The Merit Systems Protection Board: An Update

Office of Personnel Management

Roundtable – May 23, 2017

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The Regions


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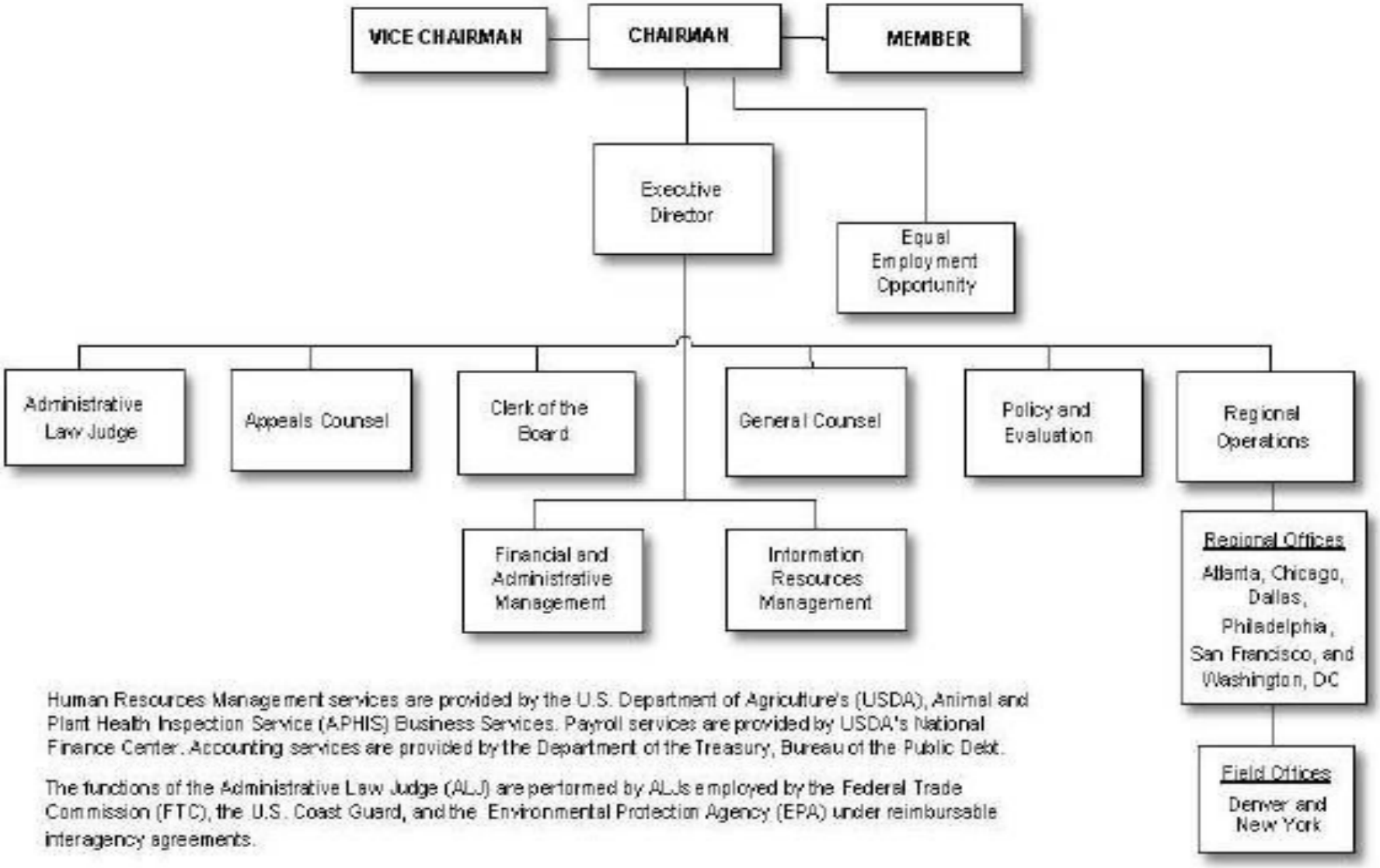
U.S. Merit Systems Protection Board

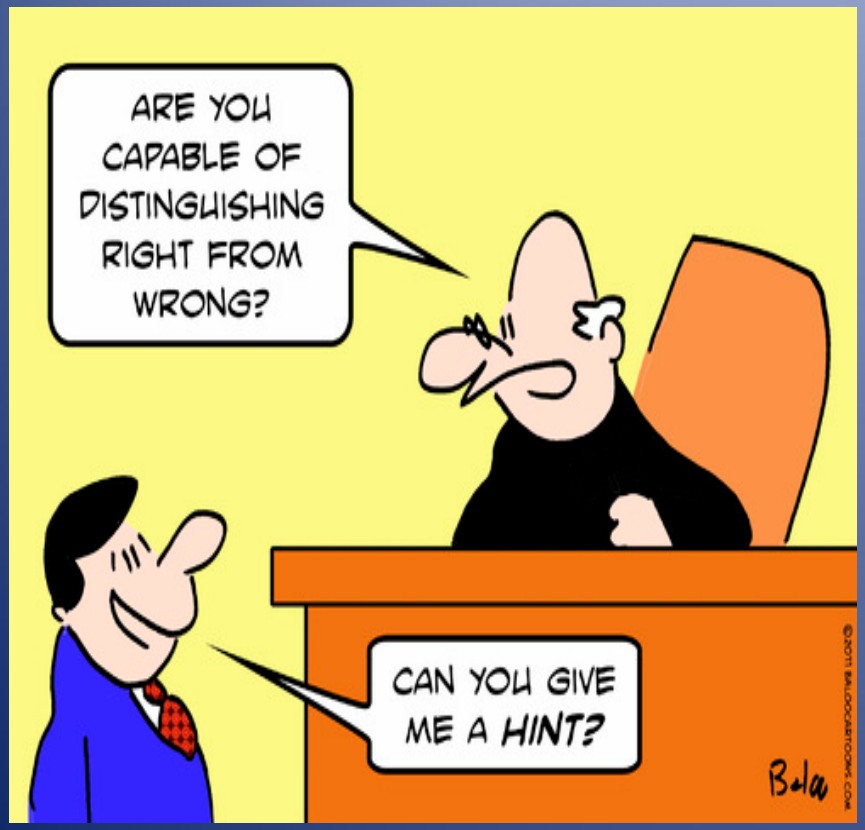


Human Resources Management services are provided by the U.S. Department of Agriculture's (USDA), Animal and Plant Health Inspection Service (APHIS) Business Services. Payroll services are provided by USDA's National Finance Center. Accounting services are provided by the Department of the Treasury, Bureau of the Public Debt.

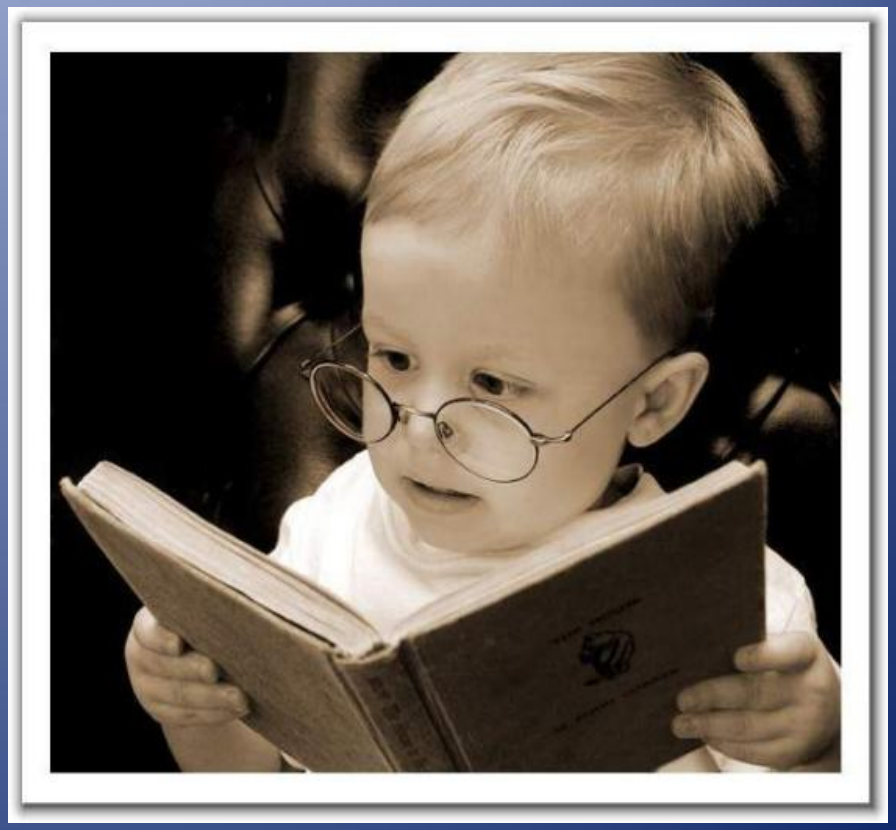
The functions of the Administrative Law Judge (ALJ) are performed by ALJs employed by the Federal Trade Commission (FTC), the U.S. Coast Guard, and the Environmental Protection Agency (EPA) under reimbursable interagency agreements.

What Is It?
And What Does It Do?

Adjudication



Studies



Adjudication

- 5 USC § 1204(a) states that the Board shall "hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation and … take final action on any such matter." Further, we may "order any Federal agency or employee to comply with any order or decision issued by the Board" pursuant to this authority, and "enforce compliance."
- § 1204(b) states the Board "may administer oaths, examine witnesses, take depositions, and receive evidence." Also issue subpoenas and order the taking of depositions, as well as responses to written interrogatories.
- Board appeal procedures are set out at 5 C.F.R. Part 1201; also 1208 (USERRA and VEOA), 1209 (WPA and WPEA), and 1210 (VA SES appeals, for now)

Studies, etc.

- 5 USC § 1204(a) also states that the Board shall "conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." In addition, "review … rules and regulations of the Office of Personnel Management." In conducting its studies function, the Board "shall have access to personnel records or information collected by [OPM] and may require additional reports from other agencies as needed. In reviewing a regulation, the Board may declare it invalid on its face because it would cause an employee to violate section 2302(b), or invalidly implemented by any agency. It may also require an agency to cease compliance and to correct any invalid implementation.

Mission

To protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices.

Vision

A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people .

Two Types of Jurisdiction, First

- **Original**
- Hatch Act cases brought by OSC
- Corrective and disciplinary actions brought by OSC against agencies or Federal employees who allegedly committed PPPs or violated certain civil service laws, rules or regulations
- Requests for stays of personnel actions alleged by the Special Counsel to result from PPPs;
- Requests for review of regulations issued by OPM or of implementation of OPM regulations by an agency; and
- Informal hearings in cases involving proposed performance-based removals from the Senior Executive Service.

- Original jurisdiction cases are processed at Board headquarters. Special Counsel cases and actions against administrative law judges are heard by the Board Administrative Law Judge (or right now, a contracted ALJ since the Board lacks an ALJ), who issues an initial decision. The parties may file a petition for review with the full Board within 35 days of the date of the initial decision. Otherwise, the initial decision will become the final Board decision.

And Second

- **Appellate**
- When the Board hears a case under its appellate jurisdiction at § 1204(a), it reviews a decision made by an agency; usually that is an employing agency but it may be an agency to which a person has applied for employment, or OPM in its administration of the retirement system or in some suitability cases, or a case in which OSC has declined to take action on behalf of a person who claims to be a whistleblower.

Issues in Appellate Jurisdiction

- Like a court, the Board must have jurisdiction (authority) over both the action at issue and the person. Complications are added when a case involves a normally appealable matter plus a claim of discrimination, a claim under the VEOA, an employee subject to a CBA, and a claim of whistleblower retaliation. They include elections of remedy (5 USC § 7121(d), (e), (g)), exhaustion requirements (§§ 1214(a)(3) (OSC) and 3330a(d)(1) (DOL)), and the possibility of a battle between MSPB and EEOC, ending in a "Special Panel." 5 USC § 7702(d)(6)(A).

Jurisdiction Over The Action

- Adverse Actions (Chapter 75)
- - Removals
- - Suspensions >14 days
- - Demotions (grade or pay)
- - Constructive Actions
- Performance (Chapter 43)
  - Removal, Demotion, & WGI
- Reductions in Force (RIF's)
- Retirement-Including Disability
- Probationary Employee Appeals
- Restoration-Medical or Military
- Suitability
- Plus several others, 5 CFR § 1201.3

- AFFIRMATIVE DEFENSES MAY BE RAISED (but do not independently give Board jurisdiction over underlying action, *Wren v. Army,* 2 M.S.P.R. 1, 2 (1980), *aff'd* 681 F.2d 867 (D.C. Cir. 1982)).

- Individual Right of Action (IRA) (whistleblowing)
- VEOA
- USERRA

- AFFIRMATIVE DEFENSES MAY NOT BE RAISED

- WHY? Each statute giving the Board authority over one of these case types limits that authority to issues concerning that law.

- But, whistleblowing, VEOA, & USERRA may themselves be affirmative defenses in the types of appeals listed to the left.

What Are Those Affirmative Defenses?

- § 7701(c)(2). [T]he agency's decision may not be sustained … if the employee or applicant –
  (A) shows harmful error in the application of the agency's procedures …;
  (B) shows that the decision was based on any [section 2302(b)] prohibited personnel practice…; or
  (C) shows that the decision was not in accordance with law.
- Burden of Proof is on the appellant by preponderant evidence. 5 C.F.R. 1201.56(b)(2)(C). (Same as to jurisdiction and timeliness)

- Harmful Error: likely to have caused the agency to have reached a different conclusion, *i.e.*, caused substantial harm or prejudice to appellant's rights. 5 C.F.R. 1201.4(r).
- PPPs – all may be asserted but the most common are discrimination (2302(b)(1)) and whistleblowing/protected activity (2302(b)(8), (9)).
- Not In Accordance With Law: no legal authority for the action. *See Stephen v. Air Force*, 47 MSPR 672 (1991).

Jurisdiction Over The Person

- Is the employee in the competitive service? The excepted service? The US Postal Service? The Foreign Service?
- Does the employee work for Congress or an office within the legislative branch? Does he work for a Federal court or another judicial branch employer?
- Is the employee a veteran? A preference eligible? A non-preference eligible?

Who is an "Employee" on Appeal of an Adverse Action?

- ***McCormick v. Department of the Air Force***
  307 F.3d 1339 (Fed. Cir. 2002) - The "or" means "or" case:

- **5 USC § 7511(a): For the purpose of this subchapter--**
  (1) "employee" means--
  (A) an individual in the competitive service--
  (i) who is not serving a probationary or trial period under an initial appointment; or
  (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
  (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions--
  (i) in an Executive agency; or
  (ii) in the United States Postal Service or Postal Regulatory Commission; and
  (C) an individual in the excepted service (other than a preference eligible)--
  (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
  (ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less.

What's New at MSPB?

Chairman - Vacant since January 8, 2017

Vice Chairman - Vacant March 2015 to February 2017 when Member Mark Robbins was appointed to fill it

Member – Vacant since February 2017 appointment of Member as Vice Chairman

Thus, the Board is without a quorum to issue decisions, etc., but AJs still decide cases in the regions.

--The NDAA 2017 created an appeal right to the Board from a notation made in an OPF about the result of an investigation if the employee resigns before the investigation is complete. 5 USC § 3322. This is especially significant because NDAA also requires agencies to check former federal employees' personnel files before it hires them. 5 USC § 3330e. (The NDAA also made probationary periods in DOD agencies two years long and created chapter 75 appeal rights to MSPB for National Guard Technicians.)

Coming Attractions

- Under consideration in Congress are numerous changes including a one-level appeal system, shortened notice period and shortened appeal period (10 days each), plus shortened adjudication time (45 days). Also a plan to simplify proof of charges and expand appeal rights to USPS employees not in a bargaining unit. And more.
- *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), held that SEC ALJs are employees, not constitutional "Officers" under the Appointments Clause, but in light of *Bandimere v. SEC*, No. 15-9886 (10th Cir.), the panel's decision will be reconsidered en banc. Implications for MSPB AJs? TBD. A separate 10th Circuit case (*McGill*) will address that.

Plus One Case at the Supreme Court

- On April 17, 2017, the Supreme Court heard arguments in *Perry v. MSPB*, a case that follows up on *Kloeckner v. Solis*. *Kloeckner* held that when MSPB dismisses a mixed case on procedural grounds (there, untimeliness), the appeal goes to a district court, not the Federal Circuit. The issue in *Perry* is which court hears a mixed case in which a claim of discrimination is not decided because the appeal is dismissed for lack of jurisdiction.

And One Big One Already Decided

- *Helman v. DVA*, No. 2015-3086 (May 9, 2017):
- The Federal Circuit noted that the DVA SES law excluded review of an AJ's decision by the Board and the court. It held, despite that, that it could review "colorable constitutional claims."
- Next it held that vesting final decision-making authority in AJs violates the Appointments clause.
- Ditto the law's provision that if a final decision is not issued within 21 days, the Secretary's decision becomes final.
- But, the court also found the removal and appeal process are severable, and that Congress would have chosen to save the former even though the court had largely gutted the latter.
- Finally, the case was sent back to the Board to decide the PfR the appellant had originally filed.

Additional Recent Decisions
First, Whistleblowing

Whistleblower Protection Act

- Only the prohibition at 5 USC § 2302(b)(8) could form the basis for an IRA appeal:
- Taking, not taking, threatening to take or not take a personnel action (defined at § 2302(a)) because of--
- **(A)** any disclosure an employee or applicant reasonably believes evidences--
- **(i)** any violation of any law, rule, or regulation, or
- **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
  if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
- **(B)** any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--
- **(i)** any violation (other than a violation of this section) of any law, rule, or regulation, or
- **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Whistleblower Protection Enhancement Act

- Also allows for an IRA appeal to be filed based on reprisal for:
- **(9)(A)** the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation--
- **(i)** with regard to remedying a violation of paragraph (8); or …
- **(B)** testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
- **(C)** cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
- **(D)** for refusing to obey an order that would require the individual to violate a law
- The exception is (9)(A)(ii): "**(ii)** other than with regard to remedying a violation of paragraph (8)."
-

Protected Disclosures

- ***Corthell v. DHS***, MSPB @ 1 – the Board had previously held that an employee who alleges that the agency perceived him to be a whistleblower is protected. Under the WPEA, certain other activities are protected. In *Corthell* the Board extended the "perceived" whistleblower rule to employees who took part in protected activity, here cooperating with the IG.

Three Strikes and You're Not Out!

- ***Salerno v. Interior***, MSPB @ 3 – although the appellant's 2013 disclosure to OSC was just a policy disagreement, so not protected whistleblowing under 5 USC 2302(b)(8)(A) ("any disclosure of information by an employee…"), the Board also had to examine whether it was protected under 2302(b)(8)(B) ("any disclosure to the Special Counsel…"). It concluded, though, that it was too general to be protected. But those are not the only ways this one disclosure could be protected. The third provision under which the Board examined it was 2302(b)(9)(C) (a disclosure to OSC "in accordance with applicable provisions of law"). Here, the appellant's disclosure met the nonfrivolous allegation standard for protection as well as contributing factor, entitling him to a hearing.
- Appellant Salerno also claimed that OSC's investigation of his claim was inadequate and amounted to harmful error. The Board found it lacks authority to consider such a claim, and it has no bearing on jurisdiction.

Rainey v. MSPB & State, FC @ 16

- The appellant claimed reprisal for his refusal to comply with an order that he claimed would have violated the FAR. The Board dismissed and the court here affirmed. The prohibition at § 2302(b)(9)(D) (taking a personnel action for refusing an order that would require the individual "to violate a law") does not include a regulation. The court analogized to the Supreme Court's decision in *MacLean* that § 2302(b)(8)(A) (protecting a disclosure if it "is not specifically prohibited by law") excludes a regulation. Use of the same word in close proximity suggests the same limitation. Also, Congress had considered the "obey, then grieve" rule and some Members did not want it overturned. As a compromise the protection in § (b)(9)(D) was limited to violation of a law. That the FAR is a "particularly significant" regulation is for Congress to consider.

Contributing Factor

- *Cahill v. MSPB*, FC @ 15 – although the Board found that no managers responsible for the personnel actions knew about the appellant's disclosures, the court disagreed. Whether he made a nonfrivolous allegation "depends on how his allegations would be understood in context, especially by the responding agency." Agency silence here suggests knowledge. Plus, it meant the appellant was not on notice of the need for more specificity. The case was remanded for hearing.

Kerrigan v. MSPB, FC @ 17

- Although the court disagreed with the Board ruling that 5 USC § 8128(b) precludes review of an OWCP benefits denial in this IRA appeal, it agreed with the Board's alternative finding that the appellant did not nonfrivolously allege contributing factor because he did not claim that the official who terminated his benefits knew of his disclosures (his concerns about OWCP's processes), just that "someone" at OWCP did. The court declined to infer knowledge based on the closeness in timing to his referral to vocational training and resulting termination of benefits when he did not go. These were just the last actions OWCP took in its several attempts over the years to adjudicate his claim. Under the circumstances, there are other likely reasons for the referral and termination.

Clear and Convincing Evidence

- *Miller v. DOJ*, FC @ 18 – the appellant ran a prison factory and reported mismanagement of funds. He was reassigned several times over 4+ years, allegedly at OIG's request. During that time the factory closed and he was given a job with no duties. Although the Board affirmed the action, a majority of the court panel, after doing its own *Carr* analysis, held that the agency did not meet its burden.
- Factor 1 – strength of the agency's evidence: the agency relied on the warden's testimony of what OIG told him and his testimony was conclusory; that he repeated it to the appellant several times does not strengthen it. There was no evidence how his presence could compromise the investigation, and he had disclosed the information they were investigating. Plus, there was no paper trail and he was a "fantastic" employee.

Miller, cont'd

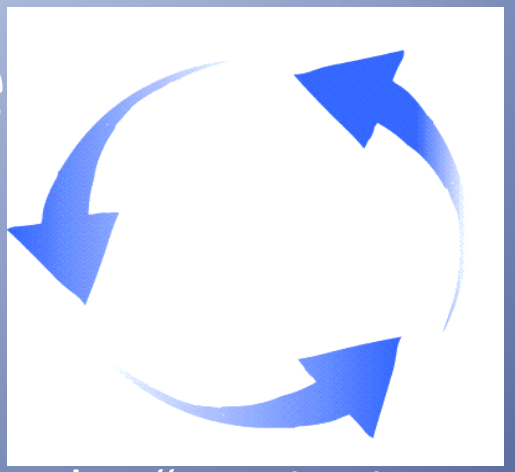
- Factor 2 – motive to retaliate: although the Board's finding that the warden had little or no motive was reasonable, the court noted that he had an interest in the operation of the factory and that the Board did not address OIG's motive.
- Factor 3 – treatment of similar non-whistleblowers: the Board found no other similarly situated senior staff members, but because there are only 4 of them, that is an "exceedingly narrow" view. While this might mean the factor is neutral, because the agency has greater access to relevant evidence the majority found it "cut slightly against the agency."
- The concurrence would remand to explore OIG's role.
- The dissent would affirm the Board because the majority did not find the warden not credible or that his reasons, in the absence of proof they are untrue, were insufficient.

Board Jurisdiction - Probationers

LeMaster v. DVA, MSPB @ 8

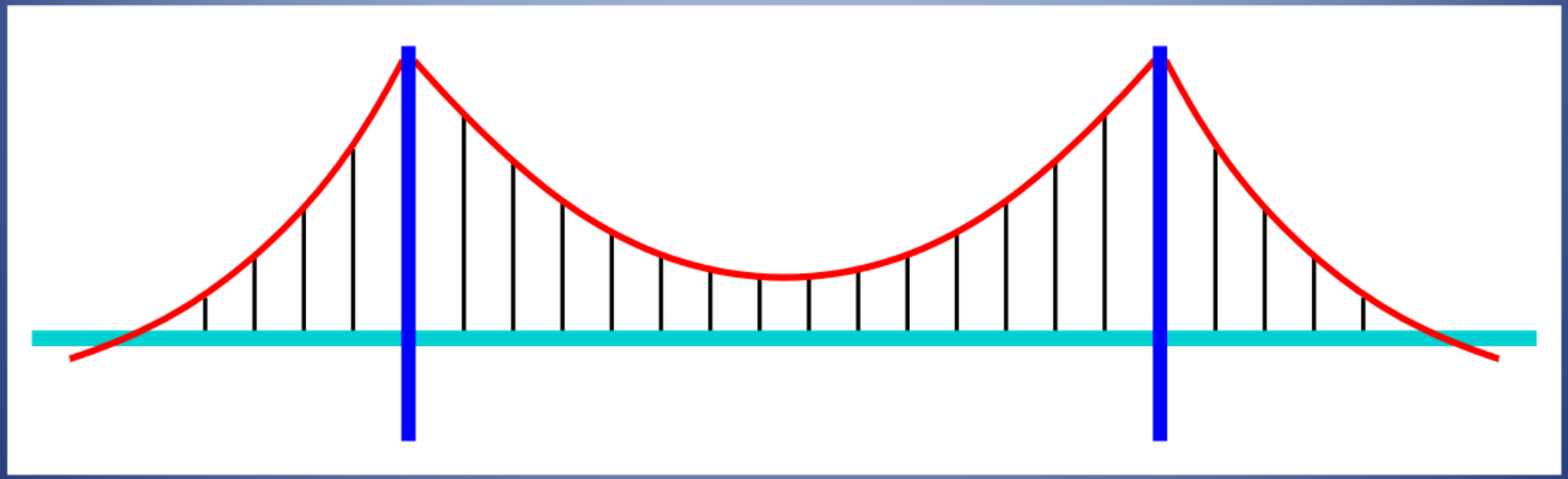
- The appellant was under a court-ordered probation agreement and was terminated during his probationary period based on its conditions and his failure to disclose their effect on his job. The Board rejected the agency argument that the termination was based on the post-appointment effects of the pre-appointment condition because the termination was not for failure to meet a condition of employment. His probation officer approved him working for the agency and had informed the HR Office of the probation terms. Thus, he is entitled to 5 CFR § 315.805 rights.

Jurisdiction – Current Continuous Service



- *Winns v. USPS*, MSPB @ 9 – overrules the "continuing employment contract theory" of a 1984 decision giving appeal rights to a person who received 5 temporary appointments each for less than 1 year although he spent less than 9 months in the last. *Winns* instead applies the § 752.402 definition of "current continuous employment" – "a period of employment or service immediately preceding an adverse action without a break in federal civilian employment of a workday." Also, the plain meaning of "continuous" seems to preclude breaks in service.

Constructive Suspensions



Or Are They Actual Suspensions?

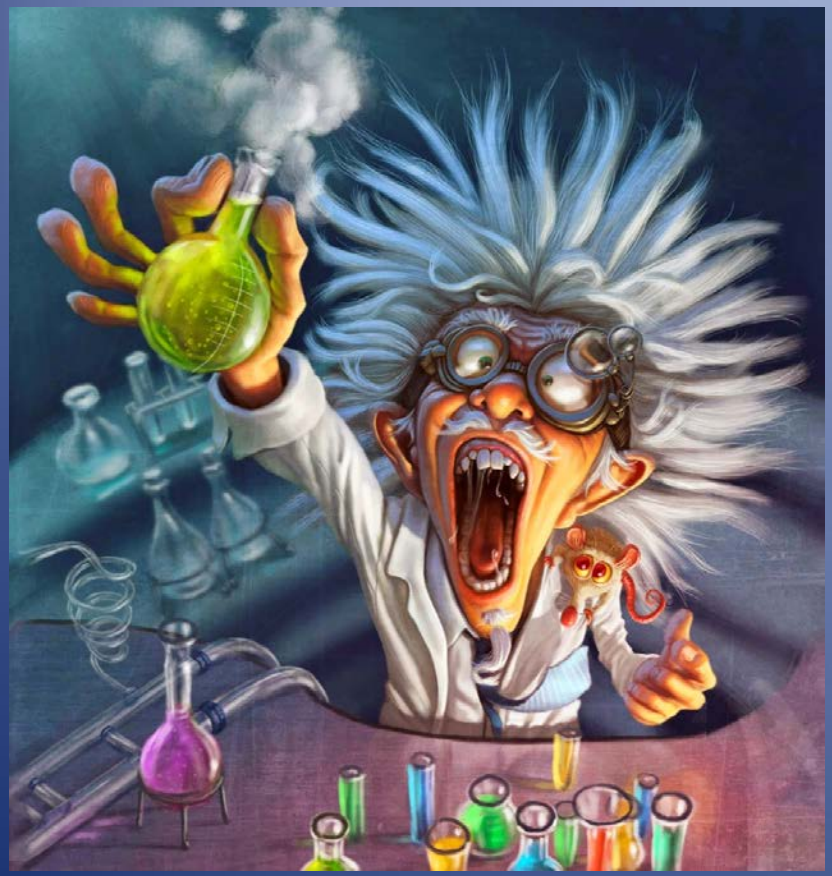
Thomas v. Navy, MSPB @ 7

- The test for an involuntary (constructive) suspension is that (1) the employee lacked a meaningful choice in the matter and (2) it was the agency's wrongful acts that deprived him of that choice.
- Here, the appellant requested accommodation for allergies, which did not allow her to work at her workstation or in another building to which she had been assigned. The agency let her telework 2 days a week and placed her on LWOP for 3. The Board found she had nonfrivolously alleged that she was forced into accepting LWOP because the agency did not accommodate her doctor's order that she not work in those buildings. The case was remanded for a hearing. If she does not prove jurisdiction, the AJ must address her alternate claim that the situation is an actual suspension.

Rosario-Fabregas v. MSPB & Army, FC @ 1

- The appellant submitted medical evidence that he was absent due to depression but stated he would return to duty. The agency asked for a medical release and told him to request leave until he submitted it. He claimed that leave constituted a constructive suspension. The Board dismissed.
- The court first upheld the Board's test and rejected the claim that it conflates the merits (whether the agency's action was wrongful) with jurisdiction (whether the absence was involuntary).
- It then affirmed the dismissal. After an absence the agency may ask for medical evidence that he is able to return and may deny it until he submits it. Dissent, though, finds this to be "a facially involuntary suspension over which the Board has jurisdiction."

Adverse Action Charges



DRUG TESTING

- *Holton v. Navy*, MSPB @ 13
- *Forte v. Navy*, MSPB @ 10
- *Bruhn v. USDA*, MSPB @ 24

Holton

- The appellant, a Rigger Supervisor, and his team were drug tested after they were involved in a crane accident while lifting a 60,000 pound load, causing $30,000 damage to the building. The accident was not named as the reason for the test until 2 days later. The Board sustained his removal for his positive test, finding the agency proved chain of custody and rejecting the claims of harmful error in the procedures leading to the test.
- A mandatory drug test is a 4th Amendment search and seizure and must be reasonable to be constitutional but "neither a warrant, probable cause, nor individualized suspicion is essential in every case to prove reasonableness."

Holton, cont'd

- Warrantless post-accident testing without individualized suspicion is a reasonable intrusion on privacy if agency regulations give it limited discretion, the test serves compelling safety interests, and the employee has a diminished expectation of privacy because he works in an industry heavily regulated for safety. If so, he can be tested even if not in a testing designated position. That he supervised the team and briefed it prior to the accident makes his testing proper despite his claim that he delegated authority for the lift during which the accident happened. That no rule or regulation had been violated does not matter because the testing program does not require such proof. Also, there is no right to due process re the decision to test.

Forte

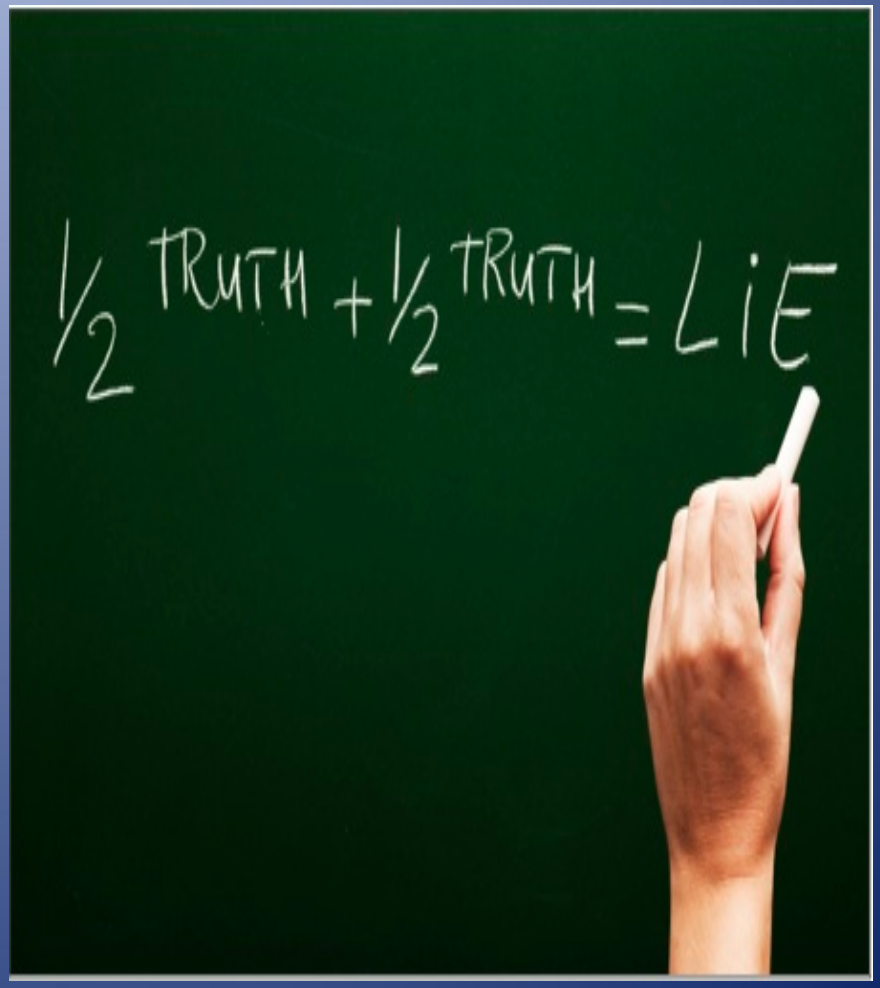
- The appellant was suspended for 30 days after testing positive for cocaine. He contended that he had been allowed to leave the test facility without signing the sample and had to be called back to do so. He also submitted the results of a hair follicle test finding no cocaine. On appeal, although the AJ granted a discovery request for the sample so it could be DNA tested, HHS regulations prohibit that. The AJ ultimately reversed the suspension. The Board agreed. The agency must prove the urine specimen came from the employee by proving the chain of custody was maintained and verifiable. Here there was a procedural error in that regard, and although the Board did not find it harmful, it agreed that the follicle test combined with the unavailability of the specimen for testing meant the agency did not prove its charge.

Bruhn

- The parties previously entered a last chance settlement agreement (LCSA) in lieu of removal for growing marijuana. The appellant was later removed when local police arrested him for growing it in his garage. He claimed he grew it to mitigate the effects of his wife's cancer treatments. Although the case centers on the requirements for enforcing an LCSA, the decision also examined his claim that he did not breach the LCSA because the California Compassionate Use Act of 1996 allows marijuana for uses such as the appellant put it to. The LCSA prohibits him from violating any Federal rule. The Federal Controlled Substances Act makes it illegal to manufacture or possess a Schedule I controlled substance, and the government designates marijuana such a substance, even if it is for medical use. Federal law preempts state laws purporting to legalize the use of marijuana.

Charges, cont'd

- *Fargnoli v. Commerce*, MSPB @ 11
- *O'Lague v. DVA*, MSPB @ 11



Lack of Candor

Fargnoli

- Lack of candor necessarily involves an element of deception, and requires proof the appellant knowingly made an incorrect statement. This means it requires proof of two elements:
- 1) the employee gave incorrect or incomplete information, and 2) he did so knowingly.
- The case was remanded because the AJ, after finding the appellant's statement was not true, did not decide if an "element of deception" was present.

O'Lague

- How does lack of candor differ from falsification? Falsification "involves an affirmative misrepresentation and requires intent to deceive." Lack of candor is a more flexible concept and need not involve an affirmative misrepresentation. It "necessarily involves an element of deception" but "intent to deceive is not a separate element of the offense." The misrepresentation or omission must have been made knowingly, however. Here, the charge was not sustained because the Board noted an error in the dates listed in the charge and it found the appellant's testimony on the matter credible.

Settlement


DARRYL F. ZANUCK presents
GREGORY PECK
DOROTHY McGUIRE
JOHN GARFIELD
in
Laura Z. Hobson's
Gentleman's Agreement
Celeste HOLM · Anne REVERE · June HAVOC · Albert DEKKER · Jane WYATT · Dean STOCKWELL
DARRYL F. ZANUCK · MOSS HART · ELIA KAZAN
20th CENTURY-FOX TRIUMPH!

Delorme v. Interior, MSPB @ 25

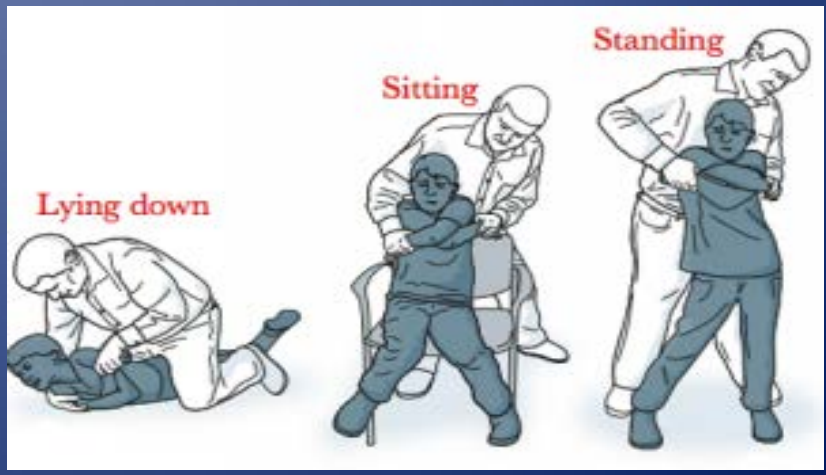
- This case changes what has been the law since *Shaw v. Navy*, 39 MSPR 586, was issued in 1989. *Shaw*, which changed what had been Board law and practice, held that the Board could not accept a settlement agreement unless the parties first established jurisdiction. *Delorme* changes the law back to its original state. In addition to the legal arguments made in support, the decision notes that the Board issues orders and processes cases before determining if it has jurisdiction over a case and finds that this approach better furthers public policy because under *Shaw*, constructive adverse action appeals, where jurisdiction is the dispositive issue, as well as IRA and VEOA appeals which often involve complex jurisdictional issues, could not be resolved with Board enforcement despite the parties' wishes.

Due Process


We the People
insure domestic Tranquility, provide for the common defence,
and our Posterity, do ordain and establish this Constitution
Article. I.

The Latest Word from the Federal Circuit: *FEA v. DOD, DDESS*, FC @ 5

- A teacher was removed on a charge of "inappropriate physical contact with a student" based on the way she restrained him. On hearing of the conduct, the Principal (later the proposing official) sent a "Serious Incident Report" to her supervisor (later the deciding official (DO)) and the latter's supervisor, the District Superintendent, who replied "We need to try and terminate her for repeated use of corporeal (sic) punishment and for insubordination." When the email was discovered the matter was explored at the arbitration hearing. The arbitrator found no due process denial.
  Did the court agree?



By Majority Vote, No.

- First, they rejected the argument that an ex parte communication before the proceedings were brought raises no DP concerns; moreover, they were then being contemplated. Cites 5 CFR § 1201.102 to say the Board holds such contacts to be prohibited when the DO has knowledge that a proceeding "will be noticed."
- The *Stone* factors: #1 – the statement introduced new evidence – that the DO's supervisor wanted the appellant removed. #2 – appellant only learned of this in discovery but post-termination review cannot cure a procedurally deficient termination. #3 – the communication was of the type to exert undue pressure, even if the decision was "subjectively independent."
- Dissent: The decision errs and has the potential to chill necessary discussions among responsible supervisors.

USERRA & VEOA

Montgomery v. HHS, MSPB @ 15

- The VEOA right to compete, 5 USC § 3304(f)(1), is triggered when an agency accepts applications from outside its workforce, not just when it uses merit promotion procedures. It need not use merit promotion procedures when it transfers an employee within its own workforce, but must allow a right to compete where it transfers in a non-employee. That the agency used a "shared certificate" issued for an identical but separate job, for which the appellant had applied, to transfer in the selectee for the job at issue, which had not been announced, may accord with agency policy but policy does not override a statute. The case was remanded to determine if this policy accorded the appellant his right to compete and whether he is qualified for the job.

Goodin v. Army, MSPB @ 16

- OPM denied the agency's request to pass over the appellant and it then made him a tentative job offer, which it withdrew after he did not submit required documentation. The Board found no violation. The pass over decision did not preclude the agency from requiring him to submit information needed to credential him and another pass over request was not necessary before withdrawing the offer.

Weed v. SSA, MSPB @ 16

- It was not necessary that the agency reconstruct the selection action that denied the appellant his right where, within 30 days of the order to reconstruct, it offered him the job retroactive to the date it was first filled. That action is not a willful violation entitling him to liquidated damages.
- More far-reaching, 5 USC § 3330c(a) entitles a prevailing appellant to "any loss of wages or benefits suffered." The Board found "or" ambiguous here and concluded it is more consistent with the legal intent of VEOA to read it to mean "and." VEOA is a remedial statute and should be interpreted broadly to protect those it benefits. USERRA and VRRA also say "or" but interpret it to mean "and." What "benefits" he is entitled to also should be construed broadly.
- Last, VEOA does not allow for an award of consequential damages, out-of-pocket expenses, or front pay.

Wilson v. Navy, FC @ 11

- The appellant's security clearance was revoked partly because he brought a gun to work. He claimed he carried it "in perceived fulfillment of his duty as a Navy Reservist" and that the revocation violated USERRA. The Board found it could not examine the merits of the revocation to determine if there had been a violation. The court agreed. Under *Egan*, the Board and the court both have limited authority with respect to security matters, and cannot review a claim that discrimination was the reason for the revocation. Here the court extended that rule to claimed USERRA violations. It is "a distinction without a difference" to say that the court can review whether the initiation of the action was discriminatory. The court distinguished and rejected reliance on a DC Circuit decision allowing review of a Title VII claim "based on knowingly false reporting."

Discrimination

- “All personnel actions affecting employees or applicants for employment … in [the covered agencies and units] shall be made free from any discrimination based on race, color, religion, sex, or national origin.” 42 USC § 2000e-16(a).

Briefly Noted Takes on *Savage v. Army*, 122 MSPR 612 (2015)

- *Mattison v. DVA*, MSPB @ 18 – distinguishes when an allegation of a § 2302(b)(9) claims is reviewed under *Warren*, when as an IRA, and when under the *Savage* test.
- *Sabio v. DVA*, MSPB @ 19 – discusses the right to a hearing on discrimination after cancellation of the underlying action, clarifying *Savage*.
- *Hess v. USPS*, MSPB @ 28 – although *Savage* holds that civil service law determines if Title VII was violated, the Board retains the authority to award compensatory damages under Title VII.

Miscellaneous Decisions to Note

- *Rumsey v. Justice*, MSPB @ 26 – discusses the rules for an attorney fee award under 5 USC § 1221(g) and for an award to a pro bono attorney.
- *Little v. USPS*, MSPB @ 28 – under 5 CFR § 1201.22, failure to pick up your mail no longer justifies a late appeal or pleading.
- *McCarthy v. MSPB*, FC @ 12 – the Clerk of the Board's letter denying a request to reconsider the Board's final decision is reviewable by the court under the abuse of discretion standard. The court here exercised its review authority where the request was premised on a change in the law.
- *Fedora v. MSPB & USPS*, FC @ 13 – the 60-day time limit for the Federal Circuit to receive an appeal from issuance of a Board decision is "mandatory and jurisdictional." Thus, it cannot be waived or equitably tolled.

QUESTIONS?

THANKS FOR YOUR ATTENTION!