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# Merit Systems Protection Board (MSPB): A Legal Overview

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SUMMARY

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# Merit Systems Protection Board (MSPB): A Legal Overview

The Merit Systems Protection Board (MSPB or Board) is a quasi-judicial independent agency in the executive branch charged with protecting federal employees against improper employment-related actions. The Board works to ensure, for example, that federal agencies avoid taking arbitrary action against employees, exhibiting favoritism, or engaging in reprisals against whistleblowers. The MSPB also aims to promote an effective federal workforce free of certain types of discrimination and other prohibited personnel practices. While the Board mainly carries out its mission through adjudication of federal employment-related disputes, it also performs specified oversight functions related to federal employment, including conducting special studies of the civil service and other executive branch merit systems.

Established by the Civil Service Reform Act of 1978, the MSPB consists of three Board members, appointed by the President with the advice and consent of the Senate. Not more than two Board members may be adherents of the same political party. The term of office of each Board member is seven years, and terms are nonrenewable. Board members may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The Board operates concurrently with the Office of Special Counsel, an independent, prosecutorial federal agency. The Special Counsel receives and investigates complaints related to certain kinds of federal agency misconduct and may petition the Board for corrective action.

The MSPB operates like a tribunal and maintains procedures for conducting hearings, examining evidence, and rendering decisions. Most cases the Board reviews are federal employee appeals of adverse actions, including those related to removal or suspension of employment. When the MSPB determines that a federal employee has been subject to an improper adverse action, the Board can issue orders that compel agencies to reverse these actions and, depending upon the particular agency action in question, may order relief, including reinstatement, backpay, and attorney's fees.

The Board also maintains original jurisdiction over certain types of cases in which it hears and decides the case initially rather than reviews an agency decision. For example, the MSPB may adjudicate cases brought by the Office of Special Counsel related to a prohibited personnel practice. The Special Counsel may, among other things, petition the Board for a stay of an adverse employment action in relation to this practice. Some of the Board's adjudicatory functions, including appeals of adverse action decisions, typically are carried out by "administrative judges" employed by the Board, while administrative law judges (ALJs) may examine matters coming under the Board's original jurisdiction.

Federal employees or applicants for employment who are adversely affected by a final order or decision of the MSPB may obtain judicial review. The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) is generally the proper judicial forum for these cases. Federal law compels the Federal Circuit to examine these cases under a standard of review that is deferential to the MSPB's determination. Consequently, the Federal Circuit typically upholds Board decisions. But a special jurisdictional rule exists for so-called "mixed cases" involving an alleged violation of federal antidiscrimination laws in connection with an improper adverse personnel action. Following the MSPB's decision in a mixed case, affected employees may seek judicial review in federal district court rather than the Federal Circuit. District court review is generally preferable for the petitioning federal employee, as district courts typically review these discrimination-related claims under a de novo standard (i.e., affording no deference to the determination of the MSPB).

Since March 2019, the Board has lacked sitting members. Lack of a quorum prevents the Board from performing some of its review functions, including issuing final decisions in cases when an initial decision issued by an administrative judge has been appealed to the full Board. As a result, a significant case backlog has developed. President Trump has submitted nominees to the Senate to fill vacancies on the Board.

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# Introduction

The Merit Systems Protection Board (MSPB or Board) is an independent, executive branch agency that works to protect current, former, and prospective federal employees against inappropriate employment-related actions, in accordance with "merit system principles," statutorily defined standards governing the performance and management of the federal workforce.[1] The MSPB also aims to promote an effective federal workforce free of prohibited personnel practices.[2] The Board mainly carries out its mission through adjudication of federal employee appeals of adverse actions.[3] When the Board determines that a federal employee has been subject to an improper adverse action, it may order relief, including reinstatement, backpay, and attorney's fees.[4] The Board may also order federal agencies to comply with Board orders, conduct special studies of the civil service and other executive branch merit systems, and review Office of Personnel Management (OPM) rules and regulations to determine, for example, whether a federal agency has invalidly implemented the OPM requirements.[5] This report focuses on the Board's adjudicatory authority.

Federal law specifies that the Board consists of three members appointed by the President with the advice and consent of the Senate.[6] However, as of March 2019, the Board lacks any sitting members.[7] Although other MSPB employees, including administrative judges who issue initial decisions in cases, will continue their work, some Members of Congress and others have raised concerns about the extent to which these vacancies limit the agency's ability to perform its other functions.[8]

This report discusses the establishment of the MSPB and its structure, as well as the role of the Office of Special Counsel, an independent, prosecutorial agency that operates concurrently with the Board. The report then addresses the Board's authority to adjudicate matters within its jurisdiction and the scope of this jurisdiction, as well as the availability of judicial review for the

[1] *See* 5 C.F.R. § 1200.1; 5 U.S.C. § 2301(b). These standards include recruiting qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society; selecting and advancing employees based on merit after fair and open competition; treating employees and applicants fairly and equitably without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights, and providing equal pay for equal work and appropriate incentives for excellent performance. *See id.*

[2] *See* 5 C.F.R. § 1200.1. In general, prohibited personnel practices include certain discriminatory or other improper actions that cause significant changes in duties, responsibilities, or working conditions for a federal employee. 5 U.S.C. § 2302(a). *See also* MSPB, ANNUAL REPORT FOR FY 2018 at 2, 28 (Feb. 28, 2019) https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1592474&version=1598254&application=ACROBAT [hereinafter *2018 Annual Report*], (declaring that the codified merit system principles and prohibited personal practices "provide foundational values for civil service policy and practice . . . help leaders and employees make good personnel decisions, and prevent conduct that undermines merit and confidence in Government.").

[3] *See* 5 C.F.R. § 1200.1; 5 U.S.C. § 1204(a)(1).

[4] Elgin v. Dep't of the Treasury, 567 U.S. 1, 6 (2012) (citing 5 U.S.C.§ §1204(a)(2), 7701(g)). The scope of MSPB's authority to review a particular penalty imposed by an agency and mitigate that penalty can depend on the particular agency action in question. *See* notes 99-111 and accompanying text.

[5] 5 U.S.C.§ 1204(a)(4) and (f)(2)(B).

[6] *Id.* § 1201(a).

[7] *2018 Annual Report*, *supra* note 2 at 1.

[8] *See generally, Government Operations Subcommittee Hearing: Effects of Vacancies at the Merit Systems Protection Board Transforming the Federal Government to Protect America from Terrorism*: Hearing Before the H. Comm. on Oversight and Reform, 116th Cong. (2019).

Board's decisions. Finally, the report examines the effect of the lack of a quorum of Board members.

# Creation of the MSPB

The origins of the MSPB may be traced back more than a century, as part of efforts to curtail the practice of political patronage in the federal government.[9] Under the "spoils system" that existed in the first century of the Republic, "federal employees came and went, depending upon party service and changing administrations, rather than meritorious performance."[10] In response to the "strong discontent with the corruption and inefficiency of the patronage system of public employment,"[11] Congress passed the Civil Service Act of 1883, also known as the Pendleton Act, which generally created a merit-based system for hiring federal employees.[12] More specifically, the Act established a Civil Service Commission (CSC) authorized to aid the President in preparing suitable civil service rules for open, competitive examinations of applicants for federal employment.[13] Over the next few decades, Congress enacted additional measures addressing issues such as merit hiring, due process rights, and appeals of agency adverse personnel actions, and the CSC played an increasingly larger role in implementing these requirements.[14]

Even so, some Members of Congress and others expressed concerns with the regulatory structure of the civil service system.[15] One central criticism of this structure involved the CSC and its simultaneous handling of managerial and adjudicatory matters.[16] A 1978 Senate committee report described the issue:

> At the present time the Civil Service Commission has a variety of functions . . . The CSC must now simultaneously serve as a management agent for a President elected through a partisan political process as well as the protection of the merit system from partisan abuse. The Commission serves, too, as the provider of services to agency management in implementing personnel programs, while maintaining sufficient neutrality to adjudicate disputes between agency managers and their employees. As a result, the Commission's performance of its conflicting functions has suffered. Expected to be all things to all parties—Presidential counsellor, merit "watchdog," employee protector, and agency advisory—the Commission has become progressively less credible in all of its roles.[17]

In response to these and other issues, Congress passed the Civil Service Reform Act (CSRA), the most comprehensive reform of the civil service system since the Pendleton Act and the current legal framework governing the federal civilian workforce.[18] As part of this reform, and in

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[9] *See* Michael Bogdanow and Thomas Lanphear, *History of the Merit Systems Protection Board*, 4 FED. CIR. HIST. SOC'Y 109, 109 (2010).

[10] *See* U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973).

[11] Elrod v. Burns, 427 U.S. 347, 354 (1976).

[12] Act of Jan. 16, 1883, ch. 27, §2, 22 Stat. 403 (1883).

[13] *See id.*

[14] *See, e.g.*, Lloyd-La Follette Act, Pub. L. No. 62-336, 37 Stat. 555 (1912); Veterans Preference Act, Pub. L. No. 78-259, 58 Stat. 387 (1944); *See also generally* ROBERT G. VAUGHN, MERIT SYSTEMS PROTECTION BOARD: RIGHTS AND REMEDIES § 2.01 (2015).

[15] *See, e.g.*, S. REP. NO. 95-969, at 2-4 (1978).

[16] *See id.* at 5.

[17] *Id.*

[18] *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

conjunction with an earlier reorganization plan developed by President Carter,[19] the CSRA split the functions of the Commission between two separate new agencies, OPM and the MSPB.[20] In general, the CSRA charged OPM with conducting personnel management functions formerly performed by the CSC, such as providing training and productivity programs, examining for civil service positions, classifying positions, and administering pay and benefits. The MSPB retained the CSC's hearing, adjudication, and appeals functions, as well as authority to enforce agency compliance with its decisions.[21] The CSRA further authorized the MSPB to develop its adjudicatory processes and procedures, and gave the Board power to, among other functions, issue subpoenas, call witnesses to testify at hearings, and enforce compliance with its final decisions.[22]

# Board Composition and Terms of Office

As noted above, the Board consists of three members—a Chairman, a Vice Chairman, and a third member—all appointed by the President with the advice and consent of the Senate.[23] Not more than two members may be adherents of the same political party.[24] In order to serve on the Board, members must have demonstrated ability, background, training, or experience that makes them "especially qualified" to carry out the MSPB's functions.[25] The term of office of each Board member is seven years, and terms are nonrenewable.[26] While a sitting member may not be reappointed after a seven-year term, a member may continue to serve on the Board for up to one additional year if no successor has been appointed. [27] Board members also have for-cause removal protection and may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office."[28]

While the three Board members make decisions in all cases by majority vote, the Chairman of the Board is the chief executive and administrative officer, responsible for handling issues related to the Board's organization and personnel policies.[29] The Vice Chairman is tasked with performing the Chairman's functions during absence, disability, or vacancy.[30] During the absence or disability of both the Chairman and Vice Chairman or vacancies in both offices, the remaining Board

[19] *See* Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36,037, 92 Stat. 5788 (1978), reprinted at 5 U.S.C. § 1101 note, which bifurcated the responsibilities of the CSC. Reorganization Plan Number 2 designated the CSC as the MSPB and the three CSC Commissioners as Board members. *See id*. at 36,038. The plan also established OPM under a director appointed by the President with the advice and consent of the Senate. *See id*. at 36,037. While the plan originally divided the functions of the CSC between OPM and the MSPB, the CSRA codified this transfer and further articulated the characteristics of the Board's adjudicatory authority. *See* Vaughn, *supra* note 14.

[20] Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 201-05, 92 Stat. 1111, 1118–44 (1978).

[21] *See id*.

[22] *2018 Annual Report*, *supra* note 2 at 8.

[23] 5 U.S.C. § 1201.

[24] *Id.*

[25] *Id*.

[26] *Id*. § 1202(a)-(c).

[27] *Id.* § 1202(c).

[28] *Id*. § 1202(d).

[29] *Id*. § 1203(a), 5 C.F.R. § 1200.2(b). *See also* PETER BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE 9 (35th ed. 2018).

[30] 5 U.S.C. § 1203(b).

member performs the Chairman's functions.[31] Neither the CSRA nor the Board's regulations expressly address a scenario in which the Board is entirely vacant.[32]

# Office of Special Counsel

The Office of Special Counsel (OSC) in an independent federal agency that protects employees, former employees, and applicants for employment from prohibited personnel practices by receiving and investigating complaints of those practices.[33] The OSC is headed by the Special Counsel, who is appointed by the President, by and with the advice and consent of the Senate, for a term of five years.[34] After receiving and investigating allegations of prohibited personal practices, the Special Counsel may petition the MSPB for corrective action if an agency does not correct the practice, and may seek disciplinary action against any employee who has committed such a practice.[35] The Special Counsel may also petition the Board to order a stay of any personnel action that he believes was taken or is to be taken as a result of a prohibited personnel practice.[36] The Special Counsel position originally resided in the MSPB.[37] In 1989, Congress established the OSC as an independent agency to be headed by the Special Counsel.[38]

# Board Adjudication

The MSPB hears and adjudicates matters within its jurisdiction, as provided by the CSRA and by any other statute, rule, or regulation.[39] The Board maintains both original and appellate jurisdiction over cases. The Board has original jurisdiction over actions brought by the Special Counsel for corrective and disciplinary action, specified removals of persons in the Senior Executive Service (SES), and certain adverse personnel actions taken against administrative law judges (ALJs).[40] In cases involving its original jurisdiction, the Board adjudicates the case initially rather than reviews an agency decision. The MSPB has appellate jurisdiction to review any action that is appealable to the Board under any statute, rule, or regulation by an employee or applicant for employment.[41] For example, an agency's decision to remove or suspend an employee for more than 14 days may be appealed to the Board.[42]

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[31] *Id*. § 1203(c).

[32] *But see* 5 C.F.R. § 1200.3 (addressing certain decisionmaking functions in the event of a vacancy or recusal, but only in cases when at least two Board members are in office). *See also infra* discussion on effects of an absence of a quorum, notes 152-163 and accompanying text.

[33] 5 U.S.C. § 1212(a).

[34] *Id*. § 1211(b). Similar to members of the MSPB, the Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

[35] *Id*. § 1212(a)(2).

[36] *Id*. § 1214(b)(1)(A)(i).

[37] *See Reorganization Plan*, *supra* note 19, § 204.

[38] Whistleblower Protection Act of 1989, Pub. L. No. 101-12 § 3(a), 103 Stat. 16, 19 (1989).

[39] 5 U.S.C. § 1204(a).

[40] 5 C.F.R. § 1201.2.

[41] 5 U.S.C. § 7701(a). *See also* 5 C.F.R. § 1201.3(a) (identifying actions that are appealable to the MSPB, including adverse personnel actions, specified retirement decisions, and reductions in force).

[42] 5 U.S.C. § 7513(d).

Cases may be heard by Board members directly, or referred to ALJs or Board employees called "administrative judges."[43] ALJs typically adjudicate and issue initial decisions in cases involving corrective and disciplinary action.[44] Administrative judges adjudicate cases and issue initial decisions under the Board's appellate jurisdiction.[45] Once decided, an initial decision may be appealed to the full Board. While both ALJs and administrative judges are attorneys who are licensed to practice law, administrative judges do not enjoy the tenure and job protections of ALJs. An ALJ, for example, may only be removed for cause.[46]

## Limits on Board Jurisdiction

The MSPB's jurisdiction does not depend solely on the nature of the action taken, but also requires consideration of the party involved.[47] For example, the Board's ability to hear and adjudicate appeals of agency-imposed adverse actions, such as removals, reductions in grade or pay, and suspensions for more than 14 days, has been limited by statute to actions involving only specified employees:

- individuals in the competitive service who are not serving a probationary or trial period or who have completed one year of current continuous service;[48]
- preference eligibles[49] in the excepted service who have completed one year of current continuous service in an executive agency, the Postal Service, or the Postal Rate Commission;[50] and

[43] *See, e.g., id*. § 7701(b)(1) ("The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases . . .").

[44] *See 2018 Annual Report*, *supra* note 2, at 4. The MSPB does not employ ALJs. ALJs from the Federal Trade Commission, the Coast Guard, and the Environmental Protection Agency adjudicate cases pursuant to interagency agreements.

[45] *Id*. at 6. Unlike ALJs, who are appointed by agencies with OPM approval or from a list provided by OPM pursuant to 5 U.S.C § 3105, no specific statutory basis exists for the appointment of administrative judges. These judges are appointed pursuant to the Board Chairman's general authority under 5 U.S.C. § 1204(j) to appoint "such personnel as may be necessary to perform the functions of the Board." *See* Vaughn, *supra* note 14 at § 3.01.

[46] *See* 5 U.S.C. § 7521(a) ("An action may be taken against an administrative law judge . . . only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.").

[47] *See* 5 C.F.R. § 1201.3(a) ("The Board's jurisdiction does not depend solely on the label or nature of the action or decision taken or made, but may also depend on the type of federal appointment the individual received, *e.g.*, competitive or excepted service, whether an individual is preference eligible, and other factors. . . . [T]he source of the Board's jurisdiction should be consulted to determine not only the nature of the actions or decisions that are appealable, but also the limitations as to the types of employees, former employees, or applicants for employment who may assert them.").

[48] *See* 5 U.S.C. § 2102. The competitive service generally consists of: (1) all civil service positions in the executive branch, except positions that are specifically excepted from the competitive service by statute, positions requiring Senate confirmation, and positions in the Senior Executive Service; and (2) civil service positions not in the executive branch that are specifically included in the competitive service by statute.

[49] *See id*. § 2108(3). The term "preference eligible" refers to specified military veterans and some of their family members, such as an unmarried widow and the wife or husband of a service-connected disabled veteran. Preference eligibles in the excepted service qualify for MSPB review of major agency disciplinary actions, such as removal or grade reduction after one year of service. *Id*. § 7511(a)(1)(B).

[50] *See id*. § 2103. The excepted service consists of civil service positions that are not in the competitive service or Senior Executive Service. *See also* 5 C.F.R. pt. 213 (identifying positions in the excepted service).

- non-preference eligible individuals in the excepted service who are not serving a probationary or trial period or who have completed two years of current or continuous service in an executive agency.[51]

For other actions, however, the Board's ability to hear and adjudicate an appeal may be broader, involving individuals other than current employees. For example, the Board can review cases involving employees, former employees, and applicants for employment when a personnel action was allegedly taken as a reprisal for whistleblowing.[52]

An employee in a collective bargaining unit that is represented by a union can generally appeal an agency's major disciplinary action, such as a removal or a reduction in grade or pay, to the MSPB or pursuant to a collective bargaining agreement's negotiated grievance procedure, but not both.[53]

The U.S. Supreme Court has also determined that the Board's jurisdiction over certain subject matters is constrained. For example, in *Department of the Navy v. Egan*, the Court concluded that the Board does not have jurisdiction to review the substance of a security clearance determination.[54] The Court maintained that the Board may evaluate only: (1) whether an agency determined that an employee's position required a clearance; (2) whether the clearance was denied or revoked; and (3) whether the employee was provided procedural protections including notice of charges, an opportunity to respond to them, and representation by an attorney or other representative.[55] In *Kaplan* v. *Conyers*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) interpreted the holding in *Egan* expansively.[56] The court maintained that the MSPB not only lacks jurisdiction to review the substance of agency security clearance determinations, but also cannot review agency determinations regarding which employees are eligible to occupy sensitive positions.[57]

## Original Jurisdiction

### Corrective Action Cases

The MSPB has original jurisdiction over cases brought by the Special Counsel to correct personnel actions involving a prohibited personnel practice.[58] An employee, former employee, or applicant for employment, who believes that a prohibited personal practice has occurred, exists, or is to be taken, may seek corrective action from the OSC.[59] If the Special Counsel believes that there are reasonable grounds to believe that a personnel action was taken or is to be taken as a

[51] 5 U.S.C. § 7511(a).

[52] *Id*. § 1221(a) (authorizing an employee, former employee, or applicant for employment to file an individual right of action alleging reprisal for whistleblowing or exercising a right granted by statute, rule, or regulation).

[53] *Id*. § 7121(e)(1).

[54] 484 U.S. 518 (1988).

[55] *Id.* at 530.

[56] 733 F.3d 1148 (Fed. Cir. 2013) (*en banc*), *cert. denied sub nom.* Northover v. Archuleta, 572 U.S. 1033 (2014).

[57] *Kaplan*, 733 F.3d at 1151.

[58] *See* 5 U.S.C. § 2302(a)(1) (defining the term "prohibited personnel practice" to include specified personnel actions involving discrimination, retaliation, nepotism, whistleblowing, and other misconduct).

[59] *Id*. § 1214(a)(1)(A).

result of a prohibited personnel practice, he may request a stay of the action from any Board member.[60] A stay will be ordered unless the member determines that it would not be appropriate.[61]

If, following an investigation of the complaint, the Special Counsel determines that a prohibited personal practice has occurred, exists, or is to be taken, and corrective action is required, he or she will report that determination and any findings or recommendations to the MSPB, the agency involved, and OPM.[62] If the agency does not correct the prohibited personnel practice, the Special Counsel may petition the Board for an order requiring the agency to do so.[63] In general, the Board will order corrective action it considers appropriate so long as the Special Counsel has demonstrated that the prohibited personnel practice has occurred, exists, or is to be taken.[64]

In cases involving a personnel action taken against an employee for making a whistleblower disclosure or exercising a right granted by statute, rule, or regulation, the Board will order corrective action if the Special Counsel has demonstrated that the disclosure or activity was a contributing factor in the personnel action.[65] However, in cases involving a whistleblower disclosure, corrective action may not be ordered if an agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.[66]

A Board order to correct a prohibited personnel practice may require the reinstatement of the individual in the position that he would have occupied if the practice had not occurred, reimbursement for attorney's fees, back pay and related benefits, medical costs, travel expenses, other reasonable and foreseeable consequential damages, and any other compensatory damages.[67]

An employee, former employee, or applicant for employment who is adversely affected by the Board's final order or decision regarding corrective action may obtain judicial review.[68]

## Disciplinary Action Cases

The MSPB also has original jurisdiction over actions brought by the Special Counsel to discipline an employee for committing a prohibited personnel practice, violating the provisions of any statute, rule, or regulation, engaging in misconduct within the Special Counsel's jurisdiction, or knowingly and willfully refusing or failing to comply with a Board order.[69] If the Special Counsel determines that disciplinary action should be taken, he is to prepare a written complaint against

[60] *Id*. § 1214(b)(1)(A)(i). *See also* 5 C.F.R. § 1201.134 (providing that any Board member may delegate to an ALJ authority to decide a request for an initial stay of an agency personnel action).

[61] 5 U.S.C. § 1214(b)(1)(A)(ii). *See also* 5 C.F.R. § 1201.136(a) (providing that an initial stay will be granted by operation of law unless it is denied within three working days after the filing of the request).

[62] 5 U.S.C. § 1214(2)(B). The Special Counsel may also report his determination and any findings or recommendations to the President.

[63] *Id.* § 1214(b)(2)(C).

[64] *Id*. § 1214(b)(4)(A). Corrective action may not be ordered in connection with a prohibited personnel practice described in 5 U.S.C. § 2302(b)(11), relating to a knowing violation of a veterans preference requirement. *See* 5 U.S.C. § 2301(e)(2).

[65] *Id*. § 1214(b)(4)(B)(i).

[66] *Id*. § 1214(b)(4)(B)(ii). *See also* 5 C.F.R. § 1209.4(e) (defining "clear and convincing evidence" to mean "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established").

[67] 5 U.S.C. § 1214(g).

[68] *Id.* § 1214(c)(1).

[69] *Id*. § 1215(a)(1).

the employee that includes his determination and a statement of supporting facts.[70] The complaint and statement are then presented to the employee and the MSPB.[71]

Upon receipt of a complaint, the employee is given an opportunity to provide an answer and to furnish affidavits and other documentary evidence in support of that answer.[72] The employee is also entitled to be represented by an attorney or other representative, to a hearing before the MSPB or an ALJ designated by the Board, and to a written decision that includes a copy of any final order imposing disciplinary action.[73]

A final Board order may provide for an employee's removal, reduction in grade, debarment from federal employment for up to five years, suspension, or reprimand.[74] The Board may also order a civil penalty not to exceed $1,000, or any combination of the aforementioned disciplinary actions.[75] In general, an employee who is subject to a final order imposing disciplinary action may obtain judicial review of the order in the Federal Circuit.[76]

## Informal Hearings for Career Senior Executives Removed from SES

A career appointee who is removed from the SES for less than fully successful performance as a manager is entitled to an informal hearing before an ALJ designated by the MSPB.[77] The appointee may appear and present arguments at such a hearing, but his removal will not be delayed as a result of the hearing.[78] But the right to an informal hearing does not provide an appointee with a right to appeal a removal from the SES to the Board.[79]

## Actions Against Administrative Law Judges

The MSPB also has original jurisdiction over certain adverse actions taken against an ALJ, such as removals and reductions in grade or pay.[80] An ALJ who faces such action has various rights, including the right to answer the agency's complaint and the right to be represented in an MSPB hearing on the record before a Board-designated ALJ.[81] The ALJ who hears the case is to issue an initial decision, which may be reviewed by the Board.[82]

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[70] *Id*.

[71] *Id*.

[72] *Id*. § 1215(a)(2).

[73] *Id*.

[74] *Id*. § 1215(a)(3)(A)(i).

[75] *Id*. § 1215(a)(3)(A)(ii), (iii). In accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015), the new maximum civil penalty is $1,093. *See* Civil Monetary Penalty Inflation Adjustment, 84 Fed. Reg. 5,583 (Feb. 22, 2019) (to be codified at 5 C.F.R. pt. 1201).

[76] *Id*. § 1215(a)(4). A party aggrieved by a final order in a case involving the Hatch Act and the political activities of a state or local government employee may obtain judicial review in an appropriate federal district court. *See* 5 C.F.R. § 1201.127(b).

[77] 5 U.S.C. § 3592(a)(2). *See also* 5 U.S.C. § 3594(b) (providing that a qualifying career senior executive who is removed from the SES as a manager is entitled to guaranteed placement to a non-SES GS-15 position and is not removed from the civil service).

[78] *Id*. § 3592(a).

[79] *Id*.

[80] *Id*. § 7521(b).

[81] 5 C.F.R. § 1201.139(b).

[82] *Id.* § 1201.140(a)(2).

The MSPB is to uphold an agency-proposed disciplinary action against an ALJ only if it determines that an agency has established good cause.[83] Good cause has been held to differ from the standard that the Board must find to sustain an adverse disciplinary action for misconduct involving most other employees.[84] For employees who are neither ALJs nor members of the SES, the applicable standard is cause "as will promote the efficiency of the service."[85]

An ALJ who is subject to a final Board decision authorizing a proposed agency action may obtain judicial review before the Federal Circuit.[86]

## Appellate Jurisdiction

A qualifying employee or applicant for employment may submit an appeal to the MSPB from any action that is appealable to the Board under any statute, rule, or regulation.[87] For example, Section 7513(d) of title 5, U.S. Code, permits an employee who, because of misconduct, is subject to removal, suspension for more than 14 days, a reduction in grade or pay, or a furlough of 30 days or less to appeal his agency's action to the MSPB.[88] This type of action is often referred to as a "chapter 75 action." Under Section 4303(e) of title 5, U.S. Code, an employee who is removed or reduced in grade because of unacceptable performance may also appeal his agency's action to the MSPB.[89] This type of action is often described as a "chapter 43 action." An individual who appeals a personnel action to the Board is entitled to a hearing and legal or other representation.[90]

Once an appeal is filed, the case may be heard by the Board or it may be referred to an ALJ or administrative judge for hearing.[91] An initial decision rendered by the Board, ALJ, or administrative judge generally becomes the Board's final decision, unless a party to the appeal or the Director of OPM files a petition for review within 30 days after receiving the decision, or the Board reopens and reconsiders the case on its own motion.[92] One Board member may grant a petition for review or otherwise direct the full Board to review a decision unless an ALJ's decision is required to be acted upon by the Board.[93]

An agency's personnel action is to be sustained only if it is supported by substantial evidence in cases involving an employee's unacceptable performance, or by a preponderance of the evidence in all other cases, such as those involving misconduct.[94] An agency's action may not be sustained

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[83] 5 U.S.C. § 7521(a).

[84] *See* Dep't. of Health and Hum. Servs. v. Haley, 20 M.S.P.B. 365, 367, n. 3 (1984) (noting the difference between "good cause" and cause "as will promote the efficiency of the service").

[85] *See* 5 U.S.C. § 7513(a) ("[A]n agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.").

[86] 5 U.S.C. § 7703. *See also* 5 C.F.R. § 1201.141 (describing the availability of judicial review).

[87] 5 U.S.C. § 7701(a).

[88] *Id*. § 7513(d).

[89] *Id*. § 4303(e).

[90] *Id*. § 7701(a). The hearing guaranteed by 5 U.S.C. § 7701(a) is derived from the nature of civil service tenured employment and the Fifth Amendment of the U.S. Constitution. For further discussion of the right to due process in connection with such employment, *see* CRS Report R44803, *The Civil Service Reform Act: Due Process and Misconduct-Related Adverse Actions*, by Jared P. Cole.

[91] 5 U.S.C. § 7701(b).

[92] *Id*. § 7701(e)(1).

[93] *Id*.

[94] *Id.* § 7701(c)(1). *See also* 5 C.F.R. § 1201.4(p) (defining "substantial evidence" as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even

if the appellant shows: (1) harmful error in the application of the agency's procedures in arriving at its decision; (2) that the decision was based on a prohibited personnel practice; or (3) that the decision was not in accordance with law.[95]

In general, an agency must establish three factors to withstand an individual's challenge of his adverse personnel action.[96] First, the agency must prove, by a preponderance of the evidence, that the charged conduct occurred. Second, it must establish a nexus between that conduct and the efficiency of the civil service. Finally, the agency must demonstrate that the penalty imposed on the employee is reasonable.[97]

If a member of a collective bargaining unit exercises a right to appeal a personnel action under a negotiated grievance procedure rather than through the MSPB, an arbitrator must apply the same standards of proof—substantial evidence for unacceptable performance actions and preponderance of the evidence for other personnel actions—that the Board applies.[98]

## Penalty Mitigation Authority

Penalties imposed by an agency for actions involving misconduct may be mitigated by the MSPB.[99] In *Douglas* v. *Veterans Administration*, the Board concluded that its statutory authority to take final action on matters within its jurisdiction includes the ability to modify or reduce a penalty imposed on an employee by his or her agency's adverse action.[100] While the Board acknowledged that the management of the federal workforce and the maintenance of discipline among its members are not among its functions, it maintained that it did have the authority to mitigate a penalty when it determines that the penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable.[101] Noting that this authority had previously been vested in the CSC and was not altered by the CSRA,[102] the Board identified factors that are relevant for consideration when evaluating the appropriateness of a penalty.[103] These factors include the nature and seriousness of the offense, and its relationship to the employee's duties, position, and responsibilities, and the employee's past disciplinary record.[104]

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though other reasonable persons might disagree"); 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").

[95] 5 U.S.C. § 7701(c)(2). *See also* 5 C.F.R. § 1201.4(r) (defining "harmful error" as "[e]rror by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.").

[96] *See* Pope v. U.S. Postal Serv., 114 F.3d 1144, 1147 (Fed. Cir. 1997) (discussing factors that must be established by an agency to sustain an adverse action).

[97] *Id*.

[98] 5 U.S.C. § 7121(e)(2). *See also* Cornelius v. Nutt, 472 U.S. 648 (1985) (holding that an arbitrator must apply the definition of "harmful error" in MSPB regulations to find that an agency's error in following procedures harmed the employee).

[99] These actions are generally taken under chapter 75 of title 5, U.S. Code. This chapter, titled "Adverse Actions," provides for removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs of 30 days or less.

[100] 5 M.S.P.B. 313 (1981). *See also* U.S. Postal Serv. v. Gregory, 534 U.S. 1, 8 (2001) (describing the Board's *Douglas* decision as establishing the "general framework for reviewing agency disciplinary actions").

[101] *See Douglas*, 5 M.S.P.B. at 327-28.

[102] *Id*. at 326-27.

[103] *Id.* at 331-32.

[104] *Id*. The Board identified the following 12 factors as relevant for consideration in determining the appropriateness of a penalty: "(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

The Board indicated that an agency's selection of an appropriate penalty must involve a balancing of the relevant factors in an individual case.[105]

Penalties imposed by an agency for actions involving an employee's unacceptable performance under chapter 43 of title 5, U.S. Code, may not be mitigated by the MSPB.[106] In *Lisiecki v. MSPB*, the Federal Circuit maintained that the CSRA's legislative history suggested that such actions should be distinguished from actions involving misconduct.[107] The court explained that the legislative history "repeatedly cautions that the old standards of review are not applicable under chapter 43 and . . . that the MSPB and the courts should 'give deference to the judgment by each agency of the employee's performance in light of the agency's assessment of its own personnel needs and standards.'"[108]

The Federal Circuit noted that allowing the Board to mitigate penalties in chapter 43 actions would give the agency more authority than Congress intended.[109] The court observed that chapter 43 prescribes certain standards that do not apply to actions involving misconduct, such as a lighter burden of proof to sustain agency action.[110] If Congress intended "more intrusive review of agency action" by the Board, the court maintained, "Congress knew what to say if such was its desire."[111]

## Discrimination

Cases involving an adverse personnel action and allegations of discrimination may be subject to review by both the MSPB and the Equal Employment Opportunity Commission (EEOC). When an employee or applicant for employment has been (1) affected by an agency personnel action that may be appealed to the MSPB and (2) believes that the basis for the action was discrimination prohibited by certain federal antidiscrimination provisions, he may appeal such action to the Board, which will decide both the discrimination issue and the appealable action.[112]

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maliciously or for gain, or was frequently repeated; (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."

[105] *Id*.

[106] An arbitrator is similarly restricted from modifying a penalty imposed by an agency in a chapter 43 action. *See, e.g.*, Horner v. Bell, 825 F.2d 382, 390 (Fed. Cir. 1987) (reversing arbitrator's penalty modification from a demotion to a transfer on the grounds that an arbitrator "must apply the same standards as the Board").

[107] 769 F.2d 1558 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

[108] *Lisiecki*, 769 F.2d at 1564 (quoting S. REP. NO. 95-969, at 45 (1978)).

[109] *Id*. at 1565.

[110] *Id*.

[111] *Id*.

[112] 5 U.S.C. § 7702(a)(1)(B). The relevant antidiscrimination provisions are: Section 717 of the Civil Rights Act of 1954 (42 U.S.C. § 2000e-16); Section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 206(d)); Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791); Sections 12 and 15 of the Age Discrimination in Employment Act

The Board's decision in a so-called "mixed case" may be appealed to the EEOC.[113] However, if the individual does not seek review by the EEOC or if the agency decides not to review the Board's decision, that decision becomes judicially reviewable.[114]

An employee in a collective bargaining unit who alleges that he was affected by a prohibited personnel practice involving discrimination may raise the matter under a statutory procedure or a negotiated grievance procedure, but not both.[115] An employee who selects a negotiated grievance procedure may request that MSPB review an arbitrator's final decision.[116]

# Judicial Review

Under 5 U.S.C. § 7703, federal employees or applicants for employment who are adversely affected by a final order or decision of the MSPB may obtain judicial review.[117] This section also specifies the judicial forum for these decisions. In general, a petition for judicial review may be filed in the Federal Circuit within 60 days after the date the petitioner received notice of a Board final decision.[118] The Federal Circuit must examine these cases under a standard of review that is deferential to the MSPB's determination.[119] More specifically, the Federal Circuit is required to review the record in these cases and hold unlawful and set aside only any agency action, findings, or conclusions found to be:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by statute, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence.[120]

Under this standard of review, the Supreme Court has recognized that the Federal Circuit's ability to review the merits of MSPB decisions is "extremely narrow."[121] As the Court has further explained, in examining these MSPB decisions, "it is not for the Federal Circuit to substitute its own judgment for that of the Board."[122] Accordingly, the Federal Circuit typically upholds Board

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of 1967 (29 U.S.C. §§ 631 and 633a); and any rule, regulation, or policy directive prescribed in these statutes.

[113] 5 U.S.C. § 7702(b)(1).

[114] *Id.* § 7702(a)(3).

[115] *Id.* § 7121(d). Selection of a negotiated grievance procedure does not prejudice the right of an aggrieved employee to seek review of a related adverse action by the MSPB.

[116] *Id*.

[117] *Id*. § 7703(a)(1). Section 1295(a)(9) of title 28, U.S. Code, provides that the Federal Circuit shall have exclusive jurisdiction of appeals from MSPB final orders and decisions pursuant to 5 U.S.C. § 7703(b)(1) (relating to Board orders and decisions not involving discrimination).

[118] 5 U.S.C. § 7703(b)(1).

[119] However, the Federal Circuit generally reviews the MSPB's decisions about its own jurisdiction without deference. *See, e.g.*, Morse v. MSPB, 621 F.3d 1346, 1348 (Fed. Cir. 2010) (judicial review over Board decision that it lacked jurisdiction to hear a case concerning the Federal Aviation Administration's decision not to waive a maximum entry age requirement for employment as a Federal Air Marshall).

[120] 5 U.S.C. § 7703(c). *See also* Lledo v. OPM, 886 F.3d 1211 (Fed. Cir. 2018) (quoting Simpson v. Office of Pers. Mgmt., 347 F.3d 1361, 1364 (Fed. Cir. 2003)); Consol. Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 229 (1938) (Court states that for purposes of 5 U.S.C. § 7703(c), substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

[121] *See* U.S. Postal Serv. v. Gregory, 534 U.S. 1, 6-7 (2001).

[122] *See id.* at 7 (citing Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

decisions. According to a 2019 MSPB report, over the past few years, the Federal Circuit has affirmed Board decisions in 93 to 96 percent of the cases it reviewed.[123]

Courts have also acknowledged that the CSRA, as amended, provides the Federal Circuit with exclusive jurisdiction over appeals of MSPB final decisions.[124] However, one central exception to this exclusivity, found under 5 U.S.C. § 7702, is for so-called "mixed cases" involving allegations of federal antidiscrimination laws in connection with an improper adverse personnel action.[125] Following the MSPB's decision in a mixed case, affected employees may seek judicial review in federal district court, rather than the Federal Circuit.[126] District court review may be preferable for the petitioning federal employee, as district courts generally review these discrimination-related claims under a de novo standard (i.e., affording no deference to the determination of the MSPB).[127]

While this special jurisdictional rule for mixed cases may appear straightforward, courts have grappled with its application in a variety of circumstances. Two recent Supreme Court decisions, *Kloeckner v. Solis* and *Perry* v. *Merit Systems Protection Board*, illustrate some of the issues that courts have confronted with respect to the judicial review of MSPB decisions involving mixed cases.[128] The Court in *Kloeckner* considered the proper judicial forum when the Board dismisses a mixed case on procedural grounds.[129] Although the Federal Circuit generally held that the appropriate forum for review was the district court if the MSPB dismissed a mixed case on the merits, other courts reached varying conclusions with respect to cases dismissed by the MSPB for procedural reasons.[130] In *Kloeckner*, a former Labor Department employee filed a discrimination claim with the agency, and the employee was subsequently terminated from her position.[131] The employee filed her case with the MSPB, but the Board dismissed her claim as untimely.[132] In a unanimous opinion written by Justice Kagan, the Supreme Court examined the statutory language in 5 U.S.C. § 7702 and held that when the MSPB decides a mixed case, the proper forum for

[123] *See* MSPB, FY 2018 ANNUAL PERFORMANCE REPORT (APR) AND ANNUAL PERFORMANCE PLAN (APP) FOR FY 2019 (FINAL) AND FY 2020 (PROPOSED) at 13 (Mar. 18, 2019) https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1598039&version=1603838&application=ACROBAT.

[124] *See, e.g.*, Elgin v. Dep't of Treasury, 567 U. S. at 13-14; Lindahl v. OPM, 470 U.S. 768, 773-75 (1985); Perry v. MSPB, 137 S. Ct. 1975, 1991 (2017) (Gorsuch, J., dissenting) (dissenting Justices address idea that Congress intended for civil service issues to be decided by the Federal Circuit so they might be subject to a uniform body of appellate case law).

[125] 5 U.S.C. §§ 7702, 7703(b)-(c).

[126] *See id.*

[127] *See, e.g.*, United States v. First City National Bank, 386 U.S. 361, 368 (1967) (explaining that "review de novo" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency).

[128] *See* Kloeckner v. Solis, 568 U.S. 41 (2012); Perry v. MSPB, 137 S.Ct. 1975 (2017).

[129] *Kloeckner*, 568 U.S. at 44.

[130] *See, e.g.*, Downey v. Runyon, 160 F.3d 139, 145 (2d Cir. 1998) ("There is nothing . . . in the CSRA that suggests that judicially reviewable actions under [§ 7702(a)(3)] are limited to decisions on the merits. . . . When the MSPB issues an adverse 'final decision' or 'final order' concerning a 'case' under section 7702(a)(1), the 'case of discrimination shall be filed' in district court.") *Cf.* Ballentine v. MSPB., 738 F.2d 1244, 1246-47 (Fed. Cir. 1985) ("The language of 5 U.S.C.S. § 7703(b)(1) strongly suggests that until the merits of a "mixed" discrimination case are reached by the [MSPB], procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed to the [Federal Circuit].").

[131] *Kloeckner*, 568 U.S. at 47.

[132] *Id*. at 48.

review is the district court, irrespective of whether the MSPB dismissed the case on the merits or procedural grounds.[133]

The Court in *Perry* also explored the judicial review of mixed case appeals, particularly in situations where the MSPB dismissed a case for lack of Board jurisdiction. [134] Traditionally, lower courts had commonly held that the Federal Circuit, and not a district court, was the appropriate court to hear these types of cases.[135] In *Perry*, a U.S. Census Bureau employee received notice that he would be removed from his position for poor attendance.[136] After the employee and the agency reached a settlement involving suspension from service and early retirement, the employee appealed to the MSPB.[137] The MSPB found that the employee's separation from service was voluntary, and, therefore, not an issue that the Board had jurisdiction to examine.[138] The employee appealed the case to the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), but the court transferred the case to the Federal Circuit.[139]

In a 6-2 decision penned by Justice Ginsburg, the Supreme Court reversed the judgment of the D.C. Circuit.[140] Similar to *Kloeckner*, the Court's opinion hinged on its interpretation of the statutory language in 5 U.S.C. § 7702, under which district court review of a mixed case applies only when an employee "(A) has been affected by an action which the employee . . . *may appeal to the [MSPB]* and "(B) alleges . . . discrimination."[141] While the federal government had argued for purposes of this section that a case constitutes a mixed case only if the employee "may appeal to the Board," the Court rejected this argument.[142] Instead, the Court declared that under this language, what matters is not what the MSPB determined about its ability to hear an appeal, but rather "the nature of an employee's *claim* that he had been "'affected by an action [appealable] to the [MSPB]'" (in this case, suspension and removal).[143]

The Court also relied on its decision in *Kloeckner* and found that when it comes to mixed cases, there was nothing in the statutory language that demonstrated Congress's intent to treat jurisdictional dismissals differently from other types of MSPB dismissals.[144] Accordingly, the *Kloeckner* and *Perry* decisions both arguably demonstrate that despite MSPB's grounds for dismissing a mixed case, if an employee (or a former employee) "complains of serious adverse action prompted . . . by the employing agency's violation of federal antidiscrimination laws," the appropriate forum for judicial review is the district court.[145]

In recent years, Congress has passed legislation that, for some types of cases, expressly extends judicial review of MSPB decisions beyond the Federal Circuit. The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 addressed MSPB appeal rights

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[133] *See id*. at 49-56.

[134] *See Perry*, 137 S.Ct. at 1979.

[135] *See, e.g.,* Conforto v. MSPB, 713 F.3d 1111, 1116 (Fed. Cir. 2013).

[136] *Perry*, 137 S. Ct. at 1982.

[137] *Id*.

[138] *Id*.

[139] *Id*. at 1983.

[140] *Id*. at 1984.

[141] *See id*. at 1983-84.

[142] *See id.*

[143] *Id*. at 1984 (quoting 5 U.S.C. § 7702(a)(1)(A)).

[144] *See id*. at 1985-88.

[145] *See, e.g., id*. at 1988.

for Veterans Affairs Department employees who have been suspended, demoted, or removed from federal service for performance or misconduct.[146] Among other things, the act specifies that employees may appeal a decision of the MSPB to the Federal Circuit or any court of appeals of competent jurisdiction.[147] Additionally, in 2018, Congress passed the All Circuit Review Act, which extends judicial review of MSPB decisions in certain whistleblower and other retaliation cases not only to the Federal Circuit, but also to federal circuit court of appeals.[148] This act is a permanent extension of the Whistleblower Protection Enhancement Act, as amended, which provided for this expanded jurisdiction for a period that terminated on November 26, 2017.[149] According to the Office of Special Counsel, the new Act will, among other things, promote more "robust implementation of whistleblower protection laws."[150] The Special Counsel further maintained that given the number of district and appellate courts that will now be hearing these cases, "[d]iffering interpretations may result in 'circuit splits,' which make it more likely that the U.S. Supreme Court will take up questions that arise regarding how these important laws are applied. This expanded judicial accountability is precisely the outcome Congress intended and will strengthen whistleblower protections."[151]

# Effect of Absence of Quorum

The MSPB currently has no sitting members.[152] Board member Mark A. Robbins, who served most recently as the MSPB's Acting Chairman, ended his term on February 28, 2019.[153] The Board has lacked a quorum since January 8, 2017, when former Board Chairman Susan Tsui Grundmann resigned. Prior to that time, there were only two members on the Board. MSPB regulations provide generally that its members will make decisions in all cases by majority vote.[154] These regulations do allow for some decision making when a majority vote is not possible because of a vacancy or recusal, but such decisionmaking is available only when there are at least two members in office.[155]

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[146] Dep't of Veterans Aff. Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat 862 § 202 (2017).

[147] 38 U.S.C. § 714(d)(5)(A).

[148] All Circuit Review Act, Pub. L. No. 115-195, 132 Stat. 1510 (2018). This Act applies to cases involving reprisal for whistleblowing under 5 U.S.C. § 2302(b) and reprisal for protected activities under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D).

[149] *See* Whistleblower Protection Enhancement Act, Pub. L. No. 112-199, § 108, 126 Stat. 1465, 1469 (2012), as amended by the All Circuit Review Extension Act, Pub. L. No. 113-170, § 2(a), 128 Stat. 1894 (2014). The All Circuit Review Act of 2018 extends jurisdiction to federal circuit courts of appeal retroactive to November 26, 2017. *See id.*

[150] Press Release, U.S. Off. of Special Couns., OSC Applauds President Signing Bill to Expand Judicial Accountability in Whistleblower Retaliation Cases (July 11, 2018), https://osc.gov/News/pr-18-38.pdf.

[151] *Id*.

[152] *See* MSPB, *Frequently Asked Questions about the Lack of Board Quorum and Lack of Board Members* (Mar. 1, 2019), https://www.mspb.gov/FAQs_Absence_of_Board_Quorum_March_1_2019.pdf.

[153] *Id*. The MSPB has indicated that in the absence of Board members, its General Counsel will become the agency's acting chief executive and administrative officer. *See 2018 Annual Report*, *supra* note 2 at 9.

[154] 5 C.F.R. § 1200.3(a). Certain MSPB actions may be completed by a single Board member. *See, e.g.*, 5 U.S.C. § 1214(b)(1)(A)(ii) (authorizing any Board member to order a stay of a personnel action that the Special Counsel reasonably believes was taken or is to be taken because of a prohibited personnel practice); *id*. § 7701(e)(1) (allowing a single MSPB member to grant a petition for review of an initial decision).

[155] *See* 5 C.F.R. § 1200.3(e). Chapter 12 of Title 5, U.S. Code, which identifies the MSPB's powers and functions, does not prescribe a quorum requirement. The Supreme Court has indicated that where there is no statutory quorum requirement, a quorum may consist of "a simple majority of a collective body empowered to act for the body." *See* Fed.

Without a quorum, the Board is unable to issue final decisions in cases where an initial decision has been appealed.[156] As of December 31, 2018, there were approximately 1,800 cases pending before the Board.[157] The absence of a quorum also restricts the Board's ability to publish reports on merit system studies or promulgate new regulations in response to any legislative changes involving the MSPB.[158]

In 2018, President Trump nominated three individuals to serve as Chairman, Vice Chairman, and Board member.[159] A confirmation hearing for these nominees was subsequently held, but the nominees were not confirmed by the Senate before the adjournment of the 115th Congress.[160] On January 16, 2019, the President resubmitted the nominations for consideration by the 116th Congress.[161] On February, 13, 2019, the Senate Committee on Homeland Security and Governmental Affairs approved two of the nominees, but the President's nominee for Vice Chairman withdrew from consideration prior to the committee's vote.[162] The committee's chairman has indicated that he will not advance the two nominees to the full Senate until the President nominates, and the committee supports, a third member.[163]

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Trade Comm'n v. Flotill Products, 389 U.S. 179, 183 (1967).

[156] *2018 Annual Report*, *supra* note 2, at 6.

[157] *Id*.

[158] *Id.* at 1.

[159] *Id*.

[160] Nominations of Dennis D. Kirk to be Chairman, MSPB; Hon. Julia A. Clark and Andrew F. Maunz to be Members, MSPB, Before the S. Comm. on Homeland Security and Governmental Aff., 115th Cong. (2018).

[161] Nominations Sent to the Senate (Jan. 16, 2019), https://www.whitehouse.gov/briefings-statements/nominations-sent-senate/.

[162] *See* Lisa Rein, *Federal Employees Will Wait Longer for Their Grievances to be Heard*, WASH. POST (Feb. 15, 2019), https://www.washingtonpost.com/politics/federal-employees-will-wait-longer-for-their-grievances-to-be-heard/2019/02/15/680567f8-313e-11e9-813a-0ab2f17e305b_story.html?utm_term=.d7a94c980637.

[163] *Id*.

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