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The Civil Service Reform Act: Due Process and Misconduct-Related Adverse Actions

Updated March 29, 2017

Congressional Research Service
https://crsreports.congress.gov
R44803

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Federal employees receive statutory protections that differ from those of the private sector, including more robust limits on when they can be removed or demoted. Although a number of laws apply to various aspects of the federal civil service system, the primary governing framework is the Civil Service Reform Act of 1978 (CSRA), as amended. The CSRA created a comprehensive system for reviewing actions taken by most federal agencies against their employees, and the act provides a variety of legal protections and remedies for federal employees. It also funnels review of agency decisions to the Merit Systems Protection Board (MSPB), subject to review by the United States Court of Appeals for the Federal Circuit (Federal Circuit).

In addition to these statutory protections, the Due Process Clause of the Fifth Amendment requires the federal government to observe certain procedures when depriving individuals of life, liberty, or property. The CSRA's requirement that covered employees may not be removed from federal service, except for cause or unacceptable performance, creates a constitutional property interest in continued employment. The government cannot deprive covered employees of this property interest without adhering to due process requirements.

Chapter 75 of Title 5 of the *U.S. Code* provides various procedural protections for certain government employees subjected to major adverse actions. Those adverse actions include removal, suspensions for more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. Agencies may only take a major adverse action against an employee "for such cause as will promote the efficiency of the service." In order to sustain an agency's decision on appeal to the MSPB, an agency must show (1) by a preponderance of the evidence that the charged conduct occurred; (2) a nexus between that conduct and the efficiency of the service; and (3) that the penalty imposed by the agency is reasonable.

The MSPB has noted three circumstances in which an agency may establish a nexus between off-duty misconduct (e.g., criminal activity) and the efficiency of the service. First, in certain egregious circumstances, the type of misconduct committed by the employee creates a rebuttable presumption of a nexus. Second, an agency may show by a preponderance of the evidence that the misconduct "adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance." Finally, the agency may demonstrate by a preponderance of the evidence that the employee's misconduct interfered with or adversely affected the agency's mission.

The CRSA does not expressly reference "indefinite suspensions," but agencies have routinely indefinitely suspended employees for certain behavior. The Federal Circuit and the MSPB have ruled that indefinite suspensions for disciplinary reasons that last more than 14 days qualify as major adverse actions under Chapter 75. The MSPB has recognized that an agency may indefinitely suspend an employee to further the efficiency of the service in three situations: (1) when there is reasonable cause to believe the employee has committed a crime carrying a sentence of imprisonment; (2) for certain medical reasons; and (3) when the employee's position requires access to classified information, but that access has been suspended. A prominent recurring issue is when an agency may indefinitely suspend an employee for alleged criminal behavior occurring outside the workplace. Whether and when indefinite suspensions may be imposed on account of alleged criminal behavior may turn upon the facts relied upon by the agency when in assessing whether there is reasonable cause to believe the employee committed a crime carrying a sentence of imprisonment.

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Background

The size and scope of the federal workforce, along with the rights and responsibilities of federal agencies and their employees, has been the subject of various legislative proposals from Congress in recent years,[1] and has also been an issue of focus for the Trump Administration.[2] A major topic of interest concerns statutory limits on when federal employees can be removed or demoted for cause or performance-related issues.[3] The current legal framework governing removal or demotion of federal employees originates from efforts to reform the nation's earlier "patronage" system for filling positions in the federal government.[4] Under the "spoils system" that existed in the first century of the Republic, many federal government jobs were filled based upon "political contributions rather than capabilities or competence."[5] Eventually, "strong discontent with the corruption and inefficiency of the patronage system of public employment" resulted in the passage of the Pendleton Act in 1883, which served as the "foundation of [the] modern civil service" and required that federal employees within the civil service be hired based on merit.[6]

A number of subsequent laws have further reformed the civil service system,[7] although the modern framework governing the rights of most federal workers is the Civil Service Reform Act of 1978 (CSRA or Act), as amended.[8] The CSRA "was designed to replace an 'outdated patchwork of statutes and rules' that afforded employees the right to challenge employing agency actions in district courts across the country."[9] This patchwork had resulted in "wide variations"

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[1] *See, e.g.*, Modern Employment Reform, Improvement, and Transformation Act of 2017, H.R. 559, 115th Cong. (2017); VA Accountability First Act of 2017, H.R. 1259, 115th Cong. (2017) (House-passed legislation that would provide greater discretion to the Department of Veterans Affairs to remove or demote employees based on performance or misconduct issues); Promote Accountability and Government Efficiency Act, H.R. 6278, 114th Cong. (2016). *See also* CRS Legal Sidebar WSLG1696, *House Passes H.R. 5620 to Grant VA Secretary Expedited Removal and Demotion Authority*, by Thomas J. Nicola (discussing measures considered in the 114th Congress to modify the removal and demotion authority of the Secretary of Veterans Affairs).

[2] *See, e.g.*, The White House, Presidential Memorandum Regarding the Hiring Freeze (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-hiring-freeze (requiring "the Director of the Office of Management and Budget (OMB), in consultation with the Director of OPM, [to] recommend a long-term plan to reduce the size of the Federal Government's workforce through attrition"); Damian Paletta, *Trump Budget Expected to Seek Historic Contraction of Federal Workforce*, WASH. POST (March 12, 2017), https://www.washingtonpost.com/business/economy/through-his-budget-a-bottom-line-look-at-trumps-new-washington/2017/03/12/29739206-05be-11e7-b9fa-ed727b644a0b_story.html?utm_term=.985f1955bfa5; Michael D. Shear, *Trump Orders Broad Hiring Freeze for Federal Government*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/federal-hiring-freeze.html?_r=0; *see also* CRS Legal Sidebar WSLG1723, *President Trump Freezes Federal Civil Service Hiring*, by Jared P. Cole.

[3] *See* MERIT SYSTEMS PROTECTION BOARD (MSPB), WHAT IS DUE PROCESS IN FEDERAL CIVIL EMPLOYMENT? (2015), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT [hereinafter "*What is Due Process*"]; 5 U.S.C. §§ 4303, 7513.

[4] Elrod v. Burns, 427 U.S. 347, 353-54 (1976).

[5] *What is Due Process*, *supra* note 3, at 3-4.

[6] *Burns*, 427 U.S. at 354. *See* Pendleton Act of 1883, 22 Stat. 404.

[7] *See, e.g.*, Lloyd-La Follette Act, Pub. Law No. 62-336, 37 Stat. 555 (1912); Veterans Preference Act of 1944, Pub. Law No. 78-259, 58 Stat. 387. *See also* Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (upholding the Lloyd-La Follette Act's removal standard – "for such cause as will promote the efficiency of the service" – against an overbreadth and vagueness challenge).

[8] 5 U.S.C. §§ 1101 *et seq*. The CSRA has been amended since the law's passage. *See, e.g.*, Civil Service Due Process Amendments of 1990, P.L. 101-376, 104 Stat. 461.

[9] Elgin v. Dep't of the Treasury, 567 U.S.—,—, 132 S. Ct. 2126, 2135 (2012) (quoting United States v. Fausto, 484 U.S. 439, 444-45 (1988)). *See also* Perry v. MSPB, 829 F.3d 760, 762 (D.C. Cir. 2016) (ruling that appeals of MSPB

within different federal courts regarding the rights of federal employees.[10] Against this backdrop, the CSRA created "a comprehensive system for reviewing personnel action taken against federal employees."[11] It established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration."[12] The Act provides a variety of legal protections for federal employees, authorizes challenges to agency decisions, and funnels review of those challenges to the Merit Systems Protection Board (MSPB or Board), whose decisions are exclusively subject to review by the United States Court of Appeals for the Federal Circuit (Federal Circuit).[13]

Among other things,[14] the CSRA establishes a statutory framework, codified in Title 5 of the *U.S. Code*, regulating specific actions taken by agencies against certain federal employees, including removal, demotion, and suspension.[15] This report focuses on certain legal issues arising under a prominent type of action taken against federal employees—major adverse actions based on employee misconduct under Chapter 75 of Title 5's provisions.[16] However, another important type of action taken by agencies against employees—performance-based actions under Chapters 75 and 43—is beyond the scope of this report.[17] Moreover, this report primarily focuses on the CRSA's applicability to the competitive service. The requirements pertaining to Senior Executive

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decisions rejecting jurisdiction of "mixed cases" must go to the Federal Circuit), *cert. granted*, 137 S. Ct. 811 (2017).

[10] *Fausto*, 484 U.S. at 445. The CSRA applies to federal employees but does not cover federal contractors. *See generally* Wagner v. Fed. Election Comm'n, 793 F.3d 1, 30 (D.C. Cir. 2015).

[11] *Fausto*, 484 U.S. at 455; Elgin v. Dep't of the Treasury, 567 U.S.—,—, 132 S. Ct. 2126, 2130 (2012) (ruling that "the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional").

[12] *Id*. at 445.

[13] Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 773-74 (1985).

[14] The Civil Service Reform Act (CSRA) also contains the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101 *et seq*., which governs labor relations for certain non-postal federal employees. Federal labor relations issues are beyond the scope of this report. For more on the FSLMRS, see CRS Report R44794, *Collective Bargaining and the Federal Service Labor-Management Relations Statute: Selected Legal Issues*, by Jon O. Shimabukuro. Another important legal issue concerning the rights of federal employees concerns the Whistleblower Protection Act, P.L. 101-12, 103 Stat. 16 (1989), along with various agency-specific statutes, which offer legal protections for employees who report illegal misconduct. For a discussion of the legal issues surrounding federal employee whistleblower laws, see CRS Report R42727, *Whistleblower Protections Under Federal Law: An Overview*, by Jon O. Shimabukuro and L. Paige Whitaker.

[15] In addition to appealing an adverse action on the grounds that an agency had insufficient cause to support its decision, employees may also allege that an agency action was discriminatory in violation of a different federal statute. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*.; Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq*. Cases appealable to the MSPB that allege such discrimination are known as "mixed cases," 29 C.F.R. § 1614.302, and are governed by distinct procedures set out by the CSRA, the MSPB, and the Equal Employment Opportunity Commission. *See* 5 U.S.C. §§ 7702, 7703(b)(2); 5 C.F.R. pt. 1201, subpt. E; 29 C.F.R. pt. 1614, subpt. C. *See generally* Kloeckner v. Solis,—U.S.—,—, 133 S. Ct. 596, 601 (2012). The legal issues surrounding mixed cases are beyond the scope of this report.

[16] *See* Lachance v. Devall, 178 F.3d 1246, 1253 n.6 (Fed. Cir. 1999) ("An agency may impose penalties on ordinary civil service employees ... pursuant to either chapter 75 or chapter 43 of title 5, United States Code. Chapter 75 covers agency actions based on employee misconduct. ... Chapter 43 covers agency actions based on unacceptable performance.").

[17] 5 U.S.C. §§ 4303, 7513. Under Chapter 43, agencies may remove or demote employees for performance-based reasons. *See* MSPB, ADDRESSING POOR PERFORMERS AND THE LAW (2009). Chapters 43 and 75 provide certain statutory protections for federal employees in common. Under both statutory provisions, the agency must give employees 30 days' advance written notice before taking action. 5 U.S.C. §§ 4303(b)(1)(A), 7513(b)(1). Employees are entitled to an attorney or representative. *Id*. §§ 4303(b)(1)(B), 7513(b)(3). Employees are also entitled to a reasonable time to respond orally and in writing, *id*. §§ 4303(b)(1)(C), 7513(b)(2), as well as a written decision from the agency describing its reasons for taking action, *id*. §§ 4303(B)(1)(D), 7513(b)(4).

Service (SES) members are thus only discussed briefly.[18] Likewise, certain categories of employees at particular agencies that are exempt from the CSRA's requirements are largely excluded from discussion in the report.[19]

The report begins with a brief examination of an important principle that informs and supplements protections for federal workers—the constitutional protections afforded civil service employees by the Due Process Clause. These constitutional considerations not only inform the interpretation and application of the existing statutory rules governing adverse actions against federal employees, but may also establish baseline parameters for policymakers' consideration of proposals to modify the removal and demotion processes authorized under current law.

Due Process Protections for Civil Service Employees

The Due Process Clause of the Fifth Amendment requires the federal government to observe certain procedures when depriving individuals of life, liberty, or property.[20] In addition to protecting against the deprivation of an individual's physical property, the Constitution also guards against the deprivation of certain "property interests" without due process.[21] The property interests protected by the Due Process Clause are not themselves created by the Constitution; instead, those interests arise from an independent source, such as state or federal law.[22]

Public Employment as a Protected Property Interest

One important type of property interest that can be created by federal law is public employment.[23] The Supreme Court has held that certain public employees have a constitutional property interest in their continued employment.[24] In order for a public employee to have a property interest in continued employment, an employee must have a "legitimate claim of entitlement to it."[25] Such an entitlement can arise when the government gives a public employee "assurances of continued employment or conditions dismissal only for specific reasons."[26]

The CSRA's requirement that covered employees may not be removed from federal service except for cause or unacceptable performance creates such an entitlement, bestowing a property interest in continued employment.[27] The government thus cannot deprive covered employees of

[18] *See infra* notes 61-62.

[19] Various procedural protections in the CSRA are inapplicable to certain positions in the federal government. *See, e.g.*, 5 U.S.C. § 7511(b)(7) (exempting positions in the Central Intelligence Agency from Chapter 75's protections); *id.* § 4301(1)(ii) (exempting various national security agencies from Chapter 43's protections). Further, certain agencies may suspend, demote, or remove employees on national security grounds. *See id.* §§ 7531, 7532.

[20] U.S. CONST. amend. V. The Fifth Amendment applies to the federal government, whereas the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." *Id.* amend. XIV, § 1. The due process procedural safeguards of the Fourteenth Amendment are no less stringent than those of the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[21] Bd. of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Stone v. FDIC, 179 F.3d 1368, 1374 (Fed. Cir. 1999).

[27] *See* King v. Alston, 75 F.3d 657, 661 (Fed. Cir. 1996).

this property interest without due process.[28] Of course, Congress is not *required* to give a property interest to federal employees in the first place; but once it does so, that property interest cannot be deprived without constitutionally adequate procedures.[29] In other words, the CSRA gives covered employees a constitutionally protected property interest in continued employment, but that interest is protected *both* by the statute's procedural provisions and the requirements of due process.[30]

Precisely what procedures are constitutionally required before depriving individuals of a protected interest can vary.[31] When deciding what process is due, courts balance three factors enunciated by the Supreme Court in *Mathews v. Eldridge*: (1) "the private interest that will be affected by the official action"; (2) the risk of an erroneous deprivation and the probable value of additional procedures; and (3) the interest of the government.[32] In general, the Court has made clear that individuals with a property interest in continued employment are entitled to notice of the proposed agency action[33] and a "meaningful opportunity to be heard" before the government may deprive them of that interest.[34] Prior to termination, an employee is thus "entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[35] Importantly, the contours of this pre-deprivation hearing are dependent on the totality of the proceedings.[36] In determining the type of procedures due process requires, courts will examine the entirety of the relevant procedures, including the available post-deprivation proceedings.[37] Particularly when employees are entitled to a subsequent full hearing and judicial review, a less formal pre-deprivation proceeding is permitted.[38]

In conducting the balancing of factors pursuant to *Mathews v. Eldridge*, the severity of the deprivation is a key factor in determining what procedures due process requires.[39] For example,

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[28] *See Stone*, 179 F.3d at 1375-76; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'") (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)). In *Loudermill*, the Court expressly rejected its prior "bitter with the sweet" approach, under which "the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right." *Id*. at 540-41 (quoting Arnett v. Kennedy, 416 U.S. 134, 152-54 (1974)).

[29] *Id*.

[30] *Stone*, 179 F.3d at 1375-76. *See What is Due Process*, *supra* note 3, at 13-32.

[31] Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Due process is flexible and calls for such procedural protections as the particular situation demands.").

[32] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[33] *Loudermill*, 470 U.S. at 546.

[34] Lachance v. Erickson, 522 U.S. 262, 266 (1998) (citing *Loudermill*, 470 U.S. at 542).

[35] *Loudermill*, 470 U.S. at 546. This has been interpreted by the MSPB to mean that "if an agency fails to provide prior notice of the charges against the appellant, an explanation of its evidence, and an opportunity to respond, its action must be reversed." Greene v. Dep't of Health and Human Servs., 48 M.S.P.R. 161, 166 (M.S.P.B. 1991). In addition, an employee must have an opportunity to respond following an agency's proposed action; a requirement not satisfied when agency official simply considers an employee's views prior to the issuance of a proposal notice. Hodges v. U.S. Postal Serv., 118 M.S.P.R. 591, 594 (M.S.P.B. 2012). Further, the agency deciding official must consider the response of the employee. *Id*.

[36] *Loudermill*, 470 U.S. at 546.

[37] *Id*.

[38] *Id*.

[39] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

the Supreme Court in *Gilbert v. Homar* upheld the immediate *suspension*—as opposed to removal—of a public employee, arrested and charged with a felony, because the Court concluded that when the government must act quickly, or it is impractical to deliver pre-deprivation procedures, post-deprivation procedures can satisfy due process.[40] In the circumstance at issue in *Homar*, where an independent third party had made a probable cause determination that the employee committed a felony, a post-suspension opportunity to be heard could satisfy due process.[41]

Further, the scope of the right to be heard is not unlimited. The Supreme Court has held that it does not violate the Due Process Clause for an agency to take an adverse action against an employee for making "false statements in response to an underlying charge of misconduct."[42] Employees are of course entitled to exercise a Fifth Amendment right not to incriminate themselves, but agencies may take this silence into consideration in determining the truth or falsity of a charge.[43]

Due Process Protections Beyond the Terms of the CSRA

While the CSRA's provisions provide statutory requirements of agency actions that effectively overlap with many constitutional requirements,[44] due process sometimes requires protections beyond what the statute obviously requires. For instance, in the adverse action reviewed by the Federal Circuit in *Stone v. Federal Deposit Insurance Corporation*, an employee was removed by an agency official who had received *ex parte* communications regarding the employee, and these communications were not disclosed to the employee until after the removal decision was made.[45] The Federal Circuit ruled that *ex parte* communications made to the decision maker containing "new and material information" violate due process because they prevent the employee from receiving notice of the reasons and evidence for the agency's decision.[46] Similarly, in *Ward v. United States Postal Service*, the Federal Circuit ruled that this principle is not limited to consideration of conduct serving as the basis for the adverse action itself, but applies to an agency's determination of an employee's penalty as well.[47] In *Ward*, the agency official responsible for determining the appropriate penalty to be imposed on the employee had received *ex parte* communications concerning the employee's conduct that were not disclosed to the employee.[48] The Federal Circuit rejected a distinction between communications regarding the

[40] Gilbert v. Homar, 520 U.S. 924, 930 (1997).

[41] *Id*. at 935-36.

[42] Lachance v. Erickson, 522 U.S. 262, 268 (1998).

[43] *Id*. at 267-68. *See generally* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (noting the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify").

[44] *See, e.g.*, 5 U.S.C. § 7513 (requiring notice to the employee and the reasons for an adverse action and the opportunity to respond).

[45] Stone v. FDIC, 179 F.3d 1368, 1372-73 (Fed. Cir. 1999). An ex parte proceeding is one that includes "one party only ... without notice to or arguments from the adverse party." *Ex Parte*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[46] *Stone*, 179 F.3d at 1376. *But see* Blank v. Dep't of the Army, 247 F.3d 1225, 1229 (Fed. Cir. 2001) ("When a deciding official initiates ex parte communication that only confirms or clarifies information already contained in the record, there is no due process violation."); Mathis v. Dep't of State, 122 M.S.P.R. 507, 512-13 (M.S.P.B. 2015) (concluding that a due process violation does not occur when the deciding official "considers issues raised by an employee in her response to the proposed adverse action" or "by initiating an ex parte communication that only confirms or clarifies information already contained in the record").

[47] 634 F.3d 1274, 1279-81 (Fed. Cir. 2011).

[48] *Id*. at 1276.

basis for the adverse action and those regarding the determination of the appropriate penalty that followed.[49] The court ruled that, just as in *Stone*, a deciding official's receipt of new and material information via *ex parte* communications regarding an employee's penalty determination runs afoul of due process.[50]

Likewise, as explained in more detail below,[51] in adverse actions where an agency seeks to show that removal of an employee promotes the efficiency of the service, certain "egregious" behavior establishes a rebuttable presumption that this standard is met.[52] When established, this presumption "places an extraordinary burden on an employee, for it forces him to prove the negative proposition that his retention would not adversely affect the efficiency of the service."[53] Consequently, the Federal Circuit made its view clear in *Allred v. Department of Health and Human Services* that due process requires the presumption actually be rebuttable by an employee's countervailing evidence.[54]

Who Is a Federal Employee Under the CSRA?

The CSRA contains an initial categorization of who counts as a federal employee and which particular employees are covered under its various procedural protections. These classifications are important because, among other things, the CSRA functions as the "comprehensive" legal framework governing certain type of actions taken by agencies against employees.[55] As such, potential claims of certain federal workers not covered by particular provisions of the CSRA may be precluded because of the comprehensive scope of the CSRA.[56]

The statute defines the civil service generally as "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States" except for the armed forces and the uniformed forces.[57] It further categorizes civil service federal government

[49] *Id*. at 1279-80.

[50] *Id*. at 1280.

[51] *See infra* notes 98-103.

[52] *See* Hayes v. Dep't of the Army, 727 F.2d 1535, 1539 (Fed. Cir. 1984); Merrit v. Dep't of Justice, 6 M.S.P.B. 493 (1981).

[53] Crofoot v. Gov't Printing Office, 761 F.2d 661, 664 (Fed. Cir. 1985).

[54] *See* Allred v. Dep't of Health & Human Servs., 786 F.2d 1128, 1131 (Fed. Cir. 1986) ("To deny a fair opportunity to rebut the presumption of nexus would violate the due process clause.") (citing Heiner v. Donnan, 285 U.S. 312, 329 (1932)); Davis v. Dep't of Veterans Affairs, 4 F. App'x 779, 782 (Fed. Cir. 2001) ("The MSPB's determination that Davis failed to rebut the presumption of satisfaction of the nexus requirement is supported by substantial evidence, is in accordance with law, and is not arbitrary, capricious, or an abuse of discretion.").

[55] United States v. Fausto, 484 U.S. 439, 455 (1988). In Fausto, the Court held that an excepted service employee's claims were barred because the CSRA "established a comprehensive system for reviewing personnel action[s]" and it excluded employees in the plaintiff's service category. *Id.* at 455. Congress subsequently expanded the definition of covered employees in the CSRA. Civil Service Due Process Amendments of 1990, P.L. 101-376, 104 Stat. 461.

[56] *Fausto*, 484 U.S. at 455 ("The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act."); Elgin v. Dep't of the Treasury, 567 U.S.—,—, 132 S. Ct. 2126, 2130 (2012) (determining that "the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional"); Semper v. United States, 694 F.3d 90, 95 (Fed. Cir. 2012) ("Congress's withholding of CSRA review rights was not inadvertent ... Congress did not intend for Judicial Branch employees who were not entitled to review under the CSRA to have alternative routes to judicial review for adverse agency actions such as termination.").

[57] 5 U.S.C. § 2101.

employees into three groups: SES employees,[58] competitive service employees,[59] and excepted service employees.[60]

SES employees are high-level positions in the federal government above the grade of General Schedule 15.[61] Career SES members are selected according to a merit-based system, and they operate functionally as a link, through successive presidential administrations, between career staff and the political appointees who head federal executive agencies. The CSRA's requirements for SES employees, including hiring and performance reviews, are distinct from those of competitive service and excepted service employees and are beyond the scope of this report.[62]

In general, federal civil service employees are in the competitive service.[63] The competitive service generally covers all civil service positions within the executive branch except those that are (1) SES positions; (2) filled via appointment by the President following Senate confirmation; or (3) excepted from the competitive service via statute.[64] By statute, certain positions not in the executive branch and positions in the government of the District of Columbia may be specifically included in the competitive service.[65]

Finally, excepted service employees are civil service employees who are not in the SES or the competitive service categories.[66]

Major Adverse Actions Under Chapter 75 of the CSRA

The primary procedural protections under the CSRA for agency actions taken against employees for misconduct are contained in Chapter 75 of Title 5. Subchapter II of Chapter 75 provides various procedural protections for certain government employees subjected to "major adverse

[58] *Id*. § 3131(2).

[59] *Id*. § 2102(a)(1).

[60] *Id*. § 2103. The CSRA created the Office of Personnel Management (OPM), which is authorized to promulgate civil service regulations for the federal government and enforce those rules in certain situations. *Id*. § 1103. OPM has promulgated regulations establishing procedures for agency adverse actions under Chapter 75 and Chapter 43. 5 C.F.R. pts 432, 752. OPM is authorized to intervene in proceedings before the MSPB in proceedings that involve the interpretation of an OPM regulation. 5 U.S.C. § 7701(d). The Director of OPM is also authorized to obtain judicial review of an MSPB order in the United States Court of Appeals for the Federal Circuit "if the Director determines ... that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." *Id*. § 7703(d).

[61] There were approximately 7,791 SES appointments in the federal government during FY2015. *See* OFFICE OF PERS. MGMT., 2015 Senior Executive Service Report 5 (May 2016), https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/ses-summary-2015.pdf.

[62] 5 U.S.C. §§ 4311-15. For discussion of the features of the SES, see CRS Report R41801, *The Senior Executive Service: Background and Options for Reform*, by Maeve P. Carey.

[63] Office of Pers. Mgmt., *Hiring Information: Excepted Service*, https://www.opm.gov/policy-data-oversight/hiring-information/excepted-service/ ("Federal Government civilian positions are generally in of the competitive civil service. To obtain a competitive service job, you must compete with other applicants in open competition.").

[64] 5 U.S.C. § 2102(a)(1).

[65] *Id.* § 2102(a)(2), (3).

[66] 5 U.S.C. § 2103. *See generally* GAO, *The Excepted Service: A Research Profile* (May 1997), *available at* http://www.gao.gov/assets/80/79968.pdf.

actions."[67] Those adverse actions include removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs of 30 days or less.[68] Agencies may only take a major adverse action against an employee "for such cause as will promote the efficiency of the service."[69] The Federal Circuit has interpreted "efficiency of the service" to involve consideration of "the work of the agency," "the agency's performance of its functions,"[70] and "the employee's job responsibilities."[71]

Which Federal Employees Are Covered Under Chapter 75?

These protections of Chapter 75 apply only to covered employees.[72] These include

- individuals in the competitive service who are not serving in a probationary period or have generally completed one year of continuous service;[73]
- preference eligibles[74] in the excepted service who have completed one year of continuous service in an executive agency, the Postal Service, or the Postal Regulatory Commission;[75] and
- other select individuals in the excepted service who are not preference eligible.[76]

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[67] Elgin v. Dep't of Treasury, 567 U.S.—,—, 132 S. Ct. 2126, 2131 (2012); Semper v. United States, 694 F.3d 90, 92 (Fed. Cir. 2012). The provisions of Chapter 75 apply to employees in the competitive service and certain excepted service employees. *See* 5 U.S.C. § 7511. The statute also provides that the Office of Personnel Management "may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter." 5 U.S.C. § 7511(c).

[68] 5 U.S.C. § 7512. Subchapter I of Chapter 75 applies to "minor adverse actions," or suspensions for 14 days or less. United States v. Fausto, 484 U.S. 439, 455 (1988); 5 U.S.C. §§ 7501-04. Employees covered by Subchapter I are entitled to advance written notice stating the reasons for the action; a reasonable time to respond orally and in writing and to support that response with documentary evidence; representation by an attorney; and a written decision from the agency stating the reasons for its decision. *Id.* § 7503. These actions are generally not appealable to the MSPB.

[69] 5 U.S.C. § 7513(a).

[70] Brown v. Dep't of the Navy, 229 F.3d 1356, 1358 (Fed. Cir. 2000) ("To satisfy that requirement, the agency must show by preponderant evidence that there is a nexus between the misconduct and the work of the agency, *i.e.,* that the employee's misconduct is likely to have an adverse impact on the agency's performance of its functions."); Doe v. Dep't of Justice, 565 F.3d 1375, 1379 (Fed. Cir. 2009) ("To sustain the charge of misconduct, the agency must have established by preponderant evidence the existence of a nexus between the employee's misconduct and the work of the agency, i.e., the agency's performance of its functions.").

[71] Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955, 957 (Fed. Cir. 1993); *Brown*, 735 F.2d at 548.

[72] Chapter 75 also expressly excludes various types of positions from coverage, including, for example, employees whose appointment is made with the consent of the Senate; certain employees in confidential, policymaking positions; members of the Foreign Service; employees whose appointment is made by the President; and employees of specific agencies, such as the Central Intelligence Agency. In addition, certain agency positions are excluded, such as the Federal Bureau of Investigation and intelligence components of the Department of Defense, unless an employee is "preference eligible" (e.g., a qualifying veteran). 5 U.S.C. § 7511(b)(8).

[73] *Id.* § 7511(a)(1)(A).

[74] Preference eligible employees are defined in 5 U.S.C. § 2108 and generally include veterans and certain family members.

[75] *Id.* § 7511(a)(1)(B).

[76] *Id.* § 7511(a)(1)(C). This category includes individuals who are "not serving a probationary or trial period under an initial appointment pending conversion to the competitive service"; or who have "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." *Id.* § 7511(a)(1)(C)(i), (ii).

When taking an adverse action against covered employees, the agency must give 30 days' advance written notice before taking action.[77] Employees also are entitled to an attorney or representative,[78] a reasonable time to respond orally and in writing,[79] and a written decision from the agency describing its reasons for taking action.[80]

After the agency has reached its decision, covered employees may appeal to the MSPB,[81] which is empowered to review the case. If the employee is the prevailing party on appeal, the Board may potentially order remedies including reinstatement, backpay, and attorney's fees.[82] When reviewing an employee's appeal of a major adverse action, the MSPB will uphold the agency's decision "only if [it] is supported by a preponderance of the evidence."[83] The "agency must establish three things to withstand challenge" to its decision: (1) it must show by a preponderance of the evidence "that the charged conduct occurred"; (2) it must "establish a nexus between that conduct and the efficiency of the service"; and (3) it must show "that the penalty imposed is reasonable."[84]

Following the MSPB's decision, employees may appeal the Board's decision to the Federal Circuit,[85] which has "exclusive jurisdiction" over the MSPB's final decisions.[86] On appeal from the MSPB's decision, the Federal Circuit will uphold the Board's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "obtained without procedures required by law, rule, or regulation having been followed"; or "unsupported by substantial evidence."[87]

Nexus Between Job and Conduct

As mentioned above,[88] to sustain an adverse action against a covered employee under Chapter 75, the agency must show that its decision was made "for such cause as will promote the efficiency of the service."[89] This means that, in addition to showing that the charged conduct actually occurred,[90] the agency must also establish by a preponderance of the evidence that there is a "nexus" between the employee's misconduct and either "the work of the agency" or "the

[77] Chapter 75 requires "at least 30 days'" notice. *Id*. § 7513(b)(1).

[78] *Id*. § 7513(b)(3).

[79] *Id*. § 7513(b)(2).

[80] *Id*. § 7513(b)(4).

[81] *Id*. §§ 7513(d), 7701(a).

[82] *Id*. §§ 1204(a)(2), 7701(g).

[83] *Id*. § 7701(c)(1)(B). *See* 5 C.F.R. § 1201.4(q) (defining preponderance of the evidence as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.").

[84] Pope v. U.S. Postal Serv., 114 F.3d 1144, 1147 (Fed. Cir. 1997); *see* McNair v. Dep't of Agric., No. DC-0752-14-0385-I-1, 2014 WL 5424411, at *1 (M.S.P.B. Sept. 16, 2014) (applying the standard outlined in *Pope*); Gonzalez v. Dep't of Homeland Sec., 114 M.S.P.R. 318, 325 (M.S.P.B. 2010) (same).

[85] 5 U.S.C. § 7703.

[86] 5 U.S.C. § 7703.

[87] 5 U.S.C. § 7703(c).

[88] *See supra* note 69.

[89] 5 U.S.C. § 7513(a). *See* MSPB, ADVERSE ACTIONS: A COMPILATION OF ARTICLES 25-27 (2016), https://www.mspb.gov/studies/adverse_action_report/index.htm [hereinafter "*Adverse Actions*"].

[90] Pope v. U.S. Postal Serv., 114 F.3d 1144, 1147 (Fed. Cir. 1997).

agency's performance of its functions."[91] Certain on-duty offenses, such as an unauthorized absence without leave, are "inherently connected to the efficiency of the service."[92] And other on-duty behavior may easily satisfy this standard as well, such as when misconduct occurs on agency property and involves agency personnel,[93] or in circumstances where an employee refuses to follow legitimate instructions.[94] However, agencies sometimes bring adverse actions against covered employees for off-duty misconduct as well.

As explored in detail in the following sections, the MSPB has noted three circumstances in which an agency may establish a nexus between off-duty misconduct and the efficiency of the service. First, in certain egregious circumstances, the type of misconduct committed by the employee creates a rebuttable presumption of a nexus.[95] Second, an agency may show by a preponderance of the evidence that the misconduct "adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance."[96] Finally, the agency may demonstrate by a preponderance of the evidence that the employee's misconduct interfered with or adversely affected the agency's mission.[97]

Egregious Misconduct

The Federal Circuit has determined that certain egregious conduct presumptively satisfies the nexus requirement when that behavior "speaks for itself."[98] When such behavior is shown, the agency establishes a rebuttable presumption that there exists a nexus between the misconduct and the efficiency of the service.[99] For example, that court has affirmed the Board's ruling on various occasions that off-duty criminal misconduct involving sexual abuse of a minor is sufficiently egregious to establish a rebuttable presumption of a nexus.[100] Similarly, the Federal Circuit "has consistently held that involvement in drug trafficking, even when limited to off-duty conduct, is sufficiently 'egregious' conduct to warrant a presumption of nexus."[101] As mentioned above,[102]

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[91] Doe v. Dep't of Justice, 565 F.3d 1375, 1379 (Fed. Cir. 2009). The agency bears the burden of proof to establish this nexus. *Id*.

[92] Law v. U.S. Postal Serv., 852 F.2d 1278, 1280 (Fed. Cir. 1988) (quoting Davis v. Veterans Admin., 792 F.2d 1111, 1113 (Fed. Cir. 1986)).

[93] Lowell v. Dep't of the Air Force, 11 M.S.P.R. 453, 455 (M.S.P.B. 1982) ("The requisite nexus is clearly established in this case as the actions of the appellant occurred on agency property, and required the use of Air Force Base Security Police and investigative personnel."); Lowell v. Dep't of the Air Force, 11 M.S.P.R. 453 (M.S.P.B. 1982); Venson v. Dep't of the Air Force, 10 M.S.P.R. 375 (M.S.P.B. 1982); Winner v. Dep't of the Air Force, 10 M.S.P.R. 177 (1982).

[94] Watson v. Dep't of Transp., 49 M.S.P.R. 509, 516 (M.S.P.B. 1991), *aff'd*, 983 F.2d 1088 (Fed. Cir. 1992) (Table).

[95] Scheffler v. Dep't of the Army, 117 M.S.P.R. 499, 503 (M.S.P.B. 2012).

[96] *Id.*

[97] *Id.* at 503-04.

[98] Allred v. Dep't of Health & Human Servs., 786 F.2d 1128, 1130 (Fed. Cir. 1986) (quoting Hayes v. Dep't of Army, 727 F.2d 1535, 1539 (Fed.Cir.1984)).

[99] *See supra* notes 52-54.

[100] *See Allred*, 786 F.2d at 1130 ("The Board did not abuse its discretion when it found that Allred's misconduct [child molestation] was sufficiently egregious to raise a presumption of nexus."); Williams v. Gen. Services Admin., 22 M.S.P.R. 476 (1984), *aff'd*, 770 F.2d 182 (Fed. Cir. 1985) (Table); Graybill v. U.S. Postal Serv., 782 F.2d 1567 (Fed. Cir. 1986); Hayes v. Dep't of the Navy, 15 M.S.P.R. 378 (1983), *aff'd*, 727 F.2d 1535 (Fed. Cir. 1984).

[101] Brook v. Corrado, 999 F.2d 523, 528 (Fed. Cir. 1993); Parker v. U. S. Postal Serv., 819 F.2d 1113, 1116 (Fed. Cir. 1987).

[102] *See supra* notes 52-54.

however, due process requires this presumption to actually be rebuttable by the employee, so a finding of a nexus is not automatic.[103]

However, the Federal Circuit has required the MSPB to articulate clear and principled standards when determining that off-duty non-criminal misconduct establishes such presumption. In *Doe v. Department of Justice*, for instance, the MSPB sustained the agency's removal decision for an employee who had videotaped sexual encounters with women without their consent.[104] Though that behavior did not appear to violate any laws in the employee's jurisdiction, the Board upheld the removal decision because that behavior was "clearly dishonest."[105] The Federal Circuit vacated this decision, in part because "[t]o allow the Board decision to stand would be to recognize a presumed or per se nexus between the conduct and the efficiency of the service."[106] The court ruled that the Board "failed to articulate a meaningful standard as to when private dishonesty rises to the level of misconduct that adversely affects the 'efficiency of the service.'"[107] The use of "clearly dishonest" behavior as the basis to sustain a removal action, for the court, "inevitably risks arbitrary results, as the question of removal would turn on the Board's subjective moral compass."[108] Without a clear guiding rule, employees would not know precisely what behavior was barred and agency officials might be able to "legitimize removals made for personal or political reasons."[109] The court thus remanded the case to the Board to "articulate a meaningful standard as to when private misconduct that is not criminal rises to the level of misconduct that affects the efficiency of the service."[110]

Misconduct Affecting Job Performance or the Agency's Trust

Aside from situations where misconduct is so egregious that a nexus is presumed, the agency may also establish by a preponderance of the evidence that misconduct adversely affected the employee's or co-worker's job performance or the agency's trust and confidence in the employee's job performance. For example, the MSPB has upheld a removal in circumstances where an employee was convicted of aggravated assault and petty larceny, and agency officials had testified that they were concerned about the safety of fellow employees and the security of government property.[111] The Board ruled in that case that the agency established that the employee's conduct adversely affected the agency's confidence and trust in her job performance.[112] Likewise, the Board has upheld an agency's removal decision where the employee engaged in criminal behavior involving pointing a laser at a police helicopter and disrupting its flight.[113] In this instance, the employee's duties involved regular interaction with the

[103] *See* Allred v. Dep't of Health & Human Servs., 786 F.2d 1128, 1131 (Fed. Cir. 1986).

[104] Doe v. Dep't of Justice, 103 M.S.P.R. 135, 141 (M.S.P.B. 2006).

[105] *Id*. at 138.

[106] Doe v. Dep't of Justice, 565 F.3d 1375, 1381 (Fed. Cir. 2009).

[107] *Id*. at 1380.

[108] *Id*.

[109] *Id*. at 1381.

[110] *Id*. The court clarified that "[t]o allow the Board decision to stand would be to recognize a presumed or per se nexus between the conduct and the efficiency of the service." *Id*.

[111] Beasley v. Dep't of Def., 52 M.S.P.R. 272, 274 (M.S.P.B. 1992).

[112] *Id*. at 275.

[113] Polson v. Dep't of the Air Force, 2016 MSPB LEXIS 4418, *1 (M.S.P.B. July 29, 2016).

public as a representative of the agency.[114] The MSPB found that the behavior "undermined [the employee's] effectiveness as a public spokesman for the agency."[115]

Misconduct Interfering with the Agency's Mission

Finally, an agency can establish a nexus by showing that an employee's off-duty misconduct interferes with the agency's mission. This can apply to the agency's mission as a whole or the employee's specific job duties.[116] For example, the MSPB has upheld an adverse action against federal correctional officers for smoking marijuana while off-duty because that behavior was "antithetical to the agency's law enforcement and rehabilitative programs that [the employees] are responsible for monitoring."[117] Even though the misconduct might not have affected the employees' job performance, public awareness of the behavior would undermine confidence in the agency, "thereby making it harder for the agency's other workers to perform their jobs effectively."[118] The Federal Circuit has also upheld an adverse action where a civilian employee of the Marine Corps for the Morale, Welfare, and Recreation Department (MWR) engaged in an adulterous affair with the wife of a deployed Marine who was part of a unit that the employee was directly responsible for supporting.[119] The court noted that although such behavior was not sufficient to support an adverse action against an employee in every civil service position, the employee's position here was unique because it required him to support Marine families, including the families of Marines deployed overseas.[120] The trust and confidence of Marine families was essential to the MWR's mission and the employee's particular job responsibilities; trust that was undermined by the employee's actions.[121]

Determining the Penalty

As mentioned above,[122] in order to sustain a major adverse action under Chapter 75, an agency must establish that the charged conduct occurred and that there exists a nexus between that conduct and the efficiency of the service. In addition, an agency must show that the imposed penalty is reasonable.[123] The Board has authority to review, and mitigate when warranted, the agency's penalty determination according to the factors outlined in *Douglas v. Veterans Administration*.[124] Those factors are

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

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[114] *Id*. at 7-8.

[115] *Id*.

[116] *See Adverse Actions*, *supra* note 89.

[117] Kruger v. Dep't of Justice, 32 M.S.P.R. 71, 75 (M.S.P.B. 1987). *See also* 5 U.S.C. § 7371 (requiring the removal of federal law enforcement officers upon a felony conviction).

[118] *Id*. at 75-76.

[119] Brown v. Dep't of the Navy, 229 F.3d 1356, 1358 (Fed. Cir. 2000).

[120] *Id*. at 1360.

[121] *Id*. at 1360-61.

[122] *See supra* note ***.

[123] Pope v. U.S. Postal Serv., 114 F.3d 1144, 1147 (Fed. Cir. 1997).

[124] *See* Archuleta v. Hopper, 786 F.3d 1340, 1352 (Fed. Cir. 2015) ("It is well established that the Board's jurisdiction under § 7513(d) includes the authority to review the agency's penalty determination using the [*Douglas*] factors articulated"); Douglas v. Veterans Admin., 5 M.S.P.R. 280, 305 (M.S.P.B. 1981).

> (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> (3) the employee's past disciplinary record;
>
> (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
>
> (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
>
> (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
>
> (7) consistency of the penalty with any applicable agency table of penalties;
>
> (8) the notoriety of the offense or its impact upon the reputation of the agency;
>
> (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
>
> (10) potential for the employee's rehabilitation;
>
> (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
>
> (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.[125]

The MSPB is not permitted to independently determine the appropriate penalty.[126] Instead, the choice of penalty is given to the employing agency and will only be overturned if unreasonable in light of the relevant *Douglas* factors.[127] The MSPB will thus "modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency imposed clearly exceeded the bounds of reasonableness."[128]

An important consideration in weighing these factors is whether similar offenses are treated in a comparable manner. In certain circumstances, the Board's finding that an agency treated analogous employee situations disparately can result in mitigation of the agency's penalty.[129] In order to make a claim that an agency treated an employee unfairly compared to similarly situated employees, the "charges and the circumstances surrounding the charged behavior must be substantially similar."[130] The employee must show that there is "enough similarity between both

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[125] Douglas v. Veterans Admin., 5 M.S.P.R. 280, 305 (M.S.P.B. 1981).

[126] Lachance v. Devall, 178 F.3d 1246, 1259 (Fed. Cir. 1999). More specifically, the Federal Circuit has instructed that

> [w]hen the Board sustains all of an agency's charges the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. When the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated either in its final decision or during proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges.

Id. at 1260.

[127] Bland v. Dep't of Health & Human Servs., 652 F. App'x 959, 961 (Fed. Cir. 2016).

[128] Spicer v. U.S. Postal Serv., 2017 MSPB LEXIS 729, *54 (M.S.P.B. Feb. 14, 2017).

[129] Woebcke v. Dep't of Homeland Sec., 114 M.S.P.R. 100, 110 (M.S.P.B. 2010); Portner v. DOJ, 119 M.S.P.R. 365, 375 (M.S.P.B. 2013).

[130] Archuleta v. Dep't of the Air Force, 16 M.S.P.R. 404, 407 (M.S.P.B. 1983).

the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the 'outcome determinative' nature of these factors."[131] If an employee establishes this, the agency must then show that it had a legitimate reason for the different treatment by a preponderance of the evidence in order to sustain the penalty.[132]

Nevertheless, this is not to imply that agencies are barred from changing their policies. If an agency has applied a lenient policy in the past but wishes to apply a more stringent one in the future, it may do so as long as it effectively notifies its employees of the change.[133]

Indefinite Suspensions for Alleged Criminal Misconduct

As mentioned above, the procedural protections for major adverse actions in Chapter 75 include removals, demotions, furloughs for less than 30 days, and suspensions for more than 14 days.[134] A suspension "means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay."[135] However, the CSRA does not reference "indefinite suspensions," although agencies have routinely indefinitely suspended employees for certain behavior.[136] Nevertheless, the Federal Circuit and the MSPB have ruled that indefinite suspensions for disciplinary reasons that last more than 14 days qualify as major adverse actions under subchapter II of Chapter 75.[137] In addition, Office of Personnel Management (OPM) regulations that implement the statute expressly provide that indefinite suspensions are adverse actions.[138]

In order to sustain an indefinite suspension against a covered employee, therefore, an agency must satisfy the procedural requirements of Chapter 75 for major adverse actions.[139] Consequently, just as in other major adverse actions, an agency may indefinitely suspend an eligible employee for more than 14 days only "for such cause as will promote the efficiency of the service."[140] In practice, this means that the agency must show that the suspension was based

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[131] Lewis v. VA, 2010 M.S.P.B. 98, 113 M.S.P.R. 657, 664 (M.S.P.B. 2010).

[132] Boucher v. U.S. Postal Serv., 118 M.S.P.R. 640, 647 (M.S.P.B. 2012).

[133] Parker v. Dep't of the Navy, 50 M.S.P.R. 343, 354 (M.S.P.B. 1991).

[134] *See supra* note 68.

[135] 5 U.S.C. §§ 7501(2), 7511(a)(2).

[136] *See* Gonzalez v. Dep't of Homeland Sec., 114 M.S.P.R. 318, 325 (M.S.P.B. 2010) (noting that "chapter 75 contains no specific reference to 'indefinite' suspensions").

[137] *See* Perez v. Dep't of Justice, 508 F.3d 1019, 1020-22 (Fed. Cir. 2007) (Bryson, J., concurring in a denial of rehearing en banc) ("An agency cannot avoid the provisions of subchapter II, including Merit Systems Protection Board review, simply by denominating a suspension 'indefinite.' An indefinite suspension that lasts for more than 14 days clearly falls within the scope of section 7512(2). This court has sensibly construed the statute to apply to such indefinite suspensions."); Dunnington v. Dep't of Justice, 956 F.2d 1151, 1153 (Fed. Cir. 1992) ("This court, this court's predecessor, and the MSPB have, at least tacitly, applied the requirements of § 7513 to indefinite suspensions."); McClure v. U.S. Postal Serv., 83 M.S.P.R. 605, 608 (M.S.P.B. 1999) ("[W]hile we agree that the term 'indefinite' suspension' is not used in the law, and such an action is peculiar in that it is imposed with no definitive end date, nonetheless it is nothing other than a Chapter 75–based adverse action.") (quotation marks omitted).

[138] *See* 5 C.F.R. § 752.401.

[139] *See, e.g.*, Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955, 958 (Fed. Cir. 1993) ("[P]etitioner's voluntary use of both government property and time to carry on his illegal acts are sufficient to base an agency finding that the agency had lost trust and confidence in petitioner; such loss of trust establishes the requisite nexus."); McDonald v. Dep't of Interior, No. DE-0752-15-0358-I-1, 2016 WL 702814 ¶ 10 (M.S.P.B. Feb. 22, 2016) (affirming the administrative judge's finding that the agency established a "nexus between off-duty misconduct and the efficiency of the service").

[140] 5 U.S.C. § 7513(a); *Perez*, 508 F.3d at 1020 (Bryson, J., concurring in a denial of rehearing en banc) ("[A]n agency

on an authorized reason[141] and that the suspension "bears a nexus to the efficiency of the service."[142] The MSPB has also made clear its view that based on the statutory definition of "suspension" as a temporary status, indefinite suspensions "must have an ascertainable end."[143] Although "the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent ... which will terminate the suspension."[144] Finally, as in all adverse actions taken against an employee, including indefinite suspensions, the ultimate penalty imposed by the agency must be reasonable.[145]

The MSPB has noted that indefinite suspensions have satisfied 5 U.S.C. § 7513(a)'s efficiency of the service standard in only three situations: (1) when there is reasonable cause to believe the employee has committed a crime carrying a sentence of imprisonment; (2) for certain medical reasons; and (3) when the employee's position requires access to classified information, but that access has been suspended.[146]

Pursuant to this authority, a prominent recurring issue regarding the federal civil service is the circumstances in which an agency can indefinitely suspend an employee for alleged criminal behavior.[147] In such situations, while an agency normally must provide 30 days' advance notice of an adverse action,[148] Chapter 75 provides that an agency may suspend an employee *immediately* if "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed."[149]

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may take any action covered by section 7512, including indefinite suspensions lasting more than 14 days, only for 'such cause as will promote the efficiency of the service.'").

[141] *See* Hernandez v. Dep't of Navy, 120 M.S.P.R. 14, 16 (M.S.P.B. 2013) ("To sustain an indefinite suspension, the agency must show: (1) It imposed the suspension for an authorized reason; (2) the suspension has an ascertainable end, i.e., a determinable condition subsequent that will bring the suspension to a conclusion; (3) the suspension bears a nexus to the efficiency of the service; and (4) the penalty is reasonable.").

[142] Sharpe v. EPA, No. DA-0752-14-0034-I-1, 2015 WL 853264 ¶ 4 (M.S.P.B. Feb. 27, 2015); Hernandez v. Dep't of the Navy, 120 M.S.P.R. 14, ¶ 6 (M.S.P.B. 2013).

[143] Harding v. Dep't of Veterans Affairs, No. 115 M.S.P.R. 284, 290 (M.S.P.B. 2010), aff'd, 451 F. App'x 947 (Fed. Cir. 2011); Rawls v. U.S. Postal Serv., 98 M.S.P.R. 98, 101 (M.S.P.B. 2004); Martin v. Dep't of the Treasury,12 M.S.P.R. 12, 17, 20 (M.S.P.B. 1982), *aff'd in part, rev'd in part on other grounds sub nom;* Brown v. Dep't of Justice, 715 F.2d 662, 669 (D.C. Cir. 1983).

[144] Rawls v. U.S. Postal Serv., 98 M.S.P.R. 98, 101 (M.S.P.B. 2004) (quoting Martin v. Dep't of the Treasury, 12 M.S.P.R. 12, 17, 20 (M.S.P.B. 1982)).

[145] Dunnington v. Dep't of Justice, 956 F.2d 1151, 1154 (Fed. Cir. 1992) ("Additionally, like all such actions, the penalty must be shown to be reasonable."); Harding v. Dep't of Veterans Affairs, 115 M.S.P.R. 284, 294 (M.S.P.B. 2010), *aff'd*, 451 F. App'x 947 (Fed. Cir. 2011) ("In order to support an indefinite suspension (or any other adverse action under chapter 75), the agency must establish that the penalty is reasonable.").

[146] Gonzalez v. Dep't of Homeland Sec., 114 M.S.P.R. 318, 325 (M.S.P.B. 2010); Williams v. Dep't of Def., 117 M.S.P.R. 675, 681 (M.S.P.B. 2012) ("Although it is not a finite list, the Board has yet to identify any further circumstances under which it would approve indefinitely suspending an employee.").

[147] Kellie Lunney, *MSPB Reminds Agencies They Don't Need Airtight Proof to Get Suspected Criminals Off the Payroll*, GOVERNMENT EXECUTIVE (2016) ("Rarely does a day go by when some government agency isn't in the news for keeping suspected criminals (and in some cases, convicted criminals) on the job during an investigation, or on paid administrative leave."), http://www.govexec.com/management/2016/05/mspb-reminds-agencies-they-dont-need-airtight-proof-get-suspected-criminals-payroll/128567/.

[148] 5 U.S.C. § 7513(b) (discussing rights to advance notice when adverse action is proposed).

[149] *Id.* § 7513(b)(1). As explained above, the MSPB has noted only three situations in which an indefinite suspension can be sustained under the efficiency of the service standard in Chapter 75, including "[w]hen the agency has reasonable cause to believe that an employee has committed a crime for which a sentence of imprisonment could be imposed." However, the Federal Circuit has interpreted the "reasonable cause" standard in § 7513(b)(1), which permits the agency to dispense with the 30-day advance notice requirement and immediately suspend an employee, not to

As a threshold matter, events subsequent to the agency's decision cannot be mustered to support an indefinite suspension. The Federal Circuit has made clear that the "inquiry into the propriety of an agency's imposition of an indefinite suspension looks only to facts relating to events prior to suspension that are proffered to support such an imposition."[150] Importantly, the relevant issue is whether the agency established reasonable cause, not whether the employee should be convicted for a crime. In other words, substantive defenses to criminal prosecution—such as, for example, that an employee's behavior does not truly constitute a crime—should be brought in a criminal trial, rather than as a challenge to the agency's decision.[151] Further, the Board may not substitute its own reasoning for that of the agency; it must examine the agency's decision exclusively based on the grounds that the agency invoked.[152]

What Constitutes Reasonable Cause?

An agency may establish "reasonable cause to believe the employee committed a crime for which a term of imprisonment may be imposed"[153] in several ways. In some cases, the agency may conduct its own investigation of the underlying facts and rely on those findings to support its decision.[154] Often however, the agency cannot do so for various reasons. For example, an agency investigation into matters in a pending criminal investigation might unfairly force the employee to prematurely voice his or her defense.[155] Consequently, an agency must sometimes rely on the accounts of third parties such as the police or courts to determine if the reasonable cause threshold has been met.

In these circumstances, whether an agency has met that threshold appears to turn somewhat on the formality of the procedures used by the third-party entity.[156] For example, the Federal Circuit has explained that "a formal judicial determination made following a preliminary hearing, or an indictment following an investigation and grand jury proceedings" is more than sufficient to satisfy the reasonable cause standard; in contrast, the mere arrest by a police officer without a probable cause finding is not.[157] But in cases that fall in between these examples, the agency itself may need to delve into the record. For instance, if an arrest warrant based on probable cause was issued by a magistrate in an *ex parte* proceeding, the agency must "assure itself that the

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impose a substantive requirement under the efficiency of the service standard. Perez v. Dep't of Justice, 480 F.3d 1309, 1313 (Fed. Cir. 2007) ("In sum, because the Bureau gave Perez 31–days notice before suspending him indefinitely, the "reasonable cause" provision § 7513(b)(1) is inapplicable.").

[150] Rhodes v. MSPB, 487 F.3d 1377, 1380 (Fed. Cir. 2007).

[151] Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955, 958 (Fed. Cir. 1993) ("Petitioner's argument that the sting operation does not establish a violation of law reflects a misapprehension of the elements of the offense charged, and in any event is a substantive defense more properly brought in the criminal trial than in this administrative proceeding.").

[152] O'Keefe v. U.S. Postal Serv., 318 F.3d 1310, 1315 (Fed. Cir. 2002); Gottlieb v. Veterans Admin., 39 M.S.P.R. 606, 609 (M.S.P.B. 1989).

[153] 5 U.S.C. § 7513(b)(1).

[154] Dunnington v. Dep't of Justice, 956 F.2d 1151, 1157 (Fed. Cir. 1992) ("Obviously, the best evidence of reasonable cause will be that determined by the agency after an appropriate investigation of the facts and circumstances of the alleged misconduct."); Bell v. Dep't of Treasury, 54 M.S.P.R. 619, 627 (M.S.P.B. 1992) ("Given the strength of the evidence revealed in the investigation by the agency ... apart from the agency's referral to the United States Attorney's Office and that office's acceptance of the matter for possible criminal prosecution ... it is not necessary for us to examine whether the state of the possible criminal proceedings pending against this appellant was sufficient, in itself, to provide the agency with 'reasonable cause.'").

[155] *Dunnington*, 956 F.2d at 1156.

[156] *Id*. at 1157-58.

[157] *Id*. at 1157.

surrounding facts are sufficient to justify summary action by the agency," such as by examining the criminal complaints and supporting statements.[158]

In turn, the MSPB has ruled that because "reasonable cause" is "virtually synonymous with [the] 'probable cause' that is necessary to support a grand jury indictment," an indictment by a grand jury satisfies the "reasonable cause" standard.[159] In such circumstances, the agency is under no obligation to conduct an independent investigation.[160] However, in line with the Federal Circuit's jurisprudence, a grand jury determination is not necessarily required. For example, a probable cause determination by a judge at a preliminary hearing is sufficient.[161] The MSPB has also upheld an agency's imposition of an indefinite suspension based on an employee's arrest and arraignment for a probation violation when the agency had information that the employee had previously been charged with a felony, had "entered into a deferred prosecution agreement," and could be imprisoned for the violation.[162] In addition, the Board has ruled that a guilty plea to a felony offense is sufficient,[163] as is a guilty plea to a criminal charge resulting in "Probation before Judgment," where violation of probation can trigger a final judgment imposing prison time.[164]

Under certain circumstances, less formal findings can establish reasonable cause. The Board has upheld an indefinite suspension where the employee was charged with a misdemeanor and, although there was no formal probable cause determination because the employee was not in police custody at the time of arraignment, "the case against the appellant had proceeded to the point where the appellant had been ordered to appear for a jury trial."[165] Employing a somewhat functional analysis to the issue, the Board in that case interpreted the misdemeanor complaint to be "comparable to an indictment" under state law.[166] In addition, the Board has upheld a reasonable cause finding based on a criminal complaint, where the agency also examined documents offered in support of an arrest warrant and a police report.[167] Similarly, the Federal Circuit has affirmed an agency's reasonable cause finding when the agency relied simply on a criminal complaint and a sworn statement explaining the applicable charges against an employee.[168]

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[158] *Id*.

[159] Barresi v. U.S. Postal Serv., 65 M.S.P.R. 656, 661 (M.S.P.B. 1994); Holsey v. Dep't of Justice, No. AT-0752-13-0291-I-1, 2014 WL 5165644 (M.S.P.B. Jan. 22, 2014) (unnumbered slip opinion); Harding v. Dep't of Veterans Affairs, 115 M.S.P.R. 284, 290 (M.S.P.B. Dec. 9, 2010) ("In light of the appellant's indictments by a grand jury on multiple felony charges, ..., we find that the agency has established that it had such reasonable cause."); Dalton v. Dep't of Justice, 66 M.S.P.R. 429, 436 (M.S.P.B. Feb. 8, 1995) ("[I]nstead, the agency may rely solely on a grand jury indictment to prove that there is reasonable cause to believe that the employee is guilty of a crime for which a sentence of imprisonment may be imposed.").

[160] *Dalton*, 66 M.S.P.R. at 436-37.

[161] McDonald v. Dep't of Interior, No. DE-0752-15-0358-I-1, 2016 WL 702814 ¶ 7 (M.S.P.B. 2016).

[162] Sharpe v. EPA, No. DA-0752-14-0034-I-1, 2015 WL 853264 ¶ 6 (M.S.P.B. 2015).

[163] Dawson v. Dep't of Agric., 121 M.S.P.R. 495, 499 (M.S.P.B. 2014).

[164] Casey v. Dep't of Navy, No. DC-0752-12-0698-I-1, 2013 WL 9663404, at *2 (M.S.P.B. 2013) (slip copy).

[165] Hernandez v. Dep't of Navy, 120 M.S.P.R. 14, 21 (M.S.P.B. 2013).

[166] *Id*. at 20.

[167] Ascencio v. Dep't of Homeland Sec., No. SF-0752-11-0821-I-1, 2012 WL 11893549, at *2 (M.S.P.B. 2012) (slip copy).

[168] Senyszyn v. Dep't of Treasury, 200 F. App'x 990, 992 (Fed. Cir. 2006) (the MSPB sustained the decision of the agency without issuing a written opinion).

The combination of third-party findings and the agency's own investigation may also support a reasonable cause finding, even if one alone were insufficient to do so. For example, when criminal proceedings alone do not justify a reasonable cause finding, such as before a pending judicial probable cause hearing, an employee's implicit admission to the investigating agency of his or her guilt can satisfy the threshold requirement.[169]

When Will Reasonable Cause Not Be Found?

In contrast, the Board has held that an agency may not indefinitely suspend an employee based simply on the agency's investigation into allegations that criminal conduct might warrant an adverse action.[170] In other words, the mere fact of an agency investigation, in itself, is not sufficient "cause" to take adverse action against an employee; an agency must instead show that it already has reasonable cause to believe the employee has committed a crime which carries a potential prison sentence.[171]

Likewise, the Board has generally required the agency to establish evidence "sufficient to support a grand jury indictment."[172] If the agency has only shown "mere suspicion" of criminal conduct, the Board will reverse the agency's decision.[173] For example, the MSPB has ruled that an agency's reliance on the written statements of three government contractors, without more, "fall[s] drastically short of the level of proof required to prove reasonable cause."[174]

The simple fact of an employee's arrest or issuance of an arrest warrant will generally not meet this standard.[175] Instead, the Board has required agencies to conduct further investigation to establish reasonable cause. For example, in one instance, the agency's reasonable cause finding

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[169] Phillips v. Dep't of Veterans Affairs, 58 M.S.P.R. 12, 15 (M.S.P.B. June 8, 1993), *aff'd,* 17 F.3d 1443 (Fed. Cir. 1994).

[170] Gonzalez v. Dep't of Homeland Sec., 114 M.S.P.R. 318, 334-35 (M.S.P.B. 2010). In *Gonzalez*, the agency expressly disclaimed reliance on the 5 U.S.C. § 7513(b)(1) reasonable cause standard and defended its indefinite suspension on the grounds that the investigation warranted indefinite suspension under 5 U.S.C. § 7513(a). The MSPB ruled that only three bases for indefinite suspension were currently recognized. In the context of alleged criminal conduct, the agency must show that it has reasonable cause to believe a crime was committed by the employee that carried a possible prison sentence—the standard set forth in § 7513(b)(1). *Id*.

[171] *Gonzalez* 114 M.S.P.R. at 334-35; Armstrong v. NLRB, No. DC-0752-10-0660-I-1, 2011 WL 12505366, at *1 (M.S.P.B. Aug. 29, 2011) (slip copy) ("The agency proposed indefinitely suspending the appellant while it awaited 'the outcome of further investigation and possible criminal proceedings before determining whether to initiate administrative disciplinary proceedings with specific charges.' The Board rejected this approach in *Gonzalez*, and the agency's attempts to distinguish *Gonzalez* are unavailing.") (internal citations omitted); Reid v. Dep't of Justice, No. AT-0752-10-0801-I-1, 2011 WL 12505417, at *1 (M.S.P.B. 2011) ("Further, because the agency's pending inquiry into allegations against the appellant is not actionable 'cause' as required under 5 U.S.C. § 7513(a), any arguments regarding the efficiency of the service are immaterial.").

[172] Holsey v. Dep't of Justice, No. AT-0752-13-0291-I-1, 2014 WL 5165644 (M.S.P.B. 2014) (unnumbered slip copy) ("Under Board law, 'reasonable cause' is virtually synonymous with 'probable cause,' which is necessary to support a grand jury indictment, i.e., probable cause to believe that a crime has been committed and that the accused probably committed it."); Moore v. Dep't of Army, No. DA-0752-12-0098-I-1, 2012 WL 11893433, at *1 (M.S.P.B. 2012); *see also* Barresi v. U.S. Postal Serv., 65 M.S.P.R. 656, 662 (M.S.P.B. 1994).

[173] More specifically, the Board may affirm an administrative judge's decision reversing the agency's adverse personnel action. *See* Armstrong v. NLRB, No. DC-0752-10-0660-I-1, 2011 WL 12505366, at *1 (M.S.P.B. 2011) (slip copy).

[174] *Moore*, No. DA-0752-12-0098-I-1, 2012 WL 11893433, at *1.

[175] *See* Vanderplas v. Dep't of Interior, No. DE-0752-14-0212-I-1, 2014 WL 7174290 (M.S.P.B. 2014); Reid v. U.S. Postal Serv., 54 M.S.P.R. 648, 654 (M.S.P.B. 1992); Dunnington v. Dep't of Justice, 956 F.2d 1151, 1153, 1157 (Fed. Cir. 1992); Phillips v. Dep't of Veterans Affairs, 58 M.S.P.R. 12, 14–15 (1993), *aff'd*, 17 F.3d 1443 (Fed. Cir. 1994) (Table).

was based on the employee's arrest (which had not been effectuated pursuant to a formal probable cause determination), a newspaper report describing the crime, and a conversation with the employee.[176] The Board ruled that reasonable cause had not been established.[177] In reaching this conclusion, the MSPB observed that the newspaper report was brief; the conversation with the employee was ambiguous as to what the employee admitted; and the agency failed to investigate the official police reports, criminal complaint, or witness statements.[178] Similarly, the MSPB rejected an indefinite suspension where the agency relied on the fact of an arrest and a conversation with the employee where he admitted that he had been arrested and incarcerated.[179] The Board in that case noted that because the arrest constituted the primary justification for the employee's indefinite suspension, consistent with Federal Circuit case law, "the agency was required to satisfy itself that the surrounding facts were sufficient to justify the indefinite suspension action."[180] However, the discussion with the employee, without more, did not satisfy this requirement.[181]

Likewise, the filing of a criminal information or complaint without a formal probable cause determination by a neutral magistrate generally will be "insufficient to establish reasonable cause."[182] In order to sustain an indefinite suspension in such a case, the agency is required to take affirmative action to assess whether reasonable cause exists,[183] such as by examining police reports or witness statements.[184] Similarly, depending on the circumstances, an arrest and arraignment alone may not be sufficient to sustain an indefinite suspension. The Board has rejected an indefinite suspension where the agency relied only on the fact of an arrest and

[176] Ellis v. Dep't of Veterans Affairs, 60 M.S.P.R. 681, 682 (M.S.P.B. Feb. 28, 1994).

[177] *Id*. at 685.

[178] *Id*. at 683-85.

[179] Reid v. U.S. Postal Serv., 54 M.S.P.R. 648, 654 (M.S.P.B. 1992).

[180] *Id*.

[181] *Id*.

[182] *Vanderplas*, No. DE-0752-14-0212-I-1, 2014 WL 7174290 ¶ 8; Brown v. Dep't of Def., No. SF-0752-13-0336-I-1, 2014 WL 7146582 (M.S.P.B. 2014) ("[T]he filing of a criminal complaint charging the appellant with three felony violations, without more, is insufficient to sustain an indefinite suspension based upon reasonable cause to believe that the appellant has committed a crime for which a sentence of imprisonment may be imposed."). *But see* Hernandez v. Dep't of Navy, 120 M.S.P.R. 14, 21 (M.S.P.B. 2013) (ruling that reasonable cause was established even though no formal probable cause determination was made because "the case against the appellant had proceeded to the point where the appellant had been ordered to appear for a jury trial" and state law did not require a probable cause determination in these circumstances). *But see* Smart v. MSPB, 342 F. App'x 595, 597 (Fed. Cir. 2009) (noting that no "decision of this court has held that the charges in a criminal information, a formal judicial document filed by the prosecutor, cannot suffice to meet the agency's burden of establishing reasonable cause"). A criminal information is "[a] formal criminal charge made by a prosecutor without a grand-jury indictment." *Information*, BLACK'S LAW DICTIONARY 849 (9th ed. 2009). It is used to prosecute misdemeanors in many states, and is also used to prosecute felonies in some states. *Id*.

[183] *Vanderplas*, No. DE-0752-14-0212-I-1, 2014 WL 7174290 ¶ 7.

[184] *See* Dunnington v. Dep't of Justice, 956 F.2d 1151, 1153, 1157 (Fed.Cir.1992). That said, while this principle represents recent holdings by the MSPB, older dicta, as well as agency representations to Congress, might be construed as considering a criminal information to be sufficient. *See* Susan Tsui Grundmann, Chairman, U.S. Merit Systems Protection Board, Letter to House Committee on Oversight and Government Reform (April 29, 2015) citing Gonzales v. Dep't of Treasury, 37 M.S.P.R. 589, 592 (M.S.P.B. 1988) The MSPB Chairman's letter cited *Gonzales* for the principle that a criminal information may establish reasonable cause, although this statement followed the assertion that an agency's internal investigation alone was insufficient to do so. Consequently, one might argue that the best reading of the Chairman's position is that an agency investigation coupled with a criminal information could establish reasonable cause. This reading would cohere with recent MSPB holdings.

arraignment, along with news reports that the agency did not verify.[185] In that case, in a footnote, the Board argued that an arraignment was irrelevant because it consisted simply of "the defendant appearing in court, the reading of the charges, and the defendant entering a plea."[186] Because the agency relied on the arrest and did not take any affirmative action to investigate the matter beyond "read[ing] a newspaper," reasonable cause was not established.[187]

Conclusion

The circumstances in which federal employees may be removed from service are thus determined by a variety of legal considerations. The rights of federal employees are protected by both statutory and constitutional requirements. Through the CSRA, Congress has provided certain procedural protections to a number of civil servants, delineating the conditions under which agencies may take adverse actions against federal employees. In the context of adverse actions for misconduct, for example, agencies may only take actions "for such cause as will promote the efficiency of the service" and must abide by various procedural provisions that ensure employees have a sufficient opportunity to defend themselves.

Because Congress has bestowed these statutory protections on the federal workforce, certain employees have a property interest in continued employment that cannot be taken away without due process. Those constitutional protections thus inform the interpretation of statutory rules regarding adverse actions against federal employees, as well as establish a baseline of protections that may inform consideration of proposals to modify the process of removing federal employees. Attention to all of these issues may occur if and when lawmakers consider amending the civil service laws.

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[185] Barresi v. U.S. Postal Serv., 65 M.S.P.R. 656, 666 (M.S.P.B. 1994).

[186] *Id*. at 662 n.3.

[187] *Id*. at 663.

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