

DELRS | 2024
Forging the DoD Workforce of the Future


MSPB Case Law Update
 Administrative Judge Martha Russo
 Administrative Judge Daniel Yehl
 U.S. Merit Systems Protection Board



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AGENDA


- Highlight noteworthy, recent Board and Federal Circuit cases covering the following areas:
 - Election of Remedies
 - Interim Relief
 - Probationers
 - Discrimination Claims
 - Medical Inability
 - Performance actions post *Santos* and *Lee*
 - Penalties
 - Whistleblower actions
- Separate breakout sessions will provide deeper dives into performance-based actions, whistleblower actions, and off-duty misconduct
- Questions?

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ELECTION OF REMEDIES


- **Refresher**
 - Under 5 U.S.C. § 7121(e)(1), an employee subjected to an adverse action such as a removal, and who is covered by a negotiated grievance procedure, may challenge such action by filing either a grievance under the negotiated grievance procedure, or a Board appeal, but not both
 - An employee is deemed to have exercised an election option when she timely files a notice of appeal or grievance, whichever occurs first
- ***Kaszowski v. Dep't of the Air Force, 2023 MSPB 15***: employee's election to challenge her removal through the negotiated grievance procedure was not binding because the agency failed to fully explain the consequences
 - Election must be knowing and informed
 - Decision letter did not explicitly inform the appellant she could not raise the matter both with the Board and through a grievance, or provide notice that election of the grievance procedure would result in waiver of Board appeal right
- ***Roquena v. DHS, 2022 MSPB 39***
 - Election of remedies statute defines "employee" narrowly, **excepting supervisors and management officials**

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INTERIM RELIEF


- **Refresher**
 - When an appellant is the prevailing party in an initial decision and the administrative judge has ordered interim relief under 5 U.S.C. § 7701(b)(2)(A), an agency must submit a certification with its petition for review that it has either complied with the interim relief order or that it has made a determination that the appellant's return to, or presence in, the workplace would be unduly disruptive. 5 U.S.C. § 7701(b)(2)(A)(ii); 5 C.F.R. § 1201.116(a)
- **Johnson v. VA, 2023 MSPB 9**
 - Two elements to interim relief: (1) return to workplace and (2) pay and benefits while PFR is pending
 - VA cancelled removal action and placed Johnson on LWOP, contending he was medically unable to work
 - Agency's PFR dismissed



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Probationers


- **Refresher**
 - Probation ends when appointee completes scheduled TOD on the day before the anniversary date of his appointment
 - Termination is accomplished by notifying the appointee in writing
- **Stewart v. Transportation, 2023 MSPB 18**
 - Termination must be effected *prior* to the end of the probationary period
- **Lewis v. Federal Bureau of Prisons, ___ F.4th ___ (Fed. Cir. March 4, 2024); Rossbach v. Interior, DC-3151-14-0066-B-1 (NPO)**
 - Appointee need not receive actual delivery of notice before effective date so long as attempts to notify were diligent and reasonable under the circumstances



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DISCRIMINATION CLAIMS


- **Pridgen v. OMB, 2022 MSPB 31**
 - Overruled *Savage* to the extent *Savage* held that the *McDonnell Douglas* framework has no application to Board proceedings
 - A finding that prohibited discrimination played "any part" in the contested action is the same as a finding of "motivating factor," and may entitle an appellant to injunctive or other "forward-looking relief"
 - To obtain full relief, an appellant must prove discrimination was a but-for cause of the employment outcome (can be more than one but-for cause)
- **Wilson v. SBA, 2024 MSPB 3**
 - Under both "pretext" and "mixed motive" theories of proving but-for causation, the burden of persuasion may shift to the agency
 - *McDonnell Douglas* framework: if prima facie case of disparate treatment established → agency must articulate a nondiscriminatory explanation for its action; appellant retains ultimate burden
 - *Mixed motive* framework: if appellant shows discrimination was a motivating factor → agency must prove by preponderant evidence it would have taken the same action absent discrimination
 - Side issue: AWOL charges



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MEDICAL INABILITY

- **Haas v. DHS, 2022 MSPB 36**
 - 5 C.F.R. § 339.206 applies where employee is removed based solely on his medical history
 - Where employee is removed based on a *current* medical condition, agency must prove:
 - Nexus between condition and observed deficiencies in performance or conduct, OR
 - A high probability, given the nature of the work involved, that his condition may result in injury to himself or others
- **Owens v. DHS, 2023 MSPB 7**
 - When appellant presents unambiguous evidence of complete recovery before ID has been issued → removal action does not promote the efficiency of the service




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PERFORMANCE: SANTOS v. NASA & LEE v. VA

Santos, 990 F.3d 1355 (Fed. Cir. 2021); Lee, 2022 MSPB 11


- To prevail in an appeal of a performance action under chapter 43, the agency must establish by substantial evidence that:
 - (1) OPM approved its performance appraisal system and any significant changes thereto;
 - (2) the agency communicated to the appellant the performance standards and critical elements of his position;
 - (3) the appellant's performance standards are valid under 5 U.S.C. § 4302(b)(1);
 - (4) **The appellant's performance during the appraisal period (i.e., before the PIP) was unacceptable in one or more critical elements;**
 - (5) the agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him a reasonable opportunity to demonstrate acceptable performance; and
 - (6) after an adequate improvement period, the appellant's performance remained unacceptable in at least one critical element.



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PENALTY SELECTION


- **Refresher**
 - Douglas factors and deference
- **Singh v. USPS, 2022 MSPB 15**
 - Re "same or similar offenses," the Board will no longer attempt to weigh the relative seriousness of various offenses in determining whether two employees who committed different acts of misconduct were treated disparately
- **Compare Chin v. DoD, 2022 MSPB 34** (DO failed to appropriately consider mitigating factors) with **Thomas v. Army, 2022 MSPB 35** (AJ erred in mitigating agency's penalty)
- **Marcell v. VA, 2022 MSPB 33:** the existence of a "zero tolerance policy" does not automatically cause agency's penalty determination to lose entitlement to deference



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WHISTLEBLOWING: APPELLANT'S BURDEN


- Exhaustion of administrative remedies before OSC
- **PLUS**
- Engaged in protected whistleblowing activity, *i.e.*, activity protected under 5 U.S.C. §§ 2302(b)(8), (b)(9)(A)(i), (B), (C), or (D)
- Contributing factor in the agency's decision to take or fail to take a covered personnel action

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WHISTLEBLOWING: APPELLANT'S BURDEN


- **Hessami v. MSPB, 979 F.3d 1362 (Fed. Cir. 2020)**: in determining if an appellant made a nonfrivolous jurisdictional allegation, the Board generally may not consider evidence introduced by the agency, but is limited to "evaluating whether the appellant has alleged sufficient factual matter, accepted as true, to state a claim that is plausible on its face"
 - The nonfrivolous allegation standard is analogous to the "well-pleaded complaint rule," **not** to a summary judgment standard
- **Skarada v. VA, 2022 MSPB 17, and Chambers v. DHS, 2022 MSPB 8**: employee exhausts with OSC where he gave OSC a sufficient basis to pursue an investigation that might lead to corrective action

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WHISTLEBLOWING: APPELLANT'S BURDEN

- **Fisher v. Interior, 2023 MSPB 11**: any disclosure of info to OIG or OSC is protected under section 2302(b)(9)(C) regardless of its content, so long as made IAWL
- **Spivey v. DOJ, 2022 MSPB 24**: an investigation is not a covered personnel action unless it results in a significant change in job duties, responsibilities, or working conditions or has effects that otherwise fall under the definition of 2302(a)(2)(A)
- **Skarada**: similar re: harassment: "practical and significant effects"


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WHISTLEBLOWING: AGENCY'S BURDEN

- Clear and convincing evidence
- **Factors:** (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)

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WHISTLEBLOWING: CARR FACTORS

- **Soto v. VA, 2022 MSPB 6:** Consider any "professional retaliatory motive" under *Carr* factor 2
- **Karnes v. DOJ, 2023 MSPB 12:** The agency's failure to present evidence as to *Carr* factor 3 may prevent the agency from carrying its overall burden
- **Wilson v. VA, 2022 MSPB 7:** comparators are not relevant absent evidence they were nonwhistleblowers

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ANY QUESTIONS

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