

SIGNIFICANT DEVELOPMENTS



Office of Workers' Compensation Conference

August 7, 2024

Thomas J. Lanphear

Chief Administrative Judge

Civil Service Process



Civil Service Reform Act of 1978

- MSPB
- OPM
- FLRA
- EEOC
- OSC
- PPP'S
- Merit Principles



Title V

- Chapter 43 (Performance)
- Chapter 75 (Conduct)
- 5 USC 8151
- 5 C.F.R. Part 353



Types of Misconduct

- Failure to follow leave procedures
- Failure to follow instructions
- Falsifying documents
- AWOL/ Excessive leave retirements
- Failure to provide documentation
- Failure to perform duties
- Disruption in the workplace
- Dishonesty
- Drugs



MSPB

- Independence
- Hear and adjudicate appeals
- Order compliance
- Special studies
- Review OPM rules and regulations



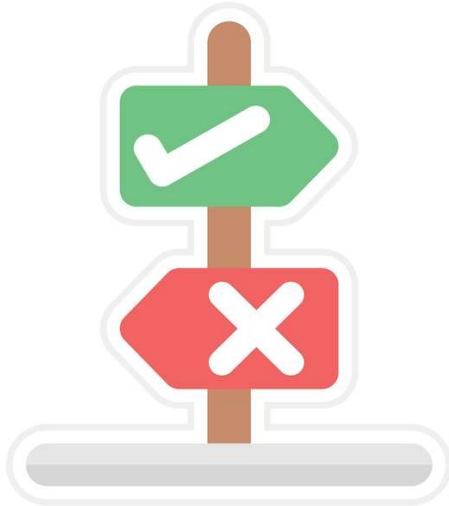
The Board

- Three members
- 7-year terms
- Appointed by the President
- Chairman, Vice Chairman, Member



Adverse Actions

- Dos
- Don'ts
- Deciding Official Preparation



"You are Fired"



Coming Right up . . . Fraud Indications

- Accurate Background Information re claims
- Lack of Witnesses and lack of cooperation
- Contradictory accounts of how it occurred
- Inconsistent injury/ physical signs
- Dissatisfied employees repeated claims
- Inconsistent reporting procedures
- Lack of contact/ avoidance
- Time of injury –Monday/ Friday
- Dissatisfied employees



CHARGES

WHO? WHAT? WHEN? WHERE? WHY?

Mendez v. Treasury, 88 MSPR 596

Pridgen v. OMB, 2022 MSPB 31



Alternate Charges

- Falsification
- Insubordination
- Sexual Harassment
- Threats
- Misuse of Funds
- Criminal charges
- Theft
- Lack of candor
- Failure to follow orders
- Inappropriate conduct
- Disruption in the workplace
- Dishonest conduct
- Conduction unbecoming
- Conversion

Burden of Proof

- Obligation imposed upon a party in making his case and upon the opposing party in asserting defenses and counterclaims to persuade the trier of fact by a standard of evidence . *Chin v. DOD*, 2022 MSPB 34.



DUE PROCESS

- "Failure to provide procedures may only be harmful error" but could also be contrary to law of a due process violation
- *Ward v. USPS*, 672 F. 3d 1294 (Fed. Cir. 2012)
- *Boss v. DHS*, 908 F.3d 1278 (Fed. Cir. 2018)
- *Ramirez v. DHS*, 975 F.3d 1342 (Fed. Cir. 2020)
- *Johnson v. Dep't of Air Force*, 50 F.4th 110 (Fed. Cir. 2022)



Anatomy of an Adverse Action

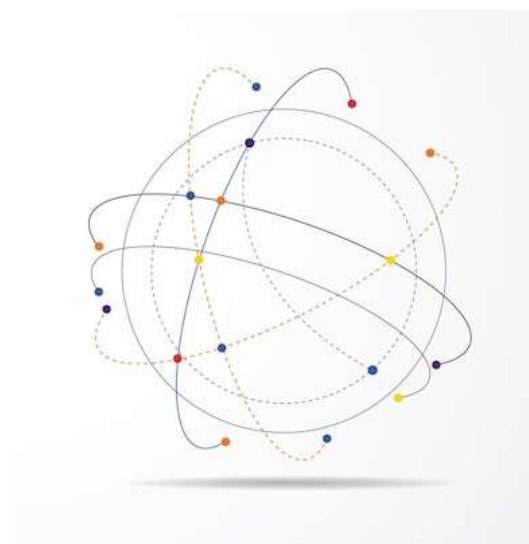
- Charges
 - Burden of proof
- Nexus
- Penalty
- Affirmative defenses



- *Valles v. Dep't of State*, 17 F.4th 149 (Fed. Cir. 2021)
- *Lowe v. Dep't of Navy*, 842 Fed. Appx. 584 (Fed. Cir. 2021)

Nexus - The Vital Connection

- Off Duty Misconduct
- *Doe v. Dep't of Justice*, 565 F.3d 1375 (Fed. Cir. 2009) (Holding that dishonest conduct must be connected to the efficiency of the service)
- *Martin v. DHS*, 810 Fed. Appx 867 (Fed. Cir. 2020)



Dishonest Conduct

- Violation of Government Policies
- *McCain v. USPS*, 57 MSPR 604
- *Howard v. Navy*, 43 MSPR 539
- *Heller v. Army*, 36 MSPR 675



Misuse of Government Property/ Criminal Activity

- Brooks v. USPS, 14 MSPR 305
- See 18 USC 1004
- Chavez v. SBA, 121 MSPR 168
- Hairston v. DOD, 835 Fed. Appx. 571



Conduct Unbecoming

- *Baker v. Dep't of the Navy*, No. 2021-1898, 2021 WL 4618530 (Fed.Cir. Oct. 7, 2021)
- *Martinez v. Army*, Fed. Cir No.23-2096, (6/11/24)



Emails --- Attention:

Aliens are coming to abduct all the good looking and sexy people, you are safe, I'm just sending this to say goodbye.



Misstatement of Facts & Insubordination

- *Hubble v. DOJ*, 6 MSPR 659
- *Minor v. USPS*, 115 MSPR 307
- *Baker v. Dep't of the Army*, 2023 WL 3587472
- *Marzares v. Department of Navy*, 302 F.3d 1382 (Fed. Cir. 2002)



Sexual Harassment

- Proven Conduct
- Sexual in Nature
- Unwelcomed
- Interfered with work performance or created an intimidating, hostile, or offensive work environment
- *Clay v. Dep't of the Army*, 123 M.S.P.R. 245 (2016).
- *Thomas v. Army*, 2022 MSPB 35



Disrespectful Behavior

- *Malloy v. USPS*, 578 F.3rd 1351 (Fed. Cir. 2009)
- *Guise v. DOJ*, 330 F.3rd 1376 (Fed. Cir. 2003)
- *Higgins v. VA*, 955 F.3rd 1347 (Fed. Cir. 2020)
- *Miranne v. Navy*, WL 4702579 (Fed. Cir. 2001)



Insubordination & Threats

- *Marcell v. Dep't of Veterans Affairs*, 2022 MSPB 33.
- *Dieter v. Dep't of Veterans Affairs*, 2022 MSPB 32.



Metz Test

- Listener's reaction
- Listener's apprehension of harm
- Speaker's intent
- Conditional nature of statement
- Attendant circumstances
- Wiley v. Dep't of the Treasury, 102 M.S.P.R. 535 (2006).
- (Zero tolerance policy)



Falsification



- *Martin v. DHS*, 810 Fed. Appx. 867
- *Freeland v. DHS*, 825 Fed. Appx. 750

Lack of Candor ??

- *Bahm v. Air Force*, 38 MSPR 627
- *Daniels v. USPS*, 57 MSPR 272
- *Moore v. DHS*, 779 Fed.Appx. 723 (Fed. Cir. 2019)



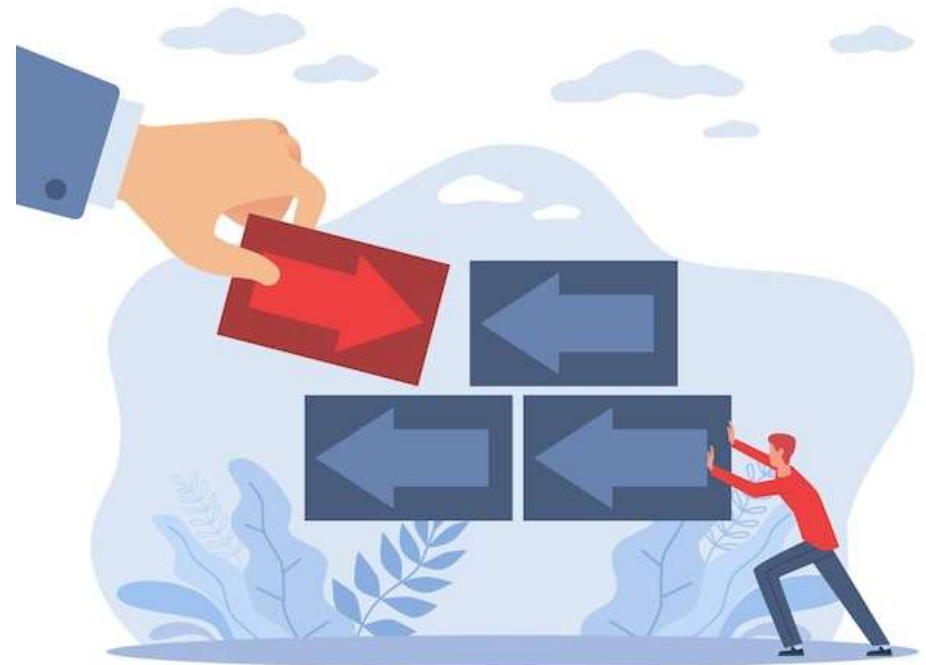
Excessive Leave

- Employee was absent for compelling reasons beyond his control.
- The absences continued beyond a reasonable time/ Agency warned employee.
- The position needed to be filled by an employee available for duty.
- *Hollingworth v. Dep't. Of Air Force*, 121 MSPR 397
- *Belle v. DOD*, 842 Fed. Appx. 559
- *Courtney v. EEOC*, 2021 WL 5230756
- *Moreno v. Interior*, 2021 WL 5068264
- *Williams v. Dep't of Commerce*, 2024 MSPB 8
- *Wilson v. SBA*, 2024 MSPB 3



Misrepresentation/ Failure to Obey Orders

- Perez v. Air Force, 37 MSPR 32
- Camenisch v. USDA, 47 MSPR 493
- Grubb v. Interior, 96 MSPR 361
- Beiber v. Army, 287 F.3rd 1358



Inability to Perform

- Haas v. DHS, 2022 MSPB 36
- Hodges v. DOJ, 121 MSPR 337
- Owens v. DHS, 2023 MSPB 7
- Jenkins v. USPS, 2023 MSPB 8
- Desjardin v. USPS, 2023 MSPB 6



Credibility



- Identify factual question in dispute
- Summarize all the evidence that supports the charge
- State which version is accepted
- Explain why it is accepted

Credibility Factors

- Witness' opportunity and capacity to observe
- Witness character
- Bias on part of witness
- Contradiction of version with other evidence
- Inherent improbability of witness' version



Credibility Factors

- Witness' demeanor
- Prior inconsistent statement
- *Lachance v. Devall*, 178 F.3d 1246 (Fed. Cir. 1999)
- *Holmes v. USPS*, 987 F.3d 1042



Chapter 43 Cases

- Performance action
- Critical elements
- Performance Improvement Period (PIP)
- *Santos v. NASA*, 990 F.3d 1355
- *Harris v. SEC*, 972 F.3d 1307
- *Braun v. DHHS*, 983 F.3d 1295
- *Pridgen v. Off. of Mgmt. and Budget*, 2022 MSPB 31



Discrimination



- *Perry v. MSPB*, 137 S. Ct. 1975 (2017)
- *Gardner v. Dep't of Veterans Affairs*, 123 MSPR 647
- *Bostock v. Clayton County*, 140 S. Ct. 1731
- *Babb v. Wilkie*, 140 S. Ct. 1168
- *Edwards v. Dep't of Labor*, 2022 MSPB 9
- *Groff v. Dejoy*, 143 S. Ct. 2279 (2023)

Factor #1: Seriousness of Offense

- "The most significant Douglas factors"
 - *Starks v. Dep't of Army*, 94 MSPR 95, ¶ 11 (2003)
- Specific misconduct
- Insubordination
 - Falsification
 - AWOL
 - Assault
 - Drugs
- Delay in taking action
- Repeated misconduct
- Poor judgment
 - *Halper v. USPS*, 91 MSPR 170 (2002)
 - *Arena v. USPS*, 2014 MSPB 34
 - *Sheiman v. Treasury*, 2024 WL 1433717 (Fed. Cir. 2024), affirmed Fed. Cir. No. 2022-2025 (4/3/24)



Factor #2: Employee's Job

Higher Standard

- Law Enforcement
- Supervisors
 - "Informal Supervisor"
 - ***Faucher v. Dep't of Air Force***, 96 MSPR 203 (2004)
- Fiduciary positions
- Contacts with public

Low level position does not excuse behavior if egregious

Toms v. Interior, 97 MSPR 395; *Nelson v. DOT*, 776 Fed.Appx. 683 (Fed. Cir. 2019)



Factor #3: Prior Discipline



- Must be in proposal letter
- Bolling factors
 - Informed of action in writing
 - Matter of record
 - Higher level review
- Pending grievance
 - **USPS v. Gregory**, 534 U.S. 1 (2001)
- State Discipline
 - Agency regulation/CBA
 - Credibility issue
 - Other uses - notice
 - See Ward et. al.

Factor #4: Past Work Record

- Remember – lengthy service is a mitigating (not aggravating) factor
 - **Shelly v. Dep't of Treasury**, 75 MSPR 677 (1997)
 - Use "should have known better" under Douglas Factor #9 (Notice). **Brown v. Dep't of Army**, 96 MSPR 232 (2004)
- Poor performance
 - If aggravating, must be in proposal letter
 - Inconsistency between appraisals and Douglas analysis
 - Action against immediate supervisor. **Underwood v. DOD**, 53 MSPR 355 (1992)
- If employee is a good performer, say so – but it may not overshadow the nature and seriousness of the offense. **Hill v. Army**, 2013 MSPB 88



Factor #5: "The Trust Factor"

- Loss of trust is a significant aggravating factor
- Continued assignment of important tasks?
- Return to position of trust
 - ***Mann v. HHS***, 78 MSPR 1 (1998)
- Position of trust?
 - ***Jackson v. Dep't of Navy***, 52 MSPR 1 (1991) (meatcutter)
- Untruthful testimony
 - ***Richardson v. RTC***, 66 MSPR 302 (1995)



Factor #6: Consistency of Penalty

- Avoid "surface consistency"
- Similarly situated employees
 - "Nearly identical"
 - *Marcell v. DVA*, 2022 MSPB 33
 - Military vs. Civilian
 - Same organization unit
 - Same supervisor
 - Settlement of comparative employees
 - *Spahn v. DOJ*, 93 MSPR 195 (2003)
- Inconsistency is not dispositive
- *Lewis v. DVA*, 111 MSPR 388
- *Miskill v. SSA*, 863 F.3d 1379 (Fed. Cir. 2017)
- *Singh v. USPS*, 2022 MSPB 15 (5/31/22)

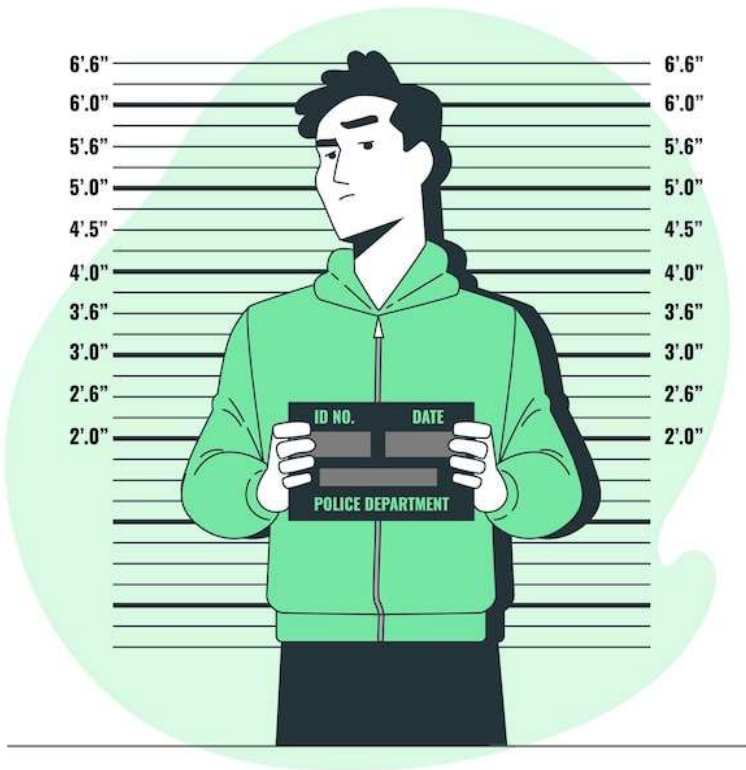


Factor #7: Table of Penalties

- "Reprimand to Removal" - no weight
- Agency's interpretation entitled to deference if reasonable
 - *Philips v. Dep't of Interior*, 95 MSPR 21 (2003)
- Not binding unless agency intended to be binding
- No constitutional right to advance notice of possible range of penalties not to be implied inflexibly as to impair consideration of other factors
 - *Farrell v. Dep't of Interior*, 314 F.3d 584 (Fed. Cir. 2002)
- Do not shoehorn charge into table of penalties
- Recharacterization of Charge
- Going outside table of penalties
- *Jenkins v. EPA*, 118 MSPR 16



Factor #8: Notoriety of Offense



- Must be supported by the record
 - Include copies of newspaper, articles, or television coverage
- Not just limited to media
 - ***Wilber v. Dep't of Treasury***, 42 MSPR 582 (1989) (M.A.D.D.)
- Widely known within Agency
- Can consider recent bad press
 - USPS - "Going Postal"
 - DoD - Gov't CC abuse

Factor #9: Prior Notice

- Agency policies
 - *Mazares v. Dep't of Navy*, 302 F.3d 1382 (Fed. Cir. 2002)
- Common sense
 - *Brown v. Dep't of Navy*, 229 F.3d 1356 (Fed. Cir. 2000)
 - *Farell v. Dep't of Interior*, 314 F.3d 584 (Fed. Cir. 2002)
- Length of service
- Lack of training
- Stale discipline
- *Chavez v. SBA*, 121 MSPR 168



Factor #10: Rehabilitative Potential



- Apologies - Weight depends on whether employee shows remorse
- ***Singletary v. Dep't of Air Force***, 94 MSPR 553 (2003)
 - Significant – own volition prior to investigation
 - Some – immediate admission upon initial inquiry by Agency
 - Little or no weight - after Agency conducts investigation
- Seeking treatment
- Does not stop at decision letter
 - ***Lentine v. Dep't of Treasury***, 94 MSPR 676 (2003); *Arema v. USPS*, 2014 MSPB 34

Factor #11: Mitigating Circumstances

- Entitled to considerable weight
- Corroborating evidence
- Must be nexus between misconduct and medical condition
- If serious misconduct - mitigation not appropriate
- Disability discrimination
- *Brown v. Interior*, 2014 MSPR 40
- Provocation/ Stress
 - *Zazueta v. DOJ*, 94 MSPR 493 (2003)
 - *Barry v. Dep't of Treasury*, 71 MSPR 283 (1996)
 - *Fox v. Army*, 120 MSPR 529
 - *Moreno v. Dep't of Interior*, 2021 WL 506824



Factor #12: Alternative Sanctions



- Must show lesser penalty would be ineffective
- Prepare deciding official
 - ***Robertson v. DOJ***, 81 MSPR 658 (1999)
- Sending a message to others
 - ***Blake v. DOJ***, 81 MSPR 394 (1999)
 - ***Harper v. Dep't of Air Force***, 61 MSPR 446 (1994)
- Zero tolerance policy does not mean removal
 - ***Omites v. USPS***, 87 MSPR 223 (2000)
 - ***Jones v. Dep't of Navy***, 67 MSPR 6 (1995)
 - ***Zazueta v. DOJ***, 94 MSPR 493

**THANK YOU FOR YOUR
ATTENTION**

THAT'S ALL FOLKS!