MSPB Update

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Adverse Actions

Akers v. Department of the Treasury, 100 MSPR 270 (September 30, 2005) – The Board agreed with AJ, who found that the appellant's removal promoted the efficiency of the service and that section 1203(b)(9) of the RRA mandated the agency's removal action as a mandatory penalty. The appellant was a WG-6907-05 Materials Handler with the Internal Revenue Service. He was removed for (1) willfully understating his individual tax liability; and (2) failing to submit a request to participate in an outside business activity. The Deciding Official sustained 2 of the 3 specifications under Reason 1 and Reason 2. The 2 specifications of reason 1 were considered willful violations of section 1203(b)(9) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA). The AJ sustained Reason 1 and its three specifications and Reason 2 and its specification and found removal mandatory. The Board agreed (although finding Specification 3 of Reason 1 not sustained).

Bitare v. DOJ, No. 04-3261 (Fed. Cir. January 31, 2006) - The Circuit reversed the AJ, who had sustained the appellant Center Adjudications Officer removal for mishandling of two visa petitions (adjudicating them earlier than deserved), disagreeing with her finding that the conduct was knowing and that it harmed the agency or any applicant. The court thus remanded for a determination as to whether there was sufficient nexus. As to the harm matter, the court – at least as to one of the petitions - noted the distinction between adjudication of a petition and visa issuance, suggesting that the issuance would not occur until priority date was reached (a date

assigned by the agency and not the appellant) and that therefore there was neither harm to the agency or any individual. (As to the other visa request misprocessing, any harm was due to a matter which the court determined was not the responsibility of the appellant). Concerning harm, the court also observed the following: [A]lthough Mr. Bitare submitted his reply on November 3, 2000, the agency did not decide to remove Mr. Bitare until the following February. Rather than suspending him, the agency chose to have him continue adjudicating petitions. In addition, Ms. Coultice, the deciding official, declined Mr. Bitare's offer to cease processing Filipino petitions pending a final determination by the agency, stating that 'from management's perspective, there is no conflict of interest in the cases you have been given to adjudicate.' Thus, the agency seemingly conceded that the infractions did not affect Mr. Bitare 's ability to accomplish his duties satisfactorily. Without explanation, the agency delayed almost two years from the first incident before removing Mr. Bitare . The lack of urgency with which the agency acted and the agency's express statement declining to restrict Mr. Bitare's duties certainly undermine the agency's subsequent claim that Mr. Bitare's conduct demonstrated 'a serious lack of sound judgment[,] integrity and professionalism."'

Garner v. Department of the Treasury, 97 MSPR 362 (September 27, 2004) - The Board reversed the AJ's decision on the charges and as to mitigation and reinstated the removal of an IRS supervisory mail and file clerk on two charges -- misuse of travel funds to which she was not entitled and failure to timely pay an outstanding travel balance. ("Specifically, the agency charged that: (1) The appellant received a travel advance in the amount of $2,400

instead of $470, on August 7, 2001, for a 4-day business trip beginning that day, and "did not notify management nor the budget analyst when [she] realized [she was] given the incorrect amount"; and (2) the appellant, "although ... directed to do so on several occasions, ... did not satisfy [her] outstanding travel advance of $2400.00 in a timely manner.") The AJ had mitigated after concluding that only the second charge was proven. In disagreeing on charge one, the Board noted that "Since the request and the transaction took place on the same day, the agency proved that the appellant took the additional $1,930 over the amount that she requested knowing that it was incorrect. We agree with the agency's statement in its petition for review that there is "no plausible reason for the appellant, a supervisor since June of 2000 with more than 16 years of service with the agency to have thought that the disbursement she received was correct," particularly when the amount of the disbursement was approximately five times greater than the amount that the appellant had requested." In reinstating the penalty, the Board stated that "The removal penalty is warranted because of the following factors, all considered by the agency: the seriousness of the appellant's offense; the fact that the appellant is a supervisor and thus held to a higher standard of responsibility; . . . the appellant's past disciplinary record that, as noted above, includes a suspension for improper use and failure to timely pay travel expenses charged to her government issued charge card and the fact that the agency informed the appellant that it would rely on this past misconduct in the notice of proposed removal . . ; and the doubt that the appellant's offense created as to her integrity and judgment . . . .. Accordingly, we sustain the agency's removal action."

Jackson v. DOJ (July 13, 2004) – The Board remanded the case for a Douglas analysis on a charge of violating a last chance agreement. The AJ had found a violation of the agreement, determined that the appellant had not waived his right to challenge the agreement but concluded that the removal was reinstated and that he had no jurisdiction to determine penalty. While the Board agreed as to the violation of the agreement and the waiver determination, the Board concluded that the agency had not reinstated a removal, which it had held in abeyance, but rather imposed a new removal for a charge of violation of the LCA, which required a Douglas determination.

Johnson v. Small Business Administration, 97 MSPR 571 (September 30, 2004) – The Board reversed the AJ, who had mitigated a demotion and 30 day suspension to a 7-day suspension, imposing a 30-day suspension. The appellant was employed as a Supervisory Computer Specialist, GS-334-14, in the agency's Denver Financial Center until March 2, 1997. The agency demoted and suspended the appellant for 30 days based on twelve charges. In the first charge, the appellant was alleged to have made false statements on his travel vouchers in order "to induce the agency to pay fraudulent travel claims." (i.e., , he was alleged to have identified his duty station on travel vouchers he submitted before January 14, 2001, as Denver rather than Washington, DC). In the second and third charges, he was alleged to have violated regulatory provisions by failing to obtain written authorization in advance of his travel. In the fourth and fifth charges, he was alleged to have violated regulatory provisions and agency procedures by failing to submit his requests for reimbursement promptly after completing the travel for

which he requested reimbursement. In the sixth and seventh charges, he was alleged to have improperly requested and received per diem payment for time spent at his official duty station in Washington, D.C. In the eighth and ninth charges, he was alleged to have failed to attach receipts for expenditures in excess of $75, or to explain why furnishing the receipts was impracticable. In the tenth, eleventh, and twelfth charges, he was alleged to have used his government-issued charge cards to charge expenses not related to official travel. Five of the 12 charges were sustained at the Board and the more serious charges (involving falsification of vouchers and improper claims for per diem) were not. Indeed, some of the sustained charges concerned the appellant's use of a government charge card to pay expenses that he thought at the time he charged them were reimbursable, and that he later decided were not reimbursable (and did not claim on his voucher). At the same time, " the appellant's use of his government charge card to make reservations for personal matters was not inadvertent. The appellant has acknowledged, in effect, that he used the government card intentionally to make lodging reservations, even though he knew those reservations were not related to government business." Moreover, two other "sustained charges -- charges four and five -- concern the appellant's delay in requesting reimbursement of his travel expenses. Those charges also warrant disciplinary action. While Mr. Wilson [the proposing official] testified that failure to file a voucher within 5 days after completing travel was 'extremely common,' he indicated that enforcing the 5-day deadline and disciplining employees who failed to meet the deadline were not 'priority issues' for the agency, and while a senior financial analyst in the appellant's office did not appear to regard the appellant's 'travel situation' as unusual, nothing in the

record indicates that any other employee in the agency was nearly as late as the appellant in filing vouchers." As a result, the Board concluded that the maximum reasonable penalty for the sustained charges and specifications was a 30-day suspension.

Laycock v. Department of the Army, 97 MSPR 597 (October 21, 2004) – The Board, as had the AJ, sustained the agency's removal of an attorney-advisor for the "withdrawal of approval of the appellant's qualifications", required for employment, based on several reasons, principally concerning the appellant's mishandling of an MSPB appeal. The facts underlying this case involved the appellant's representation of the agency in a performance demotion appeal at the MSPB. In the course of that representation, the appellant sent a memorandum to witnesses, which the AJ had concluded improperly attempted to sway the opinions of witnesses, forced the appellant's withdrawal, imposed sanctions and thereby found the demotion not sustained. As a result, the agency initiated an inquiry and then withdrew approval of the appellant's qualifications, after which it removed him. As a threshold matter, the Board appeared to agree with the AJ, who had rejected the agency's argument that the case was similar to security clearance cases and that the merits of the agency's decision was unreviewable. Nonetheless, the AJ found that the agency had sustained 4 of the 7 reasons relied on by the agency, 2 of which involved the appellant's representation in the MSPB case and 2 others involving other representation. According deference to the agency, the Board concluded that removal for these reasons was reasonable, noting as follows: "Nothing in the record suggests that the penalty of removal exceeds the range of permissible

punishment for the offenses at issue here. Moreover, the reasons that have been sustained are serious and demonstrate a pattern of incompetence. We note further that, as an attorney, the appellant was required to carry out much of his responsibility with a significant degree of independence. It is clear that, in light of the sustained charges described above, the agency was no longer able to rely on the appellant to provide competent representation and to comply with its directives in doing so. In addition, we note that the agency has presented evidence that, in reconsidering the penalty in light of the charges sustained by the administrative judge, it considered the factors identified by the Board as relevant to penalty determinations."

Simmons v. Department of the Air Force, 99 MSPR 28 (June 20, 2005) – The Board reversed an AJ, who had mitigated a removal of an IT Specialist to a 3-day suspension, after sustaining only a "Willful destruction of government information and property" charge but not two others ("withholding of a material fact in connection with matters under official investigation", and "attempted obstruction of an official investigation") and instead found the attempted obstruction of an official investigation charge sustained as well and reinstated the removal. The agency's first charge, willful destruction of government information and property, provided that the appellant destroyed government property and information by scratching off the serial numbers from the exterior of extra server # 398. While the appellant admitted that he engaged in this conduct, he denied that it amounted to the destruction of government information because the serial number for extra server # 398 was available upon reboot of the server itself. This argument was rejected by both the AJ and the Board. Under the second

charge, the agency claimed that the appellant gave a statement during a December 11, 2002 interview to JD in which he stated that the missing server was not missing at all, but had become a ghost in the bureaucracy. In not sustaining this charge, the Board agreed with the AJ that "the scratching of the serial numbers was not relevant to the purpose of . . . [the] investigation, . . . [Mr. H _____] did not ask the appellant any questions about that matter, and the appellant's actions did not slow down his investigation or affect it in any way." Concerning the third charge, the Board concluded, as "From the foregoing, it is clear that it was the appellant's opinion that there was no missing server and that the agency's investigation into a missing server was wasteful, expensive, time-consuming, and unnecessary. It is also clear that the appellant hoped that, by scratching off the serial number from the extra server, he could put an end to unnecessary investigations into the missing server. In other words, instead of letting the truth be known about the identity of the extra server, and by making it more likely that the extra server (without its external serial numbers as identification) might be mistaken for the missing server, the appellant attempted to impede, interfere with, or place obstacles in the way of the investigation. It was not the appellant's place, however, to determine that the agency's investigation was unnecessary, and he had no right to address what he saw as a problem by committing deceptive acts and omissions in an attempt to thwart the agency's efforts. Contrary to the findings of the AJ, the third charge is sustained." As to a whistleblower reprisal defense, the Board agreed with the AJ and found that the protected disclosure was not a contributing factor in the agency's personnel action (noting though that when the investigation is "so closely related to the

personnel action that it could have been a pretext for gathering evidence to retaliate against an employee for whistleblowing activity" . . . the agency must show by clear and convincing evidence that the evidence in question would have been gathered absent the protected disclosure) and that, in any event, the agency proved that it would have taken the same action by clear and convincing evidence, applying the three factors, "the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated." Finally, the Board concluded that removal was reasonable, citing to the deciding official's preparation of "a document in excess of 20 pages in length in which he exhaustively considered every Douglas factor for each of the three charges he sustained." The Board's summary of that document is useful and instructive for deciding officials.

Taylor v. Department of Veterans Affairs (March 29, 2005) – The Board reversed the AJ, who had mitigated the appellant Licensed Practical Nurse's removal for abusing a patient (i.e., cutting his hair and beard without consent and while he was restrained) and instead reinstated the removal, providing deference to the agency decision. The AJ had mitigated based on the unintentional nature of the misconduct, "the absence of any physical or long-term psychological damage to the patient, the appellant's 17 years of service with no prior discipline, the appellant's remorse, and the agency's table of penalties that set forth a penalty range from reprimand to removal for a first offense of patient abuse."

Age Discrimination

Harris v. Department of the Air Force (March 9, 2005) – Because a settlement agreement did not comply with the OWBPA, the Board sets aside only the provision waiving the right to pursue the Age discrimination claim, remanding for a determination on that claim but enforcing the remainder of the agreement as written. In relevant part, the agreement provided as follows: "The agency agreed to pay the appellant $10,000.00 in settlement of his appeal. . . . The appellant agreed, among other things, to withdraw his appeal; any equal employment opportunity complaints against the agency 'arising out of the facts of this case'; and all claims, grievances, lawsuits, and other appeals related to this appeal, except those filed through the Office of Workers' Compensation Programs. . . . The parties additionally agreed that the appellant would not accrue any annual pay, back pay, annual leave, sick pay, sick leave, or severance pay under the agreement." The settlement agreement did not comply with the requirement 29 U.S.C. § 626(f)(2) (the OWBPA) because the waiver did not specifically refer to rights or claims arising under the ADEA and there was "no indication that the agency ever advised the appellant in writing to consult with an attorney prior to executing the agreement."

Turner v. Department of Homeland Security, 95 MSPR 688 (April 15, 2004). Because the appellant did not allege that the agency discriminated against her on the basis of age, the provisions of the OWBPA do not have to be followed.

Arbitration Appeals

Atanus v. Merit Systems Protection Board and General Services Administration, No. 05-3123 (Fed. Cir. January 6, 2006) – Even though the employee withdrew her grievance and filed an appeal with the MSPB after the union refused to represent her, she voluntarily chose to file a grievance and waived her appeal rights before the Board.

Brent v. Department of Justice (December 8, 2005) – An arbitrator upheld the removal decision and the Board affirmed. Appellant was employed in a GS-11 position of Education Specialist at a Federal Correctional Institution. He was removed based on charges of: (1) The appearance of improper contact with an inmate's family member; (2) accepting an item from an inmate's family member; and (3) failure to report the receipt of an item from an inmate's family member. The Board rejected the appellant's claim of disparate treatment, as had the arbitrator, noting that "because the appellant has only provided us with the agency's charges, proposed discipline, and imposed discipline against the comparator, but has not identified his or her position, grade, supervisor, work unit, or other relevant circumstances, we are unable to determine whether the unidentified employee and the appellant were in a nearly identical employment situation."

Edwards v. Department of Veterans Affairs, 100 MSPR 437 (October 31, 2005) – The Board upheld an arbitrator's decision sustaining the removal of a Pest Control Technician for absence without leave (AWOL) and violation of "Leave Requesting Procedures." The Board rejected the appellant's claim that the arbitrator misapplied the FMLA, noting instead that a provision

relied on by the appellant applied to the private sector and Postal Service and that "Under 5 C.F.R. § 630.1207(h), an employee must provide written medical certification within 15 calendar days of the agency's request for documentation and, if it is not otherwise practical to respond within 15 days, then the employee must provide documentation within 30 days of the date of the agency's request. The agency proposed the appellant's removal three days after his return to work. Although the agency gave the appellant fewer than 15 days to provide medical certification, we find that the arbitrator's reliance on an inapplicable deadline did not prejudice the appellant's substantive rights. The arbitration was held more than seven months after the appellant's return to work and, at the time of the arbitration, the appellant still had not presented medical certification for his absences on April 27 through April 30, 2004, May 3 through May 7, 2004, May 13 and 14, 2004, and June 18, 2004."

Fulks v. Department of Defense, 100 MSPR 228 (September 30, 2005) – Board further mitigated a decision by an arbitrator to a 120-day suspension. The appellant was employed as an education technologist at the agency's Fort Knox High School in Fort Knox, Kentucky and removed for "sleeping while in a duty status and failure to follow established leave procedures resulting in [his] being absent without approved leave (AWOL)." The arbitrator found the charges sustained but mitigated to a time-served suspension of 20 months and 13 days and rejected the appellant's claim of disability discrimination (there was some evidence of narcolepsy) On review, the Board agreed with the arbitrator as to the charges and the disability defense As to disability, the accommodation sought by the

appellant was to allow him to take periodic naps during the day as long as he had completed his assignments and worked the number of hours he was scheduled to work. The Board agreed with the arbitrator that this was not an articulation of a "reasonable" accommodation. As to the penalty however, the Board agreed with the appellant that the arbitrator improperly based the length of the suspension that was to be substituted for the removal on the length of time taken to adjudicate the grievance, instead of on an analysis of the applicable Douglas factors, including a determination of the maximum reasonable penalty that could be imposed for the sustained charges. Thus, the Board held "For the reasons stated above, we find that the arbitrator erred as a matter of law in interpreting civil service law pertaining to mitigation authority, and that his mitigation of the appellant's removal to a time served suspension of 20 months and 13 days is not entitled to deference." Based on the Board's Douglas analysis, to include the appellant's 25 years of service and his medical condition connected to the misconduct, the Board substituted a 120 day suspension.

Martin v. DVA, No. 04-3023 (Fed. Cir. June 24, 2005) – The Court upholds an arbitrator's decision sustaining the agency's demotion of the appellant from his police officer position to a lower graded position that did not require carrying a firearm, after an agency physician determined that the appellant did not meet "minimum psychological requirements." The decision was upheld even though the arbitrator applied an incorrect standard (i.e., arbitrary and capricious rather than preponderant evidence) because the medical evidence established that the appellant "was not qualified" so that "the arbitrator's use of an incorrect standard was

harmless error.”

Mitchell v. Department of Veterans Affairs (April 15, 2005) – The Board upheld the arbitrator’s decision, which had sustained the appellant’s removal for charges of "insolence and using abusive language toward a supervisor, disrespectful conduct, attempting to intimidate and threaten a supervisor, AWOL, and failure to follow proper leave request procedures." The Board noted that “The scope of the Board's review of an arbitrator's award is limited; such awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges.”

Pleasant v. Department of Housing and Urban Development, 98 MSPR 602 (June 1, 2005) – The Board sustained an arbitrator’s decision mitigating a removal to a 30-day suspension for "Failure to Comply or Delay in Following Instruction", thereby denying the appellant’s petition for review. The appellant was a GS-1101-12 Public Housing Revitalization Specialist. The agency removed the appellant for four charges: (1) "Misrepresentation in connection with filing Department of Labor, Office of Workers' Compensation Forms"; (2) "Disrespectful Conduct or Disregard for Management Directive"; (3) "Failure to Comply or Delay in Following Instruction"; and (4) "Making false, malicious, or unfounded statements against [agency] employees that tend to damage the reputation or undermine the authority of those concerned." The arbitrator sustained only one specification of charge 3, which concerned the appellant’s failure, as directed, to get approval for use of official time. Among other findings, the Board upheld the arbitrator's decision requiring the appellant “to submit a copy of her 2003 income tax return to the agency so that the agency may

calculate the amount of back pay to which she is entitled."

Williams v. SSA (Apr. 28, 2006) – The Board upheld the arbitrator's mitigation of the removal penalty for "failure to comply with the rules and regulations regarding the authorized access and disclosure of Social Security systems and records and violation of the Standards of Conduct", agreeing with the arbitrator that the agency had not committed EEO repisal. This case involved an SSA Claims Representative, who, in previous EEO administrative litigation against the agency, had "used his access to agency computer systems to print workload reports for employees in the Smithfield office. The workload reports included the names and social security numbers of over a thousand claimants. In addition, the appellant obtained hard copies of his coworkers' leave balance records, which had apparently been left in the copy room." The appellant provided those to his then attorney, who unsuccessfully attempted to move them into evidence, with the agency apparently successfully arguing that release of the information violated the Privacy Act. The agency then removed the appellant for the above-described charge. An arbitrator found the charge proven, but mitigated the penalty to a 90 day suspension. The appellant appealed to the full Board, which upheld the arbitrator. The Board first noted that "we discern no legal error in the arbitrator's finding that the appellant committed misconduct warranting discipline. However, the appellant correctly notes that the arbitrator erred in failing to address the affirmative defense of reprisal for prior EEO activity." The Board described the elements for proof of reprisal: "To prove retaliation for protected EEO activity, an appellant must show by a preponderance of the evidence that: (1) He engaged in protected activity;

(2) the accused official knew of the protected activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action." The Board further noted that "to establish a genuine nexus between the protected activity and the adverse employment action[i.e., element 4], the appellant must prove that the employment action was taken because of the protected activity. . . This requires the Board to weigh the gravity of the misconduct charged against the intensity of the motive to retaliate. . . . Here, the charged misconduct represents a serious violation of public trust, and the appellant failed to produce any evidence that the proposing or deciding officials had a strong retaliatory motive. We therefore find that the appellant has failed to prove his allegation of reprisal." Importantly, the Board rejected the appellant's claim "that, because he accessed and disclosed the documents in question in the course of an EEOC proceeding, the anti-retaliation provisions of Title VII shield him from discipline." In that regard, the Board concluded that "such protection does not apply when the documents in question are improperly obtained, as is the case here."

Zingg v. Department of the Treasury, No. 04-3139 (Fed. Cir. November 2, 2004) – The Circuit upheld the arbitrator's decision sustaining the employee secretary's removal for improperly disclosing tax information relating to 1300 taxpayers.

Attendance – Related Charges

Alexander v. Broadcasting Board of Governors (August 6, 2004) – Split decision by Board resulting in final AJ decision removing employee for excessive use of sick leave. Chairman McPhie would have reversed on basis that action not proper for approved sick leave. Then Member Marshall voted to affirm AJ. Good discussion by both of this unclear and important area of Board case law

Bahrke v. United States Postal Service, 98 MSPR 513 (May 13, 2005) – The Board disagreed with the AJ and determined that the LCA was not coerced and the removal, based on a violation of the LCA, was reasonable. The agency proposed the removal of the appellant, a Mailhandler, for attendance related offenses. The agency and appellant entered into a LCA, whereby the appellant agreed to report to and undergo EAP participation. He failed to report and the agency removed him for violating the LCA. On appeal, the AJ found that because the agency's proposed removal was largely based on leave that was approved or should have been approved under the FMLA related to the appellant's knee injury, it was improper, that it thereby constituted interference with FMLA rights and that the LCA was signed under duress. The Board reversed the AJ and reinstated the removal. As to the coercion claim, the Board determined that the appellant was not coerced into signing the LCA just because the agency representative at the meeting where the LCA was signed told him to sign it or be fired. Further, as to the FMLA issue, the administrative judge incorrectly placed the burden on the agency to prove that it properly denied the appellant leave under the FMLA

and that "The record before us does not establish that the appellant requested FMLA leave for the absences upon which his August 15, 2003 proposed removal was based, nor that he provided the agency with notice that his unscheduled absences were necessitated by an FMLA-qualifying condition." The Board then addressed the removal for violation of the LCA, determined that the Deciding Official had considered the relevant Douglas factors and accorded deference to the agency.

Dias v. DHS (May 11, 2006) – The Board reversed the AJ, who had found the AWOL charge unproven, and instead sustained the charge and removal penalty against this Licensed Practical Nurse. This case involved an employee with an extensive history of discipline concerning leave and attendance, who was removed when she failed to return to duty after her most recent 14-day suspension for AWOL. While the AJ had found that the appellant failed to report for duty from November 18 to December 23, 2003, she determined that the agency had erred in denying the appellant's FMLA leave request. While the Board noted "that an employee may defend against a leave-related adverse action by presenting, on appeal, evidence of incapacitation for duty that was never submitted to the agency prior to the adverse action", it made clear that this standard was modified by the requirements of the FMLA (5 USC Section 6383(a)); that section permits an agency to "require" that a "request for such leave be supported by documentation from a health care provider . . . . [and] that [T]he employee must submit this documentation to the agency 'in a timely manner."' Because the Board concluded that "the agency had properly notified the appellant that she was required to submit evidence in support of

her FMLA leave request", her failure to do so, despite requests from the agency, meant that "evidence of her own health condition and that of her parents, submitted for the first time on appeal, should not be considered. . . . [and that] the agency's AWOL charge must be sustained." The Board then determined that the removal penalty, particularly in light of the appellant's record, was within tolerable limits of reasonableness.

Gray v. United States Postal Service, 97 MSPR 617 (October 22, 2004) – Board reinstated the removal of a Modified Clerk for improper conduct, reversing the AJ, who had mitigated to a 30-day suspension. The charge contained two specifications, "one pertaining to the appellant's alleged violation of medical restrictions limiting him to nine hours of work per day by working a second job at The Home Depot on certain days on which he worked a full tour of duty at the agency, and one pertaining to the appellant's working at his second job on ten days on which he took sick leave from the agency." The AJ sustained only the second specification, concluding that the appellant worked at his second job while on sick leave from the agency on seven of the ten charged dates but mitigated. The Board reversed, finding that all 10 charged dates were proven (the AJ had erroneously distinguished between dates that overlapped with the work schedule and the 3 dates that did not) and found that "the deciding official considered the Douglas factors most relevant to this case and that the agency reasonably exercised its management discretion. That the AJ weighed the Douglas factors differently from the agency provides no basis for mitigating the penalty. Accordingly, we find that the penalty of removal was within the tolerable limits of reasonableness."

Simien v. United States Postal Service, 99 MSPR 237 (July 15, 2005) – The Board reversed the AJ, who had sustained only a part of an AWOL charge (the part beyond 160 hours) and found EEO reprisal and instead determined that the full period of AWOL was proven (December 6, 2002, through February 14, 2003), that reprisal was unproven and that removal was a reasonable penalty. The appellant was employed by the agency as a letter carrier. The agency removed him effective June 12, 2001 but an EEOC administrative judge found that the removal was based on sex discrimination and reprisal, and ordered him reinstated with other relief, including 160 hours of restored leave. After the agency accepted that decision, it instructed the appellant to report for work, which he did but requested 160 hours of leave beginning that day. The agency approved 8 hours of leave for the day he reported but disapproved the appellant's request for leave following that date and instructed him to report for work the next day. The appellant failed to report as instructed, which led to his removal for AWOL for the period December 6, 2002, through February 14, 2003. In not sustaining the bulk of the AWOL, the AJ "found that the appellant was entitled, by December 5, 2002, to at least 160 hours of restored annual leave as a result of the EEOC decision on his discrimination complaint and that there was no evidence that the appellant 'had 'indispensable skills' or 'was a high-level official or performed key duties.'" The Board disagreed, noting that "the official responsible for approving or denying the leave relied in taking the latter action on a mistaken belief that the leave would be unpaid. Instead, testimony presented at the hearing shows clearly that the agency had a policy and practice of not scheduling leave in December and of granting leave during that month only for illness and emergencies." As to reprisal, the

Board first observed that "it is appropriate to bring the Board's approach to retaliation claims under 5 U.S.C. § 2302(b)(9) in line with its approach to discrimination claims. We hold that where, as here, the case has gone to a hearing and the evidentiary record is complete, an administrative judge (or the full Board) will not inquire into whether the action under review could have been retaliatory . . . whether the appellant has made out a "prima facie case" of retaliation, . . .or whether some other threshold of proof has been met so as to shift the burden to the agency. Rather, the inquiry proceeds to the ultimate question, which is whether, upon weighing the evidence presented by both parties, the appellant has met his overall burden of proving retaliation under section 2302(b)(9)." The Board disagreed with the AJ's finding that agency officials involved in the removal had a "strong motive" to retaliate (and, editorially, illustrates the way in which the Board is seldom deferring to an AJ's findings, if the result favors an appellant). Significantly, it also noted the AJ's reliance on the appellant's claim "that the agency had not fully complied with the EEOC judge's decision" (i.e., the appellant believed that "the agency should have assigned him to a regular route, rather than to the duties of an unassigned regular carrier; that it should have provided him with a new uniform before requiring the appellant to deliver mail; that it should have provided him with additional, more formal training regarding matters such as the procedures carriers were expected to follow and computers and other equipment they were expected to use; and that it should have ensured that he was licensed to drive postal vehicles."). Here, the Board determined that it was the employee's obligation "to first comply with the order and then register his complaint or grievance, except in certain limited circumstances in which obedience would

place the employee in a clearly dangerous situation or in which complying with the order would cause him irreparable harm" and that there was "no evidence that any failure with respect to that matter was based on retaliatory animus."

Attorney Fees

Augustine v. Department of Veterans Affairs, No. 04-3162 (Fed. Cir. November 15, 2005) – The attorney was still entitled to fees, even though not licensed in California, where services were provided. As observed by the Circuit, "Under these circumstances, the purposes of the fee-shifting statute can be served only by allowing fees for representatives who are licensed as attorneys in any state or federal jurisdiction, without regard to the state licensing requirements of the state in which services were rendered."

Carson v. Department of Energy (Feb. 23, 2004) – Because the two Board members could not agree, the AJ's decision denying attorney fees became the final decision of the Board. Interestingly, Acting Chairperson McPhie would have remanded instead, finding that while fees were not available for work spent on the petition filed in District Court, there were other matters such as those involving settlement negotiations through mediation and work done on the merits of the IRA appeals which may have been compensable.

Deshazo v. Department of the Air Force, Agency (December 9, 2005) – AJ's award of $7600.00 in attorney fees upheld, due to split decision. The Agency removed appellant from his Mechanic position at an air base for unauthorized use of a government vehicle. The AJ sustained the charge but mitigated the penalty to a 5-day suspension and then awarded $7600 in fees because the agency s action was clearly without merit. Chair McPhie would have denied fees because in his view " the agency proved its charge, and it had ample grounds for choosing the penalty of removal", so that the removal was not clearly without merit.

Hagan v. Department of the Army, 99 MSPR 313 (July 27, 2005) – The appellant, who received OWCP payments, was not entitled to attorney fees because the agency reinstated the employee (after an OWCP determination) and placed him on continuing leave without pay; under Sacco (and Buckhannon), the appellant was not a prevailing party.

Krape and Smyth v. Department of Defense, 97 MSPR 430 (September 29, 2004) - Attorney fees were warranted for these cases – one involving a mitigation of a removal to a 3 day suspension after proof of one of eight charges and the other involving a mitigation of a removal to a 15-day suspension after proof of two of eight charges. Specific findings in this case included that: 1) one attorney who initially represented the appellants by contingent fee agreement was entitled to fees at the rate of between $125.00 to 200.00 per hour (depending on the time period: 2) the law firm that completed representation by contingent fee agreement was entitled to fees at their customary billing rates of between $250.00 to $300.00 per hour; 3) enhancement in the hourly fee because of the delay in payment, in effect, constitutes a kind of interest and is not appropriately awarded against the federal government, which has not waived sovereign immunity as to such awards.

Kruger v. Department of Veterans Affairs, 95 MSPR 471 (Feb. 17, 2004) - The AJ erred in finding that attorney fees were warranted on the basis that the agency's reversed denial of a WIGI was "clearly without merit"; the case was "close" and the agency presented probative evidence in support of its charges, even though it did not prevail. The agency had denied the appellant's within-grade increase (WIGI) because of unsatisfactory

performance in two critical elements. On appeal, the AJ determined that the appellant's supervisors unreasonably required excessive meetings with the appellant that "were both unnecessary and unduly burdensome."; the appellant's performance "allegedly was only unsatisfactory based on the seemingly minor basis that she did not personally brief her supervisors, on virtually a daily basis, about activities in her division."; the appellant's division was operating well "notwithstanding her supervisors' disagreement concerning the amount of time necessary for briefings and 'communication.'"; and, the appellant's "minor" deficiencies and "isolated problems" did not warrant a finding that the appellant's performance was unacceptable. The AJ further denied the appellant's affirmative defenses. The Board denied the parties petitions for review. Thereafter, the AJ found that the appellant was a prevailing party and that an award of fees was in the interest of justice because the agency's action was "clearly without merit." and granted $73,931.26 in attorney fees and costs. The Board reversed. It first noted that the clearly-without-merit test for an award of attorney fees is based "upon of the result of the case before the Board, not upon evidence and information available to the agency at the time that it took the action"; the Board examines "the degree of fault on the employee's part and the existence of any reasonable basis for the agency's action"; and, just because an employee prevails does not mean automatic entitlement to fees. The Board then ruled that the AJ had erred "by concluding that, because the appellant was a prevailing party (i.e., because the agency did not prove its case), the appellant was automatically entitled to an award of attorney fees under the clearly-without-merit category. The AJ was required to conduct some analysis of whether an award of fees was warranted in the interest of

justice based on something more than the fact that the appellant was successful in her appeal." It further rejected the fee award on the basis of the "clearly without merit" category, determining that the case was "close and that "Although the AJ found that the agency improperly denied the appellant's WIGI, it is clear from his initial decision on the merits that this finding was substantially based upon his opinion that the agency's performance expectations were unreasonable, i.e., that the appellant's supervisors required too many meetings which he believed were not necessary. . . . The AJ's disdain for the agency's performance expectations is clear from the tone of his decision, particularly his inclusion of the word "communication" in quotation marks to imply that communication was not the agency's actual goal in setting its standards. . . . Significantly, however, the AJ found that the appellant did have "deficiencies" and "problems" in her performance. . . . The agency's perception of the appellant's communication problems was corroborated by a disinterested witness at the hearing, . . . and even by the appellant herself, who admitted that her relationship with her supervisors was adversarial . . . . Thus, the agency did present probative evidence in support of its charges, even though the agency ultimately did not prevail, so the agency's action cannot be seen to be clearly without merit."

Morrison v. National Science Foundation, No. 04-3247 (Fed. Cir. September 20, 2005) – Because the arbitrator changed his theory in denying fees, the Circuit reversed and remanded. The arbitrator reversed the appellant's indefinite suspension because it was imposed four months after the misconduct and even after the judicial adjudication. However, in

denying fees and finding that the appellant did not prove that he was "substantially innocent" or that the action was "clearly without merit or wholly unfounded", the arbitrator held that "in the existing literature respecting the use of the [indefinite suspension] mechanism by which the holding should have been anticipated, and I saw the case as presenting a close call."

Sowa v. Department of Veterans Affairs, 96 MSPR 408 (June 23, 2004) - The Board agreed with the AJ that the request for attorney fees were "padded" (the attorney had requested 1 million dollars) and agreed with the agency that new and material evidence – a fee award as to the number of hours expended in the precedential case, which resolved the instant issue – should be considered, and, on that basis, the Board remanded the case for a further reduction (the AJ had awarded $166,404.51 in attorney fees and costs). This case involved the issue of whether a "staff adjustment" constituted an appealable RIF. After some processing by the AJ, the case was dismissed pending resolution of that issue in a separate case, Von Zemenszky v. Department of Veterans Affairs, 80 M.S.P.R. 663 (1999). During the period that the appeal was inactive, the appellant participated in the Von Zemenszky appeal as an amicus. Once that case was decided in favor of that appellant, the instant matter was refilled, the ASJ advised the parties that he believed that Von Zemenszky required reversing the appellant's separation, held a hearing limited to the appellant's affirmative defenses of reprisal for engaging in EEO activity, and age, sex, and national origin discrimination, and then reversed the appellant's separation, concluding that the agency failed to comply with RIF regulations and that

the appellant failed to prove each of her affirmative defenses. Each party filed petitions for review, which were denied by the Board, after which the appellant filed a petition for attorney fees, requesting $1, 000,000.00 in attorney fees and costs. Based on numerous findings, the AJ reduced the fee award to $166,404.51 in attorney fees and costs for the work of 2 attorneys (a primary attorney, her brother, at $270 per hour, rather than the sought $375 per hour and $375 per hour for the contract attorney. Both parties petitioned for review by the Board. The Board agreed with the AJ that attorney fees were warranted in the interest of justice on the basis that the agency committed gross procedural error “by failing to follow the required RIF regulations, rejecting the agency's argument that fees were not in the interest of justice due to its alleged good faith belief that it was not required to invoke the RIF regulations to conduct its "staff adjustment.” The Board also agreed with all of the AJ’s fee reduction findings. These included that fees were not compensable for time spent on the grievance before the agency and on injunctive relief before the U.S. District Court, for time spent in the EEOC forum after appellant filed her Board appeal (but time spent pursuing discrimination issues in the EEO proceeding before her Board appeal was compensable), time spent on the amicus brief in Von Zemenszky as well as time spent preparing the appellant's unsuccessful cross petition for review. Additionally, the Board agreed with the AJ’s reduction of 30% of time claimed for discovery, due to counsel's "persistently violat[ing] orders designed to streamline the discovery process" and wasting time and that many of the claimed hours were padded. As to these latter findings, the Board observed, “We also find no reason to disturb the administrative judge's finding that the appellant's counsel padded hours. The administrative

judge found that counsel was inefficient and padded his fee request by billing an unreasonable number of hours, most of which were worked after he knew that his client would likely prevail and the agency would pay his fees. . . . The administrative judge added that, even though counsel was a 'newcomer' to employment litigation, justifying discounting his hourly rate, hours claimed were still excessive. . . . The administrative judge further found that the total amount of fees claimed was far out of proportion to the degree of success and that he remained 'convinced that [counsel's] total hours were padded. . . . . Finally, the administrative judge noted that, during discovery, counsel engaged in 'contumacious misconduct and conduct prejudicial to the administration of justice" and that, despite warnings, counsel "persistently violated orders designed to streamline the discovery process," thereby wasting time. . . . . We find that the administrative judge was in the best position to evaluate the quality of the appellant's counsel, that he imposed fair standards of efficiency and economy of time in assessing the reasonableness of the fee request, and that he properly cut requested hours for padding and inefficient work." (citations omitted). However, the Board disagreed with the AJ's award of fees for time spent pursuing unsuccessful EEO claims during the appellant's Board appeal or in other venues after filing her Board appeal." Finally, the Board agreed with the agency and considered the new and material evidence of the number of hours claimed by counsel in the Von Zemenszky case. The attorney fee request in Von Zemenszky showed that counsel spent "247 hours litigating his appeal before the Board, seeking approximately $38,000 for this time, while the appellant's counsel here seeks 392.4 hours of time just for his work on the amicus brief in Von Zemenszky." The AJ had

approved 604.6 hours of those claimed in the instant case. Thus, the Board concluded that "Because the fees requested and paid in Von Zemenszky are so far below the fees both requested and awarded here, we find that the fees here must be further scrutinized and reduced. We also find that the appeal must be remanded for determining the reduction because the administrative judge is in the best position to make this determination. . . . . On remand, the administrative judge should again scrutinize the fee award in light of this Opinion and Order and the fees in Von Zemenszky, and he should reduce fees in accordance with the procedures set forth in Smit, 61 M.S.P.R. at 619-20." (citations omitted).

Charge Framing

Allen v. USPS, No. 03-3275 (Fed. Cir. May 21, 2004) - As a "fundamental requirement of due process", an employee must be notified of the conduct, with which he is charged in sufficient detail to permit him to make an informed reply. The agency charged the appellant with misuse of Postal Service funds (involving the failure to pay a government credit card debt, despite receiving money for relocation), which was the charge sustained by the AJ. However, as noted by the court during oral argument before it, the agency's representative, consistent with the implication in the letter of decision, asserted that the appellant would not have been removed if he had given the agency the documentation showing that he had actually paid the credit card charges earlier than it believed. The court therefore found that there was a question as to whether the removal really was for the charged conduct or instead for failing to be forthcoming and cooperative with the agency in its investigation of the matter of the cancellation of the charge card. The latter was conduct with which he was not charged. Under these circumstances, the court concluded that the Board should conduct further proceedings to determine if the agency complied with due process.

Daigle v. Department of the Air Force (October 21, 2004) – The AJ wrongly construed the charge of failure to maintain a valid driver's license, a condition of employment, to include an element of the charge that the appellant could not function effectively in his position without maintaining a valid driver's license. In reversing the Board noted that the proposal contained three relevant paragraphs and only the third, which "discusses

nexus and the appropriate penalty" stated that, "because the appellant no longer had a valid driver's license, he could not function effectively in his position." The Board then found removal sustained based on its construction of the charge.

Yinat v. Department of the Army (November 18, 2005) - The Board disagreed with the AJ, who had reversed the agency action because the agency, under Mason v. Department of the Navy, 70 M.S.P.R. 584 (1996), failed to "adequately inform [the appellant] of the allegations against him." In disagreeing, the Board noted that the appellant appeared to understand the charges as evidenced by his pre hearing submissions and arguments during the hearing. The Board remanded for the AJ to determine whether the appellant was served with the notice and if there was no due process notice violation, whether the agency proved its charge and penalty.

Computer Misuse Charges

Heaggans v. DOD (Feb. 24, 2006) – With Chairman McPhie dissenting, the Board upholds the AJ's decision finding that the agency had not proven either of its charges against a supervisor, i.e., (1) that the appellant made an inflammatory, religious-based statement to her subordinates and (2) violated the agency's Internet and Electronic Resources Acceptable Use Policy by sending an e-mail that reflected adversely on the agency. The agency demoted the appellant from GS-8 Military Pay Supervisor to GS-7 Military Pay Technician based on two charges of misconduct, both of which arose from an e-mail she sent to her subordinate employees on September 19, 2003, stating that the message was important and would give them "something to think about over the weekend." The e-mail stated as follows: "Subject: Eagle This is something to think about! Since America is typically represented by an eagle, Saddam should have read up on his Muslim passages . . . The following verse is from the Quran (the Islamic Bible). Quran (9:11) – For it is written that a son of Arabia would awaken a fearsome Eagle. The wrath of the Eagle would be felt throughout the lands of ALLAH and lo, while some of the people trembled in despair, still more rejoiced; for the wrath of the Eagle cleansed the land of Allah; and there was peace. Note the verse number!!!"

Quillen v. Treasury (May 24, 2004) – Removal not mitigation was appropriate for proof of a charge that the appellant misused government equipment and another charge of misuse of official government time. The appellant was removed from his GS-0334-13 Computer Specialist position

for 2 charges, misuse of government office equipment, with three supporting specifications, and misuse of official government time. These charges concerned the appellant's viewing pornography on government time and using government provided internet, e-mail, and telephone service inappropriately for non-work related purposes (i.e., running a private business). Although the administrative judge sustained both charges, she found specification three of the first charge unproven (because it only involved limited use of government computer to copy commercial business computer files from one floppy disk to another floppy disk). Based on proof of only two of the specifications of the first charge, the lack of prior discipline and a superior work record, the AJ mitigated to a 90-day suspension. On review, the Board first found that specification three was proven. That specification stated, "Despite receiving a direct order in April 2002 to cease and desist from any misuse of Government property, you have continued to use the Government office equipment to support your private commercial business." However, the AJ accepted the appellant's testimony that the agency's evidence only showed that he had copied his commercial business computer files from one floppy disk to another floppy disk using his government computer during that time period. Because the agency permitted "limited personal use" of government property when such use involved minimal additional expense to the government and did not overburden any of the agency's information resources, the AJ correspondingly found that this use of government equipment was insufficient to support the agency's third specification. In reversing this finding, the Board held, as follows: "We do not agree with this finding regarding the appellant's admitted misuse of his government computer in

support of his commercial business following the agency's April 2, 2002 directive that he immediately cease and desist his alleged misuse of government property and use of public office for private gain . . . . Treasury Directive 87-04, upon which the AJ relied in finding that the appellant's admitted use constituted authorized '[l]imited personal use,' provides, in part, that '[e]mployees are specifically prohibited from the pursuit of private commercial business activities or profit-making ventures using the government's office equipment.' . . . Moreover, regardless of Treasury Directive 87-04, the appellant was directed in the agency's April 2, 2002 memorandum immediately to cease and desist his misuse of government property and use of public office for private gain. . . We find that the agency's evidence, when coupled with the appellant's admitted use of his government computer in support of his commercial business following the agency's April 2002 memorandum, was sufficient to sustain the agency's third specification in support of its first charge and that the AJ erred in finding to the contrary."(citations omitted). Concerning penalty, the Board observed that the agency penalty determination was entitled to deference ("Where, as here, all of the agency's charges and specifications are sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness."). It then noted "In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated. In that regard, the Board found that "appellant's own admissions during his OIG interview established

the seriousness of the charged misconduct, the fact that the misconduct was knowing and intentional, and the fact that the misconduct was on-going for an extended period of time. . . . The appellant admitted that he knew that using his government computer for the purpose of viewing pornography on government time was prohibited, but he did it anyway. . . . He admitted to using government provided internet, e-mail, and telephone service inappropriately for non-work related purposes, and he admitted to knowingly falsifying his timesheets as a result of his running his private business interest during work hours, such that he "stole" an estimated $63,106.77 in salary. . . . Further, the appellant's hearing testimony established that, even after the agency's April 2, 2002 memorandum ordering him immediately to cease and desist his alleged misuse of government property and use of public office for private gain, he continued to use his government computer to copy his commercial business files. . . We find that the appellant's admissions and the circumstances of this case show that the appellant's misconduct was serious, intentional, repeated, and directly related to his duties, position, and responsibilities as a Computer Specialist." (citations omitted). The Board also rejected the factors relied on by the AJ to mitigate, to include that the appellant had no prior disciplinary actions on his record, with the Board finding "this fact to be of little weight here, however, because the notice of proposed removal indicates that the appellant had been previously counseled regarding his personal use of government office equipment and the deciding official considered the clarity with which the appellant was on notice of the impropriety of such conduct, as well as his lack of a prior disciplinary record." And, with regard to the appellant's superior or outstanding performance ratings during his ten years of service

with the agency, that he would assist others in troubleshooting problems, and that he cooperated with the OIG investigation and stopped his improper use of his government computer following the agency's April 2002 memorandum ordering him to cease and desist, such activity did not evidence that he had potential for rehabilitation; the appellant had been previously counseled regarding his improper use of government equipment for his personal use, the agency issued him an April 2, 2002 memorandum ordering him immediately to cease and desist from his misuse of his government equipment and use of public office for personal gain following the appellant's admission of his serious on-going misconduct during the OIG investigation, and the appellant, nonetheless, admitted to using his government computer subsequently, to copy his private business computer files. Additionally, the Board noted (as to potential for rehabilitation) that the appellant attempted unpersuasively to recant his March 14, 2002 sworn admissions to the OIG during his hearing testimony.

Von Muller v. DOE (Feb. 13, 2006) – The Board reversed the AJ, who had mitigated a removal to a 90 day suspension and reinstated the removal for proof of charges related to the sending of sexually explicit e-mails from his agency e-mail and related offenses. The appellant was employed for over 21 years with the Bonneville Power Administration (BPA), a federal power marketing agency. At the time of this action, he occupied the position of Economic Development Account Executive, GS-14, in Spokane, Washington, a position that he had “to foster relationships between BPA and regional economic development entities.” Following the disclosure of e mail messages sent by the appellant on a high level manager’s computer

(including depictions of fully nude women), the agency removed the appellant for (1) Conduct Unbecoming a Federal Employee; (2) Misuse of Government Resources; (3) Failure to Follow Supervisory Instruction; and (4) Failure to Follow Written Policy and Instructions, "all related to his alleged use of his government computer to view and send sexually explicit or otherwise inappropriate materials, and his actions upon learning of the investigation into such conduct at the agency." While 18 employees were disciplined after the investigation, only one other was removed. The administrative judge sustained charges 1, 2, and 4, and mitigated the penalty to a 90-day suspension, finding that the agency decision was not entitled to deference and that the agency had treated the appellant disparately. The Board disagreed with the AJ as to charge 3 (the appellant's supervisor alleged that in a telephone conversation with the appellant, "she informed him that he was being investigated, and then specifically told him not to share the conversation with anyone. She further alleged that the appellant violated this instruction by sending emails notifying BPA employees that their computers might be monitored."). Here, it determined that the specific limits of what the appellant was told not to talk about were unclear, under the interpretation of either the appellant or the supervisor who gave him the instruction, he did not comply. As to penalty, the Board first agreed with the AJ that the agency was not entitled to deference First, it noted that the deciding official had erroneously "based his penalty determination in part on allegations of misconduct that were not included in the proposal notice—in particular, the appellant's subsequent decision to solicit letters from friends and constituents in opposition to his proposed removal." (The Board quoted the deciding official, as follows: "You first embarrassed the agency when

you sent sexually explicit emails to individuals outside the agency. You have further embarrassed the agency by soliciting written responses from the public to me. Mr. B_____ N_____, Mr. C_____, Mr. W_____ S_____ and someone with the initials of NZ are now questioning our actions in relation to this matter. You continue to use extremely poor judgment."). Thus, the Board determined that "It is error for an agency to rely on matters affecting the penalty it imposes without including those matters in the proposal notice.", thereby allowing the Board to "remedy such an error on appeal by performing its own analysis of the reasonableness of the penalty." (Editor's note: while the Board has accurately stated the case law, this case was unusual in that the aggravating factor (i.e., letters soliciting support from the public), could not have been cited in the proposal because it happened after the proposal was issues.) In not according deference, the Board also determined that the deciding official misjudged the appellant's rehabilitative potential, testifying inaccurately that the "appellant's responses to the proposal notice offered only 'hedged admissions' of his behavior, gave 'no assurance of non-repetition,' and displayed 'no significant remorse.'" Instead, it concluded that the "appellant's potential for rehabilitation was at worst neutral, and should not have been considered as an aggravating factor." Nonetheless, the Board, in performing its own Douglas analysis, determined that the removal penalty was within the bounds of reasonableness. Significantly, it disagreed with the AJ as to disparate treatment, noting that "we do not find it relevant whether . . . [the deciding official] was correctly advised of the other disciplinary actions resulting from the investigation. To prove a disparate treatment claim with regard to the penalty for an act of misconduct, an appellant must show that a

similarly-situated employee received a different penalty. *Wentz*, 91 M.S.P.R. 176, ¶ 22. The comparator employee must be in the same work unit, have the same supervisors, and the misconduct must be substantially similar. *Id*. With the exception of H_____, who was also removed, no other target of the agency's investigation was in the appellant's work unit. . . . Thus, . . . [the deciding official] had no obligation under *Douglas* to consider the consistency of the appellant's removal with other disciplinary actions arising from the investigation."

Credit Card Misuse Charges

Brown v. Army (May 28, 2004) – The Board reversed the AJ, who had mitigated a removal for a credit card abuse charge, to a 60-day suspension, and reinstated the removal. The appellant worked as a WG-7 Materials Handler at Ft. McPherson, Georgia. He was removed for "unauthorized use of [his] Government Issued Travel Card, and failure to observe a written order, rule, or procedure." On appeal, the AJ found that the agency proved that the appellant committed unauthorized use of a government credit card. The evidence showed that the appellant made 67 unauthorized charges between February 21 and May 9, 2003; that, as of May 2003, he was over 60 days late in paying $61.50; and that he had a balance of $1,247, mostly for unauthorized charges. Nonetheless, the AJ mitigated to a 60-day suspension. Giving deference to the agency decision, the Board reversed the AJ, and reinstated the penalty. It found that the misconduct was serious (we consider" first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or frequently repeated"), noting, as testified to by the deciding official, that the appellant misused his credit card at least 67 times, he allowed his account to remain delinquent for an extended period of time, and he had still not paid off the bill when the DO made the decision to remove him. The Board also agreed with the deciding official that appellant was in a position in which he was responsible for handling and managing property of value and that the offense involved misuse of property, i.e., government funds (the AJ had found that the DO improperly viewed the appellant as having a fiduciary relationship but the

Board found that the deciding official had not said that). Further, even though the DO noted that the appellant's length of time as a government employee, including as a supervisor, meant that "he should be well aware of the rules," this did not establish that the DO considered the appellant's length of service to be an aggravating factor (as the AJ had concluded) and the DO later testified that he considered the appellant's long tenure of service and the tensions and stress of his position to be mitigating factors. Additionally, as testified to by the DO, the appellant did not show remorse for his admitted misconduct and did not exhibit potential for rehabilitation (The AJ had found that the appellant had been honest from the beginning about his unauthorized expenses and acknowledged that his actions were wrong), with the Board noting that "When asked whether it was a violation to use the travel card for personal expenses, however, the appellant testified, '[i]t's a violation if they catch you.'" Moreover, the Board found that the DO did not err by declining to view the appellant's personal problems to be mitigating circumstances (divorce, eviction, and bankruptcy). Finally, the DO testified that he considered lesser penalties, including a suspension but because the appellant had already been suspended for 60 days, he believed that a suspension was insufficient to deter similar conduct in the future.

Casteel v. Department of the Treasury, 97 MSPR 521 (September 30, 2004) – The Board reversed the AJ, who had mitigated the removal of a GS-08 Tax Examining Assistant with the Internal Revenue Service for "failing to make timely financial restitution on her government-issued credit card (appellant was more than 211 days delinquent in paying $544.16 due on her government travel credit card as of November 6 and did not make full

restitution of the outstanding balance until November 21, 2001) and making a false or misleading statement in a matter of official interest (appellant falsely responded to a question she was asked during the investigation of the first charge; when asked by her supervisor "if this was the first incident of outstanding balances due on a government issued credit card", she responded in the affirmative, although she had been suspended in 1999 because she had failed to timely pay a balance). At the appellant's oral reply, she admitted each of the charges,. While the charges were undisputed, the AJ mitigated to a 60-day suspension. The AJ determined that the deciding official misunderstood the charge, considering it to be "misuse of a government credit card." The AJ also observed that the debt was completely paid approximately six months prior to the notice of proposed removal but that the DO considered that appellant did not pay the debt on her credit card. Moreover, the AJ determined that the DO had failed to give appropriate consideration to the relevant Douglas factors, “specifically noting that she had not certified an agency document indicating that she had reviewed them. “ The AJ also observed that, despite significant mitigating circumstances, the DO had failed to consider any penalty less severe than removal. The Board disagreed, finding that the agency decision was entitled to deference. And while the DO may “have forgotten to sign the document listing the Douglas factors, we find this omission to be a meaningless oversight, particularly in light of her testimony that she had, in fact, reviewed it.”

Quarters v. Department of Veterans Affairs, 97 MSPR 511 (September 30, 2004) - The Board reversed the AJ, who did not sustain the unauthorized use of a government credit card charge; instead, the Board upheld the charge as

well as the 30 day suspension. The employee had argued successfully before the AJ that ”he had pulled the wrong card from his wallet by mistake, and was unaware that he had used the government card until February 6, 2003, when he received the bill from Citibank.” However, the Board observed that “the general rule is that an agency is not required to prove intent to sustain a charge of unauthorized use of government property . . . Because the appellant admits that he purchased the tires on his government credit card, the charge is sustained.” As to penalty, the Board first recognized that “Although intent is not an element of the charge, the accidental nature of the appellant's behavior is a mitigating factor.” Nonetheless, the Board found “that the agency did not abuse its discretion in suspending the appellant. Misuse of a government credit card is a serious offense.”

Disability Discrimination

Boots v. Potter, Postmaster General, United States Postal Service (Special Panel June 23, 2005) - In a 2-1 vote, with MSPB Chairman dissenting, the Special Panel found that the EEOC decision on in this case, which concerns the defenses available under the Rehabilitation, is based on discrimination law, and, on that basis, defers to the EEOC's decision; in that decision, the Commission determined that the agency committed disability discrimination by failing to do an individualized assessment as to risk of harm and excluding the complainant, an epileptic, based on a non binding DOD regulation. The employee worked as a Tractor-Trailer Operator for the agency since 1998. He was removed in 2002 for inability to perform his job duties after Department of Transportation regulations were changed to disqualify individuals who take anti-seizure medications from holding a Commercial Drivers' License (CDL), which was necessary to work as a Tractor-Trailer Operator. The Board sustained the removal action and rejected the appellant's allegation of disability discrimination, finding that the appellant was not a qualified individual with a disability because he could not meet the qualification standards for his job. In its decision, the Commission first observed that the agency had voluntarily adopted the DOT regulations at 49 C.F.R. § 391.41(b)(8), which otherwise specifically exclude transportation performed by the Federal government. Under those regulations, a person may operate a heavy vehicle if he or she "has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle." In an accompanying "medical

advisory", it was recommended that anyone who has had a non-epileptic seizure should be evaluated on an individual basis but also recommends disqualification of a person who currently takes anti-seizure medication. The Commission then held that because the appellant was disqualified from operating a commercial motor vehicle (i.e., a class of jobs) he was an "individual with a disability" under the Rehabilitation Act. The Commission went on to address the matter of whether the appellant was a "qualified individual with a disability", noting that the agency may require, as a qualification standard, that an individual not pose a "direct threat," that is, a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. The agency bears the burden of proof on that issue, and that burden is not met merely by the employer's subjective evaluation, or "except in cases of the most apparent nature, merely on medical reports." The Commission further observed that an agency makes a "direct threat" determination, under 29 C.F.R. § 1630.2(r), by conducting an individualized assessment of the risk he or she presents. taking into account the duration of the risk, the nature and severity of the potential harm, the likelihood harm will occur, and the imminence of such harm. Evidence relevant to that assessment may include input from the employee, his work history, and medical opinion from experts or physicians familiar with the employee's condition. In that regard, it was relevant that prior to his removal, the appellant had possessed a valid CDL for many years, and he continued to hold one. He used anti-seizure medication, had a problem-free history with the agency, and his personal physician certified that he was qualified to operate a commercial motor vehicle. In any event, the Commission found that the agency here had not performed such an

assessment and had relied solely on the DOT regulation, with which it was not required to comply. Because it differed with the MSPB, the Commission referred the case back to the Board for further consideration and issuance of a new decision. Upon referral, "the Board concluded that the USPS was entitled to adopt the DOT standards and once it had done so, it was required to comply with them – thereby making the standards binding on the USPS in the same way that they would apply to a non-government employer." Stated another way, in the MSPB's view, the USPS could rely on the regulations and disqualify the employee solely on the basis if the DOT regulations and without making a direct threat determination. This disagreement between the MSPB and the EEOC necessitated the instant Special Panel decision, in which the Special Panel sided with the EEOC.

Hughes v. Department of Labor (June 6, 2005) – Board sustained the arbitrator's decision upholding the appellant's removal for physical inability to perform and rejecting her disability discrimination claim. The agency removed the appellant from her position as a GS-12 Technical Information Specialist for physical inability to perform the duties of her position. She alleged that she had multiple chemical sensitivity and electromagnetic field sensitivity, both of which prevented her from using a computer. The Board first noted the agency burden, requiring it to prove that there was "a nexus between his medical condition and observed deficiencies in his performance or conduct, or a high probability of hazard when his condition may result in injury to him or others because of the kind of work he does." The Board concluded that the arbitrator applied the appropriate standard and that the agency proved that the appellant had a debilitating medical condition that

affected her ability to use the computer, an essential function of her job. As to the disability discrimination, finding the Board agreed with the result but modified the analysis. It concluded that the appellant was not a qualified individual with a disability because she could not perform the essential function of computer use.

Otterstedt v. United States Postal Service, 96 MSPR 688 (Aug. 19, 2004) - The Board reversed the AJ, who had found disability discrimination retaliation; the appellant did not prove that he was an individual with a disability and the evidence as to the seriousness of the appellant's alleged misconduct that was before the deciding official – even though the demotion was sustained - was sufficient to outweigh a motive to retaliate against the appellant. The agency demoted the appellant from a EAS-16 Customer Services Supervisor, to a WG-5 Part-Time Flexible Clerk, based on a charge of Unsatisfactory Work Performance with two specifications Failure to Follow Instructions; and Unprofessional Conduct. On appeal, she contested the charge and raised defenses of disability (major depressive disorder and generalized anxiety disorder), as well as retaliation for prior EEO activities. On October 2, 2003, the AJ found that the agency failed to prove its charge, reversed the appellant's demotion and also found that the appellant proved disability discrimination and retaliation. The agency, in its petition for review, accepted the reversal of the demotion but challenged the findings of disability discrimination and reprisal. First, it asserted that on September 19, 2003, the EEOC issued a decision that found that the appellant failed to prove the same claims of disability discrimination and retaliation at issue in this appeal and that the decision collaterally estopped the AJ's

determination, or alternatively, should be accorded deference. The Board disagreed, found that the EEOC decision was that the appellant had not proven harassment based on a hostile work environment in violation of Title VII and "did not address whether the appellant was a qualified disabled employee . . . . whether the agency's alleged conduct could have been retaliation under the circumstances or whether there was a genuine nexus between the alleged conduct and the appellant's prior EEO activity. . . . Accordingly, the agency has failed to meet the first prong of the test for collateral estoppel, [The issue previously adjudicated is identical to that now presented] and, accordingly, we deny its request to vacate the ID's discrimination and retaliation determinations on that basis." It further found that the EEOC's findings were not entitled to deference, either, because the "findings did not involve the same issues of disability discrimination and retaliation for prior EEO activities raised by the appellant, and adjudicated by the AJ, in this appeal." In reversing the merits of the discrimination findings, the Board determined that while the appellant's "sleep, anxiety, concentration and stomach problems, along with her depression, nausea and headaches, affected her ability to work", the medical evidence did not establish that she was "restricted in her ability to perform either a class of jobs or a broad range of jobs, or that the agency regarded her as being so restricted. Rather, the evidence indicates that, to the extent she was unable to work, she was unable to work in what she perceived to be a hostile work environment based on alleged harassment and retaliation by [a co worker] . . . . To the extent that the appellant alleged she could not work with a particular coworker, . . . that is not enough to show that she was "substantially" limited in the major life activity of working." Finally, the

Board addressed and reversed the AJ's retaliation finding. The Board first observed that the AJ relied on the deciding official's testimony that "he did not consider that prior to working for . . . [the Postmaster] the appellant had worked for many years without any discipline because he believed that her prior postmasters were intimidated by her tendency to file EEO complaints constitutes direct evidence of reprisal discrimination", a statement which the AJ determined was "improperly retaliatory and an impermissible reaction to the appellant's prior use of the EEO process." The AJ also concluded that, "because the agency failed to prove both specifications underlying its charge, the demotion action was pretextual, and the appellant proved that the agency's motive to retaliate was the dominant reason for her demotion." In disagreeing, the Board held that the failure to prove charges was certainly not per se evidence "that any motive to retaliate outweighed the gravity of the charged misconduct." After a careful review of the evidence considered by the deciding official, the Board concluded "that, although the agency did not prove its charge by preponderant evidence, the evidence of the seriousness of the appellant's alleged misconduct before . . . [the deciding official] at the time he decided to demote the appellant was sufficient to outweigh a motive to retaliate against her."

Disrespectful Conduct Charges

Coldiron v. Environmental Protection Agency, No. 04-3222 (Fed. Cir. January 18, 2005) – Circuit upholds Board and AJ decision affirming removal of an Attorney/Advisor "for disrespectful conduct towards a supervisor and for making inaccurate, misleading, or disrespectful statements regarding a supervisor." The noticed conduct principally involved e-mails to a supervisor, which referred to the supervisor's claims as "bizarre" but can mostly be characterized as accusatory, sarcastic and patronizing.

Grainger v. SSA, No. 04-3303 (Fed. Cir. Jan. 5, 2005) (NP) – The court agreed with the Board and sustained the agency's 30-day suspension of an Insurance Claims Examiner for "inappropriate and disruptive behavior in the workplace, uncooperative behavior toward her supervisors, failure to follow instructions, and abuse and misuse of office materials."

Drug – Related Charges

Ivery v. DOT (May 10, 2004) – The Board reversed the AJ and set aside the appellant's removal for adulteration of a random drug test on the basis that the agency failed to prove its charge and committed harmful procedural error by not complying with the provisions of the Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11970 (Apr. 11, 1988), and the Omnibus Transportation Employee Testing Act, Pub. L. No. 102-143, 49 U.S.C. § 45101 et seq., which added split-specimen (or "split-sample") drug testing to FAA employees. The appellant was employed by the Federal Aviation Administration as a FV-I (FG-13) Airway Transportation Systems Specialist in Fort Worth, Texas. On November 7, 2001, the appellant was selected for a random drug test performed by the Northwest Drug Testing Division (NDT) of Northwest Toxicology, Inc., and produced a urine sample in which the presence of chromium, a recognized "adulterant" or drug-masking agent, was detected. When the appellant provided his urine sample, it was a split collection, divided into two bottles, Bottle A and Bottle B; however, NDT tested only Bottle A. Through his then-union representative, the appellant requested that a split-sample test be performed on Bottle B. The agency's Medical Review Officer (MRO) denied his request, claiming that the Department of Transportation (DOT) did not permit split testing "in cases of adulteration." The agency then removed the appellant based upon a charge of "Adulteration of a drug test." As stated by the Board "DOT Order 3910.1C provides that the split-specimen procedures set forth by 49 C.F.R. part 40 'must be used for all drug testing of DOT employees and applicants for the test to be valid.' . . .

The agency's own rules and regulations dictate that its failure to afford the appellant the right to pursue split-specimen testing following his positive test result for adulteration rendered the agency's drug testing of the appellant's urine invalid. . . . Thus, the sole charge underlying its removal action, which is based on the appellant's positive test for adulteration, cannot be sustained. . . . Additionally, the Board held that Moreover, the Board found that the agency's split-test failures constituted harmful procedural error.

Coleman v. Department of Defense (December 8, 2005) - the Board held that even though the Administrative Judge did not sustain the alcohol consumption on duty charge, the agency did not indicate that it wanted a lesser penalty if fewer than all of the charges were sustained and that therefore the administrative judge improperly remanded the appeal to the agency for a new penalty determination. Moreover, the Board determined that removal was within tolerable limits of reasonableness for either of the sustained charges and reinstated the removal. The Agency removed the appellant from his position as a Heavy Mobile Equipment Repairer based upon charges of (1) possessing illegal substances (marijuana) on a military base, (2) drinking alcohol during duty hours, and (3) violating the agency's Security Regulation requirements (i.e., agency security officers found a loaded Ruger .357 magnum revolver in the appellant's car and seized from the appellant two knives that exceeded the permitted maximum blade length of three inches. The administrative sustained the marijuana possession charge but did not sustain the alcohol charge because appellant had consumed the alcohol during his lunch break, which was not during duty

hours. The AJ sustained the third charge based on the appellant's possession of the loaded revolver but determined that the agency failed to prove that the knives seized from the appellant had blades exceeding the three-inch limit/ because the deciding official stated that he would have to "review [his] consideration" if the knives were not prohibited, the administrative judge remanded the matter to the agency for a new penalty determination.

Thomas v. USPS (May 25, 2004) – The Board reversed the AJ, who had sustained the charge - “unauthorized absence from assignment/outside the building without official authorization,” gaining remuneration for work he failed to perform, use of marijuana while on the clock in an official capacity, and illegal drug use - but mitigated the penalty to a 120-day suspension, and the Board instead reinstated the removal penalty. The appellant worked as a PS-6 General Expediter. The evidence as to the charge is that on January 9, 2003, Postal Inspectors conducted surveillance of agency employee A. Harris, saw the appellant enter Harris’s vehicle and smoke what appeared to be a marijuana cigarette, and detained and interviewed the occupants of the vehicle, including the appellant. During the interview, the appellant admitted that he had been smoking marijuana and had purchased a $20 bag of marijuana from Harris, while in the vehicle. The appellant also admitted that both he and Harris were on official duty – later recanted - when the drug transaction occurred, and that he had purchased marijuana from Harris on at least three different occasions in the prior 6 months while inside Harris’s vehicle, outside his place of work, while on duty. The appellant surrendered the bag of marijuana he had purchased from Harris, and the Inspectors found a second bag of marijuana during a search of the appellant’s vehicle.

Laboratory tests showed that both bags contained marijuana. Based on that evidence, the AJ sustained the charge. However, the AJ mitigated the agency penalty on the basis that the appellant showed potential for rehabilitation and that the case law supported mitigation, apparently concluding that the agency's decision was not entitled to deference because the deciding official improperly relied upon the appellant's uncharged misconduct of purchasing and using marijuana on duty more than once in determining that removal was the correct penalty. The Board first made clear that "a deciding official may consider uncharged similar misconduct in determining a penalty where the agency gave the appellant clear notice that it was relying upon that uncharged misconduct. [and that] . . . . Here, the notice of proposed removal advised the appellant that the agency was considering his admission that he had previously purchased and used marijuana on duty on agency premises [and] The appellant had the opportunity to respond to this allegation, and the deciding official testified that the appellant admitted to her that he had purchased and smoked marijuana three times while on the clock." Thus, in the Board's view, "It was not improper for the deciding official to consider this uncharged misconduct in removing the appellant." Nonetheless, because the appellant recanted his admission, the AJ should have but did not resolve the dispute as to whether the uncharged conduct (i.e., the purchase and use of marijuana on duty in the past) was proven. The Board resolved that issue in favor of the agency, applying the Hillen standards, and finding that a Postal Inspector testified that the appellant admitted to him in interviews on January 9 and 13, 2003, that he had repeatedly purchased marijuana from Harris, strongly implying that it was on duty, and that the deciding official testified that the

appellant admitted to her that he had purchased and smoked marijuana three times while on the clock. In any event, the DO testified that, "if the appellant had only purchased and smoked marijuana on duty and returned to the building impaired on one occasion, she would have removed him." As to penalty, the Board observed that the agency has primary discretion in maintaining employee discipline and efficiency, that the Board will not displace management's responsibility in this respect, but will instead ensure that managerial judgment has been properly exercised and that mitigation of a penalty by the Board is only appropriate where the agency failed to weigh the relevant factors or the agency's judgment clearly exceeded the limits of reasonableness. In that regard, as to the administrative judge's finding that the appellant showed potential for rehabilitation because he enrolled in a drug rehabilitation program, the Board stated that the AJ "neglected to consider that the appellant only enrolled in the program after the agency caught him using illegal drugs on duty and that he failed to complete the program . . . . Moreover, because the deciding official considered mitigating factors, it was improper for the administrative judge to independently weigh them." (citation omitted). The Board then noted that it has consistently upheld removals as promoting the efficiency of the service for both the purchase and use of illegal drugs at work, especially where the work performed under the influence of such substances could endanger the safety of others; that the deciding official testified "that the appellant was in a position of trust because Expediters worked on their own with little supervision and were responsible for ensuring that the mail was directed to the proper destinations"; that the appellant worked with heavy equipment in a mechanized and automated industrial environment (He was responsible for

moving equipment that weighed between 245 and 600 pounds on a floor crowded with other employees and equipment.); and, that if he were impaired by drug use, he could injure himself or other employees.

Due Process Issues

Alvarado v. Department of the Air Force, 97 MSPR 389 (September 28, 2004) – The Board disagreed with the AJ, who had found that charges failed to meet the minimal due process and constituted harmful procedural error because the proposal did not provide sufficient detail to allow the employee to make an informed reply and instead remanded, finding that the attachment to the proposal was sufficient to cure any notice defects. The employee had been removed for charges of "insubordinate defiance of authority and failure to comply with minimum standards of conduct as demonstrated by [his] careless workmanship, certification of inaccurate information on inspection checklists and misuse of government equipment."

McCollum v. National Credit Union Administration, No. 05-3015 (Fed. Cir. August 3, 2005) - The court reversed the Board and found instead that because the agency issued a proposal but never issued a removal decision, the "removal" was not in accordance with law. Further, "because the Board erred in concluding that denying an employee work duty status pending a removal was not a personnel action within the meaning of 5 U.S.C. § 2302(b)(2)(A), we reverse that determination and remand for adjudication of McCollum 's Whistleblower Protection Act claim based thereon in a manner consistent with this opinion."

Ethics-Related Charges

Celaya v. DHS, 100 MSPR 314 (October 13, 2005) - Due to split Board decision, the AJ's decision reversing the appellant's removal became final. The agency removed the appellant from his GS-11 Customs Inspector position with the agency's Bureau of Customs and Border Protection, based on two charges: (1) Associating with an individual suspected of criminal conduct; and (2) poor judgment. The first charge alleged that appellant continued to co-own a convenience/liquor store (Noño s) in Mexico even after he became aware that his business partner, D.G., was considered a fugitive by U.S. authorities because of D.G. s alleged attempted drug smuggling. The second charge alleged that the appellant improperly participated in the inspection of a vehicle driven by D.G. s father / the AJ, based largely on credibility determinations, found the charges unproven. Chairman McPhie would have sustained the agency's action, disagreeing with the AJ's credibility findings on the first charge.

James v. Dale, No. 03-3030 (Fed. Cir. Jan. 26, 2004) – The Circuit reversed the arbitrator, who had found that the agency did not prove its charge of "associating with a known or suspected law violator." Instead, on petition by OPM, the Circuit found the charge against a Border Patrol Agent proven, even though the woman associated with – he allowed her to move into his home - had not been convicted and even though the appellant may not have subjectively believed that she was a "suspected" law violator. In the Circuit's view, the arbitrator had erroneously substituted his own charge, requiring a conviction. Additionally, the standard was not a subjective one

but an objective one, that is, would a disinterested observer with knowledge of the essential facts known to or reasonably ascertainable by the employee reasonably conclude that the associate of the employee was a suspected law violator. Based on the sustained charge, the circuit found removal reasonable, noting that while the conduct was off duty that "Associations between border patrol agents and suspected criminals, especially those suspected of felony drug offenses, undermine the public's confidence in the agency's ability to fulfill its mission."

Moore v. Equal Employment Opportunity Commission, 97 MSPR 684 (November 24, 2004) - The Board sustained the removal of an EEOC investigator for conduct unbecoming, which concerned behaving "in a manner that caused members of the public to believe she was biased in favor of the charging party, "disclosing confidential information concerning the investigation", "unfairly criticizing "coworkers to members of the public", providing "the charging party with an unsigned draft letter of determination", and, informing a "respondent that she planned to 'recommend a violation.'" In turn, the EEOC upheld the Board decision at EEOC No. 03A50010 (May 12, 2005).

Neal v. Department of Justice, No. 04-3093 (Fed. Cir. December 30, 2004) (NP) – The Circuit affirmed the removal of an Intelligence Analyst by the DEA for providing sensitive information to an outside attorney. The court rejected the two primary arguments made by the appellant: "(A) the materials and information she furnished to Abraham were protected against disclosure by the attorney-client privilege, and DEA and the Board therefore erroneously relied upon them; and (B) both the DEA and the Board

committed harmful procedural error by refusing to extend filing deadlines to accommodate her medical condition and by failing to provide her with documentation she needed to refute the charges against her."

Sher v. Department of Veterans Affairs, 97 MSPR 232 (September 16, 2004) – The Board reversed the AJ and instead upheld the demotion and 45-day suspension of the Chief of Pharmacy for "charges that he solicited and received free pharmaceuticals (Lipitor) in violation of 5 C.F.R. § 2635 and that he refused to provide information relating to an administrative investigation in violation of 38 C.F.R. § 0.735-12." The AJ had found that no penalty was warranted after finding the failure to cooperate charge not sustained. The agency was initially investigating the appellant for criminal violations but later advised him and his attorney that the investigation was administrative and sought to assure them through a faxed letter from the U.S. Attorney's office. However, because the letter was ambiguous as to the dates of the misconduct, the appellant refused to cooperate, arguing that he still had a reasonable fear that he remained subject to prosecution. The AJ was convinced but the Board was not. Without much analysis and noting that the appellant, in contrast to precedent to the contrary, had access to an attorney, the board determined "the letter from the U.S. Attorney was sufficient to provide the appellant with "'use immunity from prosecution under the Garrity rule based on any statement that he made during any subsequent interview regarding "the conduct for which [the appellant] was being considered for prosecution."'" As to penalty, the Board first noted its disagreement with the AJ's finding that "the appellant 'could not be faulted for honestly believing that there was absolutely nothing wrong with the

practice'"” of receiving samples, crediting the testimony of several witnesses that they did not consider samples of drugs as a gift and that “soliciting and receiving the samples constituted no more than a technical violation of the regulations.” Relying on the agency regulations and interpreting them to include the receipt of samples as a prohibited gift (even though not specified), and training undergone by the appellant (although noting that the agency “could have done more to prevent the occurrence of this misconduct by more explicitly informing its workforce that soliciting sample drugs was prohibited”), the Board viewed the soliciting charge as more significant than the AJ. The Board also noted that the agency decision was entitled to deference, stating that “Because the agency considered the mitigating factors in this matter, the Board need not independently weigh them. Wynne, 75 M.S.P.R. at 135. We must still determine, however, whether the penalty was reasonable.” The Board then cited to the violation of the agency’s receipt of gift or gratuity regulations, the agency table of penalties and the case law supporting a significant penalty for failure to cooperate and sustained the agency penalty (which the deciding official had mitigated from a proposed removal). The board also agreed with the AJ and rejected the appellant’s claim of national origin (Pakistani) and religion (Muslim) discrimination.

Shiflett v. Department of Justice (March 14, 2005) - While two of the four charges should have been merged, removal was still reasonable for the sustained charges, involving preferential treatment by the appellant correctional officer toward an inmate. The agency removed the appellant for (1) providing preferential treatment to an inmate by allowing him

unrestricted access to the telephone; (2) violating agency regulations by allowing an inmate unrestricted access to a telephone; (3) creating an improper relationship with an inmate (i.e., providing an inmate with personal information such as his home address and date of birth); and, (4) attempting to receive a favor (helping with the appellant's credit problem) from an inmate. On review, the Board determined that charges 1 and 2 involved the same proof (i.e., proof of one establishes the other) and should have merged. Moreover, the appellant did not establish error in his claim that "Warden Hobbs, who retired before the agency removed the appellant, assured him that he would not be removed for his dealings with the inmate."; the current warden was the deciding official and made the decision. Finally, the penalty of removal was reasonable, as determined by the AJ.

Evidence / Privileges

Gangi v. United States Postal Service, 97 MSPR 165 (Sept. 1, 2004) - The AJ abused his discretion by finding that a communication between an agency attorney and a labor relations specialist communication was not protected by the attorney-client privilege and by imposing sanctions that precluded the agency from presenting the testimony of the proposing and deciding officials. The Board vacated and remanded to allow the agency to present the testimony of the proposing and deciding officials and to allow the appellant to present evidence as to affirmative defenses. The appellant worked as a Associate Supervisor, EAS-15. He was reduced in grade to a part-time flexible Carrier (City), PS-01, based on his failure to properly perform the duties of his position (failing to follow established dispatch protocols by ensuring that all available outgoing mail was dispatched to the processing plant). During discovery, the appellant filed a set of interrogatories addressed to, the John Hallinan, labor relations specialist who had drafted the agency's notice of proposed reduction in grade. As described by the Board "The interrogatories addressed to Hallinan asked him to identify other postal supervisors or officials with whom he had spoken or corresponded regarding the appellant, the content of such discussions and correspondence, and whether an agency attorney had made any revision to Hallinan's draft. The agency objected to the interrogatories on the basis of the attorney-client privilege and the attorney work-product privilege. The AJ granted the appellant's motion to compel, reviewed the pertinent documents in camera, ordered the agency to provide them (finding that "the advice the agency attorney had provided to Hallinan pertained to the appropriateness of

the penalty and was business advice rather than legal advice and, therefore, was not protected by the attorney-client privilege"), and when the agency counsel refused to provide them, partially granted the appellant's motion for sanctions, and "precluded the agency from presenting the testimony of the proposing and deciding officials and held the agency to what was stated in its response regarding the deciding official's consideration of the evidence contained in certain portions of the agency response file. Based on the record evidence, the AJ found that the agency failed to prove its charge, reversed the reduction in grade and ordered interim relief. In addressing the attorney-client privilege, the Board noted first that "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is (a) a member of a bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) or assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." It then rejected the appellant's claim "that Hallinan, the labor relations specialist who communicated with the agency attorney, cannot invoke the privilege on behalf of the agency because he was "a very low level supervisor." Instead, relying on the Supreme Court's decision in Upjohn, that "In the government context, the holder of the privilege, or the 'client,' is the agency or department", that agencies, like corporations, "can act only through their agents or representatives" ([i.e., employees], that the privilege applies to employees at

all levels, and that "Hallinan's involvement in the appellant's reduction-in-grade entitled him to invoke the privilege on behalf of the agency." The Board further addressed the appellant's claim that Salvon (the attorney) was not acting as an attorney when giving the advice, rejecting the finding of the AJ that the advice sought by Hallinan was primarily business advice and any legal advice offered by Mr. Salvon was merely incidental. Here, the Board observed that "Hallinan was confidentially seeking Salvon's legal opinion about the sufficiency of the draft proposal notice, not requesting Salvon's business opinion about whether the appellant's reduction in grade was advisable" and that the communication was "'for the purpose of securing primarily an opinion of law" that concerned the legal sufficiency of an agency action.'" Finally, the Board rejected the appellant's argument that the agency, in disclosing certain documents during the course of discovery, waived the privilege. In the Board's view, none of the e-mails or a draft proposal relied on actually disclosed the advice, and the affidavits ordered by the AJ for in camera review, "cannot be fairly characterized as a voluntary disclosure by the agency."

Grimes v. Department of the Navy, 99 MSPR 7 (June 10, 2005) - The attorney-client privilege is absolute, and can only be pierced if it is used to shield information related to criminal misconduct and cannot be pierced upon a showing of need and unavailability of the evidence elsewhere, the erroneous basis relied on by the AJ. This case arose by interlocutory appeal from the administrative judge's Order staying further proceedings in the appellant's IRA appeal. The appellant was a Supervisory Police Officer (Chief of Police), GS-12, at the Portsmouth Naval Shipyard (PNS) and filed

an IRA appeal claiming that the agency took various actions, including placing him on administrative leave, suspending him for one day, and reassigning him to the position of Property Disposal Specialist, GS-12, in retaliation for protected disclosures he made to PNS legal counsel, James Fender. According to the appellant, his disclosures to Fender concerned alleged misconduct committed by Nelson Hanson, who was the PNS physical security officer and Fender's personal friend/ Following the remand, the appellant attempted to use the Board's discovery process to elicit information from various agency officials regarding the advice and recommendations that Fender had made during the investigation and consideration of the appellant's alleged misconduct that resulted in his suspension and reassignment. Thus, the appellant filed a motion to compel discovery of that advice and recommendations. The AJ ultimately determined that "the appellant should be permitted to pierce the attorney-client privilege asserted by the agency "to obtain evidence from various agency officials, including agency counsel, regarding the advice and recommendations that agency counsel provided with respect to various agency actions at issue in the appellant's IRA appeal." The Board reversed. It concluded that "the privilege at issue in this interlocutory appeal, the attorney-client privilege, falls into the class of absolute privileges", which could be pierced only if it was used to shield information related to criminal misconduct. Accordingly, it could not be pierced upon a showing of need and unavailability of the evidence elsewhere, the reasons relied on by the AJ. The Board made clear though that "our ruling does not preclude the possibility that the administrative judge may order the agency to provide the information sought by the appellant on a proper basis. For example, the

appellant has argued that the information he seeks is not protected by the privilege because Fender was not acting as a lawyer during the relevant time. . . . In the alternative, the appellant also has argued that the agency waived the privilege and that the crime-fraud exception to the privilege applies under the circumstances of this case. The Board defined the privilege as applying "only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is (a) a member of a bar of a court, or his subordinate, and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) or assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."

Falsification / Lack of Candor Charges

Cameron v. Department of Justice, 100 MSPR 477 (November 3, 2005) – The Board agreed with the AJ as to the falsification charge but reversed the AJ and reinstated the penalty. In the Board's view, "the deciding official considered the Douglas factors most relevant to this case and reasonably exercised his management discretion. That the AJ weighed the Douglas factors differently from the agency provides no basis for mitigating the penalty. Accordingly, we find that the penalty of removal was within the tolerable limits of reasonableness." The Appellant was employed as a Cook Supervisor with the Bureau of Prisons (BOP). The agency removed the appellant based on a charge of falsification of pre-employment documents, i.e., he made a false statement during his pre-employment interview by stating that he had not been disciplined in former or current civilian employment, despite that he had been suspended from his position at Safeway in 1997 for writing a check to Safeway with insufficient funds; he failed to disclose a delinquent child support obligation of $18,000; he failed to list two of his children, on his September 2002 Questionnaire for Sensitive Positions (SF-85P); and he failed to list two of his prior employers on his SF-85P. The AJ sustained the charge by finding that the agency proved the specification concerning the appellant's failure to disclose the delinquent child support debt, but determined that the agency failed to prove the remaining three specifications. The AJ mitigated the removal to a 10-day suspension.

Carlton v. DOJ (Mar. 25, 2004) – The AJ erred in mitigating the penalty of removal of a law enforcement officer to reassignment to a non law enforcement position, finding instead that removal was reasonable for sustained misconduct involving conduct unbecoming a Deputy U.S. Marshal, and lack of candor. The agency removed the appellant from his GS-12 Deputy U.S. Marshal position based on charges of criminal conduct, conduct unbecoming a Deputy U.S. Marshal, and lack of candor. The charges arose from a domestic incident with the appellant's former wife, in which the appellant allegedly threw a vase at his then wife, threw her down on the floor, choked her, pointed a gun at her and then pointed a gun at himself. The lack of candor charge concerns the appellant's alleged lies to the agency regarding the events of September 28, 2001. The appellant subsequently pled guilty to criminal Possession of a Weapon in the Fourth Degree and was sentenced to three years of probation. On appeal, the AJ did not sustain the criminal conduct charge and one specification of the lack of candor charge. She mitigated the penalty to a reassignment to a GS-12 non-law enforcement position. In mitigating, the AJ considered the appellant's 11 years of service with the agency, his satisfactory performance, his lack of a disciplinary record, the lack of evidence indicating that his actions on September 28, 2001, were the subject of any news report, and his probation officer's testimony that the appellant accepted responsibility for his actions and was not only compliant, but exceptional, with regard to the requirements of his probation. The On review, the Board first noted , in accordance with Lachance v. Devall, 178 F.3d 1246, 1260 (Fed. Cir. 1999), that when fewer than all of the charges are sustained, it may mitigate the agency's penalty to the maximum reasonable penalty so 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 and that the penalty should be reviewed only to determine if it is within the bounds of reasonableness. On that basis, the Board reversed the mitigation, emphasizing that the deciding official "thoroughly and properly considered all of these factors, but nevertheless found that removal was warranted. Further, we have considered these factors and find that Jones did not act unreasonably because the mitigating factors cited by the AJ do not outweigh the factors supporting removal. The appellant's misconduct was serious and raises serious concerns about his lack of judgment and impulse control and his ability to perform the duties of his position. LEOs are held to a higher standard of conduct. . . . Given the appellant's lack of candor, the agency understandably has concerns about its ability to trust and have confidence in him. In addition, the appellant's guilty plea could be used against him if he is called to testify at a trial in which he is involved."

Cronk v. United States Postal Service, 98 MSPR 124 (January 3, 2005) – Board reversed AJ, who had mitigated removal to a 45-day suspension. The appellant, a PS-08 Mail Processing Equipment Mechanic, removed for "receipt of pay for time not worked and proffering false statements." The AJ mitigated, noting that while the charges were serious, appellant had "served without any prior discipline for over nine and one half years" and because the misconduct was "isolated in nature" and " appellant had been able to engage in productive work after he was given an assignment." In reversing, the Board found that AJ had substituted his judgment for that of the deciding official, who had considered the appropriate Douglas factors.

Dunn v. Air Force (May 24, 2004) – The Board reversed the AJ, who had mitigated the penalty of removal to a demotion, despite proof of two charges - (1) engaging in conduct unbecoming a federal employee; and (2) exhibiting a lack of candor – and instead reinstated the removal penalty. The appellant worked as a WG-09 Motor Vehicle Operator at Hill Air Force Base, Utah. Both charges arose out of a series of events that took place in late November 2002 when the appellant was assigned to a three-member team responsible for transporting a Minuteman III Intercontinental Ballistic Missile (ICBM) from Minot Air Force Base, North Dakota, to Hill Air Force Base, Utah. While the missile lacked a warhead, it was loaded with 66,671 pounds of explosive propellant that was classified as Division 1.3 material, which was to be "attended at all times", consistent with agency regulations. In relation to the first charge, the agency alleged that the appellant and his team mates left the missile unattended for various lengths of time. With regard to the second charge, lack of candor, the agency alleged that, during its investigation of this incident, the appellant lied under oath. (on December 9, 2002, the appellant stated that the team had not left the missile unattended during dinner on November 2, on December 10, 2002, the appellant stated that he had not gone anywhere but Arby's for dinner when he had, in fact, gone to a pool hall prior to that and that, on December 16, the appellant stated that Mr. Woodward, a team member, had not gotten into the escort vehicle on the evening of November 22 when three of his supervisors observed him do so). On appeal, the AJ sustained each of the charges but not all of the specifications and found that the maximum reasonable penalty was a demotion. On review, the Board disagreed with the AJ's mitigation and found removal within tolerable limits of reasonableness. In evaluating

the penalty, the Board first noted that it "will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. See, e.g., Wynne v. Department of Veterans Affairs, 75 M.S.P.R. 127, 136 (1997). Here, it can scarcely be argued that leaving a Minuteman III Intercontinental Ballistic Missile unattended in a public parking lot for any length of time is not a most serious offense. As the agency has emphasized again and again, the consequences of such a missile's falling into the wrong hands could be nothing short of catastrophic." The Board also noted, as had the agency, that "the appellant was trained in and fully understood the duties and responsibilities of his position", that the deciding official "considered that the appellant had concealed information and, despite numerous opportunities to do so, failed to step forward and tell the truth." In that regard, the Board determined that "a loss of trust is a significant aggravating factor given the nature of the appellant's responsibilities." (citations omitted). Finally, the Board observed that removal was consistent with the agency's table of penalties.

Freeman v. USPS, No. 04-3399 (Fed. Cir. September 6, 2005) (NP) – The court reversed the AJ, concluding that the agency had not demonstrated an intent to deceive, sufficient to support a misrepresentation claim. After the agency was informed that Freeman, a Rural Letter Carrier, was delivering newspapers during the period he was away from work on OWCP, it charged him with willful misrepresentation, with three specifications, accusing him of (1) misrepresenting his physical condition in order to extend his time away from work (that he misrepresented his medical condition or true

physical condition, that his delivery of newspapers was inconsistent with the medical restrictions his doctor had imposed, and that “he was able to return to his regular duties at the post office as of September 25, 2002, not October 9, when he actually returned.”); (2) requesting and receiving Continuation of Pay from August 31 to October 1 while maintaining a daily newspaper delivery job; and, (3) intentionally wrote an incorrect date on the OWCP CA-7 form that he filed just before returning to work, extending his "leave buy back" period by one day through October 10, 2002. For these alleged offenses, the agency removed Freeman from his position as a rural letter carrier. The AJ found only specification 3 sustained, rejecting Freeman's two affirmative defenses for supplying the incorrect information: non-accommodation of his disabilities, including Attention Deficit Hyperactivity Disorder (ADHD), and violation of due process. As to the charge, the appellant argued that his allegedly low IQ and/or ADHD caused his error, a contention that the administrative judge rejected. The court first noted that “Misrepresentation involves two elements that the government must prove by a preponderance of the evidence: (1) supplying incorrect information and (2) doing so knowingly, with an intent to deceive or mislead the agency. See Bryant v. Dep't of the Army, 84 M.S.P.R. 202, 207 (1999), aff'd, 243 F.3d 559 (Fed. Cir. 2000).” In the court’s view “The government apparently provided no evidence of intent to deceive beyond the bare falsity of the information Freeman submitted. Evidence that Freeman never needed accommodation to perform his letter carrier duties is not evidence of deceptive intent, because it does not lead to the conclusion that he could be expected to fill out the CA-7 form mistake-free. Under Naekel, intent cannot be inferred in such circumstances from the falsity of the information alone,

so there is no substantial evidence of intent to deceive or mislead. 782 F.2d at 978. On that basis, we overturn the administrative judge's decision to sustain the charge of willful misrepresentation." This is a good case for employees and illustrates, the difficulty in proving intent. Although the court decision seems to suggest that it did not rely on the appellants ADHD as a "credible explanation for supplying incorrect information", there was considerable discussion of that condition to include evidence from the employee's psychiatrist as to his difficulty in filling out forms and without evidence that he was required to do that as part of his job.

Gager v. Department of Commerce, 99 MSPR 216 (July 15, 2005) - Board reverses an AJ, and finds instead that the agency failed to prove two specifications of a falsification charge. Appellant was employed by the agency's Bureau of Census as an Interviewer, Field Representative, GS-0303-04. She was removed based on the charge of using false information to complete Census questionnaires. The agency's deciding official sustained two of three specifications of falsification. Specification one concerned alleged false reporting in the Survey of Construction (SOC) in September 2002 that a case was new residential construction when it was actually a garage remodeled into a guest house. In specification three, the appellant allegedly reported falsely in September 2002 that a house was not completed or occupied, when the house had been completed since August 2001. As to the first specification, the Board noted and held as follows: "If the appellant's intent was to report new construction accurately but she blundered in doing so, or if the contours of what constituted new construction were not sufficiently clear, the intent prong of the test would

not be met. See Haebe, 288 F.3d at 1305. In this case, because the appellant has established both of these defenses to this specification, we find the agency has failed to meet its burden on this issue." As to the third specification, the Board held that the agency had not even proven that the information was wrong: there was evidence that the house was not completed or occupied, as reported by the appellant.

Gebhardt v. Department of the Air Force, 99 MSPR 49 (June 20, 2005) – Board reinstated a removal for falsification, reversing the AJ, who had mitigated to a 45-day suspension. The agency removed the appellant from her GS-12 Information Technology (IT) Specialist position based on a charge of falsification of a contractor letter with the intent to deceive (because a computer server, valued at $18,000.00, was believed to be missing, she produced a letter from the Hewlett Packard Company (HP) that appeared to resolve the issue of the missing server but the letter was discovered to be forged with an HP logo electronically cut from another document and pasted on the forged letter. The AJ mitigated the penalty to a forty-five day suspension, finding among others that the appellant prepared the false letter so that no additional resources (time and money) would be spent on locating a server that was not there and should not have been there. The AJ noted that the appellant's first-line supervisor testified that the appellant's performance was outstanding despite a heavy workload, and that the first-line supervisor's decision to orally reprimand the appellant for the same conduct for which she was terminated showed his trust in her despite the fact that she falsified a letter as well as the opinion of the Director of the Software Technology Solutions Directorate that the appellant "was an

exceptional employee, cooperative and honest, and that he was struggling without her." The Board disagreed, finding that the agency decision was entitled to deference and noting that the deciding official had considered the appropriate Douglas factors, to include that the deciding official had lost trust in her, she had less than 3 years of civilian service (after approximately nine years of enlisted military service with the agency) and the "appellant's actions were intentional, related to her position as an IT Specialist, and committed for gain in the sense that her actions were intended to avoid a Report of Survey investigation that could have reflected negatively on her work section and a coworker, who was a friend. . . The penalty was consistent with the penalty imposed on another employee for a similar offense and consistent with the agency's table of penalties. In addition, the appellant was placed on notice that she was not to engage in the proven misconduct, given that the critical duties listed in her core personnel document required her to exhibit honesty and integrity in the federal workplace." The Board also rejected the appellant's whistleblower reprisal claim, finding that the agency had proven that it would have taken the same action anyway by clear and convincing evidence.

Hathaway v. Department of Justice, No. 03-3288 (Fed. Cir. September 16, 2004) – Because the agency sustained only the least serious of the three charges and did not sustain the most serious (i.e., falsification), the case was remanded, with language suggesting that the Board should mitigate the removal of a DEA Investigator. Hathaway was employed as a Criminal Investigator, GS-9 and was the vehicle fleet manager in the Boston, Massachusetts office of DEA. He was removed from his position based on

three charges relating to his application for employment with DEA: “(1) conduct prejudicial to DEA, (2) omission of material information from official documents, and (3) false statements.” Charge 1 had three specifications relating to alleged inconsistent statements made by Hathaway. Specification 1 identified an inconsistency between Mr. Hathaway's purported statement to a Special Agent during his May 1996 FBI polygraph examination "that [he] had used marijuana on 15 occasions during the period of 1990 to 1992," and his statement on a 1996 INS SF-86 "that [he] had used marijuana 10 times during the period from June 1991 to December [19]91." Specification 2 concerned Mr. Hathaway's 1997 DEA SF-86, where he "stated that [he] had used marijuana 5 times in June 1991," and the alleged inconsistency between that statement and his previous statements to the Special Agent and on his 1996 INS SF-86. Specification 3 involved Mr. Hathaway's statement on his 1998 DEA SF-86 "that [he] used marijuana five times in June 1991." The deciding official charged that this assertion was inconsistent with Mr. Hathaway's earlier statements to the Special Agent and on his 1996 INS SF-86. The second charge concerned Mr. Hathaway’s omission of material information from official documents. Both specifications related to Mr. Hathaway's failure to disclose his FBI application to DEA and INS in his application for employment with those agencies. Specification 1 charged Mr. Hathaway with "omitt[ing] the material fact that [he] had been the subject of a [background investigation] by the FBI which [he] knew might not have been favorable" from his 1997 DEA SF-86. Specification 2 charged Mr. Hathaway with that same omission from his 1998 DEA SF-86. Charge 3, false statements, was the most serious. The four specifications in the charge were based on DEA's claim that Mr.

Hathaway knew, from his FBI correspondence and FOIA request, that he had been rejected by the FBI because of his "repeated pattern of poor judgment and abuse of position." Therefore, as charged, when Mr. Hathaway later denied knowledge of the reasons for his rejection, those denials amounted to false statements. Statements made by Mr. Hathaway in his two interviews with OPR were the focus of charge 3. The AJ and Board sustained each of the charges (although only 2 of the 4 specifications of charge 3) and the removal. The court reversed and remanded for a penalty determination, sustaining only the second charge (the least serious), which was not contested at the circuit. As to the first charge – inconsistent statements – the court held that "5," "no more than 10," and "no more than 15," were not inconsistent. Concerning the two sustained specifications of the third (and most serious charge), the court stated, as follows: “We disagree with the AJ and the government that these letters would have placed Mr. Hathaway on notice of any derogatory information. To be sure, Mr. Hathaway would have understood from the mere fact of his rejection by the agency that his application had been viewed unfavorably, but he would not have known exactly what had led the FBI to its decision. Thus, it cannot be said that when Mr. Hathaway spoke to OPR investigators in the July 7, 2000 interview, he spoke falsely when he stated that he did not have a "negative reason" to omit the FBI background investigation (specification 3), and that he was "unaware of any negative information uncovered about [him] from the background investigation done by the FBI" (specification 4).” Concerning penalty, the court noted that when all charges are not sustained, the penalty “may be called into question”, and because the agency “gave no indication that it would have imposed a lesser penalty’, the court’s

precedent in “Guise requires that we consider "the number and seriousness of the charges sustained as compared to the number and seriousness of those that have not been sustained." . . . When the most serious charges or a majority of the charges have been invalidated, it may be appropriate for us to "vacate [ ] the penalty and remand [ ] for reconsideration of the penalty in light of the significant change in the number and seriousness of the sustained charges." (citations omitted. The case was thus remanded with language suggesting that the Board should mitigate.

Lloyd v. Department of the Army, 99 MSPR 342 (August 2, 2005) – While finding that the AJ erred in sustaining the “false statements, misrepresentations, and concealment of material facts” charge, the agency proved the other two charges (“(2) unauthorized possession of government property; and (3) misuse of government property.”) and removal was reasonable on that basis for this Supervisory Information Technology Specialist, GS-2210-12. This case arose when the appellant received a Living Quarters Allowance in Korea in the amount of 53,671,200 won, or $42,936.96 based on his agreement with a landlord. However, the appellant and the landlord subsequently altered the terms of the lease, agreeing that the appellant would pay for utilities, and that instead of paying rent in a lump sum, he would pay in installments of 10,500,000 won every six months. The appellant did not advise the agency of the new arrangement, commingled the unspent portion of the LQA with his own funds, and used at least $3,000 to pay for personal expenses, including back taxes, a court judgment, and his wedding. He also submitted a Receipt for Payment of Advance Rent, which incorrectly stated that the landlord had received an advance payment of

56,400,000 won. The agency based its first charge on six specifications, such as that the Lease Agreement which provided that the appellant would pay the landlord 56,400,000 won in advance, as well as other documents were false. However, as noted by the Board "The agency failed to show that the appellant knew or should have known that the information contained in these documents was false when he submitted them to CPAC as part of his LQA application. In fact, these documents accurately represent the lease agreement that was in effect at the time. It is undisputed that the appellant and landlord did not alter the arrangement until August 31, 2001, after the appellant had already applied for and received his LQA payment." Moreover, even as to the submission of the Receipt for Payment of Advance Rent which indicated that the landlord had received 56,400,000 won in advance rent (and the sixth specification of this first charge), the Board found that the agency failed to prove an intent to deceive. The appellant had argued "that he could not have filed the receipt with an intent to deceive, as he had already informed the investigator that he was making incremental payments." The Board agreed, observing that "We find it highly unlikely that the appellant would have submitted the receipt with an intent to deceive the agency, after he had already divulged the fact that he did not pay the full 56,400,000 won in advance. Thus, we conclude that the agency failed to prove specification (6) by a preponderance of the evidence." Further, as to this first charge the Board noted that "the title of the agency's first charge includes 'concealment of material facts'" and that the "appellant had notice of his obligation to inform CPAC of any changes to the lease agreement, and that he failed to do so, quite possibly with deceitful intent." Nonetheless, it opined that "If this sin of omission was the basis for the agency's charge, it

should have explained as much in the notice of proposed removal. The Board is obliged to review the agency's charge solely on the grounds invoked by the agency." In any event, the Board accorded deference to the agency penalty decision and concluded as follows: "There are significant mitigating factors in this case, including the appellant's 19 years of service, his excellent performance record and the lack of prior discipline. Nevertheless, considering that the appellant was a supervisor, that he was on notice of his obligation to use the LQA solely for payment of advance rent, and that the sum of money involved was far from de minimis, we find that the maximum reasonable penalty for the sustained misconduct is removal."

Gambling – Related Charges

Jones v. Department of the Interior, 97 MSPR 282 (September 28, 2004) - The Board reversed the AJ, who had sustained a gambling but not an improper conduct charge and mitigated the removal to a 90-day suspension and instead finds both charges sustained and removal reasonable for the sustained misconduct. The agency removed the appellant, a WG-5 Painting Worker with the Boston National Historical Park (BNHP), National Park Service (NPS), for two charges: "(1) Promoting a gambling activity on-duty on government premises; and (2) conduct unbecoming a Federal employee." The gambling charge was based on agency and police surveillance evidence showing that the appellant, during work hours and on the agency premises received betting or gambling slips in the form of football cards from a canteen truck operator and then distributed the football cards to BNHP employees. The appellant was arrested and charged with possession of gaming apparatus, pled guilty to a felony and was ordered to forfeit the gambling monies in his possession when he was arrested and to pay court costs. As to the unbecoming conduct charge, this involved arose "an anonymous voicemail message to a telephone located in the Maintenance Division, stating, 'Robinette, the clock is ticking, Robinette.' (Robinette was a BNHP custodian and a confidential informant who provided information to the agency and law enforcement officials about the appellant's gambling activities. Four agency management officials, to include the proposing official, listened to and identified the voice as the appellant's. In addition, the call was traced and found to have been made from a telephone located in the residence of the wife of Michael Payne, appellant's co and associate.

Thus, the agency charged as conduct unbecoming charged that the appellant had left this intimidating message for Robinette. The AJ sustained the first charge but not the conduct unbecoming charge and mitigated the penalty to a 90-day suspension. The Board disagreed on the charge and penalty. Despite alibi evidence (which the Board determined was not properly sworn) as well as the appellant's denial, the Board found the agency's sworn voice identification statements more credible. The Board then accorded deference to the agency and reinstated the removal penalty; it determined that the deciding official had properly considered the appellant's prior reprimand, the seriousness of the offense, the consistency of the penalty with the agency's table of penalties, the appellant's conviction for on duty activities, his lack of trust in the appellant, the appellant's length of service (13 years), his job performance, the appellant's rehabilitation potential, and the effectiveness of alternative sanctions to deter similar conduct in the future. The Board also opined, as had the deciding official, that removal would be appropriate for proof of the gambling charge alone.

Hatch Act

McEntee v. Merit Systems Protection Board, No. 04-3066 (Fed. Cir. April 15, 2005) – This Federal employee, who ran for mayor of Albuquerque, New Mexico, violated the Hatch Act "by running as a candidate for election to a partisan political office and by knowingly soliciting and receiving political contributions." The court thus upheld the Board's decision suspending the employee from his FAA position for 120 days.

Hearings

Jezouit v. Office of Personnel Management, 97 MSPR 48 (Aug. 12, 2004) - Under the particular circumstances of this retirement appeal, the appellant did not have a right to an evidentiary hearing because the appeal solely involved issues of law; accordingly, the Board rejected the appellant's claim that he was denied a fair hearing when the AJ converted a scheduled status conference into a hearing, and for which the appellant was not prepared to present evidence. This was a retirement appeal in which the employee unsuccessfully contested OPM's method of computing his civilian service, arguing that his civilian service credit should be recomputed based on a 360-day year.

Koehler v. Department of the Air Force 99 MSPR 82 (June 28, 2005) - AJs may hold videoconference hearings in any case, regardless of whether the appellant objects. Thus, the Board upheld the AJ's decision, after a videoconference hearing over the appellant's objection, sustaining the agency's removal of a GS-10 Aircraft Sheet Metal Mechanic based on two charges: "(1) misrepresenting her assigned duties to the Office of Workers Compensation Programs, Department of Labor; and (2) presenting contradictory information to the agency on two standard forms with improper intentions." This case overruled established Board precedent.

Harmful Procedural Error

Robinson v. Department of the Treasury, 96 MSPR 600 (Aug. 5, 2004) - While the agency committed procedural error – the appellant received notice of her 30 day suspension only 2 days before its effective date, in violation of 5 U.S.C. § 7513(b) – the appellant failed to show that this error was harmful (i.e., there was no evidence that the error likely caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error). The appellant was a Contact Representative with the Internal Revenue Service. The agency suspended her for 30 days for 15 specifications of AWOL and 3 specifications of failure to respond to the direction of her manager. The evidence showed that the appellant did not receive the agency's notice of proposed suspension and she did not receive the agency's April 1, 2002 suspension decision until April 4, 2002, two days before the April 6, 2002 effective date of the suspension. In rejecting the employees claim of harm from this error, the Board noted that the appellant did not attempt to contact the deciding official, to inform him that she had just received notice of the agency's suspension action and, request an opportunity to respond to the charges. Further, the Board observed that the "appellant had the full opportunity below to present evidence and argument regarding the agency's charges and her defenses that she asserts she was unable to present to the deciding official prior to his issuance of the suspension decision because the agency had failed to provide her with a copy of the notice of proposed suspension" but "did not present any evidence or elicit testimony from either the proposing or deciding officials showing that they would not likely have proposed or effected the appellant's

suspension based on the evidence and arguments that she presented in her appeal."

Indefinite Suspensions

Rawls v. United States Postal Service, 98 MSPR 98 (December 1, 2004) – The Board reversed the AJ, who had not sustained an indefinite suspension because the agency failed to explicitly identify the condition subsequent for terminating the suspension, with the Board determining instead that the suspension had an implicit end conditioned on the outcome of the pending criminal proceeding. As stated by the Board, "[W]e also agree with the agency's argument on review that the suspension clearly, albeit implicitly, had a condition subsequent since the suspension was based on a criminal charge which must be resolved, one way or another, through criminal proceedings. . . . It is thus apparent under the circumstances that the appellant's indefinite suspension had an ascertainable end, conditioned on the outcome of his involvement in the criminal justice system." Moreover, the Board determined that "Even assuming arguendo that the agency's failure to identify the condition subsequent explicitly in its decision notice constituted procedural error, we find that it did not constitute harmful error warranting reversal of the indefinite suspension." Finally, the Board found that "the agency properly continued the indefinite suspension beyond the appellant's conviction in March 2002, until his removal in June 2002", noting that the agency had proven the elements of such an allowance, which included "First, there must be a resolution of the charges. Second, the agency must have contemplated further action and advised the employee of the subsequent possibility of further adverse action when the initial indefinite suspension was proposed. Third, the agency must act within a reasonable period of time after resolution of the criminal charges to initiate

the additional action." . In this case, the appellant was arrested and charged with attempted first degree murder for allegedly shooting a nightclub bouncer several times with a 12-gauge pump shotgun. The agency did not issue a proposal but by decision indefinitely suspended him based on reasonable cause to believe he committed a crime for which a sentence of imprisonment could be imposed. After he was tried and convicted for reckless endangerment, and sentenced to nearly 12 months in jail incarceration, the agency removed him based on his criminal conviction, and, again, issued a decision but not a proposal. In an earlier decision in Rawls v. U.S. Postal Service, 94 M.S.P.R. 614 (2003), the Board upheld the removal, rejecting the appellant's due process and harmful error claims.

Insubordination / Failure to Follow

Doe v. USPS (Feb. 20, 2004) – The Board reversed the AJ's mitigation and found demotion of a manager to a Part Time Distribution Clerk reasonable for "Failure to Follow Instructions / Improper Conduct", involving the following specifications: failing to provide a plan as instructed to clear delay mail, failing to go to go to lunch at a particular time and delaying delivery of approximately 575 pieces of bulk mail without obtaining prior approval. The Board also rejected the employee's affirmative defenses, including disparate treatment disability discrimination (HIV) and harmful procedural error. As to the disability discrimination claim, the Board rejected the appellant's claim that a coworker supervisor had done the same things but had not been disciplined, with the Board finding that the employee was not similarly situated because, even though she shared the same job and was managed by the same supervisor, she performed different supervisory duties. As to the appellant's harmful procedural error claim – the failure to honor the appellant's request to have his attorney represent him during an investigative interview – the Board noted that while the agency "arguably" committed error, the error was not proven result determining. Concerning penalty, the Board first noted its limited standard of review when all charges are sustained (i.e., review to determine if agency considered all relevant factors and exercised management discretion within tolerable limits of reasonableness). The Board noted that the agency had appropriately considered the mitigating factors (18 years of service, no personal gain) as well as the aggravating factors (intentional failure to follow orders, 3 letters of warning, poor potential for rehabilitation). The Board

also noted that the appellant's HIV disability prevented him from returning to his previous craft position. Finally, the Board distinguished the instant case from Botto, in which a manager had been demoted to a lower – graded management position for similar misconduct, on the basis that the appellant had 18 years of service as compared with Botto's 32 years of service and other distinguishing factors).

Grubb v. Department of the Interior (June 18, 2004) - The Board found that the appellant's removal was reasonable for "failure to follow her supervisor's instructions in violation of a direct order, causing disruption in the workplace" and rejected the appellant's claim of whistleblower reprisal. The appellant worked as a GS-7 Production Accountability Technician. By a letter dated June 7, 2001, she advised her then-third-line supervisor, Field Manager Lee Otteni, that co-workers were committing misconduct, including time and attendance abuse, attaching approximately 100 pages of "documentation consisting of her color-coded notes, spreadsheets, and color photographs of the agency parking lot, the agency's sign-in whiteboard, and her co-worker's desks and cubicles." On June 27, she sent an email to Mr. Otteni, reporting additional time and attendance abuse. On July 16, Mr. Otteni issued the appellant a "Notice to Cease and Desist." In that notice, he asserted that the appellant's "repeated efforts to monitor employees . . . have disrupted the [I&E Branch], the FFO, and have resulted in a substantial misuse of work time." The appellant was ordered "to stop investigating her co-workers or using work time to document the starting or departure times of her co-workers, or take photographs of the parking lot, the whiteboard, or her co-workers' work areas . . . . [and] ordered not to discuss the

activities of her co-workers or involve others in ‘banned observations’" Mr. Otteni warned her that violation of the order could result in disciplinary action, to include removal. A little more than 2 months later, the appellant asked a co worker questions about the activities of two other employees. The co worker expressed “a reluctance to get involved in the appellant's well-known tendency to monitor other employees' behavior, reported the conversation to his supervisor, after which the agency proposed the appellant’s removal for “making repeated unfounded and unsubstantiated allegations concerning her co-workers' and supervisors' alleged misconduct and failure to follow her supervisor's instructions in violation of a direct order, causing disruption in the workplace.” She filed a complaint with OSC, alleging that the proposed removal was reprisal for protected whistleblowing. The deciding official (who had replaced Otteni because Otteni was assigned to a position in another location), did not sustain charge 1 (finding that appellant believed that her accusations were not unfounded), sustained the second charge, and found removal reasonable. On appeal, the AJ determined that the agency had proven its charge and penalty and denied the appellant’s affirmative defenses. As to the charges and removal, the Board summarily agreed with the AJ’s decision but addressed the whistleblower reprisal defense in some detail. Here, the Board first disagreed with the AJ’s determination that the disclosures were not protected because they were “trivial” (“whether her co-workers were arriving at work on time, whether they were taking longer than 15-minute breaks, and whether they were taking smoking breaks, and that these matters were none of the appellant's concern”), finding instead that “[T]he Board's case law is clear that time and attendance abuse is a violation of law, rule, or regulation.

. . . Even if some of the appellant's disclosures concerned trivial matters, there is no de minimis exception for the violation-of-law aspect of the protected disclosure standard. . . . The appellant made specific allegations of time and attendance abuse that were based on her personal observations and supported by documentation. We find that the appellant had a reasonable belief that her disclosure evidenced a violation of law, rule, or regulation, and her disclosure therefore was protected." (citations omitted). The Board also determined that the appellant met the other elements of her prima facie case – "that the deciding official was aware of the appellant's disclosures and that the disclosures occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor" – and addressed whether the agency had proven by clear and convincing evidence that it would have taken the same action anyway, considering "the strength of the agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated." As to the strength of the adverse action, the Board found that the appellant was ordered "to stop monitoring the comings and goings of her co-workers and to stop discussing her co-workers" activities in the office but nonetheless disobeyed this order by examining a co worker about himself and other co workers, in a way that made him feel uncomfortable. In addition, the deciding official had little motive to retaliate against the appellant; he had been in his position for less than six months; he had not been in the Farmington office for more than 10 years prior to that; and, the disclosures did not reflect on his management.

Additionally, there was no evidence that the agency treated similarly-situated employees who were not whistleblowers more favorably than it treated the appellant. (especially in light of the appellant's 4 previous instances of misconduct). The Board also addressed here the issue of the disclosures relationship to the adverse action, noting that the disclosures "triggered" the cease and desist order. Nonetheless, the evidence showed that the "appellant was not removed because of her whistleblowing, but because of the disruptive nature of her investigatory monitoring of her co-workers", relying on the testimony of Mr. Mr. Otteni "explained that the appellant's activities were causing disruption in the I&E division, the atmosphere in the office was hostile and anxious, work was not being performed, and a group of employees approached him about filing a complaint about the appellant's 'snooping."'

Jones v. Department of Justice, 98 MSPR 86 (November 23, 2004) - Board disagreed with the AJ, who had reversed the agency's removal of the appellant for AWOL, Failure to report for work and Failure to follow instructions and instead finds the failure to follow instructions charge sustained and reinstates the removal. The appellant was a GS-0670-13 Health Systems Administrator with the agency's Federal Bureau of Prisons. notice proposing the appellant's removal based on three charges: "Failure to Report to Work"; "Absent Without Leave" from April 24, 2003, through April 28, 2003, and from June 26, 2003, through the date of the proposal notice; and "Failure to Follow Instructions" by providing certain medical documentation to support the absences. The parties agreed that the first charge involved a failure to accept reassignment, which the AJ did not

sustain. As to the AWOL charge, the AJ found that the appellant had provided administratively acceptable evidence of incapacitation. Concerning the failure to follow instructions, the AJ found that the AJ found that the appellant "followed the agency's instructions in the letter to the extent that he was able to do so. And, as to a disputed issue of whether appellant had followed the instruction in the letter to ensure that the additional information requested from his psychiatrist was received by the agency by June 25, 2003, "the AJ found that the appellant's psychiatrist had provided the agency with all of the information she could provide without performing additional testing, that agencies customarily paid for such additional testing, and that the agency had refused to pay for the additional testing in this case. . . . The AJ also found that the appellant did not pay for the testing because he considered it both unnecessary and unaffordable. On review, the agency contested the findings on the AWOL and Failure to follow instructions charges. As to the Failure to follow instructions, the Board agreed with the agency and concluded that it was the appellant's duty "to ensure that his psychiatrist provided the information and that it was the appellant's responsibility to pay for any additional examinations that were necessary to provide such information." The Board also found that the AWOL charge merged into the Failure to follow instructions charge because "the AWOL charge is based on the same facts that underlie the charge of failing to follow instructions since the appellant's failure to follow instructions and provide the medical documentation caused him to be AWOL." As to penalty, the Board accorded deference to the agency and noted that the deciding official / warden stated that "any of the agency's three charges would have been independently sufficient to result in the

appellant's removal." The Board further noted that appellant was the head of the institution's Health Services Department, which provided medical services for the institution's approximately 1,250 inmates and that that the appellant "intentionally failed to provide the agency with the information it requested, despite being informed that it was his responsibility to obtain and submit the information, because of his view that it was the agency's responsibility to incur any cost associated with obtaining the information. . . . This is particularly troubling because the appellant held an important supervisory and law enforcement officer position." Thus, the Board concluded that the appellant had demonstrated a "lack of dependability as a supervisor, such that his removal from his position is warranted based on this charge alone."

Murry v. General Services Administration, No. 03-3297 (Fed. Cir. May 5, 2004)(NP) – The Circuit agreed with the Board, which had reversed the AJ's mitigation for charges of "insubordination-disrespect, insolence, and like behavior to her supervisor." Ms. Murry was employed as a GS-5 Supply Technician by the National Forms & Publication Center of the General Services Administration ("agency"). She was removed for "insubordination -- disrespect, insolence, and like behavior to [her] supervisor." The agency cited three specifications to support the charge. On appeal of her removal to the Board, the administrative judge determined that the agency failed to prove two of the specifications, but sustained the third (which had 2 parts), finding that Ms. Murry was disrespectful and insolent towards her supervisor. While the AJ also rejected the appellant's numerous affirmative defenses ((1) racial discrimination (2) disability discrimination due to her

asserted disabilities of depression, post traumatic stress syndrome, migraine headaches, and panic/anxiety disorder with agoraphobia, (3) retaliation for previous participation in the EEO process, (4) unlawful procedure, because the deciding official allegedly considered information not relied upon by the proposing official, (5) harmful procedural error, because the supervisor allegedly had stored up criticisms of Ms. Murry, rather than promptly issue critical comment, as required by regulation, and (6) retaliation for having made protected whistleblower disclosures), he mitigated the removal penalty to a 90-day suspension. However, the Board, on the agency's petition for review, reinstated the removal penalty, relying on Lachance and Board authorities, determining that the agency's preferred penalty is entitled to deference , when all charges are sustained but fewer than all of the specifications of the sustained charges are proven by the agency. In this decision, the circuit agreed with the full Board. It first rejected the appellant's claim that the charge ran afoul of Burroughs, noting that the Burrough's case was inapplicable "'where more than one event or factual specification is set out to support a single charge ... proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. See Fiorillo v. United States Dep't of Justice, Bureau of Prisons, 795 F.2d 1544 (Fed. Cir. 1986).'" Additionally, the Circuit noted that even though there were certain mitigating factors (e.g., long service, satisfactory performance record, while disrespectful and insolent to her superior not obscene and no malice), insubordination (including acts of disrespect and insolence) were serious matters and Ms. Murry had previously been counseled and punished for abusive, discourteous, disrespectful and disruptive behavior in the workplace, and had been put on notice that similar

future behavior would not be tolerated, the agency did not act outside the zone of reasonableness in imposing the penalty of removal. The Circuit then concluded that "The Board carefully reviewed the Douglas factors, and we see no legal error in its conclusion."

Zwagil v. GSA, No. 05-3088 (February 1, 2006) - The Circuit upheld the AJ's finding that the charge of deliberate refusal to carry out assigned duties, was sustained but disagreed with the AJ's penalty analysis in upholding the removal penalty and remanded for a new penalty determination. This case involved a police officer with the Federal Protective Service, an agency within the Department of Homeland Security. He was removed from his position based on two charges: (1) deliberate refusal to carry out assigned duties where the safety of persons and/or property is involved; and (2) making a threatening comment in the workplace. The first charge involved the appellant's allegedly "repeatedly failed to complete inspection and patrol of [his] assigned buildings," and that his "continuing failure to carry out [his] assigned patrol, despite many counseling sessions and training, is a gross violation of [his] sworn duty, and could have a serious impact on the protection of people and property, as well as on the professional image of [the FPS]." The second charge involves the following: upon receiving the notice of proposed removal, the appellant stated to a co-worker that he "was going to take the rest of the day off because if I don't and hang around here, I will probably end up hurting someone." (The statement was reported to the appellant's supervisor, who then amended the notice of proposed removal to include a second charge of making a threatening comment in the workplace.). In the agency's decision,

after citing the effect of the first charge, the deciding official stated that "more importantly, as a law enforcement officer in the Department of Homeland Security, Federal Protective Service, for you to make a threatening comment in the workplace is so entirely contrary to our mission and values that I cannot possibly have you continue as a representative of this agency." On appeal, the AJ sustained the first but not the second charge (finding that the statement was made but not intended to be threatening) and found removal reasonable, nonetheless. On appeal by the appellant, the Circuit agreed with the finding that upheld the charge but determined that the AJ "did not follow the procedure set forth in LaChance v. Devall" in setting a penalty when not all charges are upheld. The court provided, as follows: "That is, the administrative judge did not focus on whether there was any indication in the record that the agency would have imposed a lesser penalty if the penalty determination had been based solely on the sustained charge. Instead, citing the Board's decision in White v. United States Postal Service, 71 M.S.P.R. 521, 525-27 (1996), the administrative judge stated that 'when not all of the agency's charges are sustained, the Board will independently and responsibly balance the relevant factors . . . to determine a reasonable penalty.' In LaChance v. Devall, this court rejected the approach set forth by the Board in the White case, in which the Board announced that, in cases in which fewer than all the charges were sustained, it would independently determine what penalty to impose. See 178 F.3d at 1249; see also Negron v. Dep't of Justice, 95 M.S.P.R. 561, 572 (2004). In this case, rather than independently determining the appropriate penalty, the administrative judge should have first determined whether the record contained any indication that the agency would have imposed a lesser

penalty based only on the sustained charge." In remanding, the Circuit emphasized, as had the appellant, that "The Board's inquiry into whether the agency would have imposed a lesser penalty should include consideration of the decision letter itself and in particular the portion stating 'more importantly . . . for you to make a threatening comment in the workplace is so entirely contrary to our mission and values that I cannot possibly have you continue as a representative of this agency.'" The Circuit concluded with the following instruction: "If the Board finds that the record indicates the agency would have imposed a lesser penalty, the Board must give the agency an opportunity to institute a lesser penalty. On the other hand, if the Board finds that there is no indication in the record that the agency would have imposed a lesser penalty if it had considered only the sustained charge, the Board may uphold the penalty imposed if it concludes that the penalty was not in excess of the maximum reasonable penalty for the sustained offense."

Interim Relief

Batts v. Department of the Interior (May 8, 2006) – The agency made an implicit undue hardship determination and therefore did not err in failing to return the appellant to his former ADR Coordinator position, effective on the date of the initial decision, and instead assigned him to a Human Resources Specialist position at the same grade and pay, effective the date of the initial decision. This was a sexual harassment case in which the agency claimed that it placed the appellant "in a different position to minimize contact between him" and the alleged victim, as well as to "satisfy the needs of the position."

Dunn v. Air Force (May 24, 2004) – As to the interim relief order, while the agency reinstated the appellant with a "break in service," the Board found that the agency was not required to provide the appellant with full relief at that point, only to give him an interim appointment effective as of the date of the initial decision.

Gangi v. United States Postal Service, 97 MSPR 165 (Sept. 1, 2004) - The appellant failed to submit evidence to show that his late-filed motion to dismiss the agency's petition for review because of non compliance with interim relief was based on information not readily available before the close of the time limit, and therefore the motion as untimely filed. Even though the appellant claimed that he had only recently discovered the failure, his affidavit did not address "when or how he became aware that the agency had failed to comply with its interim relief obligations."

Guillebeau v. Department of the Navy, No. 03-3220 (Fed. Cir. March 24, 2004) – The Board did not err in declining to dismiss the government's appeal from the Initial Decision for failure to comply with the interim relief order; an interim relief order only protects the appellant from adverse actions based on the events underlying the action in which the order was granted, not events - such as an indefinite suspension from pay for revocation of security clearance access - that are unrelated to that order. Moreover, the discretion provided in 5 C.F.R. § 1201.115(b)(4) would allow the Board not to dismiss an agency's PFR for failure to provide interim relief "without regard to the alleged violation" of the order and therefore the holding of DeLaughter v. U.S. Postal Service, 3 F.3d 1522 (Fed. Cir. 1993), that where the agency did not comply, the Board had no choice but to dismiss its petition, is no longer applicable under the revised regulation.

Lavette v. USPS (5-28-04) - The Board denied the appellant's motion that the agency's cross-petition be dismissed for failure to comply with the AJ's interim relief order. Although the agency did not submit any evidence proving its compliance with the order until after the appellant submitted his motion, the Board noted that the agency ultimately showed that it had gone beyond the interim relief order by canceling the demotion and arranging for the appellant to receive back pay and that while an argument could be made that the cross-petition should be dismissed because the cancellation action effectively rendered it moot, the Board exercised its discretion not to dismiss the cross-petition.

Involuntariness Claims

Bartels v. United States Postal Service (March 14, 2005) – While the Board upheld the AJ's decision, the Chairman and Member Sapin used the case to express disagreement with the way in which the Federal Circuit analyzes constructive resignation or retirement cases. Under current law as held in Cruz, the Board does not "acquire jurisdiction over a constructive removal appeal unless the appellant proves that his resignation or retirement was involuntary." As stated by Sapin and McPhie: "In sum, we believe that the jurisdictional framework set out in the panel decisions in Spruill, Dorrall, Dick, and Colbath is superior to the jurisdictional framework described in Cruz. If we were free to choose, we would adopt the former framework, and would hold that Board jurisdiction attaches when the appellant makes non-frivolous allegations that he was constructively removed. We are not free to choose, however, and instead are constrained to follow the earlier en banc decision in Cruz as opposed to the later panel decisions in Spruill, Dorrall, Dick, and Colbath. . . . The initial decision in the present case is consistent with Cruz, and for that reason we affirm it. Still, it would be helpful to all concerned -- parties, practitioners, administrative judges, Board members, even panels of the Federal Circuit -- for the full court to revisit Cruz and to clarify whether it remains the law." Member Marshall sided with the settled law under Cruz.

Donovan v. USPS (May 4, 2006) – While the appellant prevailed in his constructive suspension appeal and the AJ ordered the "appropriate amount of back pay", the agency proved that the appellant was not "ready, willing

and able" to work, so that he was not entitled to back pay beyond the 1 week provided by the agency. Thus, the Board reversed the AJ and found that the agency was in compliance.

Lloyd v. Small Business Administration, 96 MSPR 518 (July 15, 2004) - When an employee resigns or retires in the face of a proposed removal for cause, the employee, in order to prevail on a constructive retirement or resignation claim, must establish that the agency did not have reasonable grounds for proposing removal. Moreover, while the instant appellant also asserted that "a retirement may be deemed involuntary if it resulted from intolerable working conditions, she did not identify "any particular aspects of her situation or any particular findings by the AJ that she believes were erroneous." Further, in order to prove Board jurisdiction for purposes of constructive discharge or retirement, and "regardless of the strength of the appellant's allegations, an appeal must be dismissed for lack of jurisdiction if the appellant does not prove that she was constructively removed." The appellant retired from a Loan Specialist, GS-12 position. She alleged that the retirement was involuntary because the agency had proposed to remove her for cause and because of intolerable working conditions resulting from race, sex, and age discrimination. The AJ held an evidentiary hearing; issued an initial decision, concluding that the appeal was within the Board's jurisdiction because the appellant made non-frivolous allegations that she retired involuntarily; concluded that the appellant had failed to prove that her retirement was involuntary; and, dismissed for "failure to state a claim upon which relief can be granted." The important aspect of this case involved the Board's reopening "to address divergent lines of cases on the question of

when Board jurisdiction over an alleged constructive removal appeal attaches." The Board noted the conflict within the Circuit, with the Cruz en banc decision determining that Board jurisdiction does not attach until there is proof of the constructive discharge or resignation, "and not not merely by the assertion of a non-frivolous constructive removal claim" and with authority in Spruill and other circuit panel decisions determining that jurisdiction is established by non frivolous allegations. (The Board also observed the distinction for whistleblower reprisal cases where jurisdiction is established by non frivolous allegations). In making clear that the issue had practical importance, the Board noted that [I]t is worth explaining why the issue outlined above is not idle theorizing about terminology; significant practical implications flow from the choice of approach to constructive removal jurisdiction. Again, once Board jurisdiction attaches in an appeal governed by 5 U.S.C. § 7701, the Board is obligated to decide any claim of prohibited discrimination, whereas the Board cannot address a discrimination claim when it lacks jurisdiction over the appeal. 5 U.S.C. §§ 7701(c)(2)(B), 7702(a)(1); . . . Further, if a finding that the appellant failed to prove that he was constructively removed is considered to be 'on the merits,' then the decision carries res judicata effect, whereas a dismissal for lack of jurisdiction does not. . . . In addition, if jurisdiction over an appeal attaches upon the making of non-frivolous allegations of constructive removal, then at that stage the parties could enter into a Board-enforceable settlement agreement, whereas Board enforcement would be foreclosed under the view that jurisdiction does not attach until after a constructive removal is proven." (citations omitted).While the Chairman argued for the opposite approach in a concurring decision, the Board determined that it was

bound by the Federal Circuit's Cruz en banc decision. In sum, in order to establish Board jurisdiction in a constructive termination or resignation case that Board jurisdiction is established only upon proof of the constructive action, and not merely by assertion of a non-frivolous claim.

Shoaf v. Department of Agriculture, 97 MSPR 68 (Aug. 13, 2004) - On remand from the Federal Circuit, the Board upheld the AJ's rejection of the appellant's motion to recuse and also sustained the AJ's rejection of the appellant's involuntary resignation claim, agreeing that the appellant "did not prove that a reasonable person in his position would have felt compelled to resign, effective March 31, 1995, under the totality of the circumstances in this appeal." The appellant was a former GS-12 Forester and Interdisciplinary Team (IDT) Leader for the agency's U.S. Forest Service in Alaska. He had filed a whistleblower claim, in July 1993, alleging that agency managers overstated the timber that could be harvested from the Tongass National Forest, and harvested timber outside approved boundaries. In March 1995, he accepted a separation incentive and resigned. However, he filed a Board appeal contending that his disclosures were a contributing factor in several personnel actions, including his resignation, after the agency purportedly gave him little or no work (following his acceptance of a reassignment in September 1993). On the first appeal, the AJ dismissed, determining that the appellant did not prove that his working conditions were so intolerable that a reasonable person in his position would have felt compelled to resign. On further appeal, the Federal Circuit vacated the Board's final decision, and remanded for a new decision. The Court observed that while the most probative evidence of involuntariness will

usually be evidence "in which there is a relatively short period of time between the employer's alleged coercive act[s] and the employee's" resignation, the totality of the circumstances must be considered in determining whether a resignation is involuntary", the AJ "failed to consider events that transpired from April 1990 through [the appellant's] September 1993 transfer." Accordingly, the circuit concluded that "While it is within the MSPB's discretion to give proper evidentiary weight to events occurring from April 1990 through September 1993 and to the events following Shoaf's transfer to the timber unit, the MSPB abused its discretion by completely failing to consider the pre-transfer activities concerning Shoaf on the Tongass." The court additionally held that, "The level of evidentiary weight the MSPB must grant to events temporally further from Shoaf's resignation than the agency's post-transfer conduct is within its discretion; yet, such events must, at a minimum, be considered to place activity and inactivity more immediately preceding Shoaf's retirement [sic] into the proper context." Id. On remand, the AJ denied the appellant's motion to recuse him (on the basis that the appellant had written and self published a book critical of the AJ) and again denied the appeal on the basis that the appellant did not prove an involuntary resignation. In his review petition, the appellant challenged both of those findings. The Board agreed that the AJ had not abused his discretion in rejecting the motion to recusee, finding, as follows "the fact that the appellant wrote a book criticizing the AJ is, alone, of little probative value with respect to whether a reasonable person, knowing all of the circumstances, would question the AJ's impartiality." In reaching that decision, the Board relied on its previous decision in Washington v. Department of the Interior, 81 M.S.P.R. 101 (1999). The

Board also agreed with the AJ's finding on the involuntary resignation claim. Here, the Board noted that "Contrary to the appellant's argument that the AJ did not consider the 'actions and inactions' predating the appellant's September 1993 transfer to the Timber Staff, we find that the AJ considered those events, but simply found they did not offer significant support for the appellant's claim that he resigned involuntarily in 1995. The AJ's findings allowed for consideration of all of the activity leading to the appellant's resignation and provided a context for his analysis of the events temporally close to the appellant's resignation. See Shoaf, 260 F.3d at 1342. As the court held, it is within the Board's discretion to give proper evidentiary weight to events occurring from April 1990 through September 1993 and to the events following Shoaf's transfer to the timber unit." (citation omitted).

Wright v. Department of Transportation, 99 MSPR 112 (July 6, 2005) - Because the appellant made a " non-frivolous allegation that he accepted an agency offer to process his appointment to . . . [a] position as an in-grade reassignment but the agency then processed his transition to that position as a change to lower grade with a lower rate of basic pay, the administrative judge's resolution of the parties' conflicting factual assertions before holding a jurisdictional hearing was error."

Jurisdiction

Brooks v. DHS (Feb. 12, 2004) – The Board lacks adverse action jurisdiction over an appeal from a TSB Screener, as a result of the provisions of the Aviation and Transportation Security Act.

Caven v. Merit Systems Protection Board, No. 04-3105 (Fed. Cir. Dec. 16, 2004) - The Board does not have jurisdiction over the appellant's appeal from the denial of "availability pay" under the Law Enforcement Availability Pay Act of 1994, 5 U.S.C. § 5545a; his pay was not reduced and availability pay was not suspended, since he had not been receiving such pay. The circuit affirmed the Board.

Conyers v. Merit Systems Protection Board, No. 04-3197 (Fed. Cir. November 9, 2004) – Board does not have jurisdiction over personnel decisions by the Transportation Security Administration, in this case a decision not to select the appellant for a screener position.

Cox-Vaughn v. United States Postal Service, 100 MSPR 246 (September 30, 2005) – The Board had jurisdiction over the appellant's appeal by virtue of the appellant's preference eligibility, derived from her husband's service-connected disability (Good Board discussion). On that basis the Board found a suspension because of the placement of the appellant in a nonduty, nonpay status for more than 30 days but upheld the AJ's determination as to the denial of notice and sustained the removal. On December 20, 2002, the agency issued a notice advising appellant that she had been placed in a nonduty, nonpay status / notice also stated that the agency was considering

taking further action against appellant concerning her alleged absence from duty on September 2, 2002. On March 8, 2003, the agency removed appellant for falsifying time records, a charge based primarily on the alleged September 2 absence. On appeal, the appellant claimed a violation of procedures because the agency did not expressly advise her, in its December 20, 2002 notice of her right to respond to that notice and it did not expressly state in that notice that the appellant's removal was being proposed. Nonetheless, the AJ found no harm, noting that the appellant and her representative had been permitted to meet with the appellant's second-level supervisor, DH, regarding the matter on February 1, 2003, 3 days before DH issued the February 4 notice of decision to remove the appellant. (In addition to agreeing on the no harm finding, the Board determined that the agency had provided the appellant with the due process of law required by the Constitution, i.e., with prior notice of the action and an opportunity to respond).

Ellefson v. Department of the Army (February 28, 2005) - Board interpreted 5 U.S.C. § 7511(a)(1)(A)(ii) so that current continuous service need not be in the same or similar positions in order for an individual in the competitive service to qualify as an "employee" under that subsection. (“We . . . hold that, for competitive service employees, ‘current continuous service’ means a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.”). This case involved a competitive service employee who was terminated during the probationary period based on his alleged failure to demonstrate his fitness for continued employment. The Board remanded because it was unable to

determine “whether the appellant has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less.” so that he could “meet the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) and the Board would have jurisdiction over his appeal.” The Board also made clear that “Even if the appellant had a break in service, he may be an "employee" under subsection (i) of section 7511(a)(1)(A) if his prior service can be "tacked" to his probationary period.” This case has good discussion of Federal Circuit precedent in Van Wersch v. Department of Health & Human Services, 197 F.3d 1144 (Fed. Cir. 1999) (applicable to excepted service employees) and McCormick v. Department of the Air Force, 307 F.3d 1339 (Fed. Cir. 2002), pet. for reh'g en banc denied, 329 F.3d 1354 (Fed. Cir. 2003) (applicable to competitive service employees) and illustrates the changing law involving employees, thought to be probationers outside the Board’s jurisdiction.

Gardner v. Department of Defense (March 2, 2005) – The Board reversed the agency’s removal of a term appointment during the one year trial period because the appellant was an “employee” who was entitled to but did not receive minimum due process of law. On December 4, 2000, appellant received a competitive service, term appointment to a GS-9 Personnel Security Specialist position with the agency, subject to completion of a one-year trial period. On November 30, 2001, the agency terminated the appellant during the trial period based on her alleged unavailability for duty / the AJ dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a non-frivolous allegation that the agency took the termination action because of partisan political reasons or marital status

discrimination / The Board reversed / it first noted that under McCormick v. Department of the Air Force, 307 F.3d 1339, 1342-43 (Fed. Cir. 2002), pet. for reh'g en banc denied, 329 F.3d 1354 (Fed. Cir. 2003), "a probationary individual who is excluded from "employee" status under 5 U.S.C. § 7511(a)(1)(A)(i) is nevertheless an "employee" with Board appeal rights if the individual meets the definition provided at 5 U.S.C. § 7511(a)(1)(A)(ii)" and that "McCormick's reasoning applies with equal force to an individual serving in a trial period" / the Board then determined that the appellant was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii); "[P]rior to the appointment from which the appellant was terminated here, the record shows that the appellant had been assigned to a Security Assistant position with the Department of the Navy on January 31, 1999. . . . She was terminated from that position on December 2, 2000. . . . On December 4, 2000, the agency appointed the appellant to the position at issue in the present case. . . . The agency terminated her from that position on November 30, 2001. . . . Although the appellant had a break in service on December 3, 2000, that was a Sunday and not a workday. . . . . Therefore, the appellant completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. On this basis, we find that the appellant is an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii), and that the Board has jurisdiction over her appeal." Because the appellant was provided a notice, without the opportunity to respond before removal, she was denied minimum due process and the action was reversed.

Gutierrez v. Department of the Treasury, 99 MSPR 141 (July 12, 2005) – "An individual serving under a competitive service appointment as a

seasonal employee whose appointment lasted more than 1 year, but who actually only worked for 10 months due to periods in a nonduty, nonpay status, can be considered to have completed 1 year of current continuous service, thereby rendering her an employee with Board appeal rights under 5 U.S.C. § 7511(a)(1)(A)(ii) as interpreted in McCormick." Thus, the Board reversed the agency's action, finding that she had been denied her constitutional right to due process ("The record shows that the appellant received written notice of her termination on December 29, 2003, and that her termination was effective on January 3, 2004.") law because she was not provided with an opportunity to respond. The appellant received a competitive service career-conditional appointment to a GS-0962-05 Contact Representative position on November 26, 2002. While the appointment was subject to a 1-year probationary period beginning November 26, 2002, she was on a seasonal basis, meaning that the appellant was subject to release to a nonpay status and recall to duty to meet workload requirements. By notice dated December 29, 2003, the agency notified the appellant that it was terminating her employment effective January 3, 2004, during her probationary period, for less than fully successful performance. At that point she had actually worked for only 10 months.

Hayes, et al v. United States Postal Service, Nos. 03-3326 and 04-3005 (Fed. Cir. December 8, 2004) – Because the appellant Machine Operators received positions at the same grade and pay level, even though the duties and responsibilities of the new positions were lower graded, they were not "demoted" and therefore the Board did not have jurisdiction over the appeals.

Johnson v. Department of Veterans Affairs, 99 MSPR 362 (August 12, 2005) – Board found no jurisdiction over the removal of a temporary employee, who meets the literal terms of 5 USC 7511(a)(1)(A)(i) (i.e., (A) an individual in the competitive service (i) who is not serving a probationary or trial period under an initial appointment) but does not meet the service requirement of 5 USC 7511(a)(1)(A)(ii) (i.e., (A) an individual in the competitive service (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less[.]). As held by the Board "To conclude in this case that the appellant has appeal rights under subsection (A)(i) because she was not serving a probationary or trial period under an initial appointment when she was separated would produce an unreasonable result. Interpreting the statute in this way would mean that every temporary appointee would have tenure, i.e., the right to be removed only for cause and a corresponding right of appeal, on his or her very first day of work. We have no reason to believe that such a construction of the law was intended either by Congress or the McCormick court."

Jolivette v. Department of the Navy, 100 MSPR 216 (September 30, 2005) - The Board reversed the removal of the appellant, an Intermittent Firefighter, during his one year "probationary employee", finding that he was an employee under 5 USC Section 7511(a)(1)(C)(ii) with Chapter 75 appeal rights, which he was not provided and therefore denied his minimum due process right to respond to his termination. The appellant established that he "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[.]"

McCormick v. Department of the Air Force (February 28, 2005) - The Board determined that the appellant, who was erroneously terminated as a probationer and not an "employee", was not denied minimum due process (that would then result in reversal). However, with Member Marshall dissenting, the agency was ordered to amend its records and give the appellant an additional 19 days of back pay retroactively because the appellant was terminated 11 days after the agency's proposal notice. This is the remand appeal from the important and surprising Federal Circuit decision that found that the appellant was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii), and that the Board had jurisdiction over her appeal. Board remands to regional office for a further determination (i.e., as to whether agency can prove the reasons for the termination). As stated by the Board, "The agency terminated the appellant from her position under the procedures of 5 C.F.R. § 315.804 (2002) for her continued absences. The record shows that the appellant received prior written notice of her proposed separation on February 11, 2000, and that she was afforded an opportunity to reply in writing within 5 calendar days. . . . The record does not indicate whether the appellant submitted a reply. She was separated on February 22, 2000, 11 days after the issuance of the proposal notice. . . . We find that the agency's procedures for effecting the appellant's separation comported with her constitutional right to minimum due process of law because she received notice of the action against her, an explanation of the reasons for the action, and an opportunity to present her response." At the same time, with Member Marshall dissenting, the Board recognized that "Under the Federal Circuit's

interpretation of 5 U.S.C. § 7511(a)(1)(A), the appellant was entitled to be retained in a pay status for at least 30 days after her termination was proposed. See 5 U.S.C. § 7513(b). The agency terminated the appellant 11 days after its proposal notice. Accordingly, the administrative judge's new initial decision shall order the agency to amend its records to give the appellant an additional 19 days of back pay retroactively."

Nash v. United States Postal Service, 97 MSPR 220 (September 15, 2004) - The Board reversed the AJ, and finds instead that it has jurisdiction over the appellant's constructive suspension appeal because he was a preference eligible "who has completed 1 year of current continuous service in the same or similar positions." The issue in this case was whether the positions of Carrier Technicians ("A Carrier Technician's duties involve the delivery and collection of mail by foot or vehicle") and Distribution Clerks ("the duties of a Distribution Clerk involve the sorting and distribution of mail within a postal facility") were essentially the same, which the Board concluded they were.

Newton v. United States Postal Service, 98 MSPR 149 (January 28, 2005) - "Preference eligible Postal Service employees may pursue their collective bargaining agreement's grievance procedures and appeal adverse personnel actions; they are not required to choose between pursuing the collective bargaining agreement's grievance procedures and appealing the adverse action." Thus, despite that the appellant's removal was upheld in arbitration, the appellant can still directly appeal to the Board.

Porter v. Department of Defense (March 25, 2005) - The Board, Member

Marshall dissenting, determined, as had the AJ, that Ms. Porter was an "employee" under 5 USC Section 7511(a)(1)(A)(ii) (i.e., an employee who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. ...") entitled to appeal her constructive removal to the Board and that she proved that her resignation was involuntary. Ms. Porter "completed nearly 14 years of federal service when, in early 2001, she applied for an Auditor position with the agency. . . . The agency selected the appellant from a certificate of eligibles and, in a letter dated March 7, 2001, made a tentative offer of employment. . . . The agency's letter explained that a 1-year probationary period was a condition of appointment." She then agreed to resign after 10 months, and only after "being told by agency officials that she had no Board appeal rights." She was an "employee" under the federal circuit's decision in McCormick, which the Board applied retroactively. Moreover, the misleading information provided by the agency as to appeal rights, justifiably relied on by Ms. Porter, was sufficient to prove that appellant's resignation was involuntary, despite that there was no intent to mislead and even though it was "factually and legally correct at the time it was provided." The Board also rejected the agency's contention that the appellant "knowingly and voluntarily waived her appeal rights", even though the agency sent the appellant a letter explaining that a1-year probationary period was a condition of its employment offer.

Schibik v. Department of Veterans Affairs, 98 MSPR 591 (May 26, 2005) - Upon remand from the circuit, the Board determined that the appellant, a Secretary, who was terminated during her one year probationary period was

an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) because she held positions in various agencies during her 12-year civil service career prior to her appointment with the agency, without a break in service (i.e., under 5 U.S.C. § 7511(a)(1)(A)(ii), she "completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less . . . ."). Moreover, the action against her (removal for "unsatisfactory work practices") was reversed because she was not provided with her due process "opportunity to present a response." The case was remanded to consider appellant's age discrimination claim.

Schott, Kyle Jiggetts, Jacob L. Younger v. Department of Homeland Security, 97 MSPR 35 (August 12, 2004) – The Board is without jurisdiction over TSA Screeners' IRA appeals due to Section 111(d) of the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001) and jurisdiction is not found in the Homeland Security Act.

Schutte v. Department of the Treasury (December 9, 2005) – A seasonal tax examining clerk was an "employee" with appeal rights to the Board under 5 U.S.C. § 7511(a)(1)(A)(ii). Appellant was serving her 1-year probationary period as a competitive service employee at the time of her termination. Her appointment began on February 3, 2003 and she was terminated on May 25, 2004. Her probationary period would have ended on February 2, 2004, except that she was placed in a nonduty, nonpay status for from June 26, 2003, to October 18, 2003, and then from December 14, 2003, to February 14, 2004. Because she was a probationary employee at the time she was terminated, she did not meet the definition of an "employee" at 5 U.S.C. § 7511(a)(1)(A)(i). However, because she occupied her position for more

than 15 months before she was terminated the Board found that she was an employee under 5 U.S.C. § 7511(a)(1)(A)(ii) “because she has completed 1 year of current continuous service, notwithstanding her placement in a nonduty, nonpay status.” In sum, the Board concluded that a seasonal employee's time in a nonduty, nonpay status is part of her employment and off-duty days are not considered a break in continuous employment. Accordingly, the Board reversed the removal, concluding that “the agency's procedure effecting the appellant's removal violated her constitutional right to minimum due process of law because she had no opportunity to present her side of the story.”

Shelton v. Department of the Air Force, No. 04-3136 (Sept. 1, 2004) - The circuit agreed with the Board and determined that the agency could properly impose a probationary period on the employee, after a thirteen-year hiatus in service; the employee was ”fully informed, and accepted the one-year probationary period. Imposition of a reasonable condition to accommodate a special circumstance is not an illegal employment action. A new probationary period was not an unreasonable condition after thirteen years away from the job, and we need not speculate about whether the job or the employee may have changed in that time.” The employee was hired as a production controller at Tinker Air Force Base from 1981 to 1988. In November 2001, she was reinstated in the competitive service as a career employee with conditional tenure, with the SF-50 providing that "Appointment is subject to completion of one year initial probationary period beginning 11-05-01." On November 5, 2001, the employee signed a document entitled "Probationary Period," stating that, "I understand that by

accepting this position, appointment is subjected to completion of a one-year probationary period." She was terminated, effective October 2, 2002, for a failure to qualify during the probationary period due to issues of her "general character." The issue on appeal was whether she was an "employee" under 5 U.S.C. § 7511(a)(1)(A), with MSPB appeal rights. That section provides that: "(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."She unsuccessfully argued that her appointment in November 2001 was not an "initial appointment" in terms of subsection (1)(A)(i), that her initial appointment was in 1981, that the 2001 appointment was a reinstatement to the same position, and that no trial period was legally imposable.

Stoute v. Department of the Navy (April 1, 2005) - The appellant, a Machinist, was an "employee" under McCormick because he had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less, had not waived his appeal rights just because the agency had informed the him that he was to serve a new probationary period. Accordingly, his termination was reversed because the agency had not provided him with minimum due process. The facts of this case are as follows: on July 31, 2000, the appellant was appointed to the competitive service position of Machine Tool Operator with the agency, a position subject to the completion of a 1-year initial probationary period; he completed his probationary period and, in March 2002, he applied for the

competitive service position of Machinist with the agency; on September 9, 2002, the appellant was appointed to that position from a certificate of eligibles and the appointment SF-50 stated that the appellant would be required to complete another one-year initial probationary period; and, on July 29, 2003, the agency terminated him from the position during his probationary period for poor performance and tardiness. The Board's findings were that the appellant was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii); the fact that the appellant was appointed from a register "is not relevant to the issue of whether he is an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii)"; unlike the appellant in Ramos, he did not sign an agreement expressly waiving his appeal rights; and, the agency's action was reversed because it violated the appellant's constitutional right to minimum due process of law.

Stringfellow v. Department of Agriculture, 100 MSPR 497 (November 16, 2005) – The Board reopened this appeal, which had been dismissed, on the basis of the federal court's decision in Kirkendall v. Department of the Army, 412 F.3d 1273 (Fed. Cir. 2005), (the 60-day period to file a complaint with the Department of Labor is subject to equitable tolling) and remands for a determination. Citation to cases as to the appropriateness of reopening, which is discretionary.

Thompson v. Department of the Treasury (December 2, 2005) – The appellant, removed during her 1-year probationary period was an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) (i.e., an employee is an individual in the competitive service who has completed one year of current continuous service under other than a temporary appointment limited to one

year or less), did not waive her appeal rights because of an agreement signed after she began employment and consequently the case was remanded to determine if the employee was provided minimum due process. This case involved an employee who had completed 18 years of service with the Department of Agriculture (a former agency) when she accepted a career appointment as a Revenue Officer for the Internal Revenue Service and on the first day of her employment with the agency, signed a Notification of Probationary Period Document. That notification stated that she understood she was serving a probationary period, she relinquished her appeal rights during the probationary period, and she did not waive any appeal rights to which she was entitled by signing the document. She was removed from her position during her probationary period for failing critical elements of her position, failing to pay the balance on her government credit card in a timely manner, and for AWOL.

Medical Inability to Perform Charges

Hughes v. Department of Labor (June 6, 2005) – The Board sustained the arbitrator's decision upholding the appellant's removal for physical inability to perform and rejecting her disability discrimination claim. The agency removed the appellant from her position as a GS-12 Technical Information Specialist for physical inability to perform the duties of her position. She alleged that she had multiple chemical sensitivity and electromagnetic field sensitivity, both of which prevented her from using a computer. The Board first noted the agency burden, requiring it to prove that there was "a nexus between his medical condition and observed deficiencies in his performance or conduct, or a high probability of hazard when his condition may result in injury to him or others because of the kind of work he does." The Board concluded that the arbitrator applied the appropriate standard and that the agency proved that the appellant had a debilitating medical condition that affected her ability to use the computer, an essential function of her job. As to the disability discrimination, finding the Board agreed with the result but modified the analysis. It concluded that the appellant was not a qualified individual with a disability because she could not perform the essential function of computer use.

Miscellaneous

Whitman v. DOT, _____ U.S. _____ (S.Ct. June 5, 2006) - The Supreme Court said that the 9th Circuit was correct in saying that the Civil Service Reform Act does not confer federal court jurisdiction. However, 28 USC Section 1331 confers jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Therefore, the question is not whether the Civil Service Reform Act confers jurisdiction, but whether it removes the jurisdiction granted by Section 1331. This, in turn, may require findings as to whether Whitman's allegations state a "prohibited personnel practice." The Court remanded for consideration of this issue, and suggested several other issues that may be addressed on remand.

Misuse Charges

Quillen v. Treasury (May 24, 2004) – Removal not mitigation was appropriate for proof of a charge that the appellant misused government equipment and another charge of misuse of official government time. The appellant was removed from his GS-0334-13 Computer Specialist position for 2 charges, misuse of government office equipment, with three supporting specifications, and misuse of official government time. These charges concerned the appellant's viewing pornography on government time and using government provided internet, e-mail, and telephone service inappropriately for non-work related purposes (i.e., running a private business). Although the administrative judge sustained both charges, she found specification three of the first charge unproven (because it only involved limited use of government computer to copy commercial business computer files from one floppy disk to another floppy disk). Based on proof of only two of the specifications of the first charge, the lack of prior discipline and a superior work record, the AJ mitigated to a 90-day suspension. On review, the Board first found that specification three was proven. That specification stated, "Despite receiving a direct order in April 2002 to cease and desist from any misuse of Government property, you have continued to use the Government office equipment to support your private commercial business." However, the AJ accepted the appellant's testimony that the agency's evidence only showed that he had copied his commercial business computer files from one floppy disk to another floppy disk using his government computer during that time period. Because the agency permitted "limited personal use" of government property when such use

involved minimal additional expense to the government and did not overburden any of the agency's information resources, the AJ correspondingly found that this use of government equipment was insufficient to support the agency's third specification. In reversing this finding, the Board held, as follows: “We do not agree with this finding regarding the appellant's admitted misuse of his government computer in support of his commercial business following the agency's April 2, 2002 directive that he immediately cease and desist his alleged misuse of government property and use of public office for private gain . . . . Treasury Directive 87-04, upon which the AJ relied in finding that the appellant's admitted use constituted authorized ‘[l]imited personal use,’ provides, in part, that ‘[e]mployees are specifically prohibited from the pursuit of private commercial business activities or profit-making ventures using the government's office equipment.’ . . . Moreover, regardless of Treasury Directive 87-04, the appellant was directed in the agency's April 2, 2002 memorandum immediately to cease and desist his misuse of government property and use of public office for private gain. . . We find that the agency's evidence, when coupled with the appellant's admitted use of his government computer in support of his commercial business following the agency's April 2002 memorandum, was sufficient to sustain the agency's third specification in support of its first charge and that the AJ erred in finding to the contrary.”(citations omitted). Concerning penalty, the Board observed that the agency penalty determination was entitled to deference (“Where, as here, all of the agency's charges and specifications are sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised

management discretion within the tolerable limits of reasonableness."). It then noted "In evaluating the penalty, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relationship to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated. In that regard, the Board found that "appellant's own admissions during his OIG interview established the seriousness of the charged misconduct, the fact that the misconduct was knowing and intentional, and the fact that the misconduct was on-going for an extended period of time. . . . The appellant admitted that he knew that using his government computer for the purpose of viewing pornography on government time was prohibited, but he did it anyway. . . . He admitted to using government provided internet, e-mail, and telephone service inappropriately for non-work related purposes, and he admitted to knowingly falsifying his timesheets as a result of his running his private business interest during work hours, such that he "stole" an estimated $63,106.77 in salary. . . . Further, the appellant's hearing testimony established that, even after the agency's April 2, 2002 memorandum ordering him immediately to cease and desist his alleged misuse of government property and use of public office for private gain, he continued to use his government computer to copy his commercial business files. . . We find that the appellant's admissions and the circumstances of this case show that the appellant's misconduct was serious, intentional, repeated, and directly related to his duties, position, and responsibilities as a Computer Specialist." (citations omitted). The Board also rejected the factors relied on by the AJ to mitigate, to include that the appellant had no prior disciplinary actions on his record, with the Board finding "this fact to be of little weight here,

however, because the notice of proposed removal indicates that the appellant had been previously counseled regarding his personal use of government office equipment and the deciding official considered the clarity with which the appellant was on notice of the impropriety of such conduct, as well as his lack of a prior disciplinary record." And, with regard to the appellant's superior or outstanding performance ratings during his ten years of service with the agency, that he would assist others in troubleshooting problems, and that he cooperated with the OIG investigation and stopped his improper use of his government computer following the agency's April 2002 memorandum ordering him to cease and desist, such activity did not evidence that he had potential for rehabilitation; the appellant had been previously counseled regarding his improper use of government equipment for his personal use, the agency issued him an April 2, 2002 memorandum ordering him immediately to cease and desist from his misuse of his government equipment and use of public office for personal gain following the appellant's admission of his serious on-going misconduct during the OIG investigation, and the appellant, nonetheless, admitted to using his government computer subsequently, to copy his private business computer files. Additionally, the Board noted (as to potential for rehabilitation) that the appellant attempted unpersuasively to recant his March 14, 2002 sworn admissions to the OIG during his hearing testimony.

Mixed Cases

Bell v. DHS (Mar. 4, 2004) – A AJ may not dismiss a mixed case appeal as untimely filed under 5 CFR Section 1201.154 based on the untimeliness of the appellant's formal EEO complaint without evidence of a final agency decision dismissing the EEO complaint as untimely that was not appealed to the EEOC or a decision by the EEOC dismissing the complaint as untimely.

Boots v. Potter, Postmaster General, United States Postal Service (Special Panel June 23, 2005) - In a 2-1 vote, with MSPB Chairman dissenting, the Special Panel found that the EEOC decision on in this case, which concerns the defenses available under the Rehabilitation, is based on discrimination law, and, on that basis, defers to the EEOC's decision; in that decision, the Commission determined that the agency committed disability discrimination by failing to do an individualized assessment as to risk of harm and excluding the complainant, an epileptic, based on a non binding DOD regulation. The employee worked as a Tractor-Trailer Operator for the agency since 1998. He was removed in 2002 for inability to perform his job duties after Department of Transportation regulations were changed to disqualify individuals who take anti-seizure medications from holding a Commercial Drivers' License (CDL), which was necessary to work as a Tractor-Trailer Operator. The Board sustained the removal action and rejected the appellant's allegation of disability discrimination, finding that the appellant was not a qualified individual with a disability because he could not meet the qualification standards for his job. In its decision, the Commission first observed that the agency had voluntarily adopted the DOT

regulations at 49 C.F.R. § 391.41(b)(8), which otherwise specifically exclude transportation performed by the Federal government. Under those regulations, a person may operate a heavy vehicle if he or she "has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle." In an accompanying "medical advisory", it was recommended that anyone who has had a non-epileptic seizure should be evaluated on an individual basis but also recommends disqualification of a person who currently takes anti-seizure medication. The Commission then held that because the appellant was disqualified from operating a commercial motor vehicle (i.e., a class of jobs) he was an "individual with a disability" under the Rehabilitation Act. The Commission went on to address the matter of whether the appellant was a "qualified individual with a disability", noting that the agency may require, as a qualification standard, that an individual not pose a "direct threat," that is, a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. The agency bears the burden of proof on that issue, and that burden is not met merely by the employer's subjective evaluation, or "except in cases of the most apparent nature, merely on medical reports." The Commission further observed that an agency makes a "direct threat" determination, under 29 C.F.R. § 1630.2(r), by conducting an individualized assessment of the risk he or she presents. taking into account the duration of the risk, the nature and severity of the potential harm, the likelihood harm will occur, and the imminence of such harm. Evidence relevant to that assessment may include input from the employee, his work history, and medical opinion from experts or physicians familiar with the

employee's condition. In that regard, it was relevant that prior to his removal, the appellant had possessed a valid CDL for many years, and he continued to hold one. He used anti-seizure medication, had a problem-free history with the agency, and his personal physician certified that he was qualified to operate a commercial motor vehicle. In any event, the Commission found that the agency here had not performed such an assessment and had relied solely on the DOT regulation, with which it was not required to comply. Because it differed with the MSPB, the Commission referred the case back to the Board for further consideration and issuance of a new decision. Upon referral, "the Board concluded that the USPS was entitled to adopt the DOT standards and once it had done so, it was required to comply with them – thereby making the standards binding on the USPS in the same way that they would apply to a non-government employer." Stated another way, in the MSPB's view, the USPS could rely on the regulations and disqualify the employee solely on the basis if the DOT regulations and without making a direct threat determination. This disagreement between the MSPB and the EEOC necessitated the instant Special Panel decision, in which the Special Panel sided with the EEOC.

Lethridge v. United States Postal Service, 99 MSPR 675 (September 22, 2005) – In this interlocutory appeal, the Board finds that three complaints referred to the Board by the EEOC for resolution because they were "inextricably intertwined, or cannot sensibly be bifurcated" from a pending Board appeal were not within the Board's jurisdiction and should be returned to the EEOC. The appellant was removed from his EAS-17 Supervisor of Distribution Operations position based on a charge of

disability separation. And appealed to the Board. During the course of the Board appeal, the appellant provided the AJ with EEOC decisions referring three issues to the Board because they were "inextricably intertwined" with the Board appeal. These concerned "inextricably intertwined (1) a complaint that the agency, because of the appellant's race and/or mental disability, denied him reasonable accommodation and placed him in a non-pay status on September 9, 1999; (2) a complaint that the agency retaliated and discriminated against the appellant based on mental disability when (a) the agency ended his detail assignment to Sacramento, California, on or about August 22, 2001, (b) his acting supervisor called him a bastard on July 28, 2001, and (c) he was informed by the Office of Workers Compensation Programs in September 2001 that he was being terminated by the agency; and (3) the agency issued a Notice of Removal-Disability Separation on July 18, 2002, that was a denial of reasonable accommodation of his disability and/or in retaliation for prior EEO activity. The AJ certified her ruling that the appellant's first and second complaints are not within the Board's jurisdiction and that those complaints should be decided by the EEOC but that "the appellant's third EEO complaint can properly be heard by the Board as a mixed-case issue as it was filed in conjunction with the agency's notice of proposed disability separation and is intertwined with the agency's ultimate disability removal action over which the Board clearly has jurisdiction." The Board, in strictly interpreting its jurisdiction over mixed case issues, found that it had no jurisdiction over any of the EEO complaint issues, even the notice of proposed removal. Thus, the Board noted that "even assuming that there are valid policy reasons for the Board to consider non-appealable actions with appealable actions, such as the avoidance of

allegedly inconsistent results, the Board cannot expand its limited jurisdiction to address those policy concerns. In any event, we find that there are distinct actions at issue in the appellant's EEO complaints and his Board appeal that, if adjudicated, would not necessarily produce inconsistent results." The Board also observed that the EEOC had recently made a change to its Management Directive, consistent with the Board's ruling.

Miller v. Potter, EEOC Petition No. 03A40039 (Feb. 25, 2004) – A last chance agreement appeal waiver of EEO claims is invalid as violative of public policy. However, because the Board did not address the appellant's discrimination claim, the EEOC held that it lacks jurisdiction over the appellant's petition. It stated, however, that the appellant may seek EEO counseling as to her removal.

Oja v. Department of the Army, No. 04-3030 (Fed. Cir. April 28, 2005) – The appeal is not mixed just because it includes a claim of discrimination in a petition to enforce a settlement agreement. Additionally, the court held that the petition to the Federal Circuit (it had first gone to the District court) was untimely as beyond the 60-day appeal period in 5 USC Section 7703(b)(1), which is not subject to equitable tolling. Judge Newman dissented as to the decision on equitable tolling.

Redd v. USPS (Feb. 28, 2006) – The Board reverses its decision in Currier and determines that an appellant who claims discrimination is not automatically entitled to a hearing. As stated by the Board, "We now hold that when the appellant's factual allegations in support of a discrimination claim, taken as true, could not support an inference that the agency's action

was a pretext for discrimination, the AJ is not required to permit the appellant to attempt to prove his allegations at an evidentiary hearing. In other words, when there is no genuine dispute of material fact regarding discrimination, an evidentiary hearing on discrimination need not be conducted."

Mootness

Gittens v. Department of Homeland Security, No. 04-3359 (Fed. Cir. February 24, 2005) (NP) – Court agreed with Board that there was no jurisdiction over the appellant's claim of racial discrimination, following the agency's rescission of its unsuitability finding and because the appellant failed to make a non frivolous claim of race discrimination. Gittens was employed as an Immigration Inspector by DHS , when he was terminated prior to the expiration of his probationary period. He then submitted an application to DHS for the position of Center Adjudication Officer, for which DHS found that he was unsuitable. Gittens appealed the agency's unsuitability finding to the Board, alleging racial discrimination. Thereafter, the agency "rescinded its finding of unsuitability, without prejudice," and stated that it "will resume processing [Gittens] application ... and will revaluate [his] suitability for employment." / the AJ further found that Gittens had failed to "set forth a non-frivolous allegation," and dismissed the appeal as moot. The circuit agreed, concluding that "Gittens provides no evidentiary support for race's being a motivating factor in the DHS rejection of his April 2003 application -- such as declarations, affidavits, or other documents -- and thus fails to establish the Board's jurisdiction."

Harris v. Air Force (May 25, 2004) - Where the appellant has an outstanding claim of discrimination and has raised what appears to be a further claim for compensatory damages before the Board, the agency's complete rescission of the action appealed does not afford him all of the relief available before the Board, so that mere rescission does not render the

appeal moot. Moreover, where the appellant did not make a claim for compensatory damages, he must be afforded notice of his right to do so before the appeal may be dismissed as moot. As to the compensatory damages issue, the Board observed that "Here, the appellant may be entitled to compensatory damages based on his outstanding claims of race and disability discrimination, as well as his claim of retaliation for his prior EEO activity. . . . Although the appellant has not yet sought compensatory damages, there is no indication that he ever received the appropriate information with respect to any such damages claim." (citation omitted).

Reed v. United States Postal Service, 98 MSPR 585 (May 26, 2005) – The Board reversed the AJ, who had dismissed the appeal as moot, and remanded to determine if the agency, despite rescinding the adverse action, was subjecting the appellant to retaliation, thereby not returning him to status quo ante relief.

Negligent Performance Charges

Velez v. DHS (May 5, 2006) - The Board reversed the AJ, who had found a charge of negligent performance of duties by a GS-12 Supervisory Border Patrol Agent unproven and instead sustained the charge and found the agency's 20 day suspension reasonable. The charge in this case was that the appellant failed to verify that the subordinate agents, who arrested and processed an illegal alien, had conducted an NCIC (National Crime Information Center) check, after they were made aware of an FBI number, prior to the appellant granting the illegal alien a voluntary release to Mexico. This matter became the subject of negative publicity for the agency, after the illegal the alien again entered the United states, a few months later, and raped two nuns and murdered one of them. In finding the charge unproven, the AJ determined that the appellant had relied on information from a subordinate that "a NCIC records check had been run." The Board determined otherwise, concluding that the records, testimony of the subordinate and the actions of the subordinate indicated that the appellant's "exculpatory explanation" was not credible. Finally, the Board held that the 20-day suspension was within tolerable limits of reasonableness for the proven misconduct.

Performance Actions

Brosseau v. Department of Agriculture, 97 MSPR 637 (November 1, 2004) – The Board agreed with the AJ and concluded that the agency had not proven its Chapter 43 performance removal of the appellant; among others the agency failed to provide the appellant with a reasonable opportunity to demonstrate fully successful performance (the assignment the agency gave to the appellant during his PIP was "doomed to fail." because the agency did not actually assign the appellant the above-described responsibilities, and instead, it detailed him to another office within a month after it placed him on the PIP and by the time the appellant was placed in charge of the audit, the fieldwork was 85 to 90 percent complete, and "the focus of the audit had been changed drastically"). Additionally, appellant was not given required supervisory assistance during the PIP ("Almost immediately following the inception of the PIP, the appellant was detailed to a position not supervised" by the person who put him on the PIP because of the detail and the person who initially supervised the appellant while on detail, retired without reviewing the appellant). The two Board members split on an issue of whistleblower reprisal, so that the AJ's finding against reprisal became the Board's final decision.

Cruz v. Department of the Army, No. 04-3189 (Fed. Cir. February 2, 2005) (NP) – The Court upheld the appellant's Chapter 43 performance removal, finding that an accuracy performance standard was achievable. Appellant worked as a GS-4 Medical Support Assistant/Medical Clerk (Data Transcribing) in an Army hospital. Approximately 90 percent of

the appellant's duties consisted of receiving telephonic patient appointment requests and booking the appointments in an automated patient appointment system. At issue was the "Accuracy sub element of a critical element (titled "Responsibilities"). Appellant was allowed no more than four errors during his one-year rating period but committed 19 errors. He was put on a PIP, during which he had "over 25 substantiated errors in booking patient appointments during a 4 month period since the start of [his] rating cycle on 1 July 2001." Appellant argued that the standards were "absolute." The court rejected that claim, noting that agencies are given "great flexibility to choose or develop their own systems" for performance appraisal and that there is no general prohibition against "absolute" performance standards. Thus, as noted by the court, performance standards can provide that a single incident of poor performance will result in an unsatisfactory rating on a job element, as long as the standards are "reasonable, based on objective criteria, and communicated to the employee in advance." The court recognized, citing to precedent that "the reasonableness standard would prohibit the adoption of an accuracy rate that is unrealistically high under the circumstances; for example, it "might be unreasonable for an agency to adopt a standard permitting so few errors in pulling medical records from files that, based upon the number of records the employee is required to pull, the employee must be at least 99.91% accurate." Nonetheless, the court held that standard was achievable, as evidenced by evidence from co-workers.

Fernand v. Department of the Treasury, 100 MSPR 259 (September 30,

2005) - The Board reversed the AJ, who found that the agency had not proven unacceptable performance. The agency removed the appellant from her position as a GS-11 Internal Revenue Agent for unacceptable performance in the critical element of Workload Management prior to and during a 60-day performance improvement period (PIP period). The AJ found that the agency had not proven unacceptable performance by substantial evidence, concluding that only 1 specification had been proven. In reversing, the Board first observed that "A proposal notice can constitute valid proof of an agency's charges, where the notice is not merely conclusory, but sets forth in detail an employee's errors and deficiencies, and where the notice is corroborated by other evidence. Gill v. Department of the Navy, 34 M.S.P.R. 308, 311 (1987)." It then held that "Here, contrary to the administrative judge's finding, the record contains ample documentary evidence that the agency proved several instances in which the appellant performed unacceptably in the performance aspect of completeness with respect to the tasks she was required to perform under the critical element of Workload Management. In addition to specification 12, which the administrative judge sustained, the agency's removal proposal notice charged in specifications 4, 7, 10, 14, 21, and 27, that the appellant performed unacceptably in the performance aspect of completeness during the PIP period. The appellant's immediate supervisor . . . corroborated these specifications with documents that he authored during the appellant's PIP period and an affidavit that he supplied during the appeal."

Guillebeau v. Department of the Navy, No. 03-3220 (Fed. Cir. March 24, 2004) – The Circuit found that while the appellant's performance standards

were absolute, there was no statutory bar to such standards and because the agency applied the standards in a reasonable manner, removal was appropriate under Chapter 43. The employee worked as an Engineer, ND-4 (equivalent to a GS-13), working as part of an agency demonstration project which had been approved by OPM in accordance with 5 USC Section 4703. The agency had issued the employee a Notice of Unsatisfactory Performance, providing that she had not been completing assigned tasks on schedule, not consistently communicating with her supervisor and allowing technical problems / issues to slow down or stop her progress without seeking immediate and appropriate technical help. In its notice, the agency also set forth numerous specific examples of unacceptable performance and enclosed a Performance Plan, developed to assist the appellant in improving her performance to an acceptable level. The Performance Plan described two assignments that she was to complete by December 17, 1999 - developing a set of web pages to document the participation of the Advanced Sensors Program in two fleet exercises. The agency extended the Performance Plan until January 5, 2000 and then again until February 4, 2000. Effective March 31, 2000, the agency removed the appellant on the basis that during the Performance Plan period she had managed to complete only one of five “deliverables” (specific tasks). In her appeal, the appellant challenged the procedures the agency used to remove her and claimed that the agency action was the result of discrimination against her because of her disability, obsessive-compulsive disorder. At the hearing, the appellant's supervisor, when asked how many errors the appellant could make with regard to the four quality standards applicable to her assigned tasks, as set forth in her Performance Plan, replied that she could not make “any errors” and

thereafter agreed with the appellant's attorney that it was “all or nothing.” On that basis, the AJ determined that the quality standards in the appellant's Performance Plan constituted an absolute standard under the Board's case law and were therefore invalid. On review, the Board noted, as had the AJ, that OPM, in approving the demonstration project, had waived the statutory requirement that an agency establish critical elements so that removal was appropriate for an employee who failed to meet the criteria (requirements and expectations) set forth in a Performance Plan. Thus, the Board observed that its case law, which defined an absolute standard as one under which a single incident of poor performance will result in an unsatisfactory rating as to a critical element of a position, did not appear to be applicable in an instance involving a demonstration project, in which the standard for critical elements had been waived. Nonetheless, the Board determined that even if the absolute standard concept was applicable, it had previously held that an absolute standard may be valid where the employee is aware that the standard would not be applied in an absolute manner. The Board further noted that despite the supervisor's testimony, the agency did not apply the four quality standards to the appellant's performance in an absolute manner. .” (The four quality standards required that: (1) all web pages be peer reviewed prior to final submission; (2) all web pages conform to the format for Coastal Systems' Station web pages and technical content be at the “public release” level; (3) all issues from the peer review be resolved and comments incorporated into the final submissions; and, (4) the final submission be provided in electronic and printed form.). For example, “it did not deem her performance unacceptable because one of a number of the web pages she was tasked with designing was not peer reviewed or did not

conform to the appropriate format or because less than 100% of the technical content was at the 'public release' level." In the Board's view, the agency did not find that the appellant's performance was unacceptable because she made a single error that justified her removal. Rather, the agency had determined (and the appellant did not dispute this) that she "simply failed to complete the assigned work during the period provided, even as extended" and that by the end of the extended period, she had completed only one "deliverable", a first draft of one of the two sets of web pages. Thus, the evidence, in the Board's view, showed that despite extensions and considerable agency assistance, "the appellant failed to complete the majority of the project that she was tasked to complete. Thus, the Board upheld the agency's termination of the appellant for unacceptable performance, disagreeing with the AJ that the agency had applied an absolute standard. The Circuit affirmed the Board but took a different approach. It held first that the standards were absolute (i.e., the standards provided that a single incident of poor performance would result in an unsatisfactory rating on a job element). The Court declined to decide whether OPM can waive the requirement for "reasonable performance standards" in a demonstration project. It then decided that there is no prohibition on absolute standards, reversing longstanding Board law (e.g., the Callaway line of cases) and criticized the Board for its focus "on the performance standard itself, rather than its application in a particular case . . . . [judging] performance standards in the abstract, without regard to how the standards are applied to a particular employee in a particular case, unless the employee has received advance notice that the standard would not be applied in an absolute manner." As the Court interpreted the statute,

performance standards must be "reasonable, based on objective criteria, and communicated to the employee in advance." On that basis, it found that "the performance standard applied to the petitioner, although it was absolute, was applied to her reasonably." The Court cautioned though that it was not suggesting "that an agency may adopt an unreasonable standard or that absolute performance standards are always reasonable. For example, it might be unreasonable for an agency to adopt a standard permitting so few errors in pulling medical records from files that, based upon the number of records the employee is required to pull, the employee must be at least 99.91% accurate."

Harris v. Department of Transportation, 96 MSPR 487 (July 12, 2004) – Even though the agency rescinded the personnel action by taking the employee off the PIP and certifying him, the case was not moot because of the employee's allegations of economic damage. As noted by the Board, "The appellant's assertions of economic damage due to being given the ODAP, particularly his assertions that being given the ODAP delayed his completing the certification process and that the labor-management agreement applicable to him mandated that controllers be promoted to the full performance level after they completed the certification process, are assertions that he was left in a worse position because of the cancellation than he would have been in if the matter had been adjudicated and he had prevailed. Thus, we find that the appellant has nonfrivolously alleged that his successful completion of the ODAP did not render his IRA appeal moot because the agency did not place him, as nearly as possible, in the position that he would have occupied had the prohibited personnel practice not

occurred. Additionally, consequential damages remain a viable form of corrective action here."

Harris v. Department of Transportation, 96 MSPR 487 (July 12, 2004) - The AJ erred in dismissing the appellant's IRA appeal as moot; while the agency took him off the Opportunity to Demonstrate Adequate Performance status and certified him, the case was not moot because of the appellant's claims that the agency's actions had damaged his career and promotional opportunities and because consequential damages were still "viable." In making its finding, the Board noted that "The appellant's assertions of economic damage due to being given the ODAP, particularly his assertions that being given the ODAP delayed his completing the certification process and that the labor-management agreement applicable to him mandated that controllers be promoted to the full performance level after they completed the certification process, are assertions that he was left in a worse position because of the cancellation than he would have been in if the matter had been adjudicated and he had prevailed. Thus, we find that the appellant has non frivolously alleged that his successful completion of the ODAP did not render his IRA appeal moot because the agency did not place him, as nearly as possible, in the position that he would have occupied had the prohibited personnel practice not occurred. Additionally, consequential damages remain a viable form of corrective action here."

Jackson v. Department of Veterans Affairs, 97 MSPR 13 (Aug. 10, 2004) - Relying on the Federal Circuit's decision in Guillebeau v. Department of the Navy, 362 F.3d 1329 (Fed. Cir. 2004), the Board determined that 5 U.S.C. § 4302(b)(1) required the use of "objective" job-related criteria enabling the

rating official to make an "accurate evaluation of job performance", that the criteria be set out "to the maximum extent feasible" in the performance standards and that neither the statute nor regulations prohibit the use of absolute performance standards, if the standards are objective and tailored to the specific requirements of the position. The appellant worked as a GS-6 Practical Nurse position. In December 2000, the agency placed the appellant on a 90-day performance improvement plan (PIP), to assist her in performing two critical elements of her position, Customer Satisfaction/Service and Patient Care. Following the PIP, she was removed, for five specifications that took place between March and April 2001. Three of the specifications (1, 2 and 5) involved patient complaints and the appellant's purported failure to use courtesy and good manners. Another specification (#3) involved the appellant's failure for the week of March 12, 2001 to present an inservice performance plan as required by her PIP. A final specification (#4) concerned the appellant's alleged failure to provide effective patient care during a particular week. On appeal, the AJ reversed the removal, finding that the customer satisfaction and patient care critical elements allowed "no more than one to two valid exceptions during a rating period, without taking into account the number of customer/patient contacts the appellant had in the rating period or the nature of her job." The Board remanded, concluding that "Because the inquiry as to the reasonableness of the standards, even if they are absolute, is case specific, this appeal must be remanded to give the parties a chance to address the validity of the appellant's performance standards under the law set forth above and for new findings and conclusions on the merits."

Probationers (See also Jurisdiction)

Banghart v. Department of the Army, 96 MSPR 453 (June 30, 2004) – The Board reversed the AJ, who had found harmful procedural error in the removal of a probationer. The agency terminated the appellant during his one year probationary period because it discovered that he was not qualified for the position since he was under a restraining order which precluded him from carrying a firearm and because he failed to tell the agency about the restraining order. The AJ reversed, finding that the removal was based on pre-appointment reasons and that the employee was not provided the procedural rights in 5 C.F.R. § 315.805 and that because the employee had a motion pending before a state court to dissolve the restraining order, the agency committed harmful procedural error. In disagreeing, the Board observed that "[E]ven if the agency had complied with 5 C.F.R. § 315.805, the appellant did not establish that it was likely that the restraining order would have been dissolved before the agency rendered its decision."

Procedures (Board)

Tunik, et al. v. Merit Systems Protection Board and Social Security Administration, No. 03-3286, 03-3330, and 03-3331 (Fed. Cir. May 11, 2005 - The Board lacked authority to overrule section 1201.142 ("An administrative law judge who alleges that an agency has interfered with the judge's qualified decisional independence so as to constitute an unauthorized action under 5 U.S.C. 7521 may file a complaint with the Board under this subpart." 5 C.F.R. § 1201.142 (2004)) by adjudication and not by notice and rulemaking. This case involved a claim by ALJs that they were constructively removed because of interference with their decision making, even though they were not actually separated. The case was remanded to determine if the ALJs established a claim under 5 C.F.R. § 1201.142 (2004).

Reassignment Actions

Frey v. DOL, No. 03-3329 (Fed. Cir. March 3, 2004) – The Circuit affirmed the Board's decision sustaining the appellant's removal for refusing to accept a geographical reassignment. The appellant worked as a supervisory coal mine inspector in charge of the Mine Safety and Health Administration's field office in Delta, Colorado. The appellant and 3 other field office supervisors were notified that they were being reassigned to other field offices within the district. The appellant was directed to report to the McAlester, Oklahoma field office. He refused, was removed and appealed to the Board, which sustained the removal and rejected his affirmative defenses of age discrimination and whistleblower reprisal. The circuit first set out the elements of proof, noting that the agency must prove, in such cases, that its reassignment decision "was bona fide, and based on legitimate management considerations in the interest of the service.", citing to Board decisions in Umsler and Ketterer. The Circuit further noted, again citing to Board authority, that "If the employee can demonstrate that the reassignment had no solid basis in personnel practice or principle, the Board may conclude that it was not a valid discretionary management determination, but was instead either an improper effort to pressure the appellant to retire, or was at least an arbitrary and capricious adverse action." The Circuit additionally noted that once the reassignment was determined to be a proper exercise of agency discretion, the Board (or the circuit) will not "review the management considerations underlying that exercise of discretion." The circuit then agreed with the Board that the agency had proven legitimate reasons for the appellant's reassignment,

perceived deficiencies in field operations. Concerning the whistleblower reprisal claim, the circuit agreed with the Board that the appellant had not shown that the relevant management official was aware of his disclosure.

Relief

Bergquist v. Department of the Interior, 99 MSPR 516 (June 7, 2005) – The Board reversed the AJ, who had found the agency was in compliance in not paying interest on back pay under a settlement agreement. It noted that "Because the agreement uses the term of art "back pay" without defining it and refers to a regulation that directs interest to be calculated before deductions and offsets are taken, we find that the agreement provides for interest on the back pay."

House v. Department of the Army, 98 MSPR 524 (May 16, 2005) - The agency complied with the Board's reinstatement order by showing that it had compelling reasons to reinstate the appellant and then reassign him two months later to another position. The agency demoted the appellant from a WG-11 Air Conditioning Equipment Mechanic position to a WG-10 Maintenance Mechanic position for two charges: "(1) that the appellant failed to properly maintain records of freon use, and (2) that he refused to cooperate in an investigation of discrepancies in freon use records." On appeal, the AJ sustained the first charge, did not sustain the second charge, and mitigated the demotion to a 14-day suspension. The agency returned the appellant to his WG-11 Air Conditioning Equipment Mechanic position but two months after the AJ's initial decision, the agency detailed the appellant to a WG-11 position of Industrial Equipment Mechanic. In that position, the appellant works in the same shop, under the same supervisor and at the same grade, officially encumbers the position from which he was originally demoted, but does not perform duties that include refrigerant responsibilities

because it cannot yet authorize the appellant to perform refrigerant duties. In finding "compelling reasons", the Board noted that the agency was simply relying on the AJ's findings in sustaining the first charge that "the appellant's conduct in handling freon (a refrigerant) showed a continued failure, after specific training and repeated verbal instruction from [his] supervisor, to follow instructions and maintain an accurate freon inventory [which] placed the Pine Bluff Arsenal (PBA) out of compliance with EPA [Environmental Protection Agency] regulations and thereby subject to substantial penalties. ID at 4 (quoting from the agency's proposal notice)."

Richardson v. United States Postal Service, 96 MSPR 649 (August 12, 2004) – The appellant made efforts to mitigate damages by seeking work during the period of her removal, thus complying with the agency's Employee and Labor Relations Manual.

Williams v. Department of the Army, 97 MSPR 246 (September 16, 2004) – Because the agency rescinded the removal action and reinstated the employee, he is not entitled to interest on back pay under the Back Pay Act because the removal action was not found to be unjustified or unwarranted by any appropriate authority.

Reduction in Force

Adams, et. al. v. Department of Defense, 96 MSPR 325 (June 16, 2004) – The Board did not have jurisdiction over this RIF appeal because the appellants were not demoted. The appellants, full-time employees at the Fort Bragg, North Carolina were informed by RIF notice that their full-time positions were being abolished and they were being offered their former part-time positions which they accepted. The appellants retained their former General Schedule or graded wage schedule grade and rate of pay, except that the number of hours per pay-period that they worked was reduced from full-time to part-time. The AJ found jurisdiction but upheld the actions. The Board modified determining that it was without jurisdiction, observing that "All of the appellants retained their respective General Schedule or graded wage schedule grades and rates of pay. . . . Although the number of hours that the appellants worked per pay period was reduced, they did not incur a reduction in grade or rate of pay, and, thus, they were not demoted."

Cooper v. Department of Defense, (March 15, 2005) – The AJ erred in dismissing this RIF appeal for lack of jurisdiction; while collective bargaining agreement covered the appellant and did not exclude RIF separations from its scope, appellant was making a discrimination claim so that he was not limited to the negotiated procedure.

Hardy v. Department of the Navy, No. 04-3086 (Fed. Cir. January 4, 2005) - In a RIF, a released employee does not have assignment rights to a vacant position unless the agency implements a mandatory policy or has issued a regulation to offer vacant positions to RIF-displaced employees. Because

there was no evidence that the instant agency had such a policy or regulation, it had discretion to place the employee in a vacant Secretary 07 position (and not the Manager 11 or Secretary 09 positions that the employee wanted) and not required to offer placement in all vacant positions, for which the employee qualified.

McNeal v. USPS (July 23, 2004) – Board reversed the AJ, who had found an appealable RIF demotion, concluding instead that the appellant was assigned to a position with no reduction in grade or pay, even though the duties performed were lower graded.

Schucker v. Federal Deposit Insurance Corporation, No. 04-3227 (Fed. Cir. March 16, 2005) - The Circuit reversed and remanded this RIF appeal "Because the Board excluded Schucker's rebuttal evidence and failed to offer a reasonable explanation for either changing or not following its longstanding practice of affording parties an opportunity to submit rebuttal evidence, we conclude that the Board acted arbitrarily. . . . ." This case involved a resolution counsel who ought to retreat to the position as special issues counsel, claiming that the positions were similar or identical.

Retaliation / Reprisal (EEO)

Burlington Northern & Santa Fe Railway Co. v. White, U.S. Supreme Court, No. 05-259 (June 22, 2006). The anti-retaliation provision of Title VII of the Civil Rights Act does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace, the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant - which means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination. Sheila White (White) was the only woman working in the Maintenance of Way department at the Tennessee yard of the Burlington Northern & Santa Fe Railway Company (Burlington). She was hired as a “track laborer” and assigned to operate a forklift. In September, 1997, White complained that her immediate supervisor, Bill Joiner, made insulting and inappropriate comments and repeatedly told her women should not be working in the department. On September 26, White was told by a senior manager that: (1) Joiner was given a 10-day suspension; and (2) White was to be removed from her forklift duty, and assigned the more rigorous standard track laborer tasks because co-workers complained that a "'more senior man'" should have the "less arduous and cleaner job" of forklift operator. In October, 1997, after White filed a sex and retaliation charge with the EEOC, she was suspended for 37 days for insubordination. White filed another charge with the EEOC. The suspension was reversed in Burlington’s internal grievance procedure. White filed a lawsuit challenging the change in her responsibilities and the 37 day suspension. A jury award of

$43,500 was affirmed by the Sixth Circuit. Burlington appealed to the Supreme Court. Title VII's anti-retaliation provision forbids employer actions that "discriminate against" an employee (or job applicant) because he has "opposed" a practice that Title VII forbids or has "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). However, the U. S. Circuit Courts of Appeal came to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation. The Sixth Circuit (the Circuit in the instant case) required that the retaliation must be an adverse employment action (a materially adverse change in the conditions of employment). The Fifth and Eight Circuits held that the retaliation must involve an ultimate employment decision, such as hiring, promotion, leave or compensation. The Ninth Circuit and the EEOC adopted the most liberal standard, holding that the challenged action, whether or not in an employment context, must only be reasonably likely to deter an individual from engaging in activity protected by Title VII. The Supreme Court adopted the standard applied by the D.C. and Seventh Circuits, stating: “In our view, 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 worker from making or supporting a charge of discrimination.' (citation omitted).” The Supreme Court stated that: “We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth ‘a general civility code for the American workplace.’ Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998). . An employee's decision to

report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. . The anti-retaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms. . It does so by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. (citations omitted). . . We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.' A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. (citations omitted). . By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination."

Settlement Agreement Issues

Brady v. Department of the Navy, 95 MSPR 619 (March 12, 2004) – Board sets aside settlement agreement because of mutual mistake; both parties agreed that they had relied on the appellant getting disability retirement, which was denied by OPM.

Campo v. United States Postal Service, 96 MSPR 418 (June 25, 2004) - The Board determined that the EEOC's prior remand of the case for failure to comply with the OWBPA rendered invalid only the settlement of the age reprisal claim and did not invalidate the settlement of the Title VII and Rehabilitation Act reprisal claims; accordingly, the Board upheld the AJ's finding that the appellant did not prove that he was removed in reprisal for filing age discrimination-based EEO complaints, even though the appellant argued that the entire agreement should be set aside. The EEOC concurred in the Board's decision. EEOC Petition No. 03A40121 (Aug. 25, 2004).

Golsby v. DHS, 100 MSPR 25 (September 20, 2005) – Board found agency in noncompliance with two provisions of a settlement agreement; the agency had not provided a promised statement regarding calculation of annual leave or the additional payment that should have resulted from [the] reclassification of two days to `administrative leave or a statement showing the correct calculation of the previous payment made for her accrued but unused annual leave. The agency was ordered to comply by providing the promised information.

Gose v. USPS, No. 05-3272 (Fed. Cir. June 14, 2006) – The agency failed to prove that the appellant breached the Last Chance Agreement; the conduct relied on, drinking at the VFW, was not proven to violate the agency's regulation, as argued. In Gose, the Postal Service had removed the employee for violation of a Last chance Agreement, which had obligated the employee to observe agency rules and regulations. The employee was reported drinking alcohol in uniform at the local VFW and the agency interpreted that conduct as a violation of its Employee and Labor Relations Manual regulation prohibiting "drink[ing] intoxicating beverages in a public place while in uniform." On appeal, the AJ rejected the employee's argument that the VFW was not a public place, accepting instead the Postal Service's assertion that "a public place is anywhere that Postal Service customers can be found." The full Board affirmed the AJ's decision but the circuit reversed and ordered reinstatement, finding that the agency's definition, offered during the MSPB proceedings, was not entitled to deference and was plainly inconsistent with a reasonable construction of the postal regulation. In rejecting the Postal Service's suggested definition, the circuit observed the following: "Because, according to the Postal Service, a public place exists wherever there is a postal customer, and because by the agency's own account, 'every citizen is [its] customer,' we reach the logical conclusion that, in the agency's view, a public place exists wherever there is a citizen. This definition would classify as 'public places' even employees' private homes, at least to the extent that the employee is not alone there. In short, the problem with this interpretation is that it effectively reads language out of the regulation. If the agency had wished to promulgate a regulation that prohibited drinking in uniform while 'in the presence of

others,' it might have done so. However, it did not. Instead, it promulgated a regulation that specifically forbade such activity only 'in a public place.' An agency interpretation that effectively eviscerates regulatory language is per se inconsistent with the regulation and may be accorded no deference. . . . Rejecting the agency's regulatory construction, we now turn to the meaning of the phrase 'in a public place.' While we need not define its precise contours, we hold that the VFW post is not a public place by any reasonable construction of the postal regulation. If the Postal Service wishes to further restrict drinking by its off-duty uniformed employees, it may promulgate a new regulation. To be clear, here we express no view on whether such a regulation would constitute an impermissible intrusion on employees' privacy interests."

Griffith v. Agriculture (June 1, 2004) – While an appellant who obtains enforceable relief under a settlement agreement made part of the Board record is a prevailing party under the Supreme Court's decision in Buckhannon, fees were still denied because the appellant did not prove that fees were awardable in the interest of justice. The agency removed the appellant from the position of AD-404-7 Biological Science Technician (Wildlife) based on the following charges: "(1) failing to inform your supervisor of your prior conviction which impacted your ability to legally perform the duties of your position; (2) failure to inform your employer of your prior conviction, probation or parole, and/or forfeiture of collateral; and (3) lack of candor." On appeal, the parties reached a settlement agreement, which was made part of the Board record. The settlement agreement provided that the agency would cancel the appellant's removal "on the basis

of misconduct"; return him to the agency's rolls and place him on leave without pay beginning April 7, 2002, until the effective date of his removal for "medical inability to perform the duties of his position"; propose his removal on the basis of "medical inability to perform the duties of his position"; and effect his removal upon completion of the required 30-day notice period. In turn, the appellant agreed to withdraw his appeal. The parties reached no agreement regarding attorney fees, and left that issue to be decided by the Board. The appellant then moved for attorney fees but the AJ found that the appellant was not a prevailing party under Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 532 U.S. 598 (2001 because the settlement agreement did not result in an "alteration of the legal relationship of the parties." (i.e., although on a different basis, the appellant remained removed for cause.). On review, the Board disagreed with the AJ, finding that the appellant was a prevailing party under Buckhannon. However, the Board disagreed with the appellant that fees were warranted in the interest of justice under Allen categories 2a ("clearly without merit or wholly unfounded") and 5 (the agency "knew or should have known that it would not prevail on the merits"). The Board noted that under the "clearly without merit" category, the Board examines, the degree of fault on the employee's part and the existence of any reasonable basis for the agency's action and that "The issue, however, is not whether the agency could have proven the charges, but whether it had a reasonable basis for them and the degree of fault on the appellant's part." Appling that standard, the Board specified that the agency file included documents supporting its charges, the appellant admitted that he gave inconsistent answers on employment documents concerning whether

he had graduated from high school, and, as remarked by the agency in the notice of removal, the appellant did not explain how his Tourette's Syndrome would likely cause him to fail to respond truthfully and completely, i.e., to engage in the misconduct underlying the charges (which was one of his arguments in response to the notice). Similarly, in the Board's view, the appellant had not shown that the agency presented incredible or unspecific evidence to the Board that he fully countered or that the accusations against him were unsubstantiated, as is required to show that the action was "wholly unfounded." As to Allen category 5 - that the agency "knew or should have known that it would not prevail on the merits" – the Board noted that the appellant must prove that the agency never possessed any credible, probative evidence to support the action taken. Based on the same considerations summarized above, the Board found that the appellant had not proven entitlement under that category either.

Lutz v. United States Postal Service (December 9, 2005) - The agency's breach of the agreement in providing negative information to OPM (after agreeing that it would take "all necessary steps to co-operate and facilitate the acceptance of Appellant's application and agrees not to place negative statements in the supervisor statement.") was not material; OPM denied the application "based on the appellant's, not the agency's, conduct in not supplying OPM with any relevant and credible medical records establishing his disability. Whether or not the supervisory statement contained negative statements, OPM's determination denying the appellant's disability retirement application would have been the same because the appellant failed to supply the required medical documentation to support his claim of

disability."

Munoz v. Social Security Administration, No. 03-3053 (Fed. Cir. April 2, 2004) (NP) – The Circuit reversed the Board, finding instead that the agency had violated the settlement agreement, when it disclosed information related to the agreement to the Office of OPM. Mr. Munoz was employed by the agency as a Benefit Authorizer Trainee. He was removed for unacceptable performance and appealed to the MSPB, after which the parties reached an agreement, providing that Mr. Munoz would withdraw his appeal, the agency would withdraw the Notification of Personnel Action, Removal, and instead allow Mr. Munoz to voluntarily resign his position and the Standard Form-50 would not state or make reference to his removal. The agreement also provided that "g. This settlement agreement and all matters discussed during the settlement negotiations shall be kept confidential by Mr. Munoz, his attorney, the Agency, and the Agency's representatives. The Agency is authorized to disclose the agreement to officials who have a need to know to perform their official duties and to other entities to the extent required by Federal statute or regulation." Mr. Munoz then resigned his position, and the SSA replaced the personnel form showing removal for unacceptable performance with one that showed voluntary resignation. Thereafter, Mr. Munoz applied for employment with the SSA as a Social Insurance Specialist (Claims Representative), citing his past experience and veterans preference. OPM placed his name on the list of eligible candidates. The following month, the SSA notified the OPM that it objected to Mr. Munoz's inclusion on the list of eligible candidates, stating: "[Mr. Munoz] was removed from his position as a Benefit Authorizer Trainee under Chapter 43

due to his failure to perform the critical elements of the job. The eligible appealed his removal to the Merit Systems Protection Board and the case was settled with the Agency. Based on his prior service as a Benefit Authorizer Trainee the Agency does not believe that the eligible could perform the duties of a more complex Claims Representative position." The agency also advised OPM of the critical elements that Mr. Munoz had not satisfactorily performed and the various performance improvement plans that he failed, as well as of the settlement agreement allowing him to resign. As a result, OPM removed Mr. Munoz's name from the list of eligible candidates. In an enforcement action, the MSPB held that the settlement agreement had not been breached by the agency's disclosures. The Circuit reversed the Board, favorably quoting from former Chair Slavet's dissenting opinion in the Board's decision.

Poett v. Department of Agriculture, 98 MSPR 628 (June 2, 2005) - The Board rescinded the agreement, as requested by the appellant, because the agency materially breached the agreement's neutral reference provision; after the appellant applied for a job with OSHA, the OSHA interviewer telephoned the appellant's former supervisor, SG, and asked her whether the appellant was Ms. Griffith's best employee, SG responded no. In making that finding, the Board noted that the "agency's assertion that the appellant suffered no adverse consequence because of the breach is irrelevant. An appellant need not show actual harm, such as a failure to obtain a position or other form of monetary loss, in order to establish a breach of a non-disclosure provision." The provision at issue, was as follows: "The AGENCY agrees that inquiries or job references regarding the

APPELLANT'S work performance, reason for resignation, or other employment matters will be referred to the AGENCY Personnel Operations Branch in Minneapolis, Minnesota. Information provided in connection with such inquiries will be of a neutral nature, and limited to employment data reflected in the OPF and the Employee Performance Folder (Fully Successful rating).”

Poett v. Merit Systems Protection Board, 360 F.3d 1377 (Fed. Cir. Mar. 18, 2004) - Even though the appellant did not petition for enforcement of the agreement involving a neutral references provision, until several years after the agreement was reached, and even after he was rejected for a position and after filing a claim with the OSC, he still filed within a reasonable amount of time of the date that he obtained actual knowledge of the breach. This case involved a Department of Agriculture employee who was suspended for 28 days. He settled with the agency, agreeing to resign and receiving, among others, a USDA agreement to refer all inquiries or requests for job references to the Personnel Operations Branch ("POB") in Minneapolis, Minnesota, and that information provided in connection with inquiries would be of a “neutral nature”, and “limited to employment data reflected in the OPF and the Employee Performance Folder (Fully Successful rating).” The settlement agreement did not specify a time limit for filing a petition for enforcement. Several years after he resigned, he applied for and was rejected for several jobs and began to suspect that the agency was giving him poor references. For example, when he was rejected for an OSHA job in July 1999, he asked how his references "were holding up." and was told by an OSHA representative "I do not wish to comment.", at which time the appellant later

stated that he "smelled a rat." In July 2000, he filed a formal OSC whistleblower complaint. In February 2001, OSC rejected the appellant's complaint, advising him that the OSC investigation was closed and that "Unfortunately, there is no information indicating . . . [your supervisor] did anything other than give her opinion as to your job performance." In March 2001, 31 days after receiving the OSC letter, the appellant filed with a petition for enforcement of the settlement agreement with the Board. The Board AJ found that the appellant "knew of the alleged breach at least as early as January 10, 2000, and that a delay in filing until March 15, 2001 was unreasonable." In disagreeing, the circuit determined that After hearing Janice Barrier's answers of, "I do not wish to comment," Mr. Poett had information that led him to suspect some sort of breach had occurred, but he had no specific information indicating a particular breach. Under the circumstances, it was proper for Mr. Poett to wait to file a petition for enforcement with the Board until he received the specific OSC information regarding an improper job reference given by Ms. Griffith. Indeed, until he knew Ms. Griffith rather than someone at the POB spoke to Ms. Barrier, he could not have actual knowledge of a breach. Under the agreement, only officials at the POB could respond to performance inquiries by prospective employers. Thus, it was a breach for . . . [the supervisor] to say anything about Mr. Poett to . . . [OSHA], not merely something non-neutral. But Mr. Poett's first specific information indicating . . . . [the supervisor] spoke to . . . [OSHA] was in the February 2001 letter from the OSC so reporting. Mr. Poett filed his petition for enforcement about one month later."

Poett v. MSPB, No. 02-3204 (Fed. Cir. March 18, 2004) – The Board erred in dismissing the appellant's petition for enforcement of a settlement agreement as not within a reasonable time; the delay was 1 month and not 14 months as erroneously found by the AJ and therefore under a laches analysis there was no undue delay or prejudice.

Powell v. Department of Commerce (March 31, 2005) – The Board concluded, as had the AJ, that the agency breached the confidentiality provision of a settlement agreement by seeking to call Mr. Levitt, appellant's former supervisor in an EEO proceeding and describing that he would testify that the appellant "attempted to use the EEO process as a shield against an involuntary reduction in force action" and "was abusive to . . . staff and . . . could not get along with Office of General Counsel staff members. " and that rescission was appropriate. The Board rejected the agency's claim that the breach was not material because Mr. Levitt's "brief conversation" had no effect on the appellant (the EEOC administrative judge rejected Mr. Levitt as a potential witness, and the agency took corrective measures, such as informing the EEOC administrative judge that the proffered testimony was "inaccurate and unauthorized" and reminding management officials of their responsibilities under the settlement agreement."). It noted that "To assert, as the agency has, that such statements had no adverse effect is to ignore the damage done to the appellant's reputation." The clauses at issue, provided, as follows: "3) The Agency will refer all employment-related inquiries or reference requests pertaining to Appellant to Aldon Abbott, the Assistant General Counsel for Finance and Litigation, or to Otto (Barry) Bird, a senior attorney in the

Office of the Assistant General Counsel for Legislation and Regulation. Such inquiries or reference requests will not be directed to the Assistant General Counsel for Legislation and Regulation [Michael Levitt]. and "12) The parties will not discuss any aspect of this Agreement, or the incidents leading up to this Agreement or the Appeal, with any other person or entity, except as necessary to implement the Agreement or as ordered by a court or administrative body of competent jurisdiction."

Turner v. Department of Homeland Security, 95 MSPR 688 (April 15, 2004) - Even though the parties "may have orally agreed to certain provisions related to the appellant's benefits which were not reduced to writing in the settlement agreement", the settlement agreement contained a valid merger clause and therefore, any additional terms not included in the agreement are excluded. The instant "merger" or "zipper" clause provided as follows: "[T]he parties mutually agree to the following terms and conditions, and further agree that these terms and conditions contained herein constitute the full agreement of the parties, and that these terms and conditions shall fully resolve the above-styled and captioned appeal, and that, except as specified herein, no other promises, conditions, or obligations are made by or imposed on the parties."

Sex Harassment Charges

Alberto v. Department of Veterans Affairs, 98 MSPR 50 (November 23, 2004) – The Board reversed the AJ, who had mitigated the removal of a Supervisory Health System Specialist for "a pattern of inappropriate and offensive misconduct.", involving numerous women employees to a one grade-level demotion to a non-supervisory position, and instead reinstated the removal. The AJ sustained all or part of 14 of the 19 specifications but mitigated the removal based on appellant's "high quality performance" and "twenty years of discipline free Federal service[.]" , noting that "the appellant was not warned that his actions were offensive to the individuals[,]" and that the appellant showed rehabilitation potential because, "when specifically warned[,] he often, if not uniformly, stopped or curtailed his inappropriate conduct." The Board disagreed. The Board also found, as had the AJ that agency did not charge the appellant with Title VII sexual harassment, despite some deposition testimony by the deciding official to contrary, in view of the wording of the charge in the proposal.

Batts v. Department of the Interior (May 8, 2006) – A Board majority reversed the AJ who had mitigated to a 30 day suspension, and instead reinstates the agency's removal penalty for sexual harassment. Member Sapin dissented, and would have upheld the AJ's charge and penalty determinations. The majority described the background as follows: "The agency removed the appellant from the position of GS-13 Alternative Dispute Resolution Coordinator on December 20, 2003, based on a charge of 'misconduct." . . . . The agency specified as follows: (1) On October 25,

2002, the appellant kissed another employee, Kelly Geer, on the cheek and would have kissed her on the mouth if she had not turned her head; and (2) during the third week of October 2002, the appellant pressured Geer for a hug, and when she acquiesced, he pressed his entire body against her, which made her uncomfortable. Geer then noted that the appellant was sending her an e-card with a cupid on it. Both incidents took place at the agency facility while the appellant and Geer were on duty.'" The AJ found both specifications proven but mitigated the penalty to a 30 day suspension, finding that the agency had improperly relied on stipulated Liability in a sexual harassment lawsuit (Lail), in which the appellant was the alleged wrongdoer and that there were other mitigating factors as well, to include that the conduct against Ms. Geer had ceased after she complained and that the appellant had unblemished government service, 6 years with the agency and 30 years with the federal government, with no evidence of performance problems during that time. The Board majority first agreed with the AJ that the agency had mistakenly considered the previous lawsuit as prior discipline. In disagreeing with the AJ's mitigation, though, the Board majority weighed the Douglas factors, finding that "the unwelcome kissing and hugging of a female coworker is a serious act of misconduct that merits a significant penalty"; while not a supervisor, the appellant, "as the agency's Alternative Dispute Resolution Coordinator . . . held an important position as part of the agency's management team and was responsible for resolving disputes and fostering a harmonious and productive workplace, [so that] . . . conduct was antithetical to the very purpose of his position and that fact supports a significant penalty"; and, the "appellant formerly served as an Equal Employment Opportunity Specialist and had significant training and

experience in equal employment opportunity rules and regulations . . . .[and] should have been particularly sensitive regarding inappropriate workplace behavior." In contrast, Member Sapin noted in dissent that "I find it most likely that the agency would not have imposed the penalty of removal, had it not discovered and then relied on the Lail lawsuit involving allegations of sexual harassment at the USDA. Indeed, when the agency thought it was presented only with the misconduct of inappropriate kissing, it issued a proposal notice to suspend the appellant for seven days based on one charge of unprofessional conduct toward another employee. By the time the agency had added the second charge involving hugging, it had learned of the Lail lawsuit. Both the proposal to remove and the removal decision letter placed heavy reliance on the Lail lawsuit. . . . The AJ was correct in finding that agency used the Lail case to aggravate the penalty to removal. . . . In the absence of that case and its alleged history of misconduct, the AJ correctly found that a careful review of the relevant factors warranted the serious penalty of a 30 day suspension, but not the extreme penalty of removal."

Faucher v. Air Force (May 25, 2004) – The AJ erred in not sustaining the agency charges of (1) indecent and immoral conduct and (2) sexual harassment and removal was within tolerable limits of reasonableness for those charges. The agency removed the appellant from a WG-10 position of Aircraft Mechanic based on charges of (1) indecent and immoral conduct and (2) sexual harassment, charging that appellant, on August 7, while working on an aircraft with a 20-year-old young woman summer hire, Sarah Reynolds, touched Ms. Reynolds' "butt" and breast and, two days later,

August 9, kissed her, "slid a wrench up her shorts near her crotch," and "put her hand on [his] crotch." The agency initiated the removal after the disposition of criminal charges against the appellant based on the same incident and, during which the appellant entered an Alford plea to indecent assault and the case was continued without a conviction, subject to the condition that the appellant "submit to an evaluation to determine if sex offender counseling is appropriate." (An Alford plea is one in which a defendant as pleads guilty coupled with a claim of innocence). On appeal, the AJ found that the Alford plea was not entitled to collateral estoppel effect and, in any event, even though "the appellant had a severe credibility problem of his own, "the reaction of Ms. Reynolds to the alleged conduct by the appellant," did not show that she was credible. (i.e., Ms. Reynolds did not bring the appellant's alleged misconduct to the attention of another worker who was on the plane at the same time that the alleged misconduct of August 9 occurred, did not threaten to do so, and did not protest to the appellant). On that basis, the AJ found that Ms. Reynolds, the sole witness to the alleged conduct, was an incredible witness and the agency failed to prove its charges by preponderant evidence. On review, the Board agreed with the AJ as to the effect of the Alford plea; there was no indication that the appellant failed to meet the conditions of his probation or that the court ever convicted the appellant based on his Alford plea. However, the Board disagreed with the AJ's credibility ruling, finding instead, that the AJ failed to discuss and analyze evidence as to a Hillen credibility ruling, such as identifying and discussing Ms. Reynold's reason for saying nothing and a number of other evidentiary submissions that supported a finding that Ms. Reynolds was a credible witness (i.e., she made an initial statement on

August 10, only one day after the second, more serious incident of sexual harassment; that statement was consistent with her subsequent testimony; she seemed to be upset during the day on August 9; although she had ridden out to the plane with the appellant, she rode back with the coworker; Ms. Reynolds was so upset and acting uncharacteristically that the coworker initiated a discussion about whether anything was wrong; and, that while "the appellant's Alford plea in court regarding the criminal charges that were brought against him is not a significant factor in assessing his credibility, we take into account the appellant's decision to enter the plea rather than to face a possible guilty verdict for the same conduct which is at issue in this appeal."). Thus, the Board found, consistent with Circuit's decision in Haebe, "that there are sufficiently sound reasons to overturn the administrative judge's demeanor-based credibility determinations and conclude that the agency proved its charges by preponderant evidence. The Board then determined that the penalty of removal was within the bounds of reasonableness for the proven misconduct. In that regard, the Board observed, as follows: "The appellant's misconduct was serious and repeated, and he was on notice that the agency had a zero-tolerance policy for sexual harassment. The appellant's misconduct is particularly egregious because he was an informal supervisor to Ms. Reynolds, who was only 20 years of age at the time of the misconduct, and he occupied a position of trust when he was working with her. . . . Moreover, the appellant's misconduct became a matter of public record through the criminal action against him. Additionally, the appellant's denial of the charges against him reveals no potential for rehabilitation. Although the appellant has five years of service and no prior disciplinary record, we find that these mitigating factors do not

outweigh the seriousness of the aggravating factors. We find that the agency considered all the relevant factors, exercised management discretion within tolerable limits of reasonableness, and properly imposed the penalty of removal for the sustained offenses." (citations omitted).

Lavette v. USPS (May 28, 2004) - The Board reversed the AJ's mitigation of a demotion to a 90-day suspension for 2 charges (sexual harassment and unsatisfactory performance by failing to comply with agency rules and regulations concerning adjustments to city routes) and reinstated the demotion. The appellant was employed as an EAS-20 Customer Service Manager in Waco, Texas. He was demoted to the position of Part-Time Flexible City Letter Carrier based on two charges: (1) Misconduct – Engaging in Conduct Characterized as Sexual Harassment by a Subordinate Employee and in Violation of the Postal Service Policy on Sexual Harassment; and (2) Unsatisfactory Performance – Failure to Comply with Postal Regulations and Rules Regarding the Count, Inspection and Adjustments to the City Routes at Highlander Station. On appeal, the AJ sustained 1 of the 3 specifications under charge 1 and sustained charge 2 but mitigated the demotion to a 90-day suspension. The specification of charge one that was sustained provided that the appellant, approached a female subordinate employee, Latchison, who was undergoing physical therapy for her back three times a week, and asked her "What kind of physical therapy are they giving you? Do they do exercises or put you in the hot tub? I could put you in a hot tub and give you massages. I could take you to the gym and give you exercises, but it would have to be after 7:00 o'clock [p.m.]." (The employee, Latchison, told the agency that the appellant's remarks made her

"feel really bad" and that "she just started shaking."). As to charge 2, the agency proved that the appellant's failure to comply with certain rules regarding Route Count and Inspection resulted in a monetary loss to the agency in the amount of approximately $3,900.00. On review, the Board found that the agency penalty was entitled to deference. It determined that the DO credibly stated that he considered the Douglas factors, to include the nature and seriousness of the appellant's misconduct in relation to his supervisory duties; the degree of trustworthiness required of a manager and the detrimental effect the misconduct had on the agency's confidence in the appellant's ability to perform effectively the duties of his position; the consistency of the demotion penalty imposed on other employees for the same or similar offenses; the appellant's prior disciplinary record, consisting of a December 4, 2001 Letter of Warning charging the appellant with Unsatisfactory Performance – Failure to Follow Instructions; the appellant's lack of honesty in responding to the charges; and the appellant's lack of potential for rehabilitation as a result of his prior disciplinary record and lack of candor concerning the underlying misconduct. And, while the DO found that the appellant's 13 years of service was a mitigating factor, that did not warrant mitigation in light of the seriousness of the misconduct. In finding demotion reasonable, the Board observed that, "notwithstanding the mitigating factors upon which the AJ relied, the sustained Charge 2 alone is sufficient to warrant the appellant's demotion" and that the agency "reasonably determined that the appellant was unsuitable for any supervisory position."

Luongo v. DOJ (Mar. 30, 2004) – The Board reversed the AJ's mitigation and finds removal appropriate for a manager's sexual harassment based misconduct. The appellant worked as a GS-12 Supervisory Correctional Officer at a Federal Correctional facility. He was the Chief Correctional Supervisor and in charge of the facility's security, and its internal investigations. He was removed for three charges: (1) Unprofessional conduct, (2) Conduct Unbecoming a Supervisor, and (3) Inattention to Duty. The first charge concerned alleged inappropriate comments of a sexual nature to an employee of a vendor, and the second alleged similar misconduct directed to agency female subordinate employees. The third charged that the appellant had accumulated 260 unopened e-mail messages in his mailbox. The AJ sustained the charges but mitigated to a 14-day suspension. The AJ had based her mitigation, principally, on the following: the use of sexually suggestive language was common at the agency; the appellant testified that he did not intend the language to be offensive; the appellant had apologized to the few women who had informed him they were offended by his words or acts; he had never been warned to stop; and, the deciding official had considered performance problems and counseling that were not cited in the proposal or decision. The Board reversed and reinstated the removal. It emphasized the higher standard of conduct and a higher degree of trust that are required of an incumbent of a position with law enforcement duties as well as the higher standard of conduct that is required of a supervisor. The Board's decision also described the deciding official's considerations, noting that he had considered that at the time of the misconduct, the appellant functioned as a high-level manager in charge of internal investigations and that his misconduct was extremely serious,

although the deciding official also considered the appellant's 17 years of service with the agency, his lack of any prior discipline, and his prior performance record that showed that he exceeded his performance standards. Other factors considered by the Board included: the appellant was provided annual training on the agency's Code of Conduct; the misconduct was carried out over a period of years, despite appellant's testimony that he was aware that his behavior was inappropriate and violated agency policy; the deciding official credibly testified that he lost confidence in the appellant's ability to enforce policy and to be an effective manager and felt that retaining the appellant would be approving of his misconduct; all of the female employees who gave affidavits said they found the appellant's conduct to be unwelcome if not offensive; and, while those employees had not filed complaints before, that would have been difficult to do, especially since the appellant was in charge of investigations. Finally, while the Board observed that it was improper for the deciding official to have considered the appellant's more recent performance and the counseling he had received because they had not been cited in the notice or decision, the Board concluded that such an omission was harmless error.

Reynolds v. Department of the Army, No. 05-3025 (Fed. Cir. May 13, 2005) – The Circuit upheld the removal of a U.S. Corps of Engineers Project Manager for numerous charges, relying on the AJ's summary of the case, as follows: "Reynolds] engaged in sexual harassment of a subordinate supervisor . . . and favoritism toward a lower-graded employee . . . based on a personal relationship. Employees' perceptions of the personal relationship caused consternation, turmoil and apprehension within the work force.

When the agency attempted to investigate possible improprieties, appellant claimed that the personal relationship was strictly professional, refused to discuss the relationship any further, was less than candid in regard to several aspects of his conduct at work, and attempted to impede the investigation by deleting large numbers of files from his government computer. Finally, when appellant's government computer was examined, it was discovered that appellant had accessed pornographic web sites and engaged in improper personal communications."

Suitability Issues

Duggan v. Department of the Interior, 98 MSPR 666 (June 15, 2005) - Board dismisses claim of non selection for lack of jurisdiction, rejecting appellant's claim that the non selections constituted constructive suitability determinations. Board holds that the rejections were based on qualifications and not the unsuitability factors. Good discussion of difference between an unappealable nonselection and an appealable suitability determination.

Folio v. Department of Homeland Security, No. 04-3459 (Fed. Cir. April 5, 2005) – The AJ erred in finding that the Board's authority in a suitability appeal did not include determining whether the charged conduct renders an individual unsuitable for the position in question. Folio applied for a position as an Immigration Inspector for the INS, but was deemed not suitable because of his failure to disclose several traffic violations between 1995 and 1998, including driving without proof of insurance, and a 1996 bench warrant that had been issued for his failure to appear for an arraignment in a Colorado state court. The AJ found that Colorado law characterized "driving without proof of insurance" and "failure to appear in court" as criminal offenses, and that those charges were appropriately considered in INS's suitability decision. However, the AJ concluded that she could not review "the connection between Folio 's alleged misconduct (i.e., certain factors in 731.501(c)) and his suitability to be an Immigration Inspector because she interpreted the Office of Personnel Management's ("OPM's") recently-revised regulation, 5 C.F.R. § 731 .501, as precluding the Board from reconsidering INS's negative suitability determination" The

court, in finding that the AJ erred, concluded, as follows: "We hold that § 731.501 provides the Board with jurisdiction to review all aspects of an unsuitability determination, including whether the charged conduct renders an individual unsuitable for the position in question. The Board is precluded only from reviewing or modifying the ultimate action taken, which is left to OPM or the appropriately delegated agency. Here, specifically, the AJ may consider on remand all aspects under § 731.202 of Folio's ability to perform as an Immigration Inspector in order to decide whether he is in fact unsuitable for that job. We thus vacate the Board's decision and remand for further proceedings consistent with this opinion." Good discussion of Board's authority in light of OPM's 2000 suitability regulations.

Nakshin v. Department of Justice, 98 MSPR 524 (May 13, 2005) - Because it was unclear whether the agency rescinded the appellant's employment offer based on his lack of communications skills and/or other qualification considerations (an unappealable non-selection) or based on information related to his character or conduct (an appealable unsuitability determination), the case was remanded. Here, the agency withdrew a tentative offer of employment for an Automated Litigation Support Specialist with the agency's U.S. Attorney's Office as a result of the evaluation of information received during the initial background check, information concerning credit delinquencies.

Prehoda v. Department of Homeland Security (April 22, 2005) – The agency erred by making a constructive suitability determination and relying on lack of credibility in prior testimony to exclude the appellant, a factor not listed in 5 CFR Section 731.202(b). This case involved the appellant, who applied

and was tentatively selected for a term competitive service position as a GS-9 Center Adjudications Officer. During the appellant's background investigation, "the agency discovered that, in a previous Board appeal concerning matters that occurred during the appellant's prior employment with the Department of Justice, an administrative judge had found that some of the appellant's testimony under oath was not credible." Thereupon, the agency withdrew its tentative selection of the appellant but acclaimed that its Office of Security had not made a suitability determination as to the appellant's application. The Board concluded that the agency made a constructive suitability determination. Moreover, it determined that the appeal was not moot (the agency had argued that there was no eligibility list to which the appellant could be returned because the Public Job Notice for which the appellant was selected was closed and that OPM has no nationwide eligibility list for Center Adjudications Officers at the GS-9/11/12 levels) because "there was a reasonable expectation that the same complaining party would be subjected to the same action again." As to the merits of the suitability determination, the Board concluded that the "negative suitability determination cannot be sustained because it was not based upon one of the exclusive factors specified in 5 C.F.R. § 731.202(b)."

Suspensions

Bradley v. United States Postal Service, 96 MSPR 539 (July 23, 2004) – "Because the emergency placement on off-duty status and the subsequent suspension arose out of separate events and circumstances, they cannot be combined to constitute a single suspension for the purpose of determining Board jurisdiction." The appellant was placed in an emergency suspension status for 12 days and then suspended for 14 days. The AJ found Board jurisdiction and reversed. The Board disagreed, determining that "the emergency placement was to allow the agency to complete an investigation under the CBA (i.e., "the appellant's actions, attitude, and behavior indicated that he was out of control. He was a potential hazard to himself, others, and postal property. Therefore, Article 16.7 was invoked to protect him, his co-workers, his supervisors, and the agency's interests." but the subsequent 14 day suspension was for the employee's unacceptable conduct.

Timeliness

Marino v. OPM (June 7, 2004) – Typically, when an initial decision clearly informs an appellant where to file his PFR but he misdirects a petition to the Federal Circuit, good cause does not exist for an untimely filing with the Board.

Stout v. Merit Systems Protection Board, No. 04-3127 (Fed. Cir. November 23, 2004) – The Circuit reversed the Board, which had dismissed this appeal because good cause had not been proven, and remanded for an evidentiary hearing to determine if the appellant was capable, because of his physical and mental conditions, to appreciate the process and deadline for filing an appeal. The circuit noted that it was troubled by certain aspects of the Board's decision, suggesting that a person who cannot comprehend a filing deadline should still be "taxed" with the "obligation to show he was unable to request assistance from his family and friends in filing his Board appeal" or faulted for not requesting "an extension of time."

USERRA

Bergman v. DOT (May 2, 2006) – Under 38 USC Section 4324(c)(4), the appellant was entitled to attorney fees for achieving relief in his USERRA appeal and the AJ erred by interpreting that statute the same as 5 USC Section 7701(g)(1), which requires a "prevailing party" and "interest of justice" standard. The Board described the background, which led to the attorney fee request, as follows: "The appellant filed an appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), asserting that the agency had charged him military leave for days he was not scheduled to work. . . The administrative judge issued an initial decision granting corrective action and ordering the agency to correct the appellant's leave record. . . . No petition for review was filed, and the initial decision became the final decision of the Board." In finding in favor of the appellant, the Board noted that 38 USC Section 4324(c)(4) and not 5 USC Section 7701(g)(1), is the applicable statute and that 38 USC Section 4324(c)(4) requires only an "order" for relief (with no "prevailing party" standard) and does not include an "interest of justice" provision.

Garcia v. Department of State (Feb. 27, 2006) - The Board may award relief for USERRA violations if they occurred prior to the enactment of USERRA. The Board described the claim, as follows: "The appellant in this case asserted below that he had been a member of the uniformed service 'from at least 1987 to 2001,' and that his employing agency, in violation of the *Butterbaugh* . . . [agencies were not entitled to charge employees military leave for days when they would not otherwise have been required to work],

charged him military leave for his absence on nonworkdays. . . . He also alleged that this action caused him 'to use annual, sick, or leave without pay to perform military duty. ...'" However, the AJ found that the appellant was only entitled to relief for actions taken after the enactment of USERRA on October 13, 1994. In disagreeing, the Board held, as follows: "The legislative history of VRRA and USERRA makes it clear that since 1940, Congress has never imposed limitation periods on the adjudication of claims under these statutes and has intended that the equitable doctrine of laches be applied to such claims. That practice appears to have continued with a recent amendment to USERRA. As part of the Veterans' Programs Enhancement Act (VPEA), Congress amended USERRA to provide that the Board should adjudicate USERRA claims without regard to whether the complaint accrued before, on, or after the enactment of USERRA. Pub. L. No. 105-368, § 213(a), codified at 38 U.S.C. § 4324(c)(1) (effective November 10, 1998). In keeping with the Congressional intent expressed in the legislative history, and with the spirit of the 1998 amendment to USERRA, we find that the only time-barred defense to claims such as the one at issue here is that of laches." (footnote omitted).

Henderson v. USPS (Feb. 10, 2004) - The Board has jurisdiction under USERRA over the appeal of "any person" alleging discrimination in federal employment on account of prior military service, including those without adverse action appeal rights.

Patterson v. Department of the Interior, No. 05-3047 (Fed. Cir. September 19, 2005) - The court agreed with the Board and dismissed the appellant's VEOA claim but disagreed and reinstated the USERRA claim. This case

involved the appellant's rejection for an excepted service attorney-advisor position. The issue in this case was how to apply the "veterans' preference rights to a preference eligible in the competitive service who is not required to pass an examination." The court determined that the statute, The Veterans' Preference Act, was silent but the gap had been filled by OPM's regulation, which did not require Numerical scoring and ranking but required that "an agency must consider veteran status as a "positive factor" in reviewing applications." However, as to the USERRA claim, the court, in finding the appellant's allegations sufficient, held "In this case, Mr. Patterson alleged that the agency did not select him on the basis of his prior military service. He further alleged that the agency's reason for not selecting him -- i.e., that he was not as qualified as the selected individual -- was a pretext, as evident from a comparison of his qualifications to those of the selectee, a non-veteran. We hold that these allegations were sufficient to establish jurisdiction under the Board's liberal pleading standard for USERRA claims that we endorsed in Yates. . . . Accordingly, we reverse the Board's decision to dismiss Mr. Patterson 's USERRA claim and remand the case for further proceedings on the merits of that claim." (citations omitted).

VEOA

Dean v. Department of Agriculture, 99 MSPR 533 (August 5, 2005) - Board agreed with the AJ and found that the agency violated the appellant's veterans preference rights under 5 U.S.C. §§ 3302, 3304(b) when it used the Outstanding Scholar Program, the product of a consent decree in Luevano, to select a nonpreference eligible who had not taken an examination for the position in question, rather than the appellant, a veteran, who was found qualified for the position under a competitive examination process / in effect, the consent decree could not trump the appellant's VEOA rights / however, Board struck down the remedy awarded by the AJ, retroactive appointment, finding instead that the agency must reconstruct the hiring process to determine if the appellant would have gotten the job if the law had been followed. Good discussion of the VEOA and veterans' preferences.

Kirkendall v. Department of the Army, No. 05-3077 (Fed. Cir. June 22, 2005) - The time filing periods under the Veterans Employment Opportunities Act of 1998 ("VEOA"), 5 U.S.C. § 3330a (2000) – 60 days to file with DOL under 3330a(a)(2)(A) and 15-day to file with the Board after the DOL determination under 5 U.S.C. § 3330a(d)(1)(B) – are subject to equitable (e.g., good cause) tolling. Moreover, under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311 (2000), veterans are entitled to a hearing (i.e., it is not discretionary with the Board) before the MSPB. Judge Dyk dissented. This case is useful and contains strong and forceful language as to the purpose of the VEOA

(e.g., “the VEOA is an expression of gratitude by the federal government to the men and women who have risked their lives in defense of the United States.”).

Perkins v. United States Postal Service, 100 MSPR 48 (September 21, 2005) - In this VEOA appeal, the Board found that 1) “pursuant to 39 U.S.C. § 1005(a)(2), preference-eligible Postal employees, like the appellant, are entitled to the same veterans preference under 5 U.S.C. §§ 3309, 3313 as preference-eligible competitive-service employees”; and, 2) “an internal applicant for a vacancy in the same agency is entitled to veterans preference when participating in a competitive examination process under which external applicants are given veterans preference. For the reasons discussed below, we answer this question in the affirmative.”

Spigner v. Department of the Air Force, 96 MSPR 275 (June 2, 2004) - While the appellant was a 10 point veteran, who applied for but was not selected for the temporary position of GS-07 construction inspector, in lieu of the selectee a 5 point veteran, the agency did not violate the Veterans Employment Opportunities Act of 1998; that act did not mandate the selection of the appellant but required “prior consideration” 5 C.F.R. § 333.203(b), which is satisfied by a reasonable explanation for passing over a “prior selection” candidate (i.e., the agency “must record its reasons for so doing and must furnish a copy of those reasons to the preference eligible and to his or her representative on request. 5 C.F.R. § 333.203(b)), which was accomplished in this case.

Violence-Related Charges

Harris v. United States Postal Service (December 19, 2005) - The Board reversed the AJ, who had mitigated a removal of a supervisor to a demotion for improper conduct and instead reinstated the removal. The appellant was removed for "improper conduct" in striking a postal customer after the customer made racial comments toward her. The AJ mitigated to a demotion based on 19 years of unblemished service and provocation but the Board reversed and reinstated the removal. Initially, after a dispute, in which the supervisor acted properly, the customer said “Let me out of this f[ ]ing place”, to which the appellant responded that the door was not locked and held the door open for the customer. As she walked by, the customer, who was white, called the appellant a “low life black bitch.” The appellant supervisor then went outside. The Post Office was closing and when the customer realized the way was blocked, “she turned around to exit the other way, saw the appellant, and screamed at her, calling her a f[ ]ing nigger several times. As the customer passed by, the appellant reached up and struck the customer.”

White v. DOJ, No. 02-3329 (Fed. Cir. May 12, 2003) – The Circuit upheld the Board’s decision, which had affirmed the removal of a GS-7 Correctional Officer for “Loss of Qualifications – Inability to possess a firearm”, as a result of his conviction of “a misdemeanor crime of domestic violence” under 18 USC Section 921(a)(3). The issues on appeal were whether the appellant’s conviction only of simple assault after the original charge of domestic assault was reduced prior to his plea of guilty constituted

"a misdemeanor crime of domestic violence" and whether he was in a spouse-like relationship to the person he assaulted, someone he lived with but was not married to. In both instances, the court answered affirmatively and upheld the appellant's removal.

Whistleblower Reprisal Claims

Clark v. MSPB, No. 03-3258 (Fed. Cir. Mar. 17, 2004) – The Board has no WPA jurisdiction over an employee serving in a non appropriated fund position.

Czarkowski v. Merit Systems Protection Board, No. 03-3300 (Fed. Cir. November 8, 2004) - The Circuit reversed the Board finding that "The agency failed to demonstrate that the President, or his lawful delegate, had explicitly exempted Ms. Czarkowski's unit, the OSP, under section 2302(a)(2)(C)(ii) of the Whistleblower Protection Act from the merit systems appeal process." Appellant was employed as a Supervisory Contracts Specialist with the Department of the Navy's ("agency's") Office of Special Projects ("OSP"). That position included dealing with classified contracts of large dollar amounts and was subject to a periodic Security Background Investigation. The agency removed the appellant's supervisory responsibilities and placed her on a performance improvement plan, which she claimed through OSC and Board constituted whistleblower reprisal. The Board dismissed on basis that OSP was exempt from Board jurisdiction under 5 U.S.C. § 2302(a)(2)(C)(ii), a statute that denies the Board jurisdiction over IRA appeals involving certain agencies. As noted by the circuit "The question before this court is whether the OSP has been "determined by the President" to be an executive agency or unit thereof "the principal function of which is the conduct of foreign intelligence or counterintelligence activities," as specified in 5 U.S.C. § 2302(a)(2)(C)(ii).

DeVera v. Smithsonian Institution (December 9, 2005) - The Board has

jurisdiction over this IRA appeal because the appellant made a protected disclosure in claiming that the agency had made a substantive change in the conditions of employment without affording the union its right to notice of those changes and reasonable time to present its views and recommendations regarding those changes. Further, the Board found that the appellant made a non frivolous allegation that the disclosure was a contributing factor in the agency's decision to take or fail to take a covered personnel action, noting that "an employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." Here, "the suspension proposal, (i.e., personnel action) which directly discussed the disclosures, followed the e-mail messages (i.e., the disclosures) by just over a week."

Downing v. Department of Labor, 98 MSPR 64 (November 23, 2004) - Upon remand from the Federal Circuit, the Board concluded that the appellant failed to make a non frivolous allegation of a protected disclosure. The appellant filed an IRA appeal when the agency decided to terminate his term appointment to the position of Economist during his one-year trial period. He alleged that he was terminated for contacting members of Congress to inform them that the Bureau of Labor Statistics was closing its New York Regional Office without justification and because he acted as a liaison to his New Jersey co-workers who signed a letter sent to their senators and congressional representatives asking them to intervene to

prevent a reduction of service to the public and to save the expense of the reorganization. Basically, the Board concluded that his disclosures did not disclosure evidence gross mismanagement, a gross waste of funds, an abuse of authority, a violation of law, rule, or regulation, or a substantial and specific danger to public health or safety and instead involved a subjective disagreement about agency policy.

Fitzgerald v. Department of Agriculture, 97 MSPR 181 (Sept. 1, 2004) - The AJ erred in finding that the appellant failed to make a non frivolous allegation of whistleblower reprisal by using a preponderant evidence standard to decide this jurisdictional issue and by concluding that the disclosures were made in the normal course of the performance of his duties; the employee made sufficient allegations that he made a protected disclosure and that his disclosure was a contributing factor in his termination because of a reorganization. The appellant worked as a GS-14 Environmental Policy Analyst. The position was administratively assigned to the agency but was located in, and, worked directly with, the U.S. AID's Bureau for Policy and Program Coordination. After approximately 2 years of employment the agency terminated him purportedly because of a reorganization at U.S. AID.

Garcetti v. Ceballos, _____ U.S. _____ (S.Ct. May 30, 2006) - The First Amendment does not shield from discipline "the expressions employees make pursuant to their professional duties." Ceballos, a Deputy DA, was employed in the office of the Los Angeles County District Attorney. A defense attorney had told Ceballos, who was employed as a calendar deputy, that a sheriff might have lied in a search warrant affidavit that had been filed as evidence in a murder case. Ceballos investigated, concluded that the

sheriff had misrepresented facts in the affidavit, and sent a memorandum reporting the misrepresentation to a deputy District Attorney. The memorandum recommended that the case be dismissed, but the deputy declined to do that. Ceballos then later testified for the defense about the validity of the subpoena and also submitted the memorandum he had sent to the deputy. In his lawsuit, Ceballos sued two employees of the office and Gil Garcetti, the District Attorney, under 42 U.S.C. § 1983, claiming that they retaliated against him for exercising his First Amendment rights. He alleged that the three individuals retaliated against him on several instances for his submission of the memorandum, including asking him to transfer to another branch or to accept being re-assigned to filing misdemeanors, not allowing him to work on future murder cases, and in denying him a promotion. The individuals sued claimed that they were immune from liability. Ceballos argued that his submission of the memorandum should be considered free speech protected under the First Amendment, and therefore that the individuals had violated his constitutional rights and could not claim immunity. The district court granted a motion for summary judgment on behalf of the individual defendants, finding no protected First Amendment speech interest in the memorandum because Ceballos wrote it in a purely job-related capacity and not in his capacity as a citizen. and in his capacity as a citizen. The Ninth Circuit reversed, holding that the memorandum was entitled to First Amendment protection because it was on a matter of public concern and, in this matter, Ceballos' speech interest outweighed the government's interests in promoting workplace efficiency and avoiding workplace disruption. The US Supreme Court in this 5-4 decision held that Ceballos was not speaking "as a citizen," and his statement has no

constitutional protection. The Court further found that, "The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties." . . . . [and] that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Court concluded that because Ceballos' speech had no constitutional protection, there was no need to apply the balancing test used in Pickering v. Board of Educ., 391 US 563 (1968) and Connick v. Myers, 461 US 138 (1983). There were four dissenting Justices, who wrote three opinions, arguing that Ceballos' speech should not be categorically excluded from 1st amendment protection, and that a balancing test should be applied.

Grimes v. Department of the Navy, 96 MSPR 595 (Aug. 4, 2004) - The Board disagreed with the AJ, who had dismissed the appellant's IRA appeal for lack of jurisdiction, finding that the appellant's disclosure (referring a report of misconduct by an employee to the agency's legal counsel) was not protected because it was made as part of his normal job duties; instead, the Board found that "it is unclear whether such referral amounted to a disclosure outside of normal job channels" and that was "sufficient to raise a question of material fact that remains to be decided." The appellant was employed as a Supervisory Police Chief at the Portsmouth Naval Shipyard. He was suspended for 1 day for the unauthorized distribution of government property and was reassigned to a Property Disposal Specialist position. He then filed a complaint with OSC, alleging that the agency actions were because of whistleblower reprisal and then appealed to the Board. The AJ

dismissed the appeal for lack of jurisdiction, determining that the disclosure was made as part of the appellant's normal job duties, and, therefore not protected by 5 U.S.C. § 2302(b)(8). The Board described the disclosure as follows: The appellant . . . received a briefing from . . . [a Captain] of the PNS Police Department indicating that an agency employee . . . was accepting gratuities and paying unauthorized overtime to workers under his supervision. . . . . [The Captain] also reported that [the employee] was being abusive to new employees by threatening that, if they crossed him, he would have their badges pulled. Id. The appellant discussed the matter with the Security Director . . . [who] agreed that the matter should be taken outside of the police department because the criminal investigators who would normally handle such matters were personal friends of . . . [the employee]. At the appellant's request, PNS Legal Counsel . . . initiated an investigation into the allegations against . . . [the employee]." The case was remanded for a hearing on the merits of the IRA claim.

Harding v. Department of Veterans Affairs (March 14, 2005) - The majority concluded that under Section 7425(b) and 38 U.S.C. § 7462, the Board was without jurisdiction over the IRA appeal of a DVA medical professional on a charge arising out of his professional conduct or competence." Effective November 8, 2002, the agency removed the appellant, a medical professional appointed under 38 U.S.C. Ch. 74, from the position of Staff Physician based on the charge of failure to document progress notes in electronic medical records. In its decision letter, the agency stated that the action was based on the appellant's "professional conduct or competence" and that he therefore had the right to file an appeal with the Department of

Veterans Affairs (DVA) Disciplinary Appeals Board (DAB). The appellant did that but also filed a request for corrective action with OSC, claiming whistleblower reprisal and after OSC advised the appellant that it was terminating its investigation, filed an IRA appeal. The AJ dismissed the appeal without a hearing, finding that the appellant failed to make a non-frivolous allegation that the disclosures he made were protected whistleblowing. On review, the Board stated the issue as "whether the Board can even entertain the possibility of IRA jurisdiction under Yunus where the appellant contests his removal from employment as a DVA medical professional on a charge arising out of his professional conduct or competence." This case boiled down to a conflict between 1994 amendments to the WPA (5 U.S.C. § 2105(f) -- added in 1994 to grant IRA appeal rights to "employees appointed under chapter 73 or 74 of title 38") and 38 USC Section 7462, (giving the DVA DAB "exclusive jurisdiction" over an appeal from a major adverse action (such as a removal) taken against a DVA physician based on "a question of professional conduct or competence."). The majority concluded that under Section 7425(b) ("Notwithstanding any other provision of law, no provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of section 7306 of this title or this chapter shall be considered to supersede, override, or otherwise modify such provision of that section or this chapter . . . .") and 38 U.S.C. § 7462 (which provided that "the DVA DAB has "exclusive jurisdiction" over appeals from actions involving the professional conduct or competence of DVA medical professionals), the Board was without jurisdiction over the IRA appeal. Member Sapin dissented and would have held that the Board had jurisdiction.

Hood v. Department of Agriculture, 96 MSPR 438 (June 28, 2004) - The agency proved by clear and convincing evidence that it would have taken the same action absent a disclosure, that is, it would have denied the appellant's request for administrative leave and offered LWOP instead. The appellant filed an IRA appeal, alleging that the agency's Rural Development Office denied her requests for administrative leave before she left the agency to accept a position with another Federal agency, in retaliation for whistleblowing. The whistleblowing involved her disclosure to the Office of the Inspector General of numerous "fake" loans that her office was making, an allegation that was substantiated after an investigation, resulting in the rescission of bonuses for all of the employees in the office, including the appellant. In her IRA complaint, she alleged that she faced daily abuse and retaliation from her supervisor because she was the only person in the office who had a problem with the "fake" loans and that because of this hostile work environment, she took a period of leave without pay (LWOP) under duress and wanted compensation for that LWOP. In describing the agency's burden, the Board stated that "Here, the appellant's disclosures appear to have led to certain conditions in the workplace that caused her to request administrative leave and LWOP, and that in turn caused the agency take or fail to take personnel actions by acting on those requests. Under these circumstances, and following the above precedent, the agency must prove that it would have taken the same personnel actions absent the appellant's disclosures; it need not prove that the workplace conditions would have arisen absent the disclosures. See Watson, 64 F.3d at 1528-30." It then concluded, principally because the agency followed established internal guidance on LWOP and administrative leave that it met its burden of proof."

Kalil v. Department of Agriculture, 96 MSPR 77 (April 26, 2004) – The Board disagreed with the AJ, who had dismissed this IRA appeal for failure to raise a non frivolous allegation of a protected disclosure, determining instead that the appellant had a reasonable belief that the information he disclosed – the failure of the agency to disclose a report contrary to its position in litigation – arguably involved a violation of an obstruction of justice statute. The appellant was a GS-15 Assistant to the Deputy Administrator of the agency's Farm Loan Programs (FLP), a part of the Farm Service Agency (FSA). This case arose when the agency suspended the appellant for 14 days based on the following charges: "Interfering with litigation; releasing a report of the FSA without prior approval; failure to treat his supervisor with respect; and failure to follow instructions", after which he filed a whistleblower reprisal complaint to OSC.

Koszola v. FDIC, No. 03-5313 (DC Cir Jan. 17, 2005) - The Agency's burden under the RTC Whistleblower Act is the same as the burden under the WPA of 1989. Koszola sued the Federal Deposit Insurance Corporation (FDIC), the statutory successor to the Resolution Trust Corporation (RTC), claiming that the RTC retaliated against him in violation of the RTC Whistleblower Act (12 USC Section 1441a(q)). The trial court found for the FDIC, concluding that the agency would have taken the same action against Koszola regardless of discriminatory animus. Here, the DC Circuit affirmed. In affirming, that court addressed the government's burden in rebutting a prima facie case of retaliation under the RTC Whistleblower Act. Section 1441a(q) provides that the "legal burdens of proof that prevail" under 5 USC Section 1221 also apply under the RTC Act. Pursuant to 5

USC Section 1221 (e)(2), the government is not liable if it "demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of [a protected] disclosure." The test for "clear and convincing evidence" in Section 1221 actions in the DC Circuit is a three-prong test set forth in Carr v. Soc. Sec. Admin., 185 F.3d 1318 (Fed Cir 1999). The court concluded that the trial court did not err in declining to use that test, stating "[g]iven the familiarity trial judges have with this standard, we do not think it grounds for reversal that the district court did not explicate its ruling according to a particular gloss."

Kutty v. Department of Housing and Urban Development, 96 MSPR 590 (Aug. 4, 2004) - The MSPB reversed the AJ's decision dismissing the appellant's IRA appeal for lack of jurisdiction (i.e., the AJ determined that the appellant had not established that she disclosed information that she reasonably believed evidenced a violation of law, rule, or regulation, an abuse of authority, or a gross waste of funds); instead, she made a non frivolous allegation of a reasonable belief that the actions of her supervisors could reasonably be regarded as violating regulatory provisions by specifically alleging that they violated several Federal Acquisition Regulations (FAR) and the Code of Federal Regulations (C.F.R.) in the Technical Evaluation Panel evaluation process. The appellant worked as an Economist, GS-0110-13, with the agency's Policy Development & Research, Financial Institutions and Regulation Division, Office of Economic Affairs. She was terminated during her 1 year probationary period for “disrespectful conduct toward her supervisor, unjustly humiliating her supervisor publicly, and inappropriate conduct toward a co-worker.” She then filed a

whistleblower action with OSC, essentially alleging that she had ranked and recommended one bidder but her managers unethically directed her to recommend another, and that she was removed for complaining about this instruction to the agency's Assistant General Counsel. On appeal to the Board, the AJ dismissed, finding that the appellant did not make a protected disclosure. In reversing the AJ, the Board first noted the jurisdictional requirements established by the Federal Circuit in Huffman and adopted by the Board in Rusin (non-frivolous allegations that the employee engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8) and that the disclosure was a contributing factor in the agency's decision to take or fail to take, or threaten to take or fail to take, a personnel action as defined by 5 U.S.C. § 2302(a)(2)(A)). It then concluded that "the appellant has provided sufficient facts to demonstrate a reasonable belief that the actions of [. . . [his managers] could reasonably be regarded as violating regulatory provisions. Specifically, the appellant alleged that . . . [the managers] violated several Federal Acquisition Regulations (FAR) and the Code of Federal Regulations (C.F.R.) in the TEP evaluation process. . . . Moreover, any doubt or ambiguity as to whether the appellant has made a non-frivolous allegation should be decided in favor of affording the appellant a hearing. . . . Further, the Federal Circuit has held that the Board has jurisdiction over an appeal if the employee makes non-frivolous allegations that the elements of his claim are satisfied. . . . Once jurisdiction is established, the Board will hold a merits hearing; 'at that hearing, the appellant must establish the elements of his claim by a preponderance of the evidence.' . . . Accordingly, we find that the appellant has made a non-frivolous allegation that a disinterested observer

with knowledge of the information the appellant disclosed about [her managers'] activities could reasonably believe that these actions violated 'any law, rule or regulation' under 5 U.S.C. § 2302(b)(8)."

Larson v. Department of the Army (April 15, 2005) – In an IRA appeal, travel-related expenses are costs and not awardable as consequential damages. Moreover, because the "costs" were incurred in relation to the Federal Circuit part of the case, the Board lacks authority to order payment.

Lewis v. Department of Commerce (December 29, 2005) - The Board reversed the AJ, who had dismissed this IRA appeal for failure to make a non frivolous claim of a protected disclosure, with the Board instead determining instead that the appellant established that made a non frivolous allegation that she had a reasonable belief that her disclosure that her supervisor had assaulted her was a violation of law, rule or regulation. In making that finding, the Board observed that "Although the AJ determined that the assault was insubstantial and that there was no evidence of criminal intent, those are merits findings inappropriate to resolve at the jurisdictional stage. There is no de minimis exception for the violation-of-law aspect of the protected disclosure standard."

McCorcle v. Department of Agriculture (March 29, 2005) – The appellant failed to make a non frivolous allegation of a protected disclosure on the basis that they were vague and not detailed. As stated by the Board "As a general matter, the majority of the appellant's alleged disclosures are conclusory allegations lacking in specificity and, as such, do not constitute nonfrivolous allegations of IRA jurisdiction. . . . For example, the

appellant's bare allegation that the agency engaged in "[i]ncidents of harassment and discrimination too numerous to list on three pages[,]" without more, does not constitute a specific and detailed disclosure of a violation of law, rule, or regulation, protected by 5 U.S.C. § 2302(b)(8). . . . The Board requires an appellant to provide more than vague and conclusory allegations of wrongdoing by agency officials." The Board also rejected the appellant's claim that his retirement was involuntary; it agreed with the AJ that "the appellant had chosen retirement in the face of unpleasant alternatives ["the appellant had chosen retirement in the face of unpleasant alternatives and that such choice did not render his retirement involuntary"] and that such choice did not render his retirement involuntary."

Miller v. Department of Homeland Security, 99 MSPR 175 (July 14, 2005) - The employee, a GS-13 Senior Criminal Investigator, made a non frivolous allegation that he reasonably believed that the information he disclosed ("i.e., he disclosed to his superiors, the agency's office of Internal Affairs, and a U.S. Senator that the Arizona DPS committed Fourth Amendment and other civil rights violations when it used excessive force in executing a search warrant at the residence of Khalid Alkhabbaz, a Saudi Arabian immigrant, on September 10, 2002, and required Alkhabbaz to be fingerprinted and photographed without his consent, a court order, or arrest") evidenced wrongdoing. Accordingly, the Board remanded for a hearing.

Mogyorossy v. Department of the Air Force, 96 MSPR 652 (Aug. 19, 2004) - The appellant was entitled to a merits' hearing on his IRA action because

he made non frivolous allegations that he made covered disclosures regarding the non payment of overtime and the failure to give breaks and that those disclosures were a contributing factor in his termination. The appellant worked as a Security Guard. The agency terminated him during his probationary period for unacceptable behavior and failure to satisfactorily perform. In his complaint to OSC and in his action before the Board, he alleged that the agency terminated him in reprisal for whistleblowing and threats to file grievances. More specifically, he claimed that his closures involved the agency's alleged failure to allow him to mediate on his lunch breaks, the alleged failure to pay overtime and the alleged failure to give employees breaks and instructions to security guards to not fully load their weapons. As to the mediation claim, the Board determined that it was not a protected disclosure. Similarly, as to the weapons claim, the Board held that "This is not the sort of disclosure that rises to the level of a 'substantial and specific danger.'" However, the Board held that the disclosure concerning overtime was protected because an "agency's alleged failure to pay its employees overtime may be a violation of the Fair Labor Standards Act and, thus, the appellant reported a violation of law which constitutes a protected disclosure under the WPA." Likewise, the claim that Security Guards were not given breaks may be a violation of agency rules and regulations, and were consequently covered as a protected disclosure. The Board also rejected the AJ's holdings that the disclosures were too trivial for coverage ("because they were allegedly ongoing for a period of time, the alleged violations of a law, rule, or regulation disclosed by the appellant were not minimal") and that the disclosures were made to the wrongdoers ("Because the appellant made his disclosures regarding the agency's failure

to pay overtime and to give its employees breaks to individuals besides Parker [the alleged wrongdoer], he has articulated non frivolous allegations that he made protected disclosures under the WPA."). Finally, the Board concluded that there was a non frivolous allegation that protected disclosures were a contributing factor in his termination. Here, the Board found that the individuals who took the personnel action knew of the disclosure and that the personnel action occurred within a period of time (5 months) "such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action."

Morgan v. DOE, No. 04-3400 (Fed. Cir. September 27, 2005) – Because collateral estoppel bars relitigation of whether disclosures were protected, the Circuit reverses the Board, which had determined that disclosures, deemed protected in a previous adjudication did not qualify under the current legal standard.

Perkins v. Department of Veterans Affairs (March 7, 2005) - The appellant, a Cemetery Caretaker Supervisor, WS-10, made a nonfrivolous allegation of a protected disclosure and that the disclosures were contributing factors (as well as other elements of proof), so that the Board has jurisdiction over his reprisal claim. He sufficiently alleged that he "contacted OIG in November 1999 and reported, inter alia, that agency employees were committing violations of law, rule, or regulation, including theft, kickbacks, and misuse of a GOV . . . . Specifically, the appellant alleged that he reported to OIG that three named agency employees had repeatedly allowed certain funeral homes to improperly bypass agency procedures for obtaining 'Burial Flags' in exchange for cash payments." Similarly, as to the allegation of a

contributing factor, the cemetery director, responsible for the challenged personnel action, knew of the appellant's 1999 disclosures to OIG and "the amount of time between the appellant's alleged October and November 1999 disclosures and his April 23, 2000 downgrade and May 31, 2000 detail was sufficiently close to satisfy the jurisdictional causation requirement."

Powers v. Department of the Navy, 97 MSPR 554 (September 30, 2004) - While the Board reversed the AJ and found that the appellant, a Supervisory Police Officer, had made a sufficient allegation of a protected disclosure to invoke board jurisdiction, the Board concluded that the appellant had failed to prove that his protected disclosures were a contributing factor in the agency's decision to detail him to other duties at another precinct. The disclosures concerned an earlier whistleblower case, in which the appellant "raised as protected disclosures his August 1990 to April 1992 reports to Senator Warner and the LEPS (Law Enforcement Physical Security) inspection team that his superiors were improperly using MWDs (Military Working Dogs) to detect explosive devices." As then noted by the Board, "Since we have found that an employee is entitled to raise the same protected disclosures in a subsequent whistleblower complaint, we find the AJ erred in finding that the appellant had failed to raise a nonfrivolous allegation of a protected disclosure when he again relied on disclosures (1), (2), and (3) in this IRA appeal." Concerning the contributing factor merits issue, the Board held that the agency decision makers were not aware of the protected disclosures and there were no other factors that indicated a connection between the reassignment and the disclosures.

Ray v. Department of the Army, 97 MSPR 101 (September 22, 2004) – The

Board reversed the AJ, who had found harmful procedural error (i.e., the agency refused to extend the appellant's reply period) and reprisal for whistleblowing, and instead determined that the time for reply (which amounted to 29 days) was reasonable and that there was no harm (i.e., insufficient evidence that the deciding official would have found the appellant credible in the reply), sustained three specifications that the AJ had found unproven, determined that the agency proved by clear and convincing evidence that it would have removed the appellant even in the absence of whisleblowing and that removal for the sustained conduct was reasonable. The agency had removed the appellant, Executive Assistant (Base Operations), GS-13, for 9 specifications, of conduct unbecoming a federal employee, to include "(1) that the appellant exhibited abusive behavior toward McPherson when he questioned her concerning an e-mail message that had been sent to COL Manning, who was then the USARJ Chief of Staff; (2) that the appellant had stated in front of Carol Dailey-Ashimine, COL Sullivan's administrative specialist, that he intended to rate Major (MAJ) Manuel Melendez negatively for the qualities of loyalty and integrity; (3) that the appellant made disparaging remarks about USARJ in an e-mail message he sent to Tsugumi Masashiro, a management analyst; (4) that, in the presence of Kemmy Okuma, a subordinate employee, the appellant stated that it was time for COL Roth, the deputy commander of USARJ, to get out of the Army; (5) that the appellant told Anna Taka, a community relations specialist, that LTC Boylan did not know his job and that the reason the appellant had to cancel an appointment with Taka was because his "lazy boss," COL Sullivan, was golfing; (6) that the appellant made disparaging remarks about MAJ Melendez in the presence of Lee; (7) that

the e-mail message the appellant sent to Pickenheim regarding statements Lascelles allegedly made to the appellant contained false statements; (8) that the appellant spread rumors about an alleged inappropriate relationship between LTC Boylan and Lee and that the e-mail message the appellant sent to COL Sullivan concerning the statements Lee allegedly made to the appellant regarding her husband's reaction to such rumors contained false statements; and (9) that the appellant addressed a female officer, LTC Donna Shaw, as "sir" and referred to various other female employees as "honey," "dear," or "young lady."' The agency proved specifications 2, 4, and 9 before the AJ and then 5, 6 and 8 at the full Board. As to penalty, the Board recognized that serious allegations were not sustained and that only specification 8 of the sustained misconduct was serious, nonetheless, the appellant was a manager, with prior discipline (driving under the influence and use of offensive language), so that his more than 40 years of military and civilian experience was outweighed by the misconduct.

Reeves v. Department of the Army (November 22, 2005) - The Board agreed with the AJ and dismissed this IRA appeal for lack of jurisdiction because the appellant failed to make a nonfrivolous allegation that these memoranda constitute "personnel actions" under 5 U.S.C. § 2302(a)(2)(A) (i.e., "the memoranda merely informed the appellant of his performance deficiencies and instructed him on what corrective actions were required, and did not threaten to take any disciplinary action") and as to other personnel actions, raised them with OSC, but "he has not proven that he raised the same set of factual allegations to OSC that he is raising before the Board with respect to his alleged protected disclosures and, thus, he has not

shown that he provided OSC with a sufficient basis to pursue an investigation of those factual allegations."

Reeves v. Department of the Army, 99 MSPR 153 (July 6, 2005) – The Board reversed an AJ and remanded, finding instead that the appellant had made a non frivolous allegation of a protected disclosure (as well as other elements of his case) by alleging that he reasonably believed that his disclosures about the weapons qualifications test (he disclosed that one of his supervisors him and other "high scorers" to qualify for those who did not achieve a high enough score on the test to qualify themselves) and a supervisor's threat of physical violence evidenced a violation of law, rule, or regulation, an abuse of authority, and a substantial and specific danger to public health or safety. The AJ had erroneously applied the now overruled Geyer test.

Rice v. Department of Agriculture, 97 MSPR 501 (September 30, 2004) – The Board revered the AJ who had dismissed the appellant's IRA appeal and instead remanded and determined that the appellant made a non frivolous allegation of a violation of law, rule, or regulation, gross mismanagement, or a gross waste of funds in regard to the expenditure of the funds (i.e., he accused a specific agency official of deliberately providing misinformation to the agency's chief financial officer and alleged that funds for security concerns were diverted to other purposes) as well as the occurrence of a personnel action (i.e., he "made a nonfrivolous allegation that the agency made a significant change in his duties when it announced the vacancy and included duties that had been his in the vacancy announcement.").

Schneider v. Department of Homeland Security (March 30, 2005) – The Board disagreed with the AJ and found that the appellant had proven that she made a protected disclosure and that the disclosure was a contributing factor in the agency's decision to suspend her for 30 days for her refusal to cooperate in an agency investigation; on that basis the Board reversed the AJ's decision sustaining the 30 day suspension and remanded to determine whether the agency could prove by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. This case involved the 30 day suspension of a District Adjudication Officer for two charges: "the appellant's refusal to cooperate in an official investigation (refusing to answer an investigator's questions about a charge that the appellant had lodged 'concerning document bribery and illegal data entry' by an agency employee . . . ; and the appellant's unauthorized acquisition of a personal document (photocopying a time and attendance report of another employee without permission, id.)." In the Board's view, the case turned on the testimony of a co worker, who had purportedly been treated disparately, and whose testimony had been erroneously denied by the AJ.

Shannon v. DHS (December 19, 2005) – An appellant, who makes an election under Section 7121(g) to go to the Board on a direct appeal over which the Board is without jurisdiction, is not precluded from filing a later IRA.

Smart v. Department of the Army, 98 MSPR 566 (May 24, 2005) - While the appellant invoked the Board's jurisdiction by making non frivolous allegations, he did not prove his IRA claim; he did not show that his

disclosures, which involved the alleged violation of a DOD regulation as to the location of training for a Special Reaction Team, were protected as a violation of law (the regulation did not support his contended restriction, and "he has not alleged nor shown that he made any inquiries or sought advice from supervisors or anyone else through agency channels concerning whether USAMPS training was required for the depot's SRT or whether the depot had obtained approval for the DOE training." or a substantial and specific danger to public safety under the WPA ("The appellant's disclosure was only speculation that there could possibly be danger at some point in the future. As such, it does not qualify as a disclosure covered by the WPA.").

Special Counsel v. DHS (Apr. 19, 2006) – On an interlocutory appeal, the Board ruled that an individual, named by the OSC as having committed a prohibited personnel practice in a corrective action before the Board, may permissively intervene. The Board described the background, as follows: "The Special Counsel (SC) filed a corrective action complaint against the agency pursuant to 5 U.S.C. § 1214(b)(2)(C), alleging that the agency: (a) Violated 5 U.S.C. § 2302(b)(6) by granting Knowles a preference or advantage not authorized by law, rule, or regulation during competition for the GS-11/12 Border Patrol Agent (BPA) positions for which he was selected; (b) violated 5 U.S.C. § 2302(b)(6) by selecting him for promotion to a GS-13 Supervisory BPA position; (c) violated 5 U.S.C. § 2302(b)(12) by assigning him to duties outside of his BPA and Supervisory BPA position descriptions without describing and classifying the duties; and (d) violated 5 U.S.C. § 2302(b)(12) by authorizing the distribution of overtime pay to him for which he was not eligible from 1999 to 2004. . . The SC requested,

among other things, that the Board order the agency to recover distributions of overtime pay unlawfully paid to Knowles and "[d]etermine Knowles'[s] future employment status based on evidence that shows he falsified two applications for promotion and was given unauthorized preferences in competitions for promotions." (citations omitted). The AJ had ruled in favor of the intervenor's request and then certified the issue to the full Board.

Tatsch v. Department of the Army, 100 MSPR 460 November 2, 2005 – The Board disagreed with the AJ and found that the appellant had made non frivolous allegations, invoking Board jurisdiction but on the merits did not prove that the agency official's involved in the pass-over and consequent non selection had knowledge sufficient to demonstrate that the whistleblowing was a contributing factor in the personnel action (i.e., the pass-over and non selection).

White v. Department of the Air Force, No. 04-3045 (Fed. Cir. Dec. 15, 2004) - The appellant did not show that he had a reasonable belief that he was disclosing gross mismanagement; while a whistleblower does not have to prove gross mismanagement by "irrefragable proof" and policy disputes may sometimes be protected under the WPA, debatable differences of opinion about policy matters are not protected. The appellant worked as a Supervisory Education Specialist at Nellis Air Force Base, with responsibility for administering off duty education programs. The appellant expressed reservations about a proposed Air Force program, Bright Flag Quality Educational System (QES). His concerns were mostly not addressed when the program was adopted, after which he was reassigned without a loss of pay based on the agency's loss of confidence in his ability to support the

QES. In a previous decision, LaChance v. White, 174 F.3d 137 (Fed. Cir. 1999), the circuit determined that the Board had applied the wrong test to decide whether the appellant had a reasonable belief that his disclosure evidenced gross mismanagement; the proper test was whether a disinterested observer who had "knowledge of the essential facts known to and readily ascertainable by the employee" could reasonably conclude that the disclosure evidenced gross mismanagement. On remand, the Board found that the appellant did not meet the "disinterested observer" standard. In this appeal of that decision, the circuit held that gross mismanagement did not require a showing of "irrefragable proof" that agency officials did not perform their duties correctly; policy disputes between an employee and an agency can sometimes be protected; differences of opinion about policy matters are not protected; "for a lawful agency policy to constitute 'gross mismanagement,' an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people." ; the matter must also be "significant." (The court noted though, as to the "debatable" policy test that the standard does not apply to alleged violations of statute or regulation, as to which there may be a reasonable belief even though the existence of an actual violation may be debatable.). Applying its test, the circuit agreed with the Board, finding that the dispute, although significant, was simply debatable based on the information available to the appellant when he made his disclosure. Despite that the appellant had pointed to 22 letters from 13 institutions complaining about the QES, nothing showed whether that was a consensus or just a minority view, and not all of the institutions complained about the QES as a whole. Moreover, just because the program was revised did not meet the appellant's

burden of proof because "[t]he mere fact that a program was revised and eventually eliminated four years later does not establish that it was a non-debatable mistake at the time of petitioner's disclosure." Finally, as to an Air Force report criticizing the program, and relied on by the appellant, even the report's author conceded that "there [was] plenty of evidence to show" that "reasonable experts in education could disagree" on the merits of the QES program and, in oral argument, the appellant's counsel made a similar concession.

Woodworth v. Department of the Navy, 98 MSPR 133 (January 7, 2005) – Because the appellant failed to make a non frivolous claim that the agency official's who refused to extend the appellant's overseas duty were aware of his whistleblowing (i.e., that he did not make a non-frivolous allegation that his disclosures were a contributing factor in the agency decision), the Board was without jurisdiction over this IRA claim.