permits allegations of discrimination to be raised in a NGP, a person wishing to file a complaint or a

grievance on a matter of alleged employment discrimination must elect to raise the matter under either Part 1614 or the NGP, but not both. 29 C.F.R. § 1614.301(a).

2. The EEOC Mixed Case Complaint. Consists of an alleged employment discrimination complaint minus a hearing before an EEOC AJ and appeal to the EEOC. A mixed case complaint is filed with a federal agency based on race, color, religion, sex, national origin, age, or handicap related to or stemming from an action that can be appealed to the MSPB. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. 29 C.F.R. § 1614.302(a)(1).

3. MSPB mixed case appeal [Note: the initial claim filed with the MSPB is still termed an "appeal"]. A mixed case appeal is an appeal initially filed with the MSPB that alleges an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap, or age. An appeal is mixed if the complainant alleges an action taken by the agency was effected wholly, or in part, because of employment discrimination based on race, color, religion, sex, national origin, age, or handicap. 29 C.F.R. § 1614.302(a)(2).

4. Electing the option. An aggrieved person may initially file a mixed case complaint with an agency or file a mixed case appeal on the same matter with the MSPB pursuant to 5 C.F.R. 1201.151, but not both.

   a. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB, and who has either orally or in writing raised the issue of discrimination during the processing of the action, of the right to file.

   b. Once the forum is selected, the election is irrevocable. The statute of limitations is tolled if the agency provides incorrect advice to an employee. If the agency provides the employee with incorrect appeal rights, the MSPB likely will find that the employee had good cause if she files a late appeal. *Toyama v. Merit Systems Protection Bd.*, 481 F.3d 1361, (Fed. Cir. 2007).

5. Complaint Process. When a complainant elects to file a mixed case complaint under Title VII procedures rather than file a mixed case appeal with the MSPB, the procedures set forth above for non-mixed case processing shall govern the processing of the mixed case complaint with the following exceptions:

   a. At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(1) if a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 C.F.R. § 1201.154(b)(2) or may file a civil action as specified at 29 C.F.R. 1614.310(g), but not both; and

(2) if the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision.

b. Upon completion of the investigation, the notice provided the complainant in accordance with 29 C.F.R. § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing.

c. When an agency issues a final decision on a mixed case complaint, the agency must inform the employee that she can appeal to the MSPB or file a civil action in U.S. district court.

6. Burden of Proof.

a. A complainant who processes a mixed complaint through the EEO process bears the burden of proving the action was based on a discriminatory motive. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

b. A complainant who processes a mixed appeal through the MSPB process puts the burden of proving the legality of the action on the agency. The affirmative defense of proving discrimination still rests with the complainant. 5 C.F.R. § 1201.56.

7. Appeal. An employee may appeal the decision of the MSPB of a mixed appeal to the EEOC, for a review of the discrimination issue, or to the appropriate district court. *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993).

8. Review by EEOC. A mixed appeal decided by the MSPB may be reviewed by the EEOC regarding the discrimination issue. *Phillips v. Dep't of Army*, 91 FEOR 3144 (1990). The EEOC must determine whether the decision of the MSPB, with respect to discrimination, constitutes an incorrect interpretation of applicable law, rule, regulation, or policy, or is not supported by the evidence in the record as a whole. *Williams v. Dep't of Housing and Urban Dev.*, 90 FEOR 24071 (1990).

9. Special Panel if MSPB and EEOC decisions clash (mixed). In the event the EEOC seeks to overrule the MSPB on the discrimination issue, the MSPB has

the option of concurring with the EEOC or reaffirming its decision and invoking the Special Panel to decide the case. 29 C.F.R. § 1614.306. *See Ignacio v. U.S. Postal Serv.*, Special Panel No. 1, 86 FEOR 5055 (February 27, 1986) (Special Panel determined that the MSPB can disagree with the EEOC only as to a misinterpretation of civil service law).

10. Review by U.S. District Court.

    a. A complainant may file in U.S. District Court if 120 days have elapsed and the complainant has not received a final decision from the MSPB on a mixed appeal. *Butler v. Dep't of Army*, 164 F.3d 634 (D.C. Cir. 1999).

    b. If the employee files in District Court once the MSPB fails to reach a decision within 120 days, or under any other circumstance in which the District Court may hear the case under 5 U.S.C. § 7702, the case shall be heard as a unit, including both discrimination and nondiscrimination complaints. *Ikossi v. Dep't of Navy*, 516 F.3d 1037 (D.C. Cir. 2008).

    c. A district court will review the MSPB determination of a non-discriminatory issue under a deferential standard, but will review the discrimination claim *de novo*. *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998).

IV. ADMINISTRATIVE COMPLAINT PROCEDURES--CLASS COMPLAINTS.

A. Class action complaints are filed when a large number of individuals who share a common protected characteristic seek to have addressed a discriminatory employment policy or practice that affects them all because of their shared protected group.

    1. A "class" is a group of employees, former employees, or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age, or disability. 29 C.F.R. § 1614.204(a)(1).

    2. A "class complaint" is a written complaint of discrimination filed on behalf of a class by the agent of the class. 29 C.F.R. § 1614.204(a)(2).

B. There is a requirement to exhaust administrative class procedures as a prerequisite to maintaining judicial class action.

C. There are significant differences in procedures that exist for class complaints. Unlike individual complaints, a class action requires a class agent. A class agent is a member

of the class who acts on behalf of the class during the processing of the class complaint. 29 C.F.R. § 1614.204(a)(3).

D. Preliminary role of AJ is to determine the propriety of class processing.

1. An EEOC AJ will dismiss a class complaint for any of the following:

a. It does not meet all the prerequisites for a class complaint listed at 29 C.F.R. § 1614.204(a)(2) (numerosity, commonality, typicality, and adequacy of representation);

b. The allegations lack specificity and detail;

c. The complaint falls within any of the criteria for dismissal listed at 29 C.F.R. § 1614.107(a) (failure to state a claim, untimeliness, mootness, etc.); and

d. The representative unduly delayed in moving for class certification.

2. The EEOC AJ assigned to a class complaint can request additional information from the complainant or the agency in deciding whether to certify a class complaint. 29 C.F.R. § 1614.204(d)(3-4).

3. In considering a class complaint, it is important to resolve the requirements of commonality and typicality prior to addressing numerosity in order to "determine the appropriate parameters and the size of the membership of the resulting class." *Moten v. Federal Energy Regulatory Commission*, 97 FEOR 3128 (1997).

E. Additional requirements for acceptance of class complaint.

1. Class complainants do not have to prove the merits of their claims at the class certification stage. Nevertheless, they must provide more than bare allegations that they satisfy the class complaint requirements. *Mastren v. U.S. Postal Serv.*, 94 FEOR 3143, 94 FEOR 3143 (1993).

2. The EEOC recognizes that complainants have limited access to discovery during the initial processing of a class complaint and that the contours of the case may change with the addition of further information. An EEOC AJ makes the decision concerning whether a class complaint should be certified or dismissed, but continues to have the authority to "redefine a class, subdivide it, or dismiss it" based on future developments. EEOC MD-110, Ch. 8.

F. Notice to class members and opting out.

1. Within 15 days of receiving notice that an AJ has certified a class complaint, the agency is obligated to notify all class members that the complaint has been accepted.

2. In some cases, the AJ may set another reasonable time frame for notification. 29 C.F.R. § 1614.204(e)(1).

3. Agencies are to use a reasonable means of notifying class members, such as mailing the notice to the members' last known addresses. If the agency intends to appeal the AJ's acceptance of the complaint, it may seek a stay in distributing the notice. EEOC MD-110, Ch. 8-6.

G. Individual relief upon finding of class-wide discrimination. After the hearing, the AJ issues a recommended decision, including any recommended relief. If no class relief is appropriate, the AJ will determine if individual class members are entitled to relief, and if so, issue a recommendation of individual relief. 29 C.F.R. § 1614.204(i).

V. RIGHT TO REPRESENTATION.

A. At any stage in the processing of an informal or formal complaint, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice. 29 C.F.R. § 1614.605.

B. Representation may include a legal, union, and/or personal representative of the complainant's choosing.

VI. OFFICIAL TIME.

A. Reasonable time to prepare and attend.

1. Normally considered in hours, not days or weeks.

2. If the complainant is an employee of the agency, s/he shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information.

3. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. 29 C.F.R. § 1614.605.

B. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer.

C. Does not allow official time for witnesses to prepare, but allows for official time when their presence is authorized or required by Commission or agency officials in connection with a complaint. Agency may restrict overall hours of official time for representative to certain percentage of representative's duty hours. *Morman v. Dep't of Air Force*, EEOC Appeal No. 07A10059 (2002); Executive Order 13836.

VII. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

A. Generally a complainant must get a final agency decision or wait 180 days after filing the administrative complaint before going to court. *Brown v. General Services Admin.*, 425 U.S. 820 (1976). However, ADEA complaints may bypass the administrative process and go directly to U.S. District Court after giving the EEOC 30-day notice of intent to sue within 180 days of alleged discriminatory act. *Stevens v. Dep't of Treasury*, 500 U.S. 1 (1991); 29 U.S.C. § 633a(c)-(d); 29 C.F.R. § 1614.201(a).

B. Equitable tolling applies to time limits for filing Title VII and other discrimination actions. Civil Rights Act of 1964, § 717(c) (as amended); 42 U.S.C.A. § 2000e-16C(c); *Irwin v. Veterans Admin.*, 498 U.S. 89 (1990) (employment discrimination actions brought against the agency within 30 days of receipt of EEOC notification are subject to equitable tolling).

VIII. JUDGMENT FUND.

A. Federal agencies (local installations) have always paid the costs associated with EEO cases decided against them or settled during the administrative phase. Until recently, any monetary relief (whether awarded in settlement or in civil judgment) resulting from civil suit was paid by the Judgment Fund, a permanently authorized fund administered by the Treasury.

B. The Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002 (No FEAR Act) holds federal agencies financially accountable for violations of discrimination and whistleblower laws by requiring agencies to reimburse the Judgment Fund for settlements and judgments paid to employees as a result of such complaints.

C. The procedures agencies use to reimburse the Judgment Fund are prescribed by the Financial Management Service (FMS) and the Department of the Treasury in Ch. 3100 of the Treasury Financial Manual.

D. All reimbursements to the Judgment Fund covered by the No FEAR Act are expected to be fully collectible from the agency.

E. The FMS will provide written notice to the agency's Chief Financial Officer within 15 business days after payment from the Judgment Fund.

F. Within 45 business days of receiving the FMS notice, agencies must reimburse the Judgment Fund or contact FMS to make arrangements in writing for reimbursement. 5 C.F.R. § 724.

IX. CONTRACTOR EMPLOYEES.

Who Is An Employee For The Purpos Of Filing An EEO Complaint of Discrimination Under 29 C.F.R. Part 1614?

A. The EEOC and federal courts have taken the position that the definition of "employee" at 5 U.S.C. § 2105 is not dispositive of the issue.

B. A person that is an employee within the meaning of 5 U.S.C. § 2105 and otherwise has standing will be considered an employee for this purpose.

C. It is possible for a contractor employee to bring a discrimination complaint even though they are not an employee under Title 5. The *Ma* case outlines the factors to be considered in applying the common law agency test to determine whether an individual is an agency employee versus a contractor. Not one factor is determinative, but all aspects of an individual's relationship with the agency must be considered. The EEOC will look to the following non-exhaustive list of factors:

1. The employer has the right to control when, where, and how the worker performs the job;

2. The work does not require a high level of skill or expertise;

3. The employer furnishes the tools, materials, and equipment;

4. The work is performed on the employer's premises;

5. There is a continuing relationship between the worker and the employer;

6. The employer has the right to assign additional projects to the worker;

7. The employer sets the hours of work and the duration of the job;

8. The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job;

9. The worker does not hire and pay assistants;

10. The work performed by the worker is part of the regular business of the employer;

11. The worker is not engaged in his/her own distinct occupation or business;

12. The employer provides the worker with benefits such as insurance, leave, or workers' compensation;

13. The worker is considered an employee for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes);

14. The employer can discharge the worker; and

15. The worker and the employer believe they are creating an employer-employee relationship. *Ma v. Dep't of Health and Human Services*, 98 FEOR 3226 (1998).

CHAPTER I

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

I. REFERENCES.

A. Uniformed Services Employment and Reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149 (1994), as amended, codified at 38 U.S.C. §§ 4301-4335.

B. The Higher Education Opportunity Act of 2008, P.L 110-315, as amended, codified at 20 U.S.C. §§ 1001–1161aa-1 (2012).

C. Department of Labor, Veteran's Employment Training Service (VETS) USERRA Final Rules, 20 C.F.R. Part 1002 (19 Dec 2005).

D. Readmission Requirements for Servicemembers, 34 C.F.R. § 668.18 (2017).

E. Department of Defense Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Armed Forces (20 May 2016 with changes).

F. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (21 Feb 96 – Rapid Action Revision 2011).

G. Restoration to Duty from Uniformed Service or Compensable Injury, 5 C.F.R. Part 353 (1995).

H. [MSPB] Practices and Procedures for Appeals Under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunity Act, 5 C.F.R. Part 1208 (2000).

I. Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55 (1999).

J. Anthony H. Green, *Reemployment Rights Under the Uniformed Services Employment and Reemployment Rights Act (USERRA)*: *Who's Bearing the Cost?,* 37 IND. L. REV. 213 (2003).

K. Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797 (2004).

L. Jeffrey M. Hirsch, *Can Congress Use Its War Power to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999 (2004).

M. Theresa M. Beiner, *Subordinate Bias Liability*, 35 U. ARK. LITTLE ROCK L. REV. 89 (2012).

N. Lieutenant Colonel Paul Conrad, *USERRA Note, How Do You Get Your Job Back?*, ARMY LAW., Aug. 1998, at 30.

O. Lieutenant Colonel Paul Conrad, *Labor Law Note, Merit System Protection Board Addresses the Uniformed Services Employment and Reemployment Rights Act*, ARMY LAW., Sept. 1997, at 47.

P. Government Accountability Office Report (GAO-02-608), *Reserve Forces: DoD Actions Needed to Better Manage Relations between Reservists and Their Employers* (June 2002).

Q. Government Accountability Office Report (GAO-05-74R), *U.S. Office of Special Counsel's Role in Enforcing Law to Protect Reemployment Rights of Veterans and Reservists in Federal Employment* (6 Oct 04).

II. OVERVIEW.

A. The USERRA provides a number of benefits.

B. USERRA's main provisions call for reinstatement of civilian employment after periods of duty with the armed forces, based on the following criteria:

1. What are the prerequisites for a returning service member to gain USERRA protections?

2. What specific reemployment protections does USERRA grant?

3. How are USERRA protections enforced if an employer does not comply with the law?

III. PREREQUISITES FOR APPLICATION OF USERRA.

A. Employee must have held a civilian job.

1. USERRA applies to virtually all employers: the federal and state governments, and all private employers, with no size-based exceptions.

2. A temporary job may receive USERRA protections, if there was a "reasonable expectation that employment will continue indefinitely or for a significant period." It is the employer's burden to prove the job was not permanent.

B. Employee must have given prior notice of military service to civilian employer.

1. Statute requires notice. It does not require written notice. A writing will, however, minimize disputes and proof problems.

2. Notice may be given by the service member or by a responsible officer from the service member's unit.

3. Exceptions (narrowly construed): "military necessity" precludes notice (e.g., fact of deployment is classified) or where giving notice would be otherwise "impossible or unreasonable." If attempting to invoke this exception, when the necessity, impossibility, or unreasonable circumstances cease to exist, the service member should give notice as soon as possible.

C. Employee's period of military service cannot exceed five years.

1. Five-year limit on military service is cumulative.

2. The five-year cumulative maximum is calculated "with that employer," and restarts when an employee changes civilian employers.

3. Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) does not count toward the five-year cumulative maximum. See Appendix A for a discussion of exceptions to the five-year rule.

4. The five-year period does not start fresh on 12 December 1994 (effective date of USERRA), it reaches back to include all periods of military service during employment with given employer, unless such service was exempted from the Veterans' Reemployment Rights Act's (VRRA) four-year service calculations.

D. Employee's service must have been under "honorable conditions," that is, no punitive discharge, no Other Than Honorable discharge, and no Dropped From Rolls.

1. For service of 31 days or more, employer can demand proof of honorable conditions.

2. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

E. Employee must report back or apply for reemployment in a timely manner.

1. If service is up to 30 days, the service member must report at next shift following safe travel time plus 8 hours.

2. If service is from 31 days to 180 days, the service member must report or reapply within 14 days.

3. If service is for 181 days or more, the service member must report or reapply within 90 days.

4. Extensions are available if employee can show that it was impossible or unreasonable, through no fault of the employee, to report or reapply.

5. Reapplication need only indicate that:

   a. Service member formerly worked there;

   b. Service member is returning from military service; and,

   c. Service member requests reemployment pursuant to USERRA.

   d. The request need not be in writing. Written request for reemployment is preferred and will hopefully work to avoid disputes and proof problems.

6. A service member who fails to comply with USERRA's timeliness requirements does not lose all USERRA protections. The employer, however, is entitled to treat (and discipline) that employee's late reporting just like any other unauthorized absence.

IV. **PROTECTIONS.**

A. Sections 4311-4318 of Title 38, United States Code, there are several protections available if the service member (employee) meets the prerequisites discussed in Section III above.

B. Prompt Reinstatement. If the employee was gone 30 days or fewer, the employee must be reinstated immediately; if gone 31 days or more, the reinstatement should take place within a matter of days.

C. Leave of absence and reinstatement. Employers must grant an authorized leave of absence when necessary for employee to perform funeral honors duty under either 10 U.S.C. § 12503, 32 U.S.C. § 115, 38 U.S.C. § 4303(13).

D. Status.

1. Opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, ad geographical location. 20 C.F.R. § 1002.193; *Crawford v. Dep't of the Army*, 113 LRP 24616 (Fed. Cir. 2013).

2. There is no fixed test for determining whether two positions are of like status. Differing criteria can be important in comparing the status associated with employment positions in a particular case. *Crawford v. Dep't of the Army*, 113

LRP 24616 (Fed. Cir. 2013). The MSPB considers the totality of the circumstances when evaluating the status of an employment position. However, this does not mean that in some cases, an individual factor cannot provide dispositive. *Id.*

3. The employee may object to the proffered reemployment position if it does not have the same status as previous employment. Examples:

4. "Assistant Manager" is not the same as "Manager," even if both carry the same remuneration.

5. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).

6. A change in shift work (from day to night, for example) can be challenged.

E. Seniority. If the employer has any system of seniority, the employee returns to the "escalator" as if he or she had never left the employer's service. 38 U.S.C. § 4313.

1. If the service was for 90 days or less, the employee is entitled to the same job *plus seniority*. If the service was for 91 days or more, the employee is entitled to the same "or like" job (status and pay), at employer's option, *plus seniority*.

2. Seniority applies to pension plans as well (including SEP, 401(k) and 403(b) plans). The seniority principle protects the employee for purposes of both vesting and amount of pension. Additional information is provided in IRS Revenue Procedure 96-49, which requires private pension plans to comply with USERRA pension requirements NLT 19 October 1996, and government pension plans NLT 1 January 2000.

   a. If the employer has a plan that does not involve employee contribution, employer must give employee pension credit as if employee never left.

   b. If the pension depends on a variable that is hard to estimate because of the employee's absence (e.g., amount of accrued pension depends on percent of commissions employee earns), employer may use employee's performance during the twelve months of service prior in order to determine pension benefits. Employer may not use military earnings as basis to figure civilian pension accrual.

   c. For an employer plan involving employee contributions, the employee must make up the contributions after returning to work. The employee has three times the period of absence for military service, not to exceed five years, to make up the contributions. The employer may not charge interest. Federal employees are entitled to four times the

period of absence to make up contributions, per 5 C.F.R. Part §1605.11.

F. Health Insurance.

1. Immediately upon return to the civilian job, the employee (and family) must be reinstated in the employer's health plan. The employer may not impose any waiting period or preexisting condition exclusions, except for Department of Veterans Affairs' determined service-connected injuries.

2. USERRA offers continued employer health coverage, at the employee's option, during military service. (Federal employees should refer to 5 C.F.R. §890.305).

a. Employer must, if requested, continue employee and family on health insurance up to 30 days of service. NOTE: TRICARE does not cover dependents on tours of less than 31 days. Cost to employee cannot exceed normal employee contribution to health coverage.

b. Employee may request coverage beyond 30 days. Employer must provide this coverage up to 24 months or end of service (plus reapplication period), whichever is first. Employer may charge employee a premium up to 102% of total cost (employee plus employer) from the first day of any tour over 30 days.

G. Training, Retraining, and Other Accommodations. An employee who returns to the job after a long period of absence may find his or her skills rusty or face a new organization or technology. An employer must make reasonable efforts to requalify the employee for his or her job.

1. Reasonable efforts are those that do not cause undue hardship for the employer. A claim of undue hardship requires an analysis of the difficulty and expense in light of the overall financial resources of employer (and several other factors). The USERRA language is similar to that employed in the Americans with Disabilities Act.

2. If the employer cannot accommodate the employee, the employer must find a position which is the nearest approximation in terms of seniority, status, and pay.

H. Special Protection Against Discharge. Depending on the length of service, there are certain periods of post-service employment where, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or *pro forma* reinstatement.

1. For service of 181 days or more, the subsequent protection lasts a year.

2. For service of 31 to 180 days, the subsequent protection is for 180 days.

3. There is no special protection for service 30 or less days. However, the statute's general prohibition against discrimination or reprisal applies.

   a. Employer cannot discriminate in hiring, employment, reemployment, retention in employment, promotion, or any other benefit of employment because of military service. Not only are current Active and Reserve Component military members covered, but so are veterans. *Petersen v. Dep't of Interior*, 71 M.S.P.R. 227 (1996).

   b. Employer cannot require someone to use vacation time/pay for military duty. 38 U.S.C. § 4316(d); *Graham v. Hall-McMillen Co., Inc.*, 925 F. Supp. 437 (N.D. Miss. 1996)

   c. Employer may not take adverse action against anyone (not just the military employee) when that person testifies or assists in a USERRA action or investigation or when that person refuses to take adverse action against a military employee.

   d. Federal military veteran/Reserve employees may raise "hostile work environment" discrimination claim based upon the individual's military status. *Petersen v. Dep't of Interior,* 71 M.S.P.R 227 (1996).

I. Other Non-Seniority Benefits. If the employer offers other benefits, not based on seniority, to employees who are on furlough or non-military leave, the employer must make them available to the employee on military service during the service. (Federal employees: see even more generous rule at 5 C.F.R. §353.106(c)).

1. The MSPB changed its analysis on the "reasonable certainty test" in USERRA reemployment claims in which returning servicemembers challenged agencies' failure to provide them with benefits they argue would have been entitled to had they not been on military leave. The discretionary/non-discretionary characterization of these benefits will no longer be considered in deciding whether the benefits were reasonably certain to have accrued during the employee's absence. *Rassenfoss v. Dep't of the Treasury,* 114 LRP 37014 (MSPB 2014).

2. Examples: employee stock ownership plans, low cost life insurance, Christmas bonus, holiday pay, etc.

3. If the employer has more than one leave/furlough policy, the military employee gets the benefit of the most generous. However, if policies vary by length of absence, the military employee may only take advantage of policies geared to similar periods of absence (e.g., 6 months, 1 year, etc.) of absence.

4. The employee may waive the right to these benefits if the employee states, in writing, that s/he does not intend to return to the job. Note, however, that a written waiver cannot deprive the employee of other reemployment rights should he change his mind and seek reemployment.

J. Location of Employment. In *Hill*, the court notes:

1. USERRA defines 'benefit of employment' as any advantage, profit, privilege, gain status, account or interest arising from an employment contract, including 'the opportunity to select work hours or location of employment. *Citing* 38 U.S.C. § 4303(2).

2. Facts in dispute about whether employee's transfer was at his request or improperly motivated due to his service.

3. The work conditions were benefits of employment when employee transferred to section of plant described as "very dirty and employees are required to wear coveralls and to shower at the end of their shifts." *Hill v. Michelin North America, Inc.*, 252 F.3d 307 (4th Cir. 2001).

K. Compensation and related matters.

1. In *Wriggelsworth*, the Court noted:

a. Police officer returned from military service. Employer willing to rehire him as a detective. Union objected saying would adversely affect other members. Employer hired back at an entry level and sued for declaratory judgment. Hired back approximately five months later than he was otherwise ready to return.

b. He was awarded backpay (difference between entry level pay and detective pay), accrued sick leave prior to entry on active duty, accrued sick leave from time he returned from active duty, accrued seniority, pension benefits, and clothing allowance (even though he did not work as a detective, the position for which the allowance was designed). *Wriggelsworth v. Brumbaugh*, 129 F. Supp.2d 1106 (W.D. Mich. 2001).

2. In *Yates*, the Court noted:

a. Plaintiff postal worker enters a 90-day training period with periodic evaluations at 30, 60, and 90 days. Performs two week annual training during first 30 days. Was not given a two-week extension. Although there was an evaluation on the 60th day, she was also not evaluated after 30 days.

b. Court held: a two-week extension and evaluation at the 30th day were benefits of employment. *Yates v. Merit Systems Protection Board*, 145 F.3d 1480 (Fed. Cir. 1998).

3. In *Ganon*, the Court noted:

a. Retired service member was hired but salaried at $1000.00 less because he lacked experience in the industry.

b. Court held that USERRA does not protect wages as a benefit of employment. *But see*, 38 U.S.C. § 4303(2), amended in 2010, struck "other than" and added "including" before "wages or salary for work performed." *Ganon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002).

4. In *Fink*, the Court noted that denial of opportunity to take a promotional test, a test that serves as a benchmark for promotion, was an unlawful employment practice. *Fink v. City of New York*, 129 F. Supp.2d 511, 521 (E.D.N.Y. 2001).

L. Paid military leave.

1. In *O'Farrell v. Dep't of Defense,* 882 F.3d 1080 (Fed. Cir. 2018):

a. In addition to the 15 days of military leave provided in 5 U.S.C. § 6323(a)(1), § 6323(b) provides up to an additional 22 days of military leave per calendar year for reservists who perform full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in 10 U.S.C.§ 101(a)(13).

b. "In support of" includes indirect assistance to a contingency operation.

c. "Contingency operation" includes a military operation that results in service members being called to active duty under any provision of law during a national emergency.

d. Upon request, a service member is entitled to additional leave as long as leave is appropriate.

e. The service member's request for additional leave need not take any particular form or use any particular language.

2. In *Butterbaugh v. DOJ*, 336 F.3d 1332 (Fed. Cir. 2003):

a. Issue was whether Federal military leave statute meant that employees would be given military leave as against their workdays or calendar days. 5 U.S.C. § 6323(a)(1) grants 15 days per year.

b. OPM practice, prior to 21 December 2001, had been to count calendar days whether or not the employee had been scheduled to work for all of those days unless the days fell at either the beginning or ending of the period.

c. Court held: statute giving military leave meant workdays.

d. Petitioner also challenged the practice as a denial of a benefit of employment under USERRA. Court ruled otherwise noting petitioner had not been denied leave.

3. In *Miller v. City of Indianapolis*, 281 F.3d 648 (7th Cir. 2002),

a. Firemen worked 24-hour shifts. Local policy construed state military leave statute to mean absence from one 24-hour shift amounted to the loss of three days military leave.

b. Unlike in *Butterbaugh,* the court spent little time interpreting statute as state authorities held that missing a 24-hour shift translated to the loss of three days military leave.

c. Court found no discriminatory treatment; other firemen (guardsmen or reservists) who did not work 24-hour shifts were treated similarly. That is, other employees were caused to use their military leave at an equal rate.

M. Liquidated damages, costs, and attorney fees.

1. In USERRA appeals, the MSPB is authorized to award reasonable attorney's fees at its discretion. The fact that an appellant has satisfied the requirement of an order under 38 U.S.C. §4324(c)(4) and has presented sufficient evidence to support his attorney's fees request under 5 C.F.R. 1201.203(a) does not automatically entitle him to attorney's feees. *Jacobsen v. Dep't of Justice,* 500 F.3d 1376 (Fed. Cir. 2007).

2. Applying the discretionary standard, the MSPB will examine the facts of each case before deciding whether an award of fees is reasonable under the circumstances, that is, whether the appellant is entitled to any fees at all. *Glassman v. Dep't of Labor,* 103 M.S.P.R. 444 (MSPB 2006).

3. In *Wriggelsworth v. Brumbaugh*, 129 F. Supp. 1106 (W.D. Mich. 2001),

a. Service member was awarded backpay and reasonable attorney fees, but not liquidated damages.

(1) No showing that employer acted in a willful manner.

(2) Employer rehired service member following a period of active duty.

(3) Employer was the plaintiff in the case seeking to resolve differences between its interpretation of USERRA and union's interpretation evincing a concern over "effects on other Union members."

b. *Compare*, *Fink v. City of New York*, 129 F. Supp.2d 511 (E.D.N.Y. 2001) (applies a reckless, instead of willful, standard to question of liquidated damages).

V. **BURDEN OF PROOF.**

A. In *Fink v. City of New York*, 129 F. Supp.2d 511 (E.D.N.Y. 2001), the court addresses the conflicting lines of decisions establishing burden of proof in USERRA cases, and adopts the so-called "NLRB framework," whereby after plaintiff makes a prima facie showing, the employer may defeat the claim by establishing the personnel action would have been taken anyway.

B. Under USERRA, if the plaintiff can show that discrimination was a motivating factor (not necessarily the sole motivating factor), the burden of proof is on the employer to show that the action would have been taken even without the protected activity. *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F. Supp. 571 (E.D. Tex. 1997).

1. Such cases are proven by direct evidence of discrimination or by indirect circumstantial evidence of discrimination. *Duncan v. U.S. Postal Service*, 73 M.S.P.R. 86, 93-94 (1997).

2. An employee's intervening act of misconduct can overcome an inference of military status discrimination inferred by the close proximity between military duty and an adverse employer personnel action. *Chance v. Dallas County Hospital District*, 1998 U.S. Dist. LEXIS 5110 (N.D. Tex. 1998) (unpub.), *aff'd*, 176 F.3d 294 (5th Cir. 1999).

3. The decision maker need not have been motivated by antimilitary animus for an employee to prevail. If the decision maker acted based on facts or a recommendation provided by someone who intended, for reasons that violate USERRA to harm the plaintiff, and the plaintiff is harmed, a USERRA violation is established. *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011).

VI. **EMPLOYER DEFENSES.**

A. A. Under 38 U.S.C. § 4312(d)(1), three defenses are established:

1. Employer suffers a change in circumstances that make the reemployment impossible or unreasonable.

2. Reemployment would pose an undue hardship on the employer.

   a. Undue hardship means actions requiring "significant difficulty or expense…"

   b. Employer must make reasonable efforts to accommodate a person with a disability and look to place the person "in any other position which is equivalent in seniority, status, and pay" when "the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer." 38 U.S.C. § 4313(a)(3)(A).

   c. When the employer cannot find a position that is an "approximation" to another position, the employer must still look to employ the person in some position that is "consistent with [the] circumstances of such person's case." 38 U.S.C. § 4313(a)(3)(B).

   d. Others who are no longer qualified, but not disabled, receive similar treatment. 38 U.S.C. § 4313(a)(4).

3. Employment is nonrecurring or brief and such that the person would not have had an expectation of returning.

B. Other potential defenses: waiver, estoppel, laches. *Miller v. City of Indianapolis*, 281 F.3d 648(7th Cir. 2002). Here, the burden of proof is on the employer. 38 U.S.C. § 4312(d)(2).

VII. **ASSISTANCE AND ENFORCEMENT.**

A. Organizations.

1. The National Committee for Employer Support of Guard and Reserve provides information on USERRA to employees and employers and seeks to resolve disputes on an informal basis. National and state ombudsman programs attempt to be the first step to resolve employer-employee USERRA disputes. *See* http://www.esgr.mil.

2. The Veterans' Employment and Training Service (VETS) is an agency within the Department of Labor. VETS will:

   a. Investigate to determine if any violation occurred.

   b. In cases of USERRA violation, VETS will attempt to negotiate a suitable resolution with the employer.

c. When resolution is not possible, VETS will refer the case, if appropriate, to the DOJ for civilian employees, and the Office of Special Counsel (OSC) for Federal employees. *See* http://www.dol.gov/vets

3. Upon referral, the OSC or DOJ may provide counsel for representation free of charge. If they do not, or the veteran desires private representation, the veteran may hire counsel. The action against the employer is brought in Federal Court or the MSPB (for federal employers).

4. Veteran need not request assistance prior to suing, but must wait for completion of VETS action if requested. *See* 38 U.S.C. § 4323(a) (state or private employer only); 38 U.S.C. § 4324-25 (federal and other federa agencies).

B. Formal Enforcement. Under 38 U.S.C. § 4323, the course of action depends on the employer.

1. Private Employers: Action is appropriate in U.S. District Court. Venue is wherever the private employer maintains a place of business.

2. State employees: Cases brought on employee's behalf by the United States are under the jurisdiction of any Federal district court located where the state exercises authority.

3. Federal Employees. The MSPB has appellate jurisdiction over probationary and non-probationary federal employees

a. Timeline. There are no time limits for individuals to file USERRA discrimination claims before the MSPB.

b. Avenues for redress.

(1) Veteran may request assistance from VETS or go directly to the MSPB. If assistance from VETS is requested, the veteran must wait for the VETS process to be completed before filing with MSPB.

(2) Before the MSPB, the OSC may also choose to represent the veteran, or the veteran may retain counsel (and, if a prevailing party, request attorneys fees).

(3) If dissatisfied with MSPB administrative hearing result, appeal to MSPB, and if necessary to Court of Appeals for the Federal Circuit as in other MSPB appeals.

c. Representation.

(1) VETS has informally retained its policy, dating from the preceding statutory scheme, of not assisting veterans who are represented by counsel.

(2) Legal assistance attorneys should beware of holding themselves out to employers or to VETS as the veteran's counsel. See AR 27-3, para 3-6e(2) concerning limits on Army legal assistance in USERRA cases.

d. MSPB Jurisdiction.

(1) To establish MSPB jurisdiction over a USERRA claim involving improper charging of leave, an appellant must file his appeal against his employing agency during the time he was performing military duty. *Michaels v. Dep't of Defense,* 112 M.S.P.R. 676 (MSPB 2009).

(2) To establish MSPB jurisdiction over a USERRA discrimination appeal, appellant must make a nonfrivolous allegation that:

(a) He performed durty or has an obligation to perform duty in a uniformed service of the United States;

(b) The agency denied him initial employment, retention, promotion, or any benefit of employment, and

(c) The denial was dut to the performance of duty or obligation to perform durty in the uniformed service. *Mims v. Social Security Admin.,* 120 M.S.P.R. 213 (MSPB 2013). NOTE: A USERRA discrimination claim should be broadly and liberally construed in determining whether it is nonfrivolous, particularly where appellant is pro se. *Willliams v. Dep't of Treasury,* 110 M.S.P.R. 191 (MSPB 2008).

(3) When appellant raises USERRA as an affirmative defense in an appeal where MSPB lacks jurisdiction over an otherwise appealable action, the Board will consider the appellant's allegation that an adverse action taken in violation of USERRA as a separate claim. *Henderson v. U.S. Postal Service,* 95 M.S.P.R. 454 (MSPB 2004).

4. The USERRA includes several "teeth" to the enforcement of reemployment rights.

   a. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgment interest), attorney's fees, and litigation costs. 5 C.F.R. §1201.202(a)(7).

   b. If the court finds that the violation was willful, the court may double the back pay award. (Does not apply to MSPB cases involving the federal government as employer.) Where there is evidence of willful employer noncompliance that could result in a double damage award, a jury trial may be authorized.

5. Extraterritorial Jurisdiction. USERRA gives Reservists and veterans residing overseas protections under the Act, provided they work for the federal government or a private company incorporated in the United States or controlled by a U.S. corporation. There is an exception from coverage for foreign companies whose compliance with the Act would violate local national law.

6. Extension of MSPB Jurisdiction and OSC Representation to Pre-USERRA cases filed after USERRA's enactment. The 1998 Amendments to USERRA provided at 38 U.S.C. § 4324(c) that the MSPB may now hear complaints "without regard as to whether the complaint accrued before, on, or after October 13, 1994 (the day before USERRA enacted). The MSPB holds that this provision allows the MSPB to hear, and OSC to represent, federal employees in VRRA cases that accrued before or on October 13, 1994. The MSPB opined that Congress was attempting to ensure that the OSC would represent federal employees on VRRA cases before the MSPB. *Williams v. Dep't of Army*, 83 M.S.P.R. 109 (1999).

7. MSPB pleadings. Pleding requirements include asserting:

   a. Performance of duty in a uniformed service with the United States;

   b. Loss of a benefit of employment; and

   c. Allegation that the benefit was lost due to the performance of duty in the uniformed service. *Yates v. Merit Systems Protection Board*, 145 F.3d 1480, 1484 (Fed. Cir. 1998).

8. Arbitration. USERRA provisions do not preempt an otherwise valid agreement to arbitrate between employer and employee. In *Garrett*, the plaintiff, a Marine reservist, alleged he was terminated in 2003 during the buildup for Iraqi Freedom because of his military status. In 1995, as part of a nationwide policy for resolving employment related disputes, Circuit City

promulgated a program which required employees who did not opt out of the program to submit employment disputes to binding arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Plaintiff acknowledged this new program in writing and failed to opt out. Despite this provision, plaintiff filed his USERRA claim in U.S. district court without submitting it to arbitration. The district court denied a defense motion to compel arbitration finding that USERRA preempted the arbitration agreement. The appellate court reviewed this decision *de novo* and reversed held that Congress had not intended USERRA to preempt otherwise valid arbitration agreements and held that USERRA claims are subject to the FAA. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006).

VIII. **OTHER MATTERS.**

A. Strict liability. In *Curby v. Archon*, 216 F.3d 549, 556 (6th Cir 2000) ("[USERRA was intended to lessen, but not eliminate, a veteran's obligation to show that employer's adverse decision was related to his or her service in the armed forces").

B. Intelligence community. In *Dew v. United States*, 192 F.3d 366, 372 92d Cir. 1999) ("Congress intended to preclude judicial review of [USERRA] claims by employees of federal intelligence agencies.").

IX. **READMISSION RIGHTS – USERRA-LIKE PROTECTIONS FOR STUDENTS.**

A. On August 14, 2008, Congress enacted the Higher Education Opportunity Act (HEOA), which reauthorized the Higher Education Act of 1965. Within the HEOA, there are specific protections pertaining to servicemembers. Under 20 U.S.C. § 1091c(b), "a person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform, service in the uniformed services shall not be denied readmission to an institution of higher education on the basis of that membership…"

B. Student-Soldiers must satisfy three prerequisites to qualify for readmission rights:

1. The student must give advance written or verbal notice of military service to the appropriate official at the institution of higher education,

2. The cumulative length of the absence (and of all previous absences) from the institution of higher education by reason of service cannot exceed five years, and

3. Upon their return, students must submit a notification of intent to reenroll in the institution.

C. Pursuant to 34 C.F.R. § 668.18(a)(2), an institution must promptly readmit a servicemember whose absence was necessitated by military service with the same academic status as the student had when the student last attended the institution. This includes the same enrollment status, the same number of credit hours, and the same academic standing on their readmission to the institution. If the student-Soldier is readmitted into the same academic program, for the first academic year after returning, the tuition and fees will be the same as the academic year during which the student-Soldier left the institution.

D. Under 34 C.F.R § 668.18(a)(2)(iv), if an institution determines student-Soldiers are not prepared to resume their program at the same academic status, the institution must make reasonable efforts at no extra cost to the student to assist them to become prepared. These reasonable efforts may include providing free refresher courses and allowing the students to retake pretests at no extra cost.

1. There are three scenarios where the institution does not have to reinstate the student-Soldier:

   a. After reasonable efforts by the institution, the institution determines the student is not prepared to resume the program at the point where s/he left off;

   b. After reasonable efforts by the institution, the institution determines the student is unable to complete the program; or

   c. The institution determines that there are no reasonable efforts the institution can take to prepare the student to resume the program at the point where s/he left off, or to enable the student to complete the program.

2. There are two important distinctions between the readmission provisions of the HEOA and employment protections of USERRA.

   a. The HEOA only applies to active-duty service "under Federal authority" for thirty or more consecutive days. This means that IDT, training pursuant to Title 32 for National Guard Soldiers (except Full-time National Guard duty of a duration of 30 or more days), and active duty for fewer than thirty consecutive days are excluded from its protections. Conversely, USERRA applies to IDT, Title 32 training periods, and active duty of any duration.

   b. The HEOA allows returning Soldiers up to three years to provide notice of intent to return to their institution upon completion of their military service. In contrast, USERRA only allows a maximum of ninety days for returning Soldiers to provide notice of their intent to return to their employers.

APPENDIX A

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT UNDER 38 U.S. § 4312(c)

NOTES:

A. Effective with enactment of the Reserve Officer Personnel Management Act (ROPMA) on October 6, 1994, several section numbers from Title 10 U.S. Code that are referenced as exceptions to the five year limit have been changed.

B. The term "Reservist" means member of the National Guard or Reserve. Sections that apply only to the National Guard or the Coast Guard are identified as such.

C. State call-ups of National Guard members are not protected under USERRA.

Title 38, U.S. Code § 4312(c) "...does not exceed five years, except that any such period of service shall not include..."

Obligated Service - § 4312(c)(1): Applies to obligations incurred beyond 5 years, usually by individuals with special skills, such as aviators.

Unable to Obtain Release - § 4312(c)(2): Needs to be documented on a case-by-case basis.

Training Requirements - § 4312(c)(3):

10 U.S.C. §10147: regularly scheduled IDT (drills) and AT.

10 U.S. C. §10148: ordered to active duty up to 45 days because of unsatisfactory participation.

32 U.S.C § 502(a): National Guard regularly scheduled IDT and AT.

32 U.S.C. § 502(f)(2)(A): National Guard responding to National Emergency as authorized by POTUS or SECDEF.

32 U.S.C. § 503: National Guard active duty for encampments, maneuvers, or other exercises for field or coastal defense.

Specific Active Duty Provisions - § 4312(c)(4)(A):

10 U.S.C. § 12301(a): involuntary active duty in wartime.

10 U.S.C. § 12301(g): retention on active duty while in a captive status.

10 U.S.C. § 12302: involuntary active duty for national emergency up to 24 months.

10 U.S.C. § 12304: involuntary active duty for operational mission up to 270 days.

10 U.S.C. § 12305: involuntary retention of critical persons on active duty during a period of crisis or other specific condition.

10 U.S.C. § 688: involuntary active duty by retirees.

14 U.S.C. § 331: Coast Guard involuntary active duty by retired officer.

14 U.S.C. § 332: Coast Guard voluntary active duty by retired officer.

14 U.S.C.§ 359: Coast Guard involuntary active duty by retired enlisted member.

14 U.S.C.§ 360: Coast Guard voluntary active duty by retired enlisted member.

14 U.S.C.§ 367: Coast Guard involuntary retention of enlisted member.

14 U.S.C. § 712: Coast Guard involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

War or Declared National Emergency - § 4312(c)(4)(B): Provides that active duty (other than for training) in time of war or national emergency is exempt from the 5 year limit, ***whether voluntary or involuntary activation***.

Certain Operational Missions - § 4312(c)(4)(C): Provides that active duty (other than training) ***in support of an operational mission*** for which Reservists have been activated under 10 U.S.C. §12304 is exempt from the 5 year limit, whether voluntary or involuntary activation. NOTE: In such a situation, involuntary call-ups would be under §12304. Volunteers may be ordered to active duty under a different authority.

Critical Missions or Requirements - § 4312(c)(4)(D): Provides that active duty in support of certain critical missions and requirements is exempt from the 5-year limit, ***whether call-up is voluntary or involuntary***. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of the Reserves were not exercised.

Specific National Guard Provisions - § 4312(c)(4)(E):

10 U.S.C. Ch. 15: National Guard call to Federal service to suppress insurrection, domestic violence, etc.

10 U.S.C. § 12406: Army/Air National Guard call to Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces.

CHAPTER J

GRIEVANCE PROCEDURES & GRIEVANCE ARBITRATION

I. INTRODUCTION.

A. Grievance: "A complaint that is filed by an employee or the employee's union representative and that usually concerns working conditions, especially an alleged violation of a collective-bargaining agreement." Black's Law Dictionary (9th ed.).

B. Arbitration: "A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding." *Id.*

C. Employee appeal rights under a grievance depends on (1) the employee's status, (2) the type of action, and (3) the existence or not of a collective bargaining agreement (CBA).

D. Executive Order 13836, Section 8 requires:

1. "Each agency subject to chapter 71 of title 5, United States Code, that engages in any negotiation with a collective bargaining representative, as defined therein, shall submit to the Office of Personnel Management [OPM] Director each term CBA currently in effect and its expiration date."

2. Such agency shall also submit any new term CBA and its expiration date to the OPM Director within 30 days of its effective date, and submit new arbitral awards to the OPM Director within 10 business days of receipt."

II. ADMINISTRATIVE GRIEVANCE PROCEDURE.

A. References.

1. Department of Defense Instruction (DODI) 140.25, Subchapter 771.

2. Secretary of Navy Instruction (SECNAVINST) 12771.1.

3. Marine Corps Order (MCO) 12771.2.

4. Air Force Instruction (AFI) 36-1203.

B. Processing.

1. Policy. Expeditious, fair, impartial, and quick resolution of an employee dispute. Alternative dispute resolution is encouraged.

2. Applies to current appropriated fund non-bargaining unit employees and bargaining unit employees whose matter cannot be grieved under the Negotiated Grievance Procedure (NGP).

3. Does not apply to non-citizens recruited and appointed overseas and non-apprpriated fund (NAF) employees.

4. NAF employee grievances are administered under AR 215-3, Chapter 8; MCO P12000.11A, para. 5005; Navy BUPERSINST 5300.10A, Section 610.

5. Matters excluded include:

   a. Matters covered by the NGP,

   b. Actions appealable to the MSPB,

   c. Matters subject to adjudication by the Equal Employment Opportunity Commission (EEOC),

   d. Non-selection for promotion; and

   e. Termination of probationers.

   f. *See* DODI 1400.25 for a complete listing.

C. Procedure.

1. Problem Solving. Opotional step. Employee may bypass this and file a grievance.

   a. Informal presentation of work-related problem to the immediate supervisor or to the next level supervisor if the problem involves the immediate supervisor. Must be presented within fifteen days.

   b. Supervisor must attempt to resolve the dispute in fifteen days and no later than thirty days. Use of neutral (ie. mediator) is encouraged. If the matter is presented in writing, the supervisor must respond in writing. If unresolved, the supervisor must inform the employee of the time limits to file a grievance.

2. Formal grievance.

   a. Filed within fifteen days of conclusion of problem-solving process or if not used, within fifteen days of the act or event.

   b. Must be written and specify the remedy sought.

c. Representation. Employee's choice. Agency can deny only if the representation would cause a conflict of interest with mission, or create an unreasonable cost.

d. Deciding official's action.

(1) Deciding official ust be assigned to an organizational level higher than any employee involved in the grievance or have a direct interest in the matter being grieved unless the deciding official is the head of a DOD component, installation, or activity.

(2) Determines whether to investigate, whether to allow the grievant's representative, and how much official time shall be granted. May designate a neutral to examine grievance and make recommendations.

(3) Fully and fairly considers grievance and issues a written decision with supporting rationale. Decision is normally done within 60 days of filing a grievance.

(4) Decision on the merits is final anot subject to further review.

III. NEGOTIATED GRIEVANCE PROCEDURES UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE.

A. Grievance Arbitration. A proceeding resulting from the voluntary contractual agreement of a labor organization (e.g., union) and management (e.g., the CBA) pursuant to which the parties submit unresolved disputes to an impartial third party for decision whose decision they normally have agreed in advance to accept as final and binding.

B. Statutory Requirements for Grievance Procedures. Under 5 U.S.C. § 7121(a), each CBA must have a grievance process. Each grievance process must:

1. Be fair, simple, and expeditious.

2. Allow grievances by exclusive representative.

3. Allow grievances by employee on own behalf.

4. Provide that any grievance not satisfactorily settled under the NGP shall be subject to binding arbitration that may be invoked by either the exclusive representative or the agency.

a. Very limited review by the FLRA.

b. Arbitrators have wide discretion to fashion awards and the Authority rarely reverses an arbitrator's award (see below).

C. Employee Status.

1. Temporary. 5 U.S.C. § 7511(a)(1)(A).

2. Seasonal. *Strickland v. Merit Systems Protection Board.*, 748 F.2d 681 (Fed. Cir. 1984).

3. Part-time. 5 U.S.C. § 3401.

4. Probationary Competitive Service. 5 C.F.R. § 315.801-806.

5. Probationary Excepted Service. 5 U.S.C. § 7511(a).

D. Scope and coverage.

1. Basic function: The grievance process in the federal sector is expanded beyond what is offered in the public sector, to include enforcing compliance with law and regulation as well as enforcing compliance with the CBA.

2. Recogize that matters covered and procedures vary from one CBA to another.

3. Under 5 U.S.C. § 7103(a)(9), grievance is defined as "any complaint...

a. by any employee concerning any matter relating to the employment of the employee;

b. by any labor organization concerning any matter relating to the employment of any employee; or

c. by any employee, labor organization, or agency concerning

(1) the effect, interpretation, or a claim of breach, of a CBA, or

(2) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." (NOTE: See Chapters F and G for a discussion about "conditions of employment").

4. Under 5 U.S.C. §§ 7121(c)(1)-(5), grievances are excluded with regard to five general matters from coverage by a NGP:

a. Prohibited political activities;

b. Retirement, life insurance, or health insurance;

c. A suspension or removal for national security reasons;

d. Examination, certification, or appointment; or

e. The classification of any position which does not result in the reduction in grade or pay of an employee.

(1) When the substance of a grievance concerns the grade level of the duties assigned to, and performed by the grievant, the grievance concerns the classification of a position within the meaning of § 7121(c)(5).

(2) Where the substance of a grievance concerns whether the grievant is entitled to a temporary promotion by reason of having performed the established duties of a higher-graded position, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5). *AFGE Local 1617 and Kelly Air Force Base*, 55 FLRA 345 (1999) (setting aside an arbitrator's award and finding that a grievance concerning a grievant's entitlement to a temporary promotion based on the performance of higher level work was arbitrable).

5. The employee will elect to pursue relief either through the MSPB procedure or the NGP for matters deemed grievable:

a. Removal or reduction in grade for unacceptable performance (under Chapter 43);

b. Removal, reduction in grade or pay, suspension for more than 14 days for misconduct, or furlough for 30 days or less (under Chapter 75);

c. Once the employee makes the election, it is binding. Employee may not pursue both an MSPB appeal and NGP grievance. 5 U.S.C. § 7121(e)(1).

6. Mandatory use of the NGP (no MSPB appeal available), unless the NGP specifically excudes the matter: reduction in force (RI) or denial of within grade increase (WGI, "step increase").

IV. REVIEW OF ARBITRATION AWARDS BY THE FEDERAL LABOR RELATIONS AUTHORITY.

A. Statutory Authority.

"*Either party* to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (*other than an award relating to a matter described in § 7121(f) of this title*). If upon review the Authority finds that the award is deficient (1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relation, the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. § 7122(a).

"If no exception to the arbitrator's award is filed ... during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay..." 5 U.S.C. § 7122(b)

1. "Either party" is defined as a party is any person who participated as a party in a matter where the award of an arbitrator was issued.

    a. Generally, only the union and the agency are entitled to file exceptions because they are the only parties to arbitration.

    b. An agency's failure to attend the hearing does not preclude it from filing exceptions with the Authority. However, the Authority will not consider evidence that was not before the arbitrator. *Dep't of Navy Mare Island and Federal Employees Metal Trades Council*, 53 FLRA 390 (1997).

    c. Employee is not a party and may not take exception. *Oklahoma Air Logistics Center and AFGE*, 49 FLRA 1068 (1994*), request for reconsid.denied,* 50 FLRA 5 (1994).

2. "Other than an award relating to a matter described in § 7121(f) of this title."

    a. 5 U.S.C. § 7121(f) provides for review of § 4303 (unacceptable performance) and § 7512 (misconduct) matters, and similar matters, which arise under other personnel systems.

    b. The arbitrator makes the decision rather than the Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission (EEOC).

        (1) In deciding the case, the arbitrator must apply the same statutory standards as applied by the MSPB (or other appropriate agency).

(2) Things such as the evidentiary standards, the harmful error rule (§ 7701(c)), and prohibitions of § 7701(c)(2) that an agency decision may not be sustained if based on a prohibited personnel practice or if not in accordance with law will apply. *Cornelius v. Nutt*, 472 U.S. 648 (1985).

(3) Appeal is to the U.S. Court of Appeals for the Federal Circuit in an MSPB case, or Federal Circuit Court of Appeals in an EEO case. *Office and Prof'l Employees Int'l Union, Local 268 and U.S. Dep't of Energy, Oak Ridge, Tenn.*, 55 FLRA 775 (1999) (no jurisdiction).

c. Notwithstanding the rule that these decisions are not subject to FLRA review, the Authority has reviewed such actions and reversed the arbitrator's decision granting back pay. *AFGE, Local 2986 and U.S. DoD, National Guard Bureau, Oregon*, 51 FLRA 1549 (1996); *AFGE v. FLRA*, 130 F.3d 450 (D.C. Cir. 1997) (The Authority's decisions were not reviewable); *FAA v. Nat'l Assoc. of Air Traffic Specialists*, 54 FLRA 235 (1998) (Authority lacks jurisdiction).

d. On the agency side, only the Director of the Office of Personnel Management (OPM) may obtain review. The Director of OPM must establish that the award misinterpreted civil service law or regulation and will have a substantial impact on civil service law and regulation. 5 U.S.C. § 7703(d); *Devine v. Nutt*, 718 F.2d 1048 (Fed. Cir. 1983), *rev'd as to other matters sub nom.*, 472 U.S. 648 (1985).

e. The Authority will not consider issues that could have been, but were not, presented to the arbitrator. 5 C.F.R. § 2429.5; *Panama Area Maritime Metal Trades Council and Panama Canal Comm.*, 55 FLRA No. 1199 (1999); *SSA Office of Hearings and Appeals and AFGE Local 3627*, 55 FLRA 778 (1999) (refusing to consider a procedural argument raised by the agency because there was no evidence that the argument was raised before the arbitrator).

B. Time limits.

1. 30-day Filing Period. Jurisdictional and cannot be waived or extended. 5 C.F.R. § 2429.23(d); *Dep't of Transportation Federal Aviation Administration and Nat'l Air Traffic Controllers Assn*, 55 FLRA 293 (1999) (if agency fails to take exception to an arbitrator's award in a timely manner, it will be prohibited from collaterally attacking the award by raising a defense during a subsequent Unfair Labor Practice (ULP) hearing).

a. Computation. The 30-day period begins on the day the award is served. 5 C.F.R. § 2425.1(b).

b. Exceptions must be filed within 30 days unless the 30th day is a Saturday, Sunday, or Federal holiday or unless the award was served by mail.

(1) If the 30th day is a Saturday, Sunday, or Federal holiday, the exception must be filed by the next day that is not a Saturday, Sunday, or Federal holiday. 5 C.F.R. § 2429.21(a).

(2) If the award was served by mail, five days are added to the filing period after the 30-day period is first computed taking into account weekends and holidays. The additional five-day period is also extended if the fifth day falls on a weekend or holiday. 5 C.F.R. § 2429.22.

2. Mailbox Rule. 5 C.F.R. § 2429.21(b).

a. The date of the postmark is the day of filing.

b. In the absence of a postmark, the date of filing is determined to be the date of receipt minus five days. *IRS & Nat'l Treasury Employees Union*, 44 FLRA 538 (1992) (Authority will not consider proof that a letter had been filed more than five days earlier).

3. Filing by personal delivery is accomplished the day that the Authority receives the documents.

C. Scope of Review.

1. Although Congress specifically provided for review of arbitration awards in § 7122(a), Congress also expressly made clear that the scope of that review is very limited.

2. The Authority will presume that the award should be accorded the binding status required by the Statute.

3. Only when it is established that the award is deficient as one of the specific grounds set forth in § 7122(a) will an award be found deficient.

D. Grounds for Review.

1. Contrary to any law, rule, or regulation. 5 U.S.C. § 7122(a)(1).

a. Awards contrary to law. 5 U.S.C. §§ 7106(a), 7116(d), 7121(d); *NTEU and IRS*, 40 FLRA 614 (1991); *AFGE & HUD*, 54 FLRA 1267 (1998).

(1) The Statute.

(a) No arbitration award may improperly deny the authority of an agency to exercise any of its rights. 5 U.S.C. § 7106(a); *SSA and AFGE*, 55 FLRA 1063 (1999) (denying agency exception because it elected to bargain permissive topics in the CBA and arbitrator simply enforced that election); *Dep't of Air Force Warner Robins Air Logistics Center and AFGE Local 987*, 53 FLRA 1344 (1998) (denying agency exceptions where it had agreed to bargain over impact and implementation to mitigate adverse effects).

(b) When an issue has been raised under the ULP procedures, the issue subsequently may not be raised as a grievance. 5 U.S.C. § 7116(d); but see *EEOC and AFGE*, 53 FLRA 465 (1997) (Same facts may support both ULP and grievance where different legal theories apply).

(c) When an employee affected by discrimination timely raised the matter under an applicable statutory basis, the matter subsequently may not be raised as a grievance. 5 U.S.C. § 7121(d).

(2) Back Pay Act, 5 U.S.C. § 5596.

(a) Necessary findings.

(i) Agency personnel action was unjustified and unwarranted.

(ii) Action directly resulted in the withdrawal or reduction of the pay, allowances, or differentials of the grievant.

(iii) But for such action, the grievant would not have suffered such withdrawal or reduction of pay, allowances, or differentials.

(b) Attorney fees. *Dep't of Defense & Federal Ed. Assoc.*, 54 FLRA 773 (1998); *Dep't of Veterans Affairs & Nat'l Assoc. of Gov't Employees*, 53 FLRA 1426 (1998)

(Parties are not required to request, and arbitrator is not required to decide requests for, attorney fees before award of back pay becomes final).

(c) Attorney fees: statutory requirements for award by an arbitrator.

(i) Unjustified personnel action resulting in loss of pay;

(ii) Fee award in conjunction with backpay award;

(iii) Reasonable and related to the personnel action; and

(iv) In accordance with the standards of § 7701: in the interest of justice, and a fully articulated, reasoned decision.

(d) Back pay awards that include allowances or differentials are limited to six years. 64 Fed. Reg. 72457 (28 Dec. 1999).

(e) In *Dep't of Defense Dependents Schools and Federal Educ. Ass'n*, 54 FLRA 514 (1998), the Authority held that an arbitrator may properly award attorney fees for the time spent litigating the entitlement to interest on back pay. The Authority determined that interest is an inseparable part of any payment under the Back Pay Act and there is no requirement that a back pay award be in the same proceeding as the proceeding that determines the entitlement to attorney fees.

(3) Environmental Differential Pay. *AFGE Local 2004 and Defense Logistics Agency*, 55 FLRA 6 (1998) (denying union's exceptions to arbitration award because arbitrator properly applied the asbestos standards used by OSHA as negotiated by parties); but see *AFGE, Local 1617 and Dep't of the Air Force, Kelly Air Force Base*, 58 FLRA No. 13 (2002) (holding that the arbitrator erred in not applying the asbestos standard in an agency regulation).

b. Awards not subject to grievance and arbitration. 5 U.S.C. § 7121(c).

(1) Classification grievances. Where the substance of the grievance concerns the grade level of duties performed by the grievant and the grievant has not been reduced in grade or pay, the grievance is precluded. *HUD and AFGE Local 3475*, 53 FLRA 1611 (1998).

(2) Examination, certification, or appointment. *Dep't of Defense and Overseas Ed. Assoc.*, 51 FLRA 210 (1995).

(3) Grade and pay retention matters. When employees retain their grade and pay following certain reduction-in-force or reduction-in-grade actions, grievances are precluded over the action that was the basis for the grade and pay retention and over the termination of such benefits. *Dep't of Vet. Affairs and AFGE Local 1915*, 34 FLRA 580 (1990).

(4) Management rights and scope of the NGP. In *Dep't of the Treasury, Bureau of Engraving and Printing, Washington, D.C. and NTEU, Chapter 201*, 53 FLRA 146 (1997), the Authority clarified that there is a two-prong test for determining whether an award is deficient as contrary to management's rights under section 7106(a):

(a) Under Prong 1, the Authority will examine whether the award provides a remedy for a violation of either applicable law or a contract provision that was negotiated pursuant to section 7106(b);

(b) Under Prong 2, the Authority will determine whether the award reflects what management would have done if it had not violated the applicable law or the 7106(b) provision.

(c) Performance appraisal matters are considered in connection with resolution of the grievance on the merits. *Nat'l Federal of Fed. Employees & Bureau of the Census*, 47 FLRA 812 (1993).

(d) Contracting out. The decision to contract out is a management right governed by OMB Circular A-76, a government-wide regulation. Grievances concerning the decision to contract out or claiming a failure to follow A-76 are barred. *AFGE Local 1345 and Fort Carson*, 48 FLRA 168, 205 (1993).

(5) Matters for exclusive resolution by the Authority.

(a) Duty to bargain as a negotiability dispute. 5 U.S.C. § 7117; *Indian Educators Federation & Bureau of Indian Affairs*, 53 FLRA 696 (1997).

(b) Bargaining-unit status. *Gen. Services Admin. Region IX and AFGE*, 44 FLRA 901 (1992).

(6) Separation of probationary employees. *Dep't of Justice, Immigration and Naturalization Service v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983).

(7) Discipline of a National Guard civilian technician under § 709(e) of the Civilian Technicians Act of 1968. *Dep't of Defense & AFGE Local 3006*, 51 FLRA 1693 (1996).

(8) Discipline of a professional employee of the Department of Medicine & Surgery of the Department of Veterans Affairs. *NFFE and Veterans Admin.*, 31 FLRA 360, 364 (1988), *remanded*, No. 88-1314 (D.C. Cir. 9/27/88), *dec. on remand*, 33 FLRA 349 (1988).

(9) Adverse actions against non-preference eligible, excepted service employees. While the Authority held that grievances were permitted; the courts disagreed. *HHS v. FLRA*, 858 F.2d 1278 (7th Cir. 1988), *reversing NTEU and HHS, Region V*, 25 FLRA 1110 (1987). Legislation now permits grievances. Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990).

(10) Assessment of pecuniary liability. Nothing prevents an arbitrator from reviewing the assessment. *AFGE Council 214 and AFLC, Wright-Patterson AFB*, 21 FLRA 244 (1986).

(11) Denials of within-grade increases. The grievance procedure is the exclusive procedure for employees in bargaining units. *NTEU v. Cornelius*, 617 F. Supp. 365 (D.D.C. 1985).

(12) An arbitrator may not review merits of an agency's security-clearance determination. *Dep't of the Navy v. Egan*, 108 S. Ct. 818 (1988).

c. Contrary to Law, the Privacy Act. *Federal Correctional Facility, El Reno, Oklahoma and AFGE Local 171*, 51 FLRA 584 (1995).

2. Awards contrary to regulation. *Dep't of Army and AFGE*, 37 FLRA 186 (1990).

   a. Only an arbitration award that conflicts with a regulation that governs the matter in dispute will be found deficient.

   b. Government-wide regulations govern a matter in dispute unless they conflict with pre-existing CBA provisions. If there is a conflict, the CBA will control until expiration of the agreement.

   c. Agency regulations govern a matter in dispute only when the matter is not covered by a CBA.

3. On other grounds similar to those applied by Federal courts in private sector labor-management relations. 5 U.S.C. § 7122(a)(2).

   a. Arbitrator failed to conduct a fair hearing. *Dep't of Defense & AFGE Local 3407*, 44 FLRA 103 (1992).

   b. Arbitrator was biased or partial, guilty of misconduct which prejudiced the rights of a party, and the award was obtained by fraud or undue means. *AFLC Hill AFB and AFGE Local 1592*, 34 FLRA 986 (1990).

   c. Award is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. *Delaware National Guard and Association of Civilian Technicians*, 5 FLRA 50 (1981).

   d. Arbitrator exceeded authority.

      (1) The FLRA will find an award deficient when the arbitrator rendered the award in disregard of a plain and specific limitation on the arbitrator's authority. *Dep't of Navy and AFGE Local 22*, 51 FLRA 305 (1995).

      (2) The Authority will find an award deficient when the arbitrator determines an issue not included in the subject matter submitted. *Dep't of Navy Puget Sound Naval Shipyard and AFGE Local 48*, 53 FLRA 1445 (1998) (setting aside an award where the arbitrator rephrased the relevant issue, found grievant not entitled to a temporary position and yet awarded grievant with a temporary promotion and backpay).

      (3) Arbitrators exceed their authority by extending an award to cover employees outside the bargaining unit or by ordering an agency to take an action beyond its authority. *Bureau of Indian Affairs and NFFE*, 25 FLRA 902 (1987).

(4) Arbitrators may also exceed their authority by extending an award to cover employees who did not file grievances. *SSA and AFGE Local 3509*, 53 FLRA 43 (1997).

e. Award is based on a nonfact. *Dep't of Defense and AFGE Local 916*, 53 FLRA 460 (1997).

(1) The central fact underlying the award is clearly erroneous, but for which, a different result would have been reached.

(2) To find an award deficient, it should be shown that the alleged nonfact was:

(a) Central to the result of the award,

(b) Clearly erroneous, and

(c) But for the arbitrator's misapprehension, the arbitrator would have reached a different result.

(d) Also, it should be shown that the arbitrator not only erred in the view of the facts, but that the sole articulated basis for the award was clearly in error and it should be shown that the evidence discloses a clear mistake of fact, but for which, in accordance with the expressed rationale of the arbitrator, a different result would have been reached. *Redstone Arsenal & AFGE*, 18 FLRA 374, 375 (1985).

f. Award is contrary to public policy. *Dep't of Veterans Affairs & AFGE Local 1963*, 48 FLRA 1067 (1993).

g. Award does not draw its essence from CBA. *Antilles Consolidated Ed. Assoc. and Dep't of Defense*, 50 FLRA 132 (1995).

(1) Cannot in any rational way be derived from agreement;

(2) Is so unfounded in reason and fact, and so unconnected with the wording and purpose of the agreement, as to manifest an infidelity to the obligation of the arbitrator;

(3) Evidence a manifest disregard for the agreement; or

(4) Does not represent a plausible interpretation of the agreement.

4. Reconsideration. 5 C.F.R. § 2429.17. A party seeking reconsideration after the Authority issued a final decision or order has the burden of establishing that

extraordinary circumstances exist to justify this unusual action. *NTEU Chapter 208 and U.S. Nuclear Regulatory Comm'n*, 55 FLRA 666 (1999) (denying union's motion because it failed to establish extraordinary circumstances); *Scott Air Force Base*, 50 FLRA 80, 86-87 (1995) (identifying the limited number of situations in which extraordinary circumstances have been found to exist).

5. Remedies. The Authority may take action and make recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations. 5 U.S.C. § 7122.

6. Compliance. Compliance is required with final award and failure to comply is an ULP with no collateral attack on award permissible.

   a. Award to which no exceptions or no timely exceptions are filed. *Wright Patterson AFB and AFGE*, 15 FLRA 151 (1984), *aff'd, Dep't of the Air Force v. FLRA*, 775 F.2d 727 (6th Cir. 1985).

   b. Award as to which the Authority has denied exceptions. *U.S. Marshals Service and AFGE*, 13 FLRA 351 (1983), *enforced*, 778 F.2d 1432 (9th Cir. 1985); *FAA and NATCA*, 54 FLRA 480 (1998).

   c. Award as to which timely exceptions have been filed and are pending. *U.S. Army Armament Reserve and Nat'l Federation of Fed. Employees Local 1437*, 52 FLRA 527 (1996).

V. APPEAL OF GRIEVANCES UNDER § 7121(D).

A. Mixed Cases. The election of an employee to select the grievance process in no way prejudices the employee's right to ask the MSPB to review the final decision pursuant to § 7702 (Mixed Case Procedure).

B. EEOC Matters. The election of an employee to select the grievance process in no way prejudices the employee's right to ask the EEOC to review the final decision in any matter involving a complaint of discrimination of the type prohibited by any law administered by the EEOC.

VI. JUDICIAL REVIEW OF FLRA ARBITRATION DECISIONS.

A. 5 U.S.C. § 7123(a). The Authority's arbitration decisions are generally not subject to judicial review. *Dep't of Treasury and FLRA*, 43 F.3d 682 (D.C. Cir. 1994).

B. Arbitration Awards that Involve ULPs.

1. Under 5 U.S.C. § 7123(a), a circuit court can review a final decision of the FLRA involving an arbitrator's award only if an unfair labor practice is involved. *NTEU v. FLRA*, 112 F.3d 402 (9th Cir. 1997).

2. Although the precise meaning of § 7123(a) is still uncertain, the courts have generally construed the provision narrowly. *Dep't of Interior v. FLRA*, 26 F.3d 179 (D.C. Cir. 1994).

C. Review of Arbitration Awards Under 5 U.S.C. § 7121(f).

1. "In matters covered under §§ 4303 and 7512 ... which have been raised under the [NGP regarding MSPB performance or discipline cases] ... judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board."

2. Appeal to the Court of Appeals for the Federal Circuit.

3. Applicable case law. *Cornelius v. Nutt*, 472 U.S. 648 (1985).

4. 5 U.S.C. § 7703(d). Director of OPM may obtain review.

5. Grounds for Review. Same as for appealing final decision of MSPB.

CHAPTER K

DRAFTING SETTLEMENT AGREEMENTS

I. ADVANTAGES OF SETTLEMENT.

A. Public policy favors settlement. Title VII of the Civil Rights Act of 1964, § 717; 29 C.F.R. § 1614.603.

1. Win-win solution v. uncertainty and the risk of litigation.

2. Resolves conflict and could allow for global settlement of various disputes.

3. Resource savings (time, money, etc.) and allows for creative resolution.

4. Salvages relationship; particularly if the complainant is a current employee.

B. Settlement not always a viable option.

II. CONTENT—WHO, WHAT, WHEN, WHERE, WHY, AND HOW.

A. Definition of Settlement. A voluntary agreement between an employee and an agency that brings closure to a dispute over a disciplinary or performance-based action or other matter related to an employee's condition of employment.

B. Settlement Agreement (SA) viewed as a contract.

1. Merit Systems Protection Board (MSPB). The SA is a contract, and its interpretation is a matter of law. *Greco v. Dep't of the Army*, 852 F.2d 558 (Fed. Cir. 1988) ("Our task is to determine the intent of the parties at the time they contracted, as evidenced by the contract itself. Only if there is ambiguity should parole evidence be considered."); *King v. Navy*, 130 F.3d 1031 (Fed. Cir. 1997) (The meaning of terms in a [SA] is a question of law and reviewed de novo. *Anderson v. Dep't of Commerce*, 243 F.3d 556 (Fed. Cir. 2000) citing Greco.)

2. Equal Employment Opporotunity Commission (EEOC). A SA between a complainant and a federal agency is a contract subject to ordinary principles of contract interpretation and construction. In interpreting a SA, the EEOC has applied the contract principle known as the "plain meaning rule," which holds "it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction"; where a writing is unambiguous on its face, its meaning is determined from the four corners of the instrument without resort to extrinsic evidence. *Vacanti v. Dep't of the Navy*, EEOC Appeal No. 01A01356 (March 27, 2002); *Gray v. USPS*, EEOC Appeal No. 01A03346 (July 26, 2001).

C. Consistent with Law and Public Policy.

1. Consideration.

a. The operative portion of a SA provides: "Both parties agree that, in order to promote a more harmonious relationship in the workplace, they will deal with each other fairly and treat each other with dignity and respect in the workplace." *Yip v. U.S.P.S.*, EEOC Appeal No. 01A21290 (March 27, 2002) (EEOC voided SA for lack of consideration).

b. EEOC held that consideration need not be great, but requires that "some right, interest, profit, or benefit accrues to one party or some forbearance, detriment, loss, or responsibility is given, suffered, or undertaken by the other. Where the promisor receives no benefit and the promisee suffers no detriment, the whole transaction is a *nudum pactum." Tamura-Wageman v. Dep't of the Army*, EEOC Appeal No. 01A11459 (March 7, 2002).

c. Agreeing to do what you are already required to do by law is not valid consideration. *DuBois v. Social Security Administration*, EEOC Request No. 05950808 (September 26, 1997). (SA not binding because no valid consideration. Agency agreed simply to rate complainant fairly.); *Morita v. Dep't of the Air Force*, EEOC Request No. 05960450 (December 12, 1997). (SA set aside because agency incurred no legal detriment. Agency agreed to affirm that discrimination on any basis except performance is unacceptable and will not be tolerated; investigations of fraud and wrongdoing would not be based on race or ethnic origin; and investigations would be conducted in accordance with DOD and Air Force directives.)

d. Agreeing to do what you cannot legally do is not valid consideration—No Clean Record Settlements. Executive Order 13839, Section 5 states: "Agencies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action."

2. A SA can waive current complaint rights, but not right to file complaint over future discrimination. *Mello v. U.S.P.S.*, EEOC Appeal No. 01944734 (August 10, 1995) (A knowing waiver made without duress of a pending EEO action concerning a prior removal is valid, but waiver of an EEO claim concerning a possible future removal is invalid.).

D. Written Agreement.

1. Under 29 C.F.R. § 1614.603, any settlement reached shall be in writing and signed by both parties and shall identify the claims resolved.

2. Terms read into the record. *Davis v. Dep't of Transportation*, EEOC Request No. 05950023 (January 26, 1996) (Terms of settlement read into the record constitute a binding agreement); *Anderson v. Environmental Protection Agency*, 81 M.S.P.R. 618 (1999).

3. However, oral agreements have be upheld.

   a. In *Thomas*, under the theory of detrimental reliance, the EEOC sustained an oral SA because there was no dispute of the terms, despite the agency's argument that there was no binding SA to enforce since there was no written agreement. *Thomas v. Smithsonian Institution*, EEOC Appeal No. 01965078 (May 16, 1997), *reconsid. Denied* (September 25, 2000).

   b. In *Lind*, EEOC found a binding agreement where the parties agreed to settle during hearing before EEOC administrative judge (AJ) and recorded terms on the record, agreed to "more fully elaborate" in a written SA, but no written SA was ever signed. Agency offered payment as agreed. *Lind v. U.S.P.S.*, EEOC Appeal No. 01A14196 (December 17, 2001).

   c. In *Sargent*, the EEOC held that absent a showing that the parties "did not intend to be bound until a written contract was signed." Unless the record clearly states there would be no agreement "until and unless" a written agreement was executed, an oral agreement read into the record is enforceable against the parties. *Sargent v. Dep't of Health and Human Services*, 229 F.3d 1088, 1090 (Fed. Cir. 2000).

E. Settlement Authority.

1. Authority from the Agency. *Epstein v. Dep't of Health and Human Services*, EEOC Request No. 05970671 (July 2, 1998). Parties entered into a SA before an EEOC AJ, and the terms were read into the record. The agency's lawyer agreed to give complainant a letter of apology signed by the agency's Secretary. Before the agreement was reduced to writing, the agency advised complainant that it would not produce a letter of apology. The EEOC found that the agency breached the agreement and ordered reinstatement of the complaint and payment of attorney's fees and costs.

2. Authority under Law and Policy. Date of resignation under SA is controlling for determining retirement entitlements. *See* Office of Personnel Management (OPM) Guidelines for Settlement of Federal Personnel Actions (http://www.opm.gov/policy-data-oversight/settlement-guidelines/).

   a. The retirement fund is not a litigation settlement fund.

b. A settlement may not provide retirement benefits beyond what a court or administrative body could order as relief in the litigation.

c. A settlement cannot be implemented which conflicts with express provisions of Civil Service Retirement Act or Federal Employees Retirement System.

d. Settlement of personnel actions should include consideration of the total cost to the Government.

e. Agencies must make all employee and employer contributions to employee benefits programs under a settlement.

f. There are special considerations in settlement of cases involving reemployment or back pay of an annuitant.

3. Cannot bind a third party to act. A SA may not impose duties or obligations on a third party without that party's consent. With respect to a SA to which OPM is not a party, OPM has the authority to determine whether any separation date established by the agreement is an artifice designed to evade the statutory requirements for entitlement to an annuity. *Parker v. Office of Personnel Management*, MSPB No. 93 M.S.P.R. 529 (2003).

4. However, recognize that authority to bind is different from legality to bind.

F. Time for Performance. In the absence of specific time for performance stated in the SA, the parties must fulfill the terms of the agreement within a "reasonable time." *Lorna Lee v. Dep't of Army*, EEOC Appeal No. 01995591 (March 22, 2002) (two months to obtain payment of attorney fees reasonable).

1. Practice Tip: When SA requires the complainant to provide information (back pay, employment history, signed statement, or other), make the time for agency performance begin upon receipt of all information and documentation.

2. Practice Tip: When SA includes terms for performance by non-agency activity (e.g., DFAS), agreement should include only promises over which agency has control ("the agency will prepare and submit to DFAS all documents necessary to authorize payment within 30 days").

G. Rescission. "It is well-established that in order to set aside a settlement, an appellant must show that the agreement unlawful, was involuntary, or was the result of fraud or mutual mistake." *Sargent v. Dep't of Health & Human Servs.*, 229 F.3d 1088, 1091 (Fed. Cir. 2000). A SA can be rescinded for material breaches. *King v. Dep't of the Navy*, 178 F.3d 1313 (Fed. Cir. 1998), *citing Thomas v. Dep't of Housing and Urban Dev.*, 124 F.3d 1439, 1442 (Fed. Cir. 1997) (expunging record 6 years after SA entered did not constitute material breach without a showing of harm).

H. Enforcement of Agreement.

1. The MSPB.

   a. The MSPB retains jurisdiction over an agreement for purposes of enforcement when it is entered into the record. Manley v. Dep't of Air Force, 91 F.3d. 117 (Fed. Cir. 1996).

   b. The Board does not have the power to enforce an agreement against a third party without its consent; performance of a specific term is excused on the ground of impossibility when the appellant chooses not to rescind the agreement. Foreman v. Dep't of Army, 241 F.3d 1349 (Fed. Cir. 2001) (Army agreed to register an employee in DOD priority placement program but the employee was not eligible under DOD rules and DOD refused to accept registration; court found that DOD and Army were separate legal entities by law).

      Practice Tip: Require the appellant to notify the agency and allow it an opportunity to cure non-performance before alleging breach.

2. The EEOC.

   a. In enforcing the terms of a SA, the EEOC will apply common rules of contract enforcement. *Gilmore v. U.S.P.S.*, EEOC Appeal No. 01A10815 (March 14, 2002) ("failure to satisfy a time frame specified in a [SA] does not prevent a finding of substantial compliance, especially when all required actions were subsequently completed").

   b. It is the intent expressed in the agreement that controls the contract construction and not the unexpressed intention. *Clark v. Dep't of Veterans Affairs*, EEOC Appeal No. 01A44177 (November 10, 2004) (Agency tendered $20,000 for Complainant's agreement to withdraw any current EEO complaints. Agreement did not address Complainant's FTCA claim.)

III. SPECIFIC TERMS AND CONDITIONS.

A. Priority Consideration.

1. In *Wilson*, EEOC found agency breach when agency agreed to give priority consideration in advance of any formal action to recruit and then initiated recruitment by posting a vacancy announcement without first considering complainant. *Wilson v. EEOC*, EEOC Appeal No. 01881684 (October 10, 1989) (Even though no other applicants had yet been selected, EEOC viewed this as a material breach).

2. In *Bush*, EEOC found breach when agency failed to give complainant priority consideration. The selecting official determined complainant was not qualified. *Bush v. Dep't of the Army*, EEOC Appeal No. 01960709 (February 2, 2000) (If he was not qualified, he did not receive *bona fide* priority

consideration. EEOC ordered specific performance by directing the agency to provide complainant one *bona fide* priority consideration for the first position for which complainant is qualified that becomes available).

B. Last Chance Agreement (LCA).

1. In Anderson, a 30-day suspension for sexual harassment held in abeyance for two years during mandatory counseling and agreement not to engage in such behavior. Discipline for "subsequent acts" of misconduct not covered by waiver of appeal rights. Suspension was imposed when employee made lewd remarks to female. Federal Circuit held this constituted breach of agreement, not subsequent misconduct. *Anderson v. Dep't of Commerce*, 243 F.3d 556 (Fed. Cir. 2000).

2. Waiver of appeal rights must be clear, unequivocal, and decisive. *Smith v. Dep't of Veteran Affairs*, 78 M.S.P.R. 594 (1998) (A LCA from proposed removal put the employee on a performance improvement plan. Board was unable to find any language in SA that appellant waived appeal rights for future violations of the LCA; no clear waiver of jurisdiction, appeal reinstated.)

3. In Mello, EEOC enforced a LCA that contained an illegal prospective waiver provision regarding EEO rights, finding that it did not affect the validity of other portions of the SA. *Mello v. U.S.P.S.*, EEOC No. 01944734 (August 10, 1995).

4. "To overcome such a waiver, an employee must prove either compliance with the [LCA], that the agency breached the agreement, or that the employee did not knowingly and voluntarily enter into the agreement." *Buchanan v. Dep't of Energy*, 247 F.3d 1333, 1338 (Fed. Cir. 2001*), citing Link v. Dep't of Treasury*, 51 F.3d 1577, 1582 (Fed. Cir. 1995).

C. Clean Record/Expungement of Records. No longer authorized pursuant to Executive Order 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles (May 25, 2018).

D. Reinstatement or Reassignment.

1. In *Gullette,* Agency breached SA by reassigning appellant to another position 2 years after execution. The SA was silent with regard to the duration of performance. *Gullette v. U.S.P.S.*, 77 M.S.P.R. 459 (1998).

2. In *Parker,* SA that did not specify length of service for position to which complainant was placed was not breached by her temporary detail two years after date of execution. The EEOC rejected the notion that the agency, via the SA, forever bargained away its right to reassign complainant to another position. *Parker v. Dep't of Defense,* EEOC Appeal No. 05910576 (August 30, 1991).

3. In *Smith,* Agency did not breach SA when it temporarily removed complainant from a position she was placed in pursuant to SA. The SA did not provide for a specific time period in which complainant would remain in the position. *Smith v. Dep't of Trans.*, EEOC Appeal No. 01994230 (January 6, 2000).

4. In non-selection cases, complainant should be placed into the position applied for (or a substantially equivalent position—one similar in duties, responsibilities, and location). *Handy v. Dep't of Trans.*, EEOC Appeal No. 04950012 (February 23, 1996).

E. Self-triggering Provisions. *Anderson v. Environmental Protection Agency*, 81 M.S.P.R. 618 (1999) (Agency may consider the SA to be appellant's voluntary resignation, given her refusal to comply with the Board's order to submit a written resignation). However, do not rely on this in practice.

F. Severability Clause. Language should be included that in the event it is determined that a provision(s) of the SA be deemed contrary to law, regulation, or is otherwise unenforceable, only that provision(s) shall be considered null and void and all other provisions shall remain in full force and effect.

IV. ATTORNEY'S FEES AND COSTS.

A. The EEOC. 29 C.F.R. § 1614.501(e).

1. In a decision or final action, the agency, AJ, or EEOC may award the reasonable attorney's fees (including expert witness fees) and other costs incurred in the processing of the complaint. This applies to allegations of discrimination prohibited by Title VII and the Rehabilitation Act. NOTE: Federal sector complainants cannot obtain attorney's fees for the administrative processing of age discrimination claims.

2. Prevailing Party. Absent an express waiver, the question of entitlement to attorney's fees turns on whether complainant is a prevailing party. *Parks v. Dep't of the Air Force*, EEOC Appeal No. 05880609 (June 27, 1988).

a. An individual may be considered a "prevailing party" for purposes of Title VII even if there is no formal adjudication of the complaint and no finding of discrimination. Hewitt v. Helms, 482 U.S. 755 (1987).

b. A prevailing party is one who succeeds on any significant issue and achieves some benefits sought in bringing the action. *Morales v. U.S. Information Agency*, EEOC Appeal No. 01956779 (December 3, 1997).

c. "In federal EEO law, there is a strong presumption that a complainant who prevails, in whole or in part, on a claim of discrimination is entitled to an award of attorney's fees and costs.

More specifically, complainants who prevail on claims alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 (as amended) and the Rehabilitation Act of 1973 (as amended) are presumptively entitled to an award of attorney's fees and costs, unless special circumstances render such an award unjust." Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110).

3. "To determine the proper amount of the fee, a lodestar amount is reached by calculating the number of hours reasonably expended by the attorney on the complaint multiplied by a reasonable hourly rate [prevailing in the relevant community]." *Donelson v. Dep't of Veterans Affairs*, EEOC Appeal No. 01996394 (July 27, 2001), *citing Blum v. Stenson*, 465 U.S. 886 (1984). Counsel for the prevailing party must make a "good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary." *Hensley v. Echerhart*, 461 U.S. 424, 434 (1983). Where a complainant does not prevail on every issue, fees are only available for the work that was performed with regard to the issue on which the complainant prevailed. The hours spent on unsuccessful claims should be excluded in considering the amount of a reasonable fee where the unsuccessful claims are distinct from the successful claims. *Hensley*, 461 U.S. at 43.

4. An attorney who represents federal employees at a reduced hourly rate based on public interest motives can recover fees at the higher prevailing market rate, notwithstanding a retainer agreement. *Lal v. Securities & Exchange Comm'n*, EEOC Appeal No. 01974652 (February 2, 2000), *citing Morales v. USIA*, EEOC Appeal No. 01956779 (December 3, 1997).

B. The MSPB. 5 C.F.R. § 1201.201.

1. The Board applies a prevailing party standard. *Buckhannon v. W. Va. Dep't of Health & Human Serv.*, 532 U.S. 598 (2001).

2. The "catalyst theory" does not support award of attorney's fees under the American Rule; a "prevailing party" is one who is awarded relief by the court. *Accord, Nichols v. Veterans' Admin.*, 89 M.S.P.R. 554 (2001).

3. There are seven statutory provisions that authorize MSPB to pay attorney's fees; know which one applies to your case.

C. NEVER SEVER. When settling a dispute that will include payment of attorney fees, always come to an agreement on fees before reaching settlement. Litigation over fees will often be just as bad (or worse), last as long (or longer), as (than) contesting the underlying action. See *Congelton v. Dep't of Justice*, EEOC Appeal No. 01A04726 (March 22, 2002).

D. During settlement, <u>always address fees</u>—do not let the SA be silent on the issue. *See Horn v, Dep't of Defense*, 81 M.S.P.R. 652 (1998), *aff'd* 230 F.3d 1374 (Fed. Cir.

1999). Best to state the amount of fees, to whom the check is made payable, where the check will be sent, and when payment will be made (process initiated, for DOD agencies processing through DFAS).

V. COMPENSATORY DAMAGES.

A. Availability.

1. The MSPB. 5 C.F.R. § 1201.201(c-d). Compensatory damages include pecuniary losses, future pecuniary losses (not including front pay), and nonpecuniary losses, such as emotional pain, suffering inconvenience, mental anguish, and loss of enjoyment of life.

a. *Compensatory damages* are awarded to a prevailing party who is found to have been discriminated against based on race, color, religion, sex, national origin, or disability.

b. *Consequential damages* (medical costs, travel expenses, and other reasonable and foreseeable consequential damage) may be awarded:

(1) Where the Board orders corrective action in a whistleblower appeal under 5 U.S.C. § 1221, and

(2) Where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. § 1214.

2. The EEOC. *See* Civil Rights Act of 1991, § 102. Compensatory damages may be awarded for pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

NOTE: Federal sector complainants cannot recover compensatory damages for age discrimination claims or in Rehabilitation Act cases in which the agency made a good faith effort to accommodate the complainant's disability.

B. Types of Compensatory Damages.

1. Past Pecuniary: monetary expenses incurred, including job-hunting expenses, moving expenses, medical expenses, physical therapy expenses, and other quantifiable expenses. These monetary claims are not subject to the $300K cap (front pay also not subject to the cap).

2. Future Pecuniary: monetary expenses likely to occur after resolution of a complaint, such as the projected cost of physical and/or psychiatric therapy.

3. Nonpecuniary: monetary compensation for intangible injuries, such as emotional distress, loss of self-esteem, anxiety, fatigue, humiliation, injury to reputation, embarrassment, depression, sleep problems, paranoia, pain and suffering, loss of enjoyment of life.

VI. **CHALLENGES AND ENFORCEMENT.**

A. Procedures.

1. The MSPB - Petition for enforcement. 5 C.F.R. § 1201.182. Most petitions fall under the Board's appellate jurisdiction and the petition must be filed with the regional or field office that issued the initial decision. If seeking enforcement of a final Board decision or order issued under its original jurisdiction, the petition for enforcement must be filed with the Clerk of the Board.

2. The EEOC - Compliance with settlement. 29 C.F.R. § 1614.504. Complainant shall notify the EEO Director (EEOCCR in Army) in writing within 30 days of when the complainant knew or should have known of the alleged noncompliance. Complainant may appeal to the EEOC 35 days after serving notice to the agency, or within 30 days of receipt of the agency's noncompliance determination.

B. Grounds. Bad faith, coercion, mutual mistake, lack of authority, diminished capacity, emotional distress, duress, fraud, etc. *Wade v. Dep't of Veteran Affairs*, 61 M.S.P.R. 580, 583 (1994) ("To set aside a settlement, an appellant must show that the agreement is "unlawful, was involuntary, or was the result of fraud or mutual mistake"). *Harris v. Dep't of Veteran Affairs*, 142 F.3d 1463, 1468 (Fed. Cir. 1998).

1. Bad Faith. *Miller v. Dep't of Health and Human Services*, EEOC Appeal No. 05970174 (August 26, 1998) (EEOC set aside SA finding that the agency acted in bad faith by not executing SA until two months after complainant had signed agreement.)

2. Coercion. In determining whether a release was knowing and voluntary, the EEOC will look to the totality of circumstances. Factors to be considered include complainant's education and experience; amount of time to consider agreement before signing; clarity of agreement; opportunity to consult with an attorney; employer's encouragement or discouragement of consultation with an attorney; and consideration given in exchange for the waiver. *Brown v. Dep't of Agriculture*, EEOC Appeal No. 05960769 (July 16, 1999).

3. Diminished capacity. *Kocher-Kinsman v. Dep't of Agriculture*, EEOC Appeal No. 01992748 (January 18, 2000) (EEOC voids SA finding that complainant had diminished capacity based on unrefuted medical evidence that she suffered from significant anxiety symptoms. Agency argued that complainant voluntarily entered into the SA, noting she had been consulting with an attorney and the SA contained a provision for payment of fees.)

C. Remedies.

1. Rescission and reinstatement. 5 C.F.R. §1614.504(c).

a. If EEOC determines that the agency is not in compliance with the terms of a SA and the noncompliance is not attributable to acts or conduct of the complainant, it may order compliance or it may order that the complaint be reinstated for further processing from the point processing ceased.

b. The decision regarding whether to order compliance with the SA or reinstatement of the complaint is discretionary and based on the factual circumstances presented in each case.

c. Any allegations that raise subsequent acts of discrimination as violations of a SA should be processed as a separate complaint, rather than as allegations of breach of the SA. *Nash v. U.S.P.S.*, EEOC Appeal No. 01996251 (March 14, 2002) (ordering complaint be reinstated for agency failure to comply with SA's overtime commitment; claim of reprisal must be raised in separate complaint).

2. Enforcement.

a. Appellant's status as a former employee does not deprive the Board of authority to order him to comply with the SA. *Wisdom v. Dep't of Defense*, 78 M.S.P.R. 652 (1998).

b. When an agency breaches SA, the employee normally has the option of enforcing the agreement or rescinding it and reinstating the appeal if the provision breached was a "principal term" or "material to the agreement." *Day v. Dep't of Air Force,* 78 M.S.P.R. 364 (1998).

c. A SA cannot impose obligations on a third party without its consent; such a term is excusable on the ground of impossibility and can be severed from the remaining terms of the agreement. *Foreman v. Dep't of the Army*, 241 F.3d 1349 (Fed. Cir. 2001).

3. Attorney Fees, Interest, Costs.

a. Agency refusal to comply with terms read into the record constituted bad faith dealing, justifying an award of attorney's fees as a sanction. *Epstein v. Dep't of Health and Human Services*, EEOC Appeal No. 05970671 (July 2, 1998).

b. Agency failure to complete the investigation or issue decision within the timeframes ordered by the EEOC constitutes noncompliance, thereby entitling complainant to attorney's fees and costs in processing the petition for enforcement. *Velasquez v. Dep't of Justice*, EEOC Appeal No. 04960018 (February 2. 1997).

4. Compensatory and Other Damages in Enforcement and Compliance Proceedings.

a. The EEOC.

(1) Compensatory damages are not available for allegations of breach, since such allegations do not involve a determination of whether discrimination has occurred. *Gibbons v. U.S.P.S.*, EEOC Appeal No. 01952319 (December 14, 1995).

(2) EEOC's regulations do not provide for sanctions for breach of SA. *Jenkins v. Dep't of Agriculture*, EEOC Appeal No. 01960794 (December 11, 1996) (EEOC lacked authority to order agency to pay complainant the entire amount of his compensatory damage claim as a sanction for the agency's delay. Complainant may only seek an order for specific enforcement of the SA or reinstatement of his complaint.)

(3) The issue of sanctions also arises during the formal stage of an EEO compliant when an administrative judge finds that an agency representative exceeded their representational duties. Please see Chapters G and H for further discussion).

b. The MSPB likewise has no authority to pay damages for breach or order amendment of the terms of the agreement. *Foreman v. Dep't of the Army*, 241 F.3d 1349 (Fed. Cir. 2001).

VII. ARMY SETTLEMENT POLICY (EEO)—AR 690-600.

A. Compensatory Damages. Activity or installation commanders possess authority to settle compensatory damage claims up to the maximum amount authorized by law, subject to certain conditions and any limits set by the appropriate Major Commands.

B. Reporting Requirement. In addition to other reporting requirements to EEOC and OOPM, whenever an activity agrees to pay compensatory damages in settlement of an EEO complaint, the activity labor counselor must forward a copy of the signed SA to the Chief, Labor and Employment Law Division, Office of The Judge Advocate General. The labor counselor also must provide the following information about the settlement:

1. The total amount of compensatory damages the activity paid.

2. The amount of pecuniary compensatory damages the activity will pay.

3. The amount of nonpecuniary compensatory damages the activity will pay.

NOTE: Reporting requirements apply to any payment of compensatory damages by settlement, even if the payment of compensatory damages is not specifically stated in the SA but was considered as a component of a lump sum payment.

C. Attorney's Fees. Although there are no dollar limits on payment of attorney's fees claims in settlements, the regulation specifies the kinds of evidence needed to substantiate a fee claim.

VIII. **PRACTICAL TIPS.**

A. Comply with Older Workers Benefit Protection Act (OWBPA). 29 U.S.C. § 621, *et seq.*

1. 29 C.F.R. § 1625.22 - Waiver of rights and claims under the Age Discrimination Employment Act (ADEA) *does not apply*. Kiwan v. Caldera, EEOC Appeal No. 01996318 (January 21, 2001). The minimum requirements for determining if a waiver is knowing and voluntary in *settlement* of an EEO complaint are:

   a. Understandable to complainant.

   b. Agreement in writing.

   c. Refers to rights or claims under the ADEA.

   d. No waiver of future rights.

   e. Valuable consideration.

   f. Complainant advised in writing to consult with attorney.

   g. Reasonable time to consider.

NOTE: Statutory provisions for waiver of a right or claim under 29 U.S.C. § 626(f)(1) are different than the rights listed above for settlement of an EEO complaint under § 626(f)(2) (21 day to consider, 7 days to cancel do not apply to settlement of EEO complaints).

2. A waiver of rights under the OWBPA is knowing and voluntary only if it specifically references the OWBPA and contains all terms listed in 29 U.S.C. § 626(f)(2). *Farley v. Dep't of the Navy*, EEOC Appeal No. 01A06004 (July 17, 2001).

3. At least one of appellant's formal or informal complaints referenced in the SA was based on age, therefore SA subject to OWBPA waiver standards. *Woychik-Brown v. Dep't of Agriculture*, EEOC Appeal No. 05960768 (July 16, 1999); *Harris v. Dep't of the Air Force*, 98 M.S.P.R. 261 (March 9, 2005) ("[SA] was ineffective only insofar as it constitutes a waiver of any claim that the agency 's removal action constituted discrimination based on age.")

B. Don't Make Promises Regarding Tax Consequences.

1. Small Business Job Protection Act (1996). Revised 26 U.S.C. § 104(a) (IRS Code) to clarify that damages received for personal physical injuries or physical sickness are excluded from taxable gross income; however, emotional distress shall not be treated as a physical injury or physical sickness. Exception: damages paid for medical care attributable to emotional distress not in excess of the amount paid for medical care.

2. DFAS must make appropriate deductions and withholdings. Include a provision in the SA that states back pay awards are subject to normal federal and state income tax, FICA, and other withholdings as specified by law and regulation. Also include a statement that the parties agree the employee is solely liable for all tax consequences and obligations arising from the payment. *See Crosby v. U.S.P.S.*, 85 M.S.P.R. 26 (December 22, 1999), *aff'd,* 243 F.3d 560 (Fed. Cir. 2000).

C. Coordinate. All leaders are best served by coordinated agreement between HR, EEO, and management officials. All bring a different perspective; coordinate laterally and vertically, when appropriate.

D. Avoid Confidentiality Clauses. Some federal agencies prohibit entering into SAs that contain confidentiality provisions. 28 C.F.R. § 50.23(a). *Consunji v. Dep't of the Navy*, EEOC Appeal No. 01A02199 (March 14, 2002); *Bradford v. Dep't of Defense,* EEOC Appeal No. 01964282 (March 31, 1997); *Powell v. Dep't of Commerce*, 98 M.S.P.R. 398 (March 31, 2005) (Board found breach material when it relates to a matter of vital importance, or goes to the essence of the contract. Promises of non disclosure provide a major benefit to the employees who agree to withdraw appeals. Such a breach can not be cured; order of enforcement not possible. Reinstatement ordered.).

E. Beware of Future Promises. These are easy to breach and given the fluidity of our management, hard to maintain.

F. Ensure a Meeting of the Minds (clear concise language; anticipate future disputes and ambiguity).

G. Fix the Problem. The SA should aim to fix the problem, not just resolve the complaint; heal the relationship.

H. Seek Global Agreements (consolidate all outstanding complaints, when feasible). *Dunn v. Dep't of Army,* 100 M.S.P.R. 89 (August 31, 2005) ("The parties acknowledge that this [SA] fully and completely resolves all disputes and claims between them, whether known, or unknown, administrative or judicial, accruing on or before the date of this document.").

I. Execution. After signed and effected; follow-up to ensure full compliance. Document.

CHAPTER L

CIVILIAN WHISTLEBLOWER COMPLAINTS & PROHIBITED PERSONNEL PRACTICES

[Whistleblower protection] is predicated on the congressional determination that whistleblowers "serve the public interest by helping to eliminate fraud, waste, abuse, and unnecessary government expenditures. . . [P]rotecting whistleblowers leads to a more effective civil service." Marren v. Dep't of Justice, 51 M.S.P.R. 632 (1991).

I. REFERENCES.

A. 5 U.S.C. §§ 2302, 1211-1219 (Whistleblower Protection Act of 1989, as amended by the Whistleblower Protection Enhancement Act of 2012, Pub. L. 112-199).

B. Civil Service Reform Act of 1978, found thru 5 U.S.C., and codified as amended at 5 U.S.C. §§ 1101-8913.

C. Office of Special Counsel Reauthorization Act, 108 Stat 4361 (1994). Made management responsible for informing employees of rights, especially whistleblower.

D. 5 U.S.C. Ch. 12, subchapters II and III (Office of Special Counsel and Individual Right of Action in Certain Reprisal Cases).

E. 5 U.S.C. Ch. 23 (Merit System Principles and Prohibited Personnel Practices).

F. 5 C.F.R. Pt. 1201, Subpart D (MSPB Practices and Procedures for Special Counsel Actions).

G. 5 C.F.R. Pt. 1209 (Practices and Procedures for Appeals and Stay Requests of Personnel Actions Allegedly Based on Whistleblowing).

H. 5 C.F.R. Pt. 1800 (OSC Implementation of the Whistleblower Protection Act).

I. 32 C.F.R. Pt. 145 (DOD Cooperation with OSC).

J. 5 C.F.R. Pt. 772 (Interim Relief).

II. OVERVIEW.

A. Lloyd-La Folette Act of 1912 was the first federal law enacted to protect whistleblowers.

B. The Whistleblower Protection Act (WPA) of 1989, as amended, prohibits agencies from taking adverse personnel actions against employees and applicants for employment because they have engaged in whistleblowing activities.

C. Protected Whistleblowing. An employee or applicant for employment is entitled to whistleblower protection from retaliation if he or she makes a "protected disclosure," i.e., "any disclosure of information . . . which the employee or applicant reasonably believes evidences any violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds; an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. 2302(b)(8)(A).

D. The WPA was amended by the Whistleblower Protection Enhancement Act (WPEA) of 2012, P.L. 112-199. This Act provides whistleblowers additional protection from retaliation for reporting government fraud, waste, or abuse. It also clarifies what constitutes a protected disclosure, and requires a statement in non-disclosure policies, forms, and agreements that they are consistent with certain disclosure protections.

E. The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, P.L. 115-73, continued to expand protections. It created a new prohibited personnel practice for "accessing medical records of another employee or applicant as a part of, or in furtherance of, any conduct described in paragraphs 1-13 of 5 U.S.C. § 2302. This Act also required agencies to train supervisors on how to handle complaints of whistleblower retaliation and, by expanding 5 U.S.C. § 7515 mandataed disciplinary action for supervisors who violate specific sections of the WPEA.

III. OFFICE OF SPECIAL COUNSEL.

A. Originally the Office of the Special Counsel (OSC) was created by the Civil Service Reform Act of 1978 as the prosecutorial arm of the Merit Systems Protection Board (MSPB).

B. With the enactment of the WPA, the OSC became an independent agency within the executive branch. 5 U.S.C. §§ 1211-19; 5 C.F.R. Part 1800. It authorized OSC to:

1. Investigate prohibited personnel practices (PPP) and other activities prohibited by civil service law, rule, or regulation,

2. Seek corrective action on behalf of individuals who are victims of PPPs,

3. Seek disciplinary action against agency officials who commit PPPs,

4. Advise on and enforce Hatch Act provisions regarding political activity applicable to federal, state, and local government employees.

IV. PROHIBITED PERSONNEL PRACTICES.

Under 5 U.S.C. § 2302, there are four statutory prerequisites to asserting a PPP claim with OSC: (1) a covered agency, (2) a covered position, (3) a covered personnel action, and (4) commission of a PPP.

A. Covered Agencies include most executive branch agencies and the Government Printing Office, but not:

1. The Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the Central Imagery Office, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

2. The General Accounting Office; and

3. Most government corporations except in the case of an alleged PPP described under 5 U.S.C. § 2302(b)(8).

B. Covered Positions include employees and, in some cases, applicants:

1. In the competitive service; career senior executive service; most excepted service (except schedule C policy or confidential positions).

2. Nonappropriated Funds (NAF) employees are protected from whistleblower-type reprisal by 10 U.S.C. § 1587, as implemented by DODD 1401.03. NAF employees have the right and are encouraged to submit complaints of fraud, waste, mismanagement, and reprisal to the DOD Inspector General (IG).

C. Covered Personnel Actions include *most* employment actions.

1. Examples include:

a. appointment; promotion; disciplinary or corrective action; detail, transfer, or reassignment; reinstatement; restoration; reemployment; performance evaluation; decision concerning pay, benefits, awards, or

b. action concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, or performance evaluation;

c. a decision to order psychiatric testing or examination; and

d. any other significant change in duties, responsibilities, or working conditions.

e. Examples of actions not covered: letter of counseling or warning.

D. PPP. In order to assert an action against the agency, the PPP must have been taken by an employee with requisite personnel authority. This includes any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not:

1. Discriminate. Although discrimination is a PPP, the OSC defers the most Title VII discrimination allegations to the agency to utilize the EEO complaint processes.

2. Solicit or improperly consider improper employment recommendations or statements.

3. Coerce political activity or take reprisal for refusal to engage in political activity.

4. Deceive or willfully obstruct anyone from competing for employment.

5. Influence a withdrawal from competition in order to improve or injure employment prospects of another.

6. Grant unlawful preference or advantage in order to improve employment prospects.

   a. Common misconception: Unauthorized preference is more than a preconceived idea that one person may be the best selectee for a particular position ("preselection").

   b. To constitute a PPP, the action requires granting some illegal advantage and an intentional manipulation of the system to insure that one person is favored and another person is disadvantaged.

   c. It is not unlawful for management to select the candidate it had in mind at the time a vacancy announcement was posted, so long as the selection followed an open competition and is otherwise justifiable.

7. Improperly employ relatives (nepotism).

8. Retaliate against whistleblowers.

9. Take or fail to take personnel action for exercise of appeal, complaint, or grievance right; for testimony or assistance to person exercising such rights; for cooperation with OSC or IG; for refusal to obey unlawful order.

10. Discriminate based on conduct not adverse to job performance, except suitability determinations.

11. Take or fail to take personnel action in violation of a veterans preference requirement.

12. Violate merit principles (codified at 5 U.S.C. §2301).

13. Implement or enforce any nondisclosure policy, form, or agreement, if they do not contain a written statement of adherence to certain disclosure protections.

14. Access medical records of another employee or applicant as a part of, or in furtherance of, any conduct described in paragraphs 1-13 of 5 U.S.C. § 2302.

V. PROCESSING CLAIMS OF PPPS.

A. Upon receipt of an allegation of a PPP, the OSC must investigate, to the extent necessary to determine, whether reasonable grounds exist to believe a PPP has or will occur.

1. Procedures.

a. Notification of receipt of allegation by the complainant.

b. Periodic status notification to the complainant.

c. Notification provided of the complainant to terminate the investigation. The OSC will screen each case to determine whether to refer for full field investigation or to close (due to lack of jurisdiction or evidence).

d. Provide complainant an opportunity to respond to OSC's notice of termination.

e. NOTE: Non-disclosure of complainant's identity. 5 U.S.C. § 1212(g)(1).

2. Personnel Action: Stays. The stay is intended to preserve (or restore) the status quo while:

a. Purpose:

(1) The OSC completes its investigation of the alleged PPP; or

(2) The MSPB considers OSC's request for corrective or disciplinary action.

b. Procedures. OSC seeks "stays" of personnel actions by:

(1) Negotiation with agency.

(2) Petition to MSPB (Board member can grant stay for up to 45 days). MSPB may extend stay after agency comment. *Special Counsel v. Dep't of Air Force*, 56 M.S.P.R. 365 (1993).

(3) The OSC may initiate termination of stay. *Special Counsel v. Fed. Aviation Auth*., 60 M.S.P.R. 19 (1993).

3. Corrective Actions.

a. OSC's common remedy for most PPPs (job restoration and back pay).

b. Negotiate voluntary compliance by agency.

c. File petition for corrective action to MSPB.

4. Elements of Proof in whistleblower retaliation cases, as outlined in 5 U.S.C. § 1214(b)(4) are:

a. Protected disclosure of information.

(1) Any disclosure of information that reasonably evidences a violation of any law, rule, regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if the disclosure is not specifically prohibited by law and if the information is not specifically required to be kept secret; or

(2) Any disclosure to OSC, the agency IG, or any employee designated to receive such disclosures, of information that reasonably evidences a violation of any law, rule, regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(3) Standard of Proof is preponderance of evidence. "...Whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8)." *Ormond v. Dep't of Justice*, 112 LRP 37380, 118 M.S.P.R. 337, 2012 WL 2924126 (M.S.P.B. July 18, 2012).

(4) Disclosure need not be accurate to be protected, so long as employee had *reasonable belief* that it is true (test is both objective and subjective).

(5) The WPEA states that a disclosure is not unprotected because:

(a) The disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered.

(b) The disclosure revealed information that had been previously disclosed.

(c) Of the employee's or applicant's motive for making the disclosure. *Fickie v. Army*, 86 M.S.P.R. 525, 530 (2000).

(d) The disclosure was not made in writing.

(e) The disclosure was made while the employee was off duty.

(f) Of the amount of time that has passed since the occurrence of the events described in the disclosure.

(g) The disclosure was made in the normal course of the employee's duties.

(6) Disclosures that are NOT protected include:

(a) Filing an EEO complaint. *Spruill v. MSPB,* 978 F.2d 679 (Fed. Cir. 1992).

(b) Filing a grievance and other actions in support of an employee. *Wooten v. Dep't of Health and Human Services*, 54 M.S.P.R. 143 (1992).

(c) An earlier MSPB appeal. *Metzenbaum v. Dep't of Justice*, 54 M.S.P.R. 32 (1992).

(d) Filing an unfair labor practice complaint. *Coffer v. Dep't of Navy*, 50 M.S.P.R. 54 (1991).

(e) Assignment of an employee to a different supervisor without a change of position. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337 (1991), *aff'd by Wagner v. Environmental Protection Agency*, 972 F.2d 1355 (Fed. Cir. 1992).

(f) Employee's allegation that he was denied training for a period of two years failed to show a "personnel action" within meaning of WPA. For denial of training to be a personnel action within WPA there must be, at a minimum, a moderate probability that training would have resulted in some type of personnel action. *Shivaee v. Dep't of Navy*, 74 M.S.P.R. 383 (1997).

(g) Employee's exclusion from a conference. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 326 (1991).

(h) Management's request for audit of employee's pay records. *Marren v. Dep't of Justice*, 50 M.S.P.R. 474 (1991).

(i) Disclosures specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 2302(b)(8).

b. Personnel action taken, not taken, or threatened. Examples include:

(1) Proposing the removal of a probationary employee. *Sirgo v. Dep't of Justice*, 66 M.S.P.R. 261 (1995).

(2) Failure to renew or extend a temporary appointment. *Kern v. Dep't of Agriculture*, 48 M.S.P.R. 137 (1991).

(3) Denial of annual leave. *Marren v. Dep't of Justice*, 50 M.S.P.R. 369 (1991), aff'd, 980 F.2d 745 (Fed. Cir. 1992).

(4) Reductions in force and qualification determinations may be personnel actions. *Carter v. Dep't of Army*, 56 M.S.P.R. 321 (1993), reversed, 62 M.S.P.R. 393 (1994).

(5) Order to undergo a fitness for duty exam is a personnel action.

(6) Placing an employee on "administrative leave". *Special Counsel v. Internal Revenue Serv.*, 65 M.S.P.R. 146 (1994).

c. Actual or constructive knowledge of the protected disclosure.

(1) The acting official's knowledge of the disclosure and the timing of the personnel action constitute circumstantial evidence for consideration. *Kinan v. Dep't of Defense*, 87 M.S.P.R. 561 (2001).

(2) An employee can also demonstrate reprisal by establishing the official taking the action had constructive knowledge of the protected activity. *Marchese v. Dep't of Navy*, 65 M.S.P.R. 104 (1994).

d. Protected disclosure was a "contributing factor" in the personnel action. Circumstantial evidence of knowledge of protected disclosure and reasonable relationship between time of protected disclosure and time of personnel action will establish, prima facie, that disclosure was contributing factor to personnel action. *Kewley v. Dep't of Health and Human Servs*., 153 F.3d 1357 (C.A.Fed., 1998).

5. Agency Defense. The agency must show by "clear and convincing" evidence that it would have taken the same action even if there had been no protected disclosure. 5 U.S.C. § 1221(e)(2).

6. OSC disciplinary actions against management. 5 U.S.C. § 1215.

a. Standard of Proof: preponderance of evidence. *Special Counsel v. Eidmann*, 49 M.S.P.R. 614 (1991), aff'd, 976 F.2d 1400 (Fed. Cir. 1992).

b. OSC does not have jurisdiction over military personnel.

c. The evidentiary standard used to determine whistleblowing retaliation is proof that the employee's whistleblowing was a significant or motivating factor in the personnel action. *Eidmann v. MSPB*, 976 F.2d 1400 (Fed. Cir. 1992).

d. Dr. Chris Kirkpatrick Whistleblower Protection Act expanded 5 U.S.C. § 7515 to state "if the head of the agency employing a supervisor ... [] determines that the supervisor has committed a prohibited personnel action, the head of the agency employing the supervisor, in accordance with procedures required under paragraph (2) [of this section]:

(1) For the first prohibited personnel action committed by a supervisor shall propose suspending the supervisor for a period of not less than 3 days; and may, in addition to a suspension described [above] propose any ther action, including a reduction in grade or pay, that the head of the agency determines appropriate, and

(2) For the second prohibited personnel action committed by a supervisor, shall propose removing the supervisor."

7. Procedures. OSC files complaint with MSPB, charging employee with commission of PPP. *See* 5 U.S.C. §§ 1215, 7515. Employees are afforded the following rights:

   a. Right to file answer within 35 days.

   b. Right to representation by attorney or other representative.

   c. Hearing before an administrative judge (AJ).

   d. A recommended written decision issued by the AJ.

   e. Right to file exceptions to the recommended decision.

   f. Final written decision by Board.

8. Penalty.

   a. Possible types of discipline include removal; reduction in grade; debarment from federal employment for up to 5 years; suspension; reprimand; or a civil penalty up to $1,100. 5 C.F.R. § 1201.126.

   b. Penalties are imposed alternatively and not collectively. *Special Counsel v. Doyle, McDonald, Endsley, Floersheim, and Betten*, 45 M.S.P.R. 43 (1990).

   c. Douglas factors applicable in determining appropriate penalty. *Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984).

9. Judicial Review. Appealable as a final MSPB decision to Court of Appeals for Federal Circuit. 5 U.S.C §§ 1215(a)(4), 7703(b); 5 C.F.R. § 1201.127.

B. Employee Actions.

1. MSPB Jurisdiction in Individual Right of Action (IRA) Whistleblowing Cases. 5 U.S.C. § 1221; 5 C.F.R. Part 1209.

   a. Limited to non-frivolous claims of whistleblower retaliation.

   b. Elements of an action include:

      (1) The employee engaged in protected whistleblowing activity.

      (2) The agency took, failed to take, or threatened to take (or fail to take) a personnel action covered by 5 U.S.C. § 2302(b)(8).

(3) The employee exhausted the administrative process before the OSC. *Lozada v. EEOC*, 45 M.S.P.R. 310 (1990). NOTE: Constructive Exhaustion will be inferred if after filing with OSC, the OSC investigation is not completed within 120 days from the filing of the complaint.

(4) IRA must be filed within 65 days of notification of termination of OSC investigation.

c. An employee invoking Board jurisdiction must assert essentially the same facts asserted in the complaint to the OSC. *Ward v. MSPB*, 981 F.2d 521 (Fed. Cir. 1992).

d. In an IRA, the MSPB will not deem OSC's termination of the investigation as relevant.

e. The MSPB has no authority to review discrimination claims raised in an IRA. *Marren v. Dep't of Justice*, 51 M.S.P.R. 632 (1991), aff'd, 980 F.2d 745 (Fed Cir. 1992).

2. Raising Appealable actions with OSC. Claims of PPP's may be raised as affirmative defenses in an otherwise appealable action. 5 U.S.C. § 7701(c)(2)(B).

3. Employee "Stay" Requests.

a. Procedures. 5 C.F.R. Part 1209, Subpart C.

b. Basis for granting stay is substantial likelihood that employee can demonstrate whistleblowing was a contributing factor in a personnel action (taken, proposed, or threatened). 5 U.S.C. §§ 1221(c)(1), 1221(I).

c. Exhaustion of the administrative process through OSC, unless it constitutes an otherwise appealable action.

d. Stay request filed with MSPB regional offices. Employee has the burden to establish jurisdiction and appropriateness of stay.

e. Agency must be given an opportunity to respond to appellant employee's request.

f. Hearing and order on stay request.

g. Length of Stay. A stay of the termination of an employee during his probationary period serves to maintain the probationary period for the

duration of the stay. *Special Counsel v. Dep't of Veterans Affairs*, 45 M.S.P.R. 486 (1990).

h. Stay decisions are reviewable by interlocutory appeal. *Weber v. Dep't of Army*, 47 M.S.P.R. 130 (1991).

4. Employee Corrective Actions.

a. Basis for relief:

(1) A protected disclosure under 5 U.S.C. § 2302(b)(8); and

(2) The whistleblowing was a contributing factor in a personnel action.

b. Burdens of Proof in IRA cases. Employee must show that whistleblowing was a contributing factor in the personnel action, and then the agency can attempt to show by clear and convincing evidence that it would have taken the same action even if there had been no protected disclosure. 5 U.S.C. § 1221(i).

5. Relief.

a. Such corrective action as the Board considers appropriate.

b. Make whole remedy. Attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages. *Bonggat v. Dep't of Navy*, 56 M.S.P.R. 402 (1993).

c. Remedy does not include restoration of annual leave for employee who prosecuted his case *pro se* and used the annual leave to prepare his case to the Board. *Reams v. Dep't of Treasury*, 91 M.S.P.R. 447 (2002).

6. Judicial Review. U.S. Court of Appeals for the Federal Circuit. *See* 5 U.S.C. §§ 1221(h)(2), 7703(b).

7. Election of Remedies. Employees covered by a collective bargaining agreement must choose between remedies for PPPs: negotiated grievance procedure, OSC complaint, or MSPB appeal. 5 U.S.C. § 7121(g).

CHAPTER M

REDUCTION IN FORCE & TRANSFER OF FUNCTION

There are numerous ways to accomplish personnel reductions across the workforce: limit, free or selective hiring; release temporary employees; voluntary early retirement programs; contract out; furlough; reduction in force (RIF) and transfer of function (TOF). In deciding the appropriate course, attempts should be made to minimizing disrupton of the workforce while ensuring the feasibility of the mission is met.

I. REFERENCES.

A. Statutory.

1. 5 U.S.C. §§ 3501-3504 (reduction in force and transfer of function).

2. 5 C.F.R. Part 351, Reduction in Force.

3. 5 C.F.R. Part 550, Subpart G, Severance Pay.

4. 5 C.F.R. § 330.203, Eligibility due to RIF

B. Military Department Guidance.

1. Army Regulation (AR) 690-351-1, Reduction in Force (7 Feb 92).

2. Secretary of the Navy Instruction (SECNAVINST) 12351.5G (3 Jan 12).

C. Federal Agency Guidance.

1. DOD Civilian Personnel Manual (DODI 1400.25), Chapter 1800, Priority Placement Program (Reissued April 2009).

2. OPM Reduction in Force Resource Page (Regulations, Guidance, and Information Resources).

D. Additional Resources.

1. A Guide to Merit Systems Protection Board Law and Practice, Ch. 10: Reductions in Force, Peter B. Broida, Dewey Publications Inc., P.O. Box 663, Arlington, VA 22216; www.deweypub.com. (updated annually).

2. A Guide to Federal Labor Relations Authority Law and Practice, Ch. 6: Reductions in Force, Peter B. Broida, Dewey Publications, Inc., P. O. Box

663, Arlington, Virginia 22216; http://www.deweypub.com. (updated annually).

3. Jerome and Rosemary Hardiman, RIFs and Furloughs: A Complete Guide to Rights and Procedures; Consolidated Resource Group, Inc., 1993.

II. REDUCTION IN FORCE (RIF).

A. Definition. A RIF is defined as "release of a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling; reorganization; the exercise of reemployment rights or restoration rights; or reclassification of an employee's position due to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days." 5 C.F.R. § 351.201(a)(2)

1. An agency may not use RIF procedures for other purposes, *e.g.*, attempt to circumvent an employee's procedural rights in an adverse action for cause (misconduct or unacceptable performance). *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

2. Standard of Review: The agency has the burden to show by preponderant evidence that it invoked RIF regulations for one of the legitimate management reasons specified in 5 C.F.R.§ 351.201(a)(2)

3. Once the agency has met its burden, the Merit Systems Protection Board (MSPB) lacks authority to review the management considerations underlying the exercise of the agency's discretion. *Schroeder v. Dep't of Transp.*, 60 M.S.P.R. 566 (1994) (citing *Winchester v. Tennessee Valley Auth.*, 55 M.S.P.R. 485 (1992)).

4. The MSPB will reverse a RIF action only if a procedural defect in application of regulations affects an employee's substantive entitlements. *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994).

B. Determining Employee Retention Rights in a RIF Action.

1. Establishing the scope of competition. Determining the competitive area and competitive levels.

a. Competitive area. An organizational and geographical boundary within which employees compete in a RIF. 5 C.F.R. § 351.402.

(1) The competitive area need not be larger than the commuting area. Generally, the minimum competitive area is the local

installation. "Just because a few employees may travel great distances and endure substantial commute times, the agency is not obligated to reflect these extremes in establishing competitive areas." *Kelley v. Dep't of Defense*, 71 M.S.P.R. 568 (1996), *aff'd*, 107 F.3d 30 (Fed. Cir. 1997).

(2) Agency has the burden of proving, by preponderant evidence, that the competitive area was properly established. *O'Brien v. Office of Personnel Mgmt.*, 144 F.3d 1458, 1460 (Fed. Cir. 1998).

(3) An agency has the discretion to expand the competitive area to provide *actual* competition. *Ginnodo v. Office of Personnel Mgt.*, 753 F.2d 1061 (Fed. Cir. 1985), *cert den'd*, 474 U.S. 848 (1985).

b. Competitive level. All positions in a competitive area within the same grade (or occupational level) and classification series, and similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption. 5 C.F.R. § 351.403(a).

(1) Agency has the burden of showing by preponderant evidence that the competitive levels were properly established. *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994).

(2) Competitive levels must be established based on the position description and not the qualifications of the particular employee occupying the position. 5 C.F.R. § 351.403(a)(2).

(3) Separate competitive levels are required by service (excepted and competitive service), appointment authority, pay schedule, work schedule, and trainee status. 5 C.F.R. § 351.403(b).

2. Preparing the retention register for each competitive level. 5 C.F.R. § 351.404. The Department of Defense (DOD) uses a computer program called AutoRIF to process RIFs and to maintain required documentation.

a. Tenure group. 5 C.F.R. §§ 351.501, 351.502.

(1) Group I--career employees.

(2) Group II--career conditional employees (less than 3 years of service).

(3) Group III--term and temporary employees.

b. Veterans' preference (subgroup). Generally, a retired member of the military is not considered preference eligible for RIF purposes.

(1) Subgroup AD: preference eligible employees with service connected disabilities of 30% or more.

(2) Subgroup A: other preference eligible employees.

(3) Subgroup B: nonpreference eligible employees.

c. Length of Service. Stated in years of creditable service. 5 C.F.R. § 351.503.

d. Credit for Performance (retention service credit). 5 C.F.R. § 351.504.

(1) Missed ratings. Retention service credit for employees who do not have three ratings during the four-year period. 5 C.F.R. § 351.504(c).

(2) Single and Multiple Rating Patterns. *See* 5 C.F.R. §§ 351.504(d-e).

C. Release from Competitive Level.

1. When a position is abolished within a competitive level, the incumbent is not necessarily released from the competitive level. Instead, the employee competes to remain in the competitive level (first round competition). Non-competing employees within the competitive level are released first (e.g., temporary appointees).

2. Order of release. If competition among employees within the competitive level is necessary, they are selected for release in inverse order of retention standing. Example: Employees in Group III are released before employees in Group II, and employees in Group II are released before employees in Group I. 5 C.F.R. § 351.601.

3. Assignment Rights. Following release from a competitive level, an employee may be eligible to be assigned to a position in another competitive level (second round competition). The employee *must be qualified* for the offered position, the position shall be in the same competitive area, last at least three months, and have the same type of work schedule as the position from which the employee is released. 5 C.F.R. § 351.701(a).

a. Bumping. An employee's right of assignment to a position occupied by another employee in a lower tenure group (I, II, III) or subgroup (AD, A, B) in another competitive level in the same competitive area (within three-grade intervals). 5 C.F.R. § 351.701(b). For example: Employee in Group I, Subgroup AD has bump rights over employees in Groups IA, IB, II, and III.

b. Retreating. An employee's right of assignment to a position formerly held, or essentially identical to one previously held, when the position is occupied by a lower-standing employee in the same tenure subgroup, and is in another competitive level in the same competitive area (within three grade intervals). 5 C.F.R. § 351.701(c). For example: Employee in Group I, Subgroup A may retreat to a position held by a lower-standing Group IA employee. He may not retreat to a job held by a group IB employee because assignment to a lower subgroup is a bump.

4. Separation or Furlough. An agency may furlough or separate under RIF procedures only when an employee has no right of assignment to another position or turns down an offered position satisfying the assignment right.

5. An employee is entitled to only one offer and has no right to a choice of positions. *Holland v. Dep't of Army*, 84 M.S.P.R. 269 (1999) (citing *Endsley v. Dep't of Army*, 55 M.S.P.R. 46 (1992)).

6. Voluntary acceptance of lower graded position. An assignment to a lower-grade position constitutes a RIF demotion even when the employee voluntarily applies for, or is offered, an assignment to that position, as long as the assignment was made after the agency informed the employee that his original position had been abolished and he had not been selected for assignment to a position at his former level. *Harants v. U.S. Postal Serv.*, 130 F.3d 1466, 1468 (Fed. Cir. 1997).

D. Notice Requirements.

1. General rule. Agency must give notice to employee and union at least 60 days before effective date of release. 5 C.F.R. § 351.801.

2. Exception. Agency may give less than 60 days (but more than 30 days) if:

a. Need to shorten notice period is caused by circumstances not reasonably foreseeable by the agency; and

b. OPM approves. 5 C.F.R. § 351.801(b).

3. Content. Under 5 C.F.R. § 351.802, the notice must inform the employee of:

a. Action to be taken,

b. Reason for the action,

c. Effective date,

d. Competitive area, competitive level, subgroup, service date, and three most recent ratings of record during past four years,

e. Right to inspect documents relied on and location of records,

f. Exceptions to retention standing rules,

g. Information on reemployment rights and other benefits,

h. Appeal and if applicable, grievance rights,

i. How to apply for state unemployment benefits and information on benefits available under the state's Workforce Investment Act of 1998 programs,

j. Estimate of severance pay, if eligible, and

k. A release to authorize, at employee's option, the release of his or her resume and other information for employment referral.

E. Appellate forum.

1. MSPB jurisidiction. The Board's jurisdiction in RIF appeals is conferred by OPM regulations. 5 C.F.R. § 351.901.

2. No MSPB jurisdiction. Employees who voluntarily leave their positions in advance of an imminent RIF do not suffer an appealable adverse action. *Krizman v. MSPB*, 77 F.3d 434 (Fed. Cir. 1996).

3. Negotiated Grievance Procedure (NGP). Employees in a bargaining unit where the collective bargaining agreement does not specifically exclude RIFs from its coverage must use the NGP. 5 U.S.C. § 7121(a)(1); *Executive Order 13836.*

4. Prohibited Personnel Practice (PPP). Where an employee alleges the RIF is a *per se* PPP, the employee may elect to appeal to the MSPB or use the NGP (if a bargaining unit employee), but not both. 5 U.S.C. § 7121(d).

5. Equal Employment Opportunity (EEO) complaints. When an employee cites discrimination as the basis for the RIF:

a. Employees who are not members of a bargaining unit have a choice between the EEO complaint process and filing an MSPB appeal.

b. Bargaining unit employees covered by a NGP that does not exclude discrimination complaints or RIF actions have a choice between using the NGP, EEO, or MSPB.

6. Unfair Labor Practice (ULP). If a RIF is alleged to constitute a ULP, it may be appealed under the NGP or ULP procedures to the Federal Labor Relations Authority, but not both. 5 U.S.C. § 7116(d).

F. Corrective action. If errors are discovered, the record is examined to determine whether correction of the error would affect the outcome (harmless error). If the absence of error would not have made a difference, the action will not be reversed. If the agency does not prove the error was harmless, the action will be reversed. *Jicha v. Dep't of Navy*, 65 M.S.P.R. 73 (1994).

III. TRANSFER OF FUNCTION (TOF).

A. Definition. When the work (function) of one or more employees is moved from one competitive area to another and the gaining area undertakes a function it did not previously perform. 5 C.F.R. §§ 351.203, 351.301.

B. Impact on Employees.

1. Employee performing the function in the losing area has the right to TOF, but only if the alternative in the losing activity is separation or demotion.

2. If an employee does not elect a TOF, the agency has the option of separating the employee or including the employee in a concurrent RIF.

C. Appeal Rights. Employees have no right to appeal a transfer of function per se; however, demotion or separation by RIF resulting from the transfer of function may be appealable. *McLean v. Dep't of Army*, 55 M.S.P.R. 414 (1992).

IV. DISPLACED EMPLOYEE BENEFITS.

A. Placement Assistance Programs. *See* DODI 1400.20, DoD Program for Stability of Civilian Employment (Sep. 26, 2006) (*certified current through Sep. 26, 2013)*.

B. DOD Priority Placement Program. *See* DODI 1400.25, Ch. 1800.

1. The intent of this program is to minimize adverse effects on employees caused by such actions as RIFs, base closures, realignments, consolidations, contracting-out actions, position classification decisions, rotations from overseas, and TOFs.

2. Employees who have been adversely affected through no fault of their own are registered in the Automated Stopper and Referral System (ASARS), an automated placement database and system operated by the Priority Placement Support Branch.

C. Reemployment Priority List (RPL).

1. Agencies must give reemployment consideration to its competitive service employees separated by RIF or those who are fully recovered from a compensable injury after more than one year.

2. Each agency must maintain an RPL for each commuting area.

3. DOD is considered an "agency" for purposes of this program, so all DOD activities within the commuting area must utilize a single RPL and are responsible for giving priority consideration to the RPL registrants.

4. RPL eligibles receive priority consideration for reemployment across DOD components.

D. Office of Personnel Management (OPM) Displaced Employee Program (DEP). The DEP is a voluntary program for career or career conditional employees who have been displaced or are scheduled to be displaced because of RIF or inability to accept assignment to another area when affected by a transfer of function. Displaced employees are given priority referral to Federal agencies so they may be considered for employment ahead of eligibles on OPM registers.

E. Army Career Alumni Program (ACAP).

F. Local outplacement efforts.

G. Other RIF Benefits.

1. Grade and pay retention. 5 C.F.R. Part 536.

2. Severance pay. 5 C.F.R. Part 550, Subpart G.

3. Unemployment compensation. *See* DODI 1400.25, Subchapter 850. The Unemployment Compensation for Federal Employees (UCFE) program provides unemployment benefits to Federal workers similar to those provided by State unemployment insurance laws to workers in private industry. States, through agreement with the Secretary of Labor, act as agents in administering this program. The Civilian Personnel Advisory Center has a representative who serves as program administrator and liaison with the various State Unemployment Offices.

4. Lump sum payment for unused annual leave. 5 C.F.R. Part 550, Subpart L.

5. Retirement.

V. LABOR MANAGEMENT ISSUES.

A. RIF's.

1. The decision to conduct a RIF is a management right under 5 U.S.C. § 7106(a)(2).

2. Many of the labor-management issues involved in RIF's revolve around the negotiability of various issues, including competitive levels and competitive areas. *See* Executive Order 13836.

3. An agency is required to bargain over a proposal that requires it to follow RIF regulations, however, there is no obligation to bargain over a provision that defines a RIF to include reclassification due to changes in duties. *NTEU v. Dep't of Treasury, Financial Management Service*, 29 FLRA 422 (1987). Moreover, an agency must bargain over its use of RIF principles when separating or downgrading an employee through no fault of the employee. *NAGE Local R7-23 and Scott AFB*, 26 FLRA 916 (1987).

4. There is no obligation to bargain over competitive levels since the right to retain or layoff is non-negotiable under 5 U.S.C. § 7106(a)(2)(A). Any non-negotiable provisions shall be disapproved during agency head review of the collective bargaining agreement renegotiation. *See* Executive Order 13836.

5. Although an agency decision to conduct a RIF is not negotiable, an agency is still required to negotiate the impact and implementation (I&I) of the decision (I & I bargaining). *Dep't of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO*, 22 FLRA 91 (1986).

B. Transfer of Function. Most bargaining obligations for TOF involve I&I bargaining. *See generally*, AFGE Local 3673, and Dep't of the Navy, NAWC, Trenton, 50 FLRA 720 (1995).

CHAPTER N

EMERGENCY ESSENTIAL CIVILIANS

I. REFERENCES.

A. Statutory.

1. 10 U.S.C. § 1580, Criteria for Designating Emergency Essential Employees.

2. 10 U.S.C. § 1580a, Anthrax Notification Requirements.

3. 5 U.S.C. § 5547, Limitation on Premium Pay.

4. 5 U.S.C. § 8101, Federal Employees' Compensation Act.

5. 18 U.S.C. § 3261, Military Extraterritorial Jurisdiction Act of 2000.

B. Department of Defense Directives (DODD) and Intructios (DODI)

1. DODD 1400.31, DOD Civilian Work Force Contingency and Emergency Planning and Execution (April 1995).

2. DODI 1400.32, DOD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures (April 1995).

3. DODI 1000.13, Identification Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals (April 2014).

4. DODI 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members (March 2005).

C. Service Regulations.

1. Army Regulation (AR) 690-11, Use and Management of Civilian Personnel in Support of Military Contingency Operations.

2. Air Force Instruction (AFI) 36-3026, Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel.

II. INTRODUCTION.

A. Throughout history, civilian employees have played an important and unique role in accompanying the force during military operations. Recent operations highlight civilian employees' importance to the military mission, as an integrated and value-added member of the team.

B. Civilian employees may perform a wide variety of jobs "to ensure the success of combat operations." *See* AR 690-11.

C. Understanding the process for designating, training, and directing the efforts of emergency-essential (E-E) civilians while deployed is essential for Judge Advocates (JA) when advising commanders.

III. DESIGNATING EMERGENCY-ESSENTIAL (EE) POSITIONS.

A. Identify EE Positions.

1. Situations where civilian employees must be directed to perform in E-Epositions on an involuntary or unexpected basis should be limited to the degree practicable.

2. Under 10 U.S.C. § 1580, the Secretary of Defense (SECDEF) or the Secretary of the military department concerned may designate an E-E employee as any employee of the DOD, whether permanent or temporary, the dutes of whose position meets all of the following criteria:

a. Provide immediate and continuing support for combat operations or to support maintenance and repair of combat essential systems of the armed forces.

b. Perform that duty in a combat zone after the evacuation of non-essential personnel, including any dependants of members of the armed forces, from the zone in connection with a war, a national emergency declared by Congress or the President, or the commencement of combat oeprations of the armed forces in the zone.

(1) This includes civilian positions overseas or in the United States that would be transferred overseas in a crisis situation.

(2) The term "combat zone" is defined by the Internal Revenue Code.

c. Civilians may not be assigned to guard duty or perimeter defense or to engage in offensive combat operations.

d. NOTE: It is impracticable to convert the employee's position to a position authorized to be filled by a member of the armed forces

because of a necessity for that duty to be performed without interruption.

3. Employees of nonappropriated fund instrumentalities (NAFs) are eligible for designation as E-E personnel.

4. E-E personnel civilians are not contractor employees.

B. Recording E-E Position Designation.

1. A statement shall be included in the position description (PD) of each E-E indentified position. For example:

This position is emergency-essential. In the event of a crisis situation, the incumbent, or designated alternate, must continue to perform the EE duties until relieved by proper authority. The incumbent, or designated alternate, may be required to take part in readiness exercises. This position cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the organization to function effectively; therefore, the position is designated "key," which requires the incumbent, or designated alternate, to be screened from military recall status.

2. The specific crisis situation or wartime duties, responsibilities, and physical requirements of each E-E position must be identified and documented to ensure that E-E employees know what is expected and to ensure that each E-E employee is able to satisfy the conditions of their employment. Documentation can include:

a. Annotation of E-E duties in existing peacetime PDs,

b. Brief statement of crisis situation duties attached to PDs if materially different than peacetime PDs, or

c. Separate E-E PDs.

3. Civilian employees applying for an E-E or NCE position must sign DD Form 2365, DOD Civilian Employee Overseas Emergency-Essential Position Agreement, as a condition of their employment.

a. This agreement documents that incumbents of E-E positions accept certain conditions of employment arising out of crisis situations wherein they shall be sent on temporary duty, shall relocate to duty stations in overseas aras, or continue to work in overseas areas after the evacuation of other U.S. citizen employees who are not in E-E positions.

b. All individuals selected for E-E positions must be exempted from recall to the military reserves or recall to active duty for retired military.

c. For an E-E employee who occupies an overseas E-E position, this agreement takes precedence over any existing transportation agreement.

C. Unable or Unwilling to Serve as E-E.

1. Civilian employees in E-E positions may be directed to accept deployment requirements of the position, however, whenever possible, the ECW will be asked to serve expeditionary requirements voluntarily.

2. Due to unforseseen circumstances, it may become necessary to identify E-E positions that have not been previously identified as such. If an employee is unable or unwilling to accept a position designation as E-E, every effort will be undertaken to reassign the employee to a different position, including a vacant position if reasonably practicable, consistent with the needs of the mission and approval of management.

a. Overeas Position. Employees in overseas positions that are identified as E-E after the outbreak of a military crisis will be asked to execute an E-E agreement. If the employee declines, the employee will continue to perform the functions of the position if no other qualified employee or military member is reasonably available. The employee will be entitled to the benefits and protections of an E-E employee, but will be reassigned out of the position and assigned to a non-E-E position as soon as reasonably practicable under the circumstances.

b. CONUS Position. If an employee in the United States is identified as E-E after the outbreak of a military crisis, the employee will be asked to execute an E-E agreement. If the employee declines, the agency will seek another employee to volunteer to fill the position. If a volunteer is available, the employee will be detailed or transferred to a non-E-E position, if one is available, at the same grade for which he or she is qualified. If a volunteer is not found, and the incumbent declines to sign the agreement but possesses the skills and expertise, which in management's view renders it necessary that he or she perform the E-E position, the employee may be involuntary assigned the E-E duties at the location where needed, and directed to perform those duties on a temporary basis.

c. E-E employees may be separated from employment for failure to remain in an E-E position or to relocate on temporary duty or permanent change of station to an E-E position.

IV. EXPEDITIONARY CIVILIAN WORKFORCE (ECW).

1. Members of the DOD ECW shall be organized, trained, cleared, equipped, and ready to deploy in support of combat operations by the military; contingencies; emergency operations; humanitarian missions; disaster relief; restoration of order; drug interdiction; and stability operations of the DOD in accordance with Directive-type Memorandum (DTM) 17-004.

2. All civilian employees deploying to combat operations or crisis situations are considered E-E regardless of volunteer status or the signing of an E-E position agreement.

3. The ECW will be coded as:

   a. Emergency Essential (E-E). A position-based designation to support the success of combat operations or the availability of combat-essential systems in accordance with 10 U.S.C. § 1580, and will be designated as Key.

   b. Non-Combat Essential (NCE). A position-based designation to support the expeditionary requirements in other than combat or combat support situations and will be designated as Key.

   c. Capability-Based Volunteer (CBV). An employee who may be asked to volunteer for deployment.

   d. Capability-Based Former Employee Volunteer Corps. A collective group of former (including retired) DOD civilian employees who have agreed to be listed in a database as individuals who may be interested in returning to Federal service as a time-limited employee to serve expeditionary requirements or who can backfill for those serving other expeditionary requirements. When these individuals are re-employed, they shall be deemed CBV employees.

   e. Key Employees. Federal position that shall not be vacated during a national emergency or mobilization without seriously impairing the capability of the parent Federal Agency or office to function effectively. Positions and employees designated as E-E and NCE will be designated Key in accordance with DoDD 1200.7.

4. On-Call Employees. Emergencies or administrative requirements that might occur outside the established work hours may make it necessary to have employees "on-call."

   a. On-site commanders may designate employees to be available for such a call during off-duty times.

   b. Designation will follow these guidelines:

      (1) A definite possibility that the designated employee's services might be required;

      (2) Required on-call duties will be brought to the attention of all employees concerned;

      (3) If more than one employee could be used for on-call service, the designation should be made on a rotating basis; and

      (4) The designation of employees to be "on-call" or in an "alert" posture will not, in itself, serve as a basis for additional compensation (i.e., overtime or compensatory time).

   c. If an employee is called in, the employee must be compensated for a minimum of two hours.

V. NOTIFICATION OF ANTHRAX IMMUNIZATION REQUIREMENTS.

1. Section 1580(a) of Title 10 of the U.S. Code (NDAA FY 2001) requires the SECDEF to prescribe regulations to ensure that any DOD civilian employee designated as E-E, and who is required to participate in the anthrax vaccine immunization, be notified of the requirement to participate and the consequences of deciding not to participate.

   a. The notification requirement applies to both current and new E-E employees.

   b. The notice must be written and the employee must sign to acknowledge receipt.

   c. A copy of the notice and the acknowledgement should be filed with the signed DD Form 2365.

   d. A sample notice states:

This is to notify you that your position has been designated as E-E. You may be required, as a condition of employment, to take the series of anthrax vaccine immunizations, to include annual boosters. This may also include other immunizations that may in the future be required for this position, or for a position you may fill as an E-E alternate.

Failure to take the immunizations may lead to your removal from this position or separation from Federal service.

Acknowledgement: This is to acknowledge that I have read and fully understand the potential impact of the above statement. (employee signature and date).

e. Notice of the anthrax vaccine requirements must also be included in all vacancy announcements for E-E positions.

2. By memorandum from the SECDEF for Force Management (dated June 25, 2001), it mandatory for all military personnel and DOD civilian E-E and contractor personnel assigned, deployed, or on temporary duty in high threat areas and contiguous waters of Southwest Asia for one day or more, to be vaccinated against anthrax. Countries included are Kuwait, Saudi Arabia, Bahrain, Jordan, Qatar, Oman, United Arab Emirates, Yemen, Israel, and the Korean Peninsula.

3. Anthrax Vaccine ImmunizationPolicy (AVIP).

a. In 2004, the U.S. District Court for the District of Columbia issued an injuction against operation of the AVIP based on a conclusion that the Food and Drug Administration (FDA) was required to solicit additional public comment before finalizing its conclusion that antrax vaccine is safe and effective for protection against inhalational anthrax.

b. On Dec. 15, 2005, the Assistant SECDEF issued a memorandum stating that the FDA issued a Final Rule and Order on the license status of the antrax vaccine adsorbed (AVA). "Unless otherwise directed by the Secretary or Deputy SECDEF, the services are directed to continue implementation of AVIP as authorized in April 2005. This interim approach will protect the same personnel to include an option to refuse and weekly reporting requirements."

c. On Oct. 12, 2006, Deputy SECDEF issued a memoranda stating that "based on the continuing heightened threat to some U.S. personnel of attack with anthrax spores ,the [DOD] will resume a mandatory [AVIP], consistent with [FDA] guidelines and best practices of

medicine, for designated military personnel, [E-E] and comparable DOD civilian employees, and certain contractor personnel performing essential services. Vaccination is mandatory for those personnel based on geographic areas of assignment or special mission roles, except as provided under applicable medical and administrative exemption policies."

d. See http://www.anthrax.osd.mil for the most current guidance.

VI. DEPLOYMENT PREPARATION.

A. Protective Equipment, Clothing and Equipment Issue.

1. Civilian employees should be issued (and trained in the use of) the same protective gear as is issued to military personnel in theater.

2. Organization clothing and invidual equipment will be issued to E-E personnel. All deploying civilians are expected to wear the appropriate military uniform, as determined and directed by the theater commander. *See* AR 670-1.

3. Maintenance and accountability of military uniforms and equipment is the employee's responsibility.

B. Training Requirements.

1. Frequency.

a. Initial orientation upon becoming part of the ECW,

b. Annual refresher training,

c. Pre-deployment (including theater-specific) training,

d. On-the-job training, and

e. Post-deployment reintegration training, as appropriate and practicable.

2. Topics.

a. First aid and field survival,

b. The use of specialized equipment required for the specific missions such as vehicles, weapons, and communication systems,

c. Cultural awareness training (if provided to military forces),

d. Legal status under the Uniform Code of Military Justice in accordance with Public Law 109-364 (2006), the Military Extraterritorial Jurisdiction Act under DoDI 5522.11, SECDEF Memorandum, implementing regulations, and

e. And other training directed by the commander.

3. Weapons Certification.

a. E-E employees may be issued a military weapon for personal self-defense, subject to military regulations regarding training in proper use and safe handling of firearms.

b. Acceptance of a personal weapon is voluntary.

c. Authority to carry a weapon for personal self-defense is contingent upon the approval and guidance of the Combatant Commander.

d. Only Government-issued weapons/ammunition are authorized.

e. Familiariation training will be conducted in accordance with FM 3-23.35.

C. Documentation and Recordkeeping.

1. Issue Geneva Contention identity cards, passports, visas, country clearances, and any required security clearances. When theater conditions necessitate different requirements, the theater commander will notify the appropriate hesds of DOD components expeditiously.

2. Each civilian will complete DD Form 93, "Record of Emergency Data." Components will establish procedures to store and access civilian DD 93s that are the same as or parallel to those for military personnel.

3. Civilian casualty notification and assistance should be the same as, or parallel to, that provided to military personnel.

4. Encouraged to maintain current and valid Family Care Plans.

5. Complete a pre-outside the continental United States (OCONUS) travel file program survey, which creates a digital Isolated Personnel Report File (IPRP) in the Personnel Recovery Mission Software database. Civilians are required to review their IPRP within 90 days of travelling OCONUS.

6. Civilians may be issued "dog tags" for identification purposes.

7. Legal assistance, including wills and any necessary powers of attorney relating to deployments, is available to E-E civilians notified of deployment, as well as their families, and will be available throughout the deployment.

   a. Assistance is limited to deployment-related matters as determined by the on-site supervising attorney.

   b. DOD civilian employees who are serving with the U.S. military in a foreign country (and their family members who accompany them) are eligible to receive legal assistance.

D. Accountability. The Army has developed a web-based automated tracking system called Civilian Tracking System (CIVTRACKS) designed to account for civilian employees supporting unclassified military contingencies and mobilization exercises.

1. Deployed ECW personnel must be tracked and accounted for, including their daily locations, in accordance with AR 638-8 and DoDI 1400.32.

2. It is the employee's responsibility to input their data into CIVTRACKS, and data should be entered each time there is a change in duty location while deployed, to include the initial move from home station.

3. The employee's home station is responsible for providing the employee a deployment card with user identification and password for access to CIVTRACKS (https://cpolrhp.belvoir.army.mil/civtracks/default.asp).

4. CIVTRACKS is maintained by the Deputy Chief of Staff G-1.

E. Medical and Dental Care for Deployed Civilians.

1. E-E must meet the medical fitness and physical requirements of the job, as determined by the combatant or major command commander.

   a. Any special medical fitness requirements must be job-related and/or theater-specific.

   b. Civilian employees covered by 29 U.S.C. §§ 791-794d (The Rehabilitation Act of 1973, as amended) will undergo an individualized assessment to determine if the employee is able to perform the essential functions of an E-E position with or without reasonable accommodation.

   c. All E-E employees are required to have an annual health assessment to determine whether the employee is fit and available for worldwide deployment.

2. Force health protection pre- and post-health assessments shall be conducted in accordance with DoDI 6490.03.

3. E-E employees shall be HIV-tested before deployment, if the country of deployment requires it.

4. All DOD sponsored non-military personnel OCONUS shall have panarex or DNA samples taken for identification purposes. Dental x-rays may be sumitted when the availability to take panarex or DNA samples is not available.

5. Civilians shall carry with them a minimum of a 90-day supply of any medication they require.

6. Civilian employees who become ill, contract diseases, or who are injured or wounded while deployed in support of U.S. military forces engaged in hostilities are eligible for medical evacuation and health care treatment and services in military treatment facilities (MTFs) at no cost to the employee and at the same level and scope provided to military personnel.

7. Deployed civilian employees who were treated in theater continue to be eligible for treatment in an MTF or civilian medical facility for compensable illnesses, diseases, wounds, or injuries under the Department of Labor Office of Workers' Compensation Program (DOL OWCP) upon their return at no cost to the employee. If they are subsequently determined to have compensable illnesses, diseases, wounds, or injuries under the DOL OWCP programs also are eligible for treatment in an MTF or civilian medical facility at no cost to the employee.

VII. **COMMAND AND CONTROL DURING DEPLOYMENTS.**

A. During deployments, E-E civilians are under the direct command and control of the on-site supervisory chain, which will perform the normal supervisory functions, such as performance evaluations, task assignments and instructions, and disciplinary actions.

B. On-site commanders may impose special rules, policies, directives, and orders based on mission necessity, safety, and unit cohesion. These restrictions need only be considered reasonable to be enforceable.

C. For contractor issues during deployment see 18 U.S.C. § 3261.

VIII. **PAY, ALLOWANCES, AND BENEFITS DURING DEPLOYMENTS.**

A. Foreign Post Differential (FPD**)**. Employees assigned to work in foreign areas where environmental conditions either differ substantially from CONUS conditions or

warrant added compensation as a recruiting and retention incentive, are eligible for FPD after a period of time.

1. FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate, not to exceed 35% of basic pay.

2. The Department of State determines which areas are entitled to receive FPD, the FPD rate for the area, and the length of time the rate is in effect. NOTE: Different areas in the same country can have different rates. 5 U.S.C. § 5925.

B. Danger Pay Allowance (DPA). Civilian employees serving at or assigned to foreign areas designated for danger pay by the Secretary of State (SECSTATE) because of civil insurrection, civil war, terrorism, or wartime conditions which threaten physical harm or imminent danger to the health or well-being of a majority of employees stationed or detailed to that area, will receive DPA.

1. The allowance will be a percentage of the employee's basic compensation at the rates of 15, 20, 25, 30, or 35 percent as determined by the SECSTATE.

2. This allowance is in addition to any FPD prescribed for the area, but in lieu of any special incentive differential authorized the post prior to its designation as a DPA area.

3. For employees already in the area, DPA starts on the date of the area's designation for DPA. For employees later assigned or detailed to the area, DPA starts upon their arrival in the area. For employees returning to the post after a temporary absence, it starts on the date of return.

4. DPA will terminate with the close of business on the date the SECSTATE removes the danger pay designation for the area, or on the day the employee leaves the post, for any reason, for an area not designated for DPA.

5. DPA paid to Federal civilian employees should not be confused with Imminent Danger Pay (IDP) paid to the military. IDP is triggered by different circumstances, and is not controlled by the SECSTATE.Tour of Duty.

C. Hostile Fire Pay allows paying of $150 per month, but not payable to employees already receiving DPA. 5 U.S.C. § 5949.

D. Overtime.

1. General Schedule (GS) employees whose basic rate of pay does not exceed that of a GS-10 step 1, will be paid at the rate of one and one half times their basic hourly pay rate for each hour of work authorized and approved over the normal eight hour day or 40 hour work week.

2. Employees whose rate exceeds the GS-10, step 1, will be paid at the rate of one and one-half times of the basic hourly rate of a GS-10, step 1 or their basic rate of pay, whichever amount is greater. 5 C.F.R. Part 551.

3. If overtime is not approved in advance, the employee's travel orders should have this statement in the remarks column: "Overtime authorized at TDY site as required by the Field Commander. Time and attendance reports should be sent to (name and address)." The Field Commander should then request to the employee's home installation a local overtime authorization form with a copy of their travel orders, documenting the actual premium hours worked by each employee for each day of the pay period as soon as practicable after the premium hours are worked.

4. Premium Pay limitations.

   a. Normally, the aggregate rate of pay (including base and premium pay) for any pay period is limited to the greater of the biweekly rate of pay for GS-15, step 10 or Level V of the ES. *See* 5 U.S.C. Part 551.

   b. This biweekly limitation does not apply to work performed in connection with an emergency that involves a direct threat to life or property or work that is critical to the agency's mission. The authority to determine what constitutes an "emergency" has been delegated to officials who exercise personnel appointing authority (normally the head of an installation or activity).

   c. By administrative extension, this emergency authority to apply the annual limitation also applies to NAF payband employees.

   d. WG employees are not subject to the premium pay limitations.

E. Tour of Duty.

1. The administrative workweek constitute the regularly scheduled hours for work a deployed employee must receive basic and premium pay. Under some conditions, hours worked beyond the administrative workweek may be considered to be irregular and occasional, and compensatory time may be authorized in lieu of overtime/premium pay. 29 U.S.C. § 201 *et seq.*

2. The authority for establishing and changing the tours of duty for civilian employees is delegated to the in-theater commander or his designee. The duration of the duty is dependant upon the particular operation and will be established by the in-theater commander.

3. E-E civilians may be susceptible to expeditionary assignments will be designated in six or twelve-month rotational periods. Individual deployment

tours shall not exceed two years. Consecutive deployments should generally not be approved without at least a six-month period of reintegration between deployments and assurance that medical clearance requirements are met and not more than twelve months have lapsed since the employee's last physical examination.

F. Leave Accumulation.

1. Any annual leave in excess of the maximum permissible carry-over is automatically forfeited at the end of the leave year.

2. Annual leave that was forfeited during a combat or crisis situation determined by appropriate authority to constitute an exigency of the public business may be temporarily restored. However, the employee must file for carry-over.

3. Normally, the employee has up to two years to use restored annual leave.

G. The Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 et seq, provides comprehensive workers compensation coverage for deployed federal employees in zones where armed conflict may take place.

1. A wide variety of benefits are available under FECA including medical and wage loss benefits, schedule awards for permanent impairment due to loss of hearing, vision or certain organs, vocational rehabilitation for injured employees; survivor benefits are available if an employee is killed in performance of duty or if an employee later dies from a covered injury.

2. The DOL OCP is authorized to pay an additional death gratuity of $100,000 to the survivor(s) of an "employee who dies of injuries incurred in connection with the employee's service with an Armed Force in a contingency operation."

H. Life Insurance. Going to a combat zone can be considered a life event that allows employees an opportunity to elect different health insurance coverage or enhanced life insurance coverage.

1. Federal civilian employees are eligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program.

2. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death.

3. Civilians who are deployed with the military to combat support roles during times of crises are not "in actual combat" and are entitled to accidental death and dismemberment benefits under FEGLI in the event of death. Similarly, civilians carrying firearms for personal protection are not "in actual combat.

IX. **CIVILIAN DISCIPLINE WHILE OCONUS.**

A. Military Extraterritorial Jurisdiction Act of 2000 (MEJA); 18 U.S.C. § 3261; DODI 5525.11.

1. Purpose: MEJA closes the jurisdictional gaps by extending federal criminal jurisdiction to civilians overseas and former military members.

2. What is covered.

a. Conduct that a crime under U.S. law in special maritime and territorial jurisdiction.

b. Felony-level offenses, ie., offenses punishable by imprisonment for more than one year.

c. Conducted committed OCONUS.

3. Who is covered.

a. Civilians while employed by the Armed Forces, including:

(1) Those present or residing OCONUS in connection with such employment who are:

(a) Civilian employees of any federal agency, or provisional authority, *to the extent such employment relates to supporting the mission of DOD overseas*

(b) Contractors and subcontractors of any federal agency, or provisional authority, *to the extent such employment relates to supporting the mission of DOD overseas,* or

(c) Employees of a contractor or subcontractor of any federal agency

(2) Does not include a national or person ordinarily residing in the host nation.

b. Civilians "Accompanying the Force" including:

(1) Those who reside OCONUS and are dependants of

(a) Any of the above civilian employees, contractors, or subcontractors

(b) Any member of the Armed Forces

(2) Does not include a national or person ordinarily residing in the host nation.

c. Former military members who commit such crimes while a member of the Armed Forces overseas, but who cease to be subject to the Uniform Code of Military Justice (UCMJ) court martial jurisdiction and have not previously been court martialed for such offenses.

4. Limitations.

a. Foreign Criminal Jurisdiction. If a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting the person, the United States will not prosecute the person for the same offense, absent approval by the Attorney General (AG) or Deputy AG.

b. Military member as co-actor/conspirator. Military members subject to the UCMJ will not be prosecuted under this Act unless the member ceases to be subject to the UCMJ, or the indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ.

c. Juveniles. Juveniles are subject to the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042). Juvenile delinquency is an adjudication of status, not a crime. In limited cases, juveniles over 13 years old may be tried as an adult. Federal courts cannot proceed against juveniles without AG certification to the U.S. District Court that:

(1) State courts do not have jurisdiction (ie. overseas offense),

(2) Offense is a crime of violence or violates the Controlled Substances Act, and

(3) There is a substantial federal interest in the case or the offense to warrant the exercise of federal jurisdiction.

5. Removal to the United States.

a. SECDEF is authorized to designate any DOD law enforcement person to make a probable cause arrest of persons for such U.S. felonies and promptly deliver these persons to the custody of U.S. civilian law enforcement for removal to the United States for judicial proceedings.

b. Limitations: The person arrested shall not be removed to another foreign country, other than where the offense was committed, or to the United States except when ordered by a federal magistrate judge for:

(1) Presence in the United States at a detention hearing,

(2) Pretrial detention,

(3) Preliminary examination when the person is entitled to one and does not waive it, or

(4) When otherwise ordered by the federal magistrate judge.

c. Overases Transfer. When SECDEF determines the military necessity requires waiver of limitations on removal, then the person may be removed to the nearest U.S. military installation OCONUS adequate to detain the person and facilitate the initial appearance as required by the Act.

6. Initial Proceedings.

a. Federal magistrate judge will conduct an initial appearance proceeding, which may be carried out by telephone or other voice communication means, including counsel representation.

b. Federal magistrate judge will determine probable cuase that the crime was committed and the person committed it, and conditions of release if the government counsel does not make a motion seeking pretrial detention.

c. Federal magistrate judge will also conduct any detention hearing required under federal law, which at the request of any person may be carried out overseas by telephonic menas, including any counsel representing the person.

d. Federal magistrate judge may appoint military counsel for the limited purpose of overseas initial appearance proceedings.

B. UCMJ Jurisdiction over DOD Civilian Employees. Art. 2(a)(10), UCMJ.

1. On Oct. 17, 2006, Article 2(a)(1), UCMJ was amended to state "in time of declared war or contingency operation, persons serving with or accompanying an armed force in the field."

2. This change allows court martial jurisdiction to reach a great number of civlians who were not previously susceptible to court martial jurisdiction.

3. When offenses alleged to have been committed by civilians violate U.S. federal criminal laws, DOD shall notify responsible DOJ authorities and afford DOJ the opportunity to puruse its prosecution of the case in federal district court. While the DOJ notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime.

4. Commanders shoud ensure that any preliminary military justice procedures that would be required in support of the exercise of UCMJ jurisdiction continue to be accomplished during the concurrent DOJ notification process. Commanders should be prepared to act, as appropriate, should possible U.S. federal criminal jurisdiction prove to be unavailable to address the alleged criminal behavior.