

Advanced Topics in U.S. Merit Systems Protection Board Law

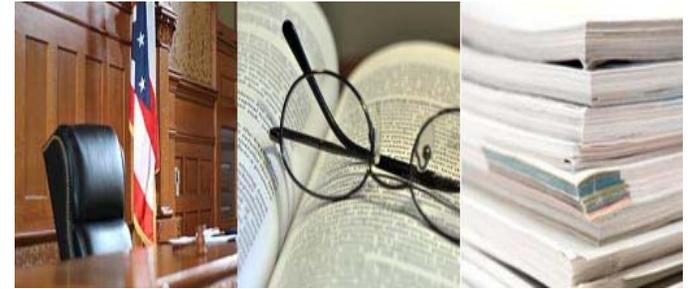
Laura M. Albornoz

Chief Administrative Judge, Denver Field Office

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Administrative Judge, Denver Field Office



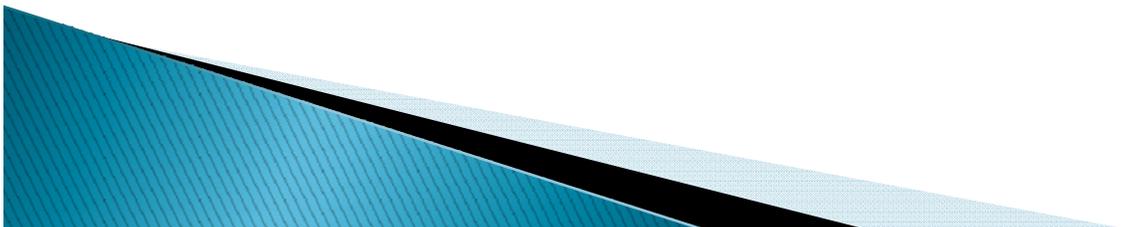


Appeal System Required By Law

The U.S. Supreme Court:

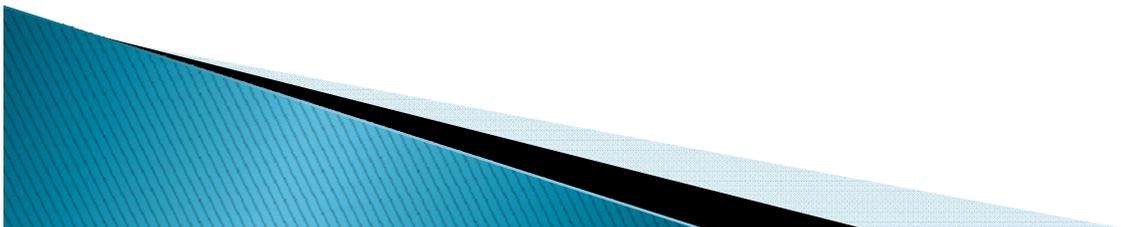
A tenured public employee has a “property interest” in his or her employment that cannot be taken away without due process of law.

Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 538 (1985).



Fundamental Due Process

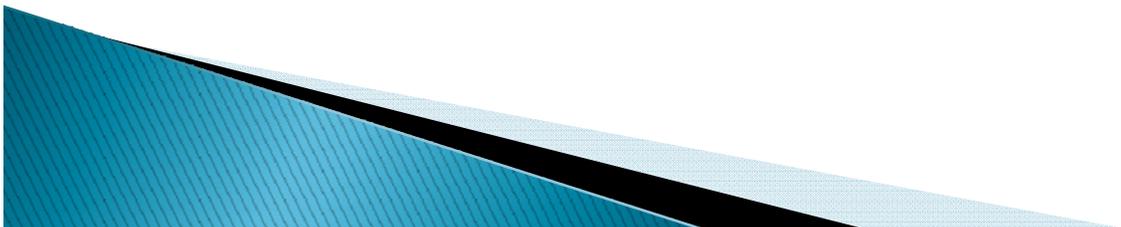
- ▶ 5 U.S.C. § 7513(b)(1): An employee must receive advance written notice stating the specific reasons for the proposed adverse action.
- ▶ The agency must state the specific reasons for a proposed adverse action in sufficient detail to allow the employee to make an informed reply and defend the case. The Board cannot consider or sustain charges or specifications that are not included in the notice of a proposed adverse action.



Ex Parte Communications

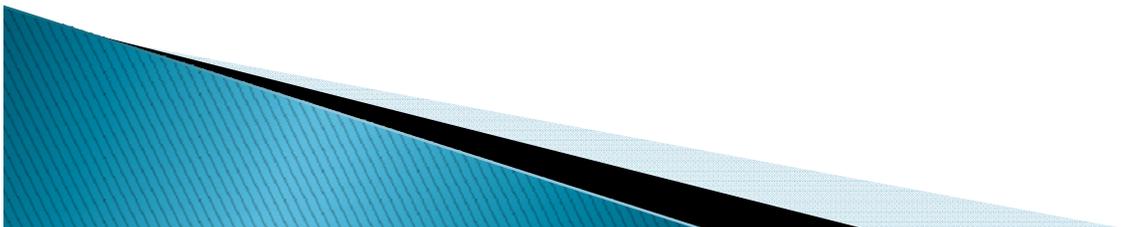
Stone v. FDIC, 179 F.3d 1368 (Fed. Cir. 1999):

“The introduction of new and material information by means of *ex parte* communications to the deciding official undermines the public employee’s constitutional due process guarantee of notice ... and the opportunity to respond. . . . It is constitutionally impermissible to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process.”



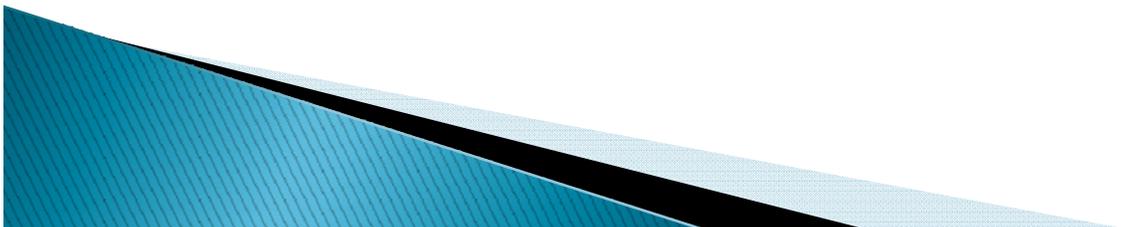
Giannantonio v. USPS, 111 M.S.P.R. 99 (2009)

- ▶ Agency demoted District Manager of Statistics based on failure to meet the duties and responsibilities of his position.
- ▶ Appellant supervised employees who measured workflow and time spent performing postal work. The proposal cited problems with the accuracy of the data collected.
- ▶ After the oral reply, the deciding official received new and material statistical information from another manager showing the appellant's overall national performance. The deciding official relied on the *ex parte* information in his decision.
- ▶ Board reversed demotion.



Ward v. USPS, 634 F.3d 1274 (Fed. Cir. 2011)

- ▶ A preference-eligible Maintenance Mechanic was removed on charges of shouting at a supervisor and disobeying her instructions.
- ▶ The deciding official testified at the Board hearing that he not only relied on the documents he was provided, he also discussed Mr. Ward with 4 other supervisors who told him about prior incidents when Mr. Ward was “loud” and “intimidating.”
- ▶ The deciding official testified in his penalty analysis that under *Douglas* this was a pattern of behavior he considered in making his decision.



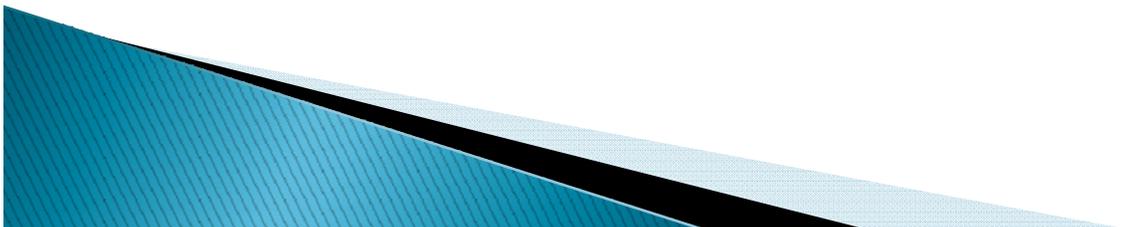
The Board in *Ward*

- ▶ The AJ in *Ward* upheld the removal because she distinguished between *ex parte* communications related to the charge versus those related to penalty in a *Douglas* analysis.
- ▶ The Board agreed with the AJ.
- ▶ The Court of Appeals for the Federal Circuit disagreed.



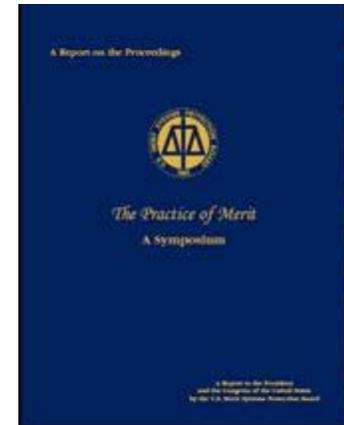
The U.S. Court of Appeals for the Federal Circuit Held:

- ▶ *Stone* emphasized the importance of giving the employee notice of aggravating factors supporting an enhanced penalty and whether the level of penalty is appropriate.
- ▶ *Ex parte* communications that introduce new and material information whether related to the charge or the penalty violate due process.



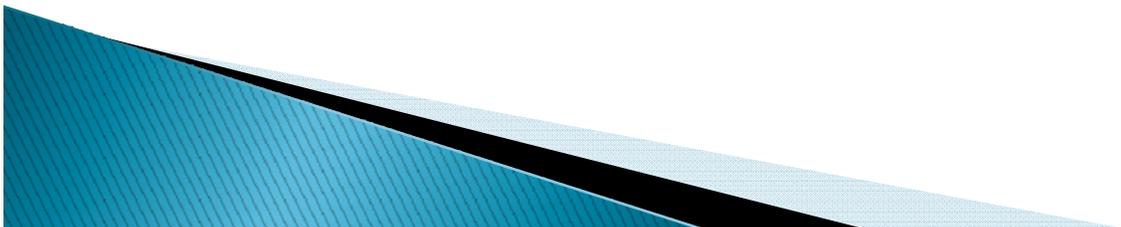
What is New and Material?

- ▶ Is the information merely cumulative?
- ▶ Did the employee otherwise know and have an opportunity to respond?
- ▶ Did the *ex parte* communication result in “undue pressure” upon the deciding official to rule in a particular manner?



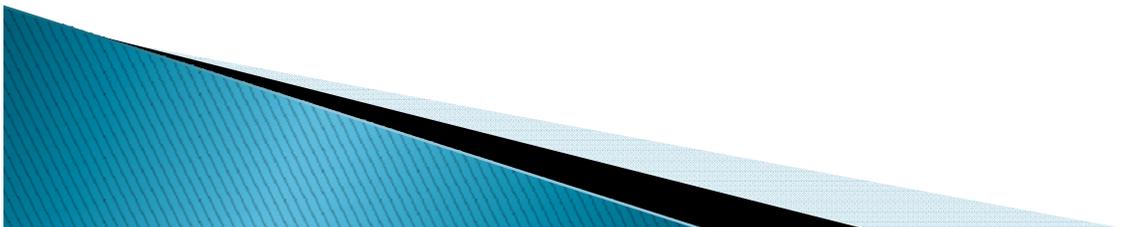
The *Ward* Result

- ▶ If new and material information – due process violation, the Board must reverse.
- ▶ If not new and material – perform a harmful error analysis.
 - The appellant must prove that in the absence of the error, the agency would have reached a different result.



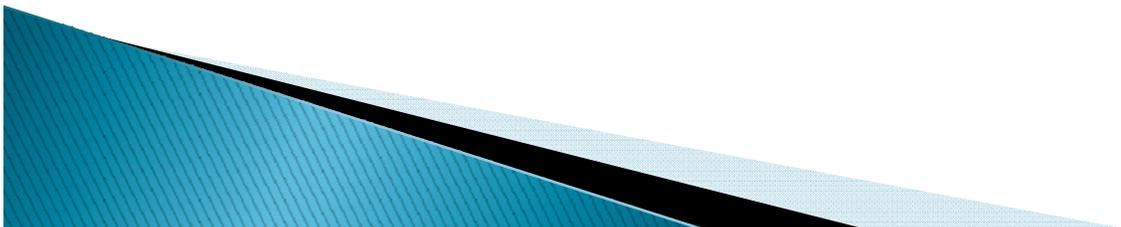
No *Ex Parte* Communication – *Ward* Still Applies

- ▶ *Lopes v. Navy*, 116 M.S.P.R. 470 (2011). Ms. Lopes was an IT Specialist, GS-11. Her removal was proposed for misuse of a government computer and resources. The proposal did not mention prior discipline.
- ▶ The deciding official knew about her prior 3-day suspension for misuse of her government credit card and considered it.
- ▶ Even though no *ex parte* communication, reversed based on *Ward*.



Case Examples

- ▶ *Ross-Rawlins v. USPS*, DE-752-11-0006-I-1 (Initial Decision, July 2011, final when no PFR) (demotion reversed because deciding official spoke to manager & considered erroneous information that the appellant did not wish to return to her position).
- ▶ *Silberman v. DOL*, 116 M.S.P.R. 501 (2011) (due process violation when the deciding official considered five memos (MFR) written by the supervisor with information about similar misconduct).
- ▶ *Gray v. DOD*, 116 M.S.P.R. 461 (2011) (removal of auditor convicted of felony reversed when deciding official considered an email about the appellant's eligibility to occupy a security-sensitive position).



Norris v. SEC, 675 F.3d 1349 (Fed. Cir. 2012)

- ▶ Deciding official's knowledge of an employee's background only raises due process concerns when that knowledge is a basis for the deciding official's decision on the charge or penalty imposed.
- ▶ Result: Deciding official's **credible testimony** about what he or she considered is very important.
 - *Bennett v. DOJ*, 2013 MSPB 64 (Aug. 16, 2013) (remanded for AJ to determine credibility of deciding official).



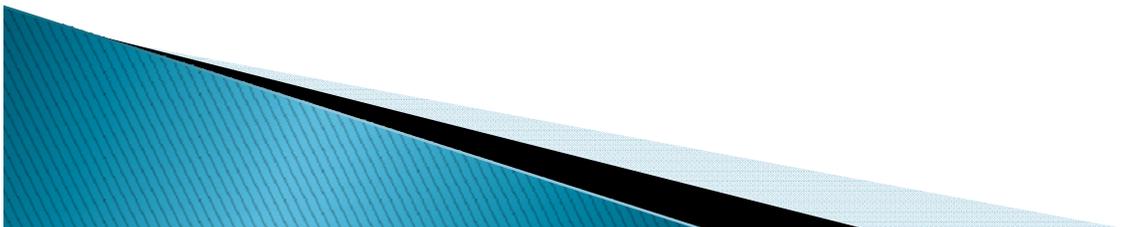
Cure Potential *Ward* Violations Before Issuing Decision

- ▶ Provide written notification of the new and material information to the appellant.
- ▶ Consider providing employee with a copy of deciding official's *Douglas* factor analysis.
- ▶ Include notice that that the deciding official may consider the information in the charge or penalty phase.
- ▶ Give the employee a reasonable amount of time to respond.



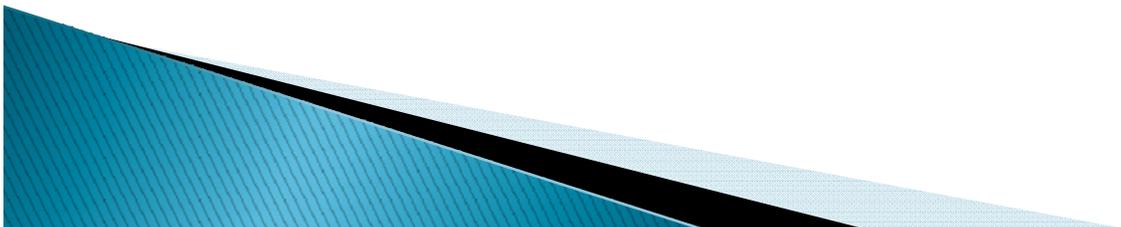
Woebcke v. DHS, 114 M.S.P.R. 100 (2010)

- ▶ Woebcke was a Federal Air Marshal removed for conduct unbecoming & missing a mission.
- ▶ While on official travel in Hawaii, Woebcke was arrested for solicitation of prostitution resulting in cancellation of his return mission to his duty station at Newark, New Jersey.
- ▶ AJ mitigated the removal to a 14-day suspension based on mitigating factors (medical condition/rehabilitative factors). Board affirmed.



Disparate Penalties

- ◉ Woebcke identified a group of FAMS who within the same time period received suspensions for solicitation while on travel to Germany
- ◉ Agency must explain why differing chains of command would justify different penalties for employees disciplined for similar misconduct. *Williams v. SSA*, 586 F. 3d 1365 (Fed. Cir. 2009).
- ◉ Agency failed to prove a legitimate reason for the difference in treatment, therefore Board affirmed AJ's mitigation to a 14-day suspension.



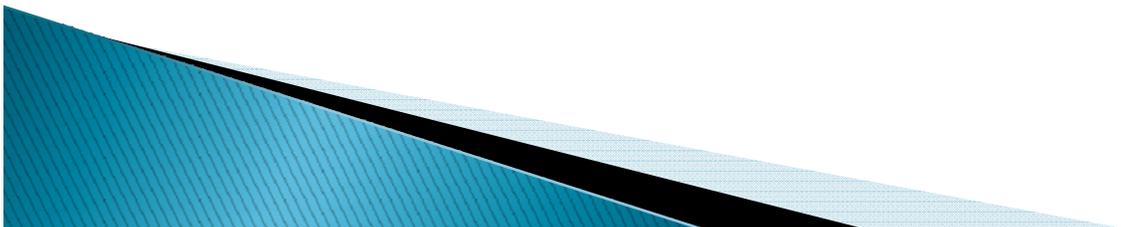
No Factor is Outcome Determinative

- ▶ In the past, if the comparator was in a different work unit, the Board would not find disparate penalties. This has changed.
- ▶ No one factor is outcome determinative.
Villada v. USPS, 115 M.S.P.R. 232 (2010);
Lewis v. VA, 113 M.S.P.R. 657 (2010).
- ▶ Board has overruled cases that stated there must be a “great deal of similarity” between offenses, work unit, supervisor, deciding official, and period of time considered.
Boucher v. USPS, 118 M.S.P.R. 640 (2012)



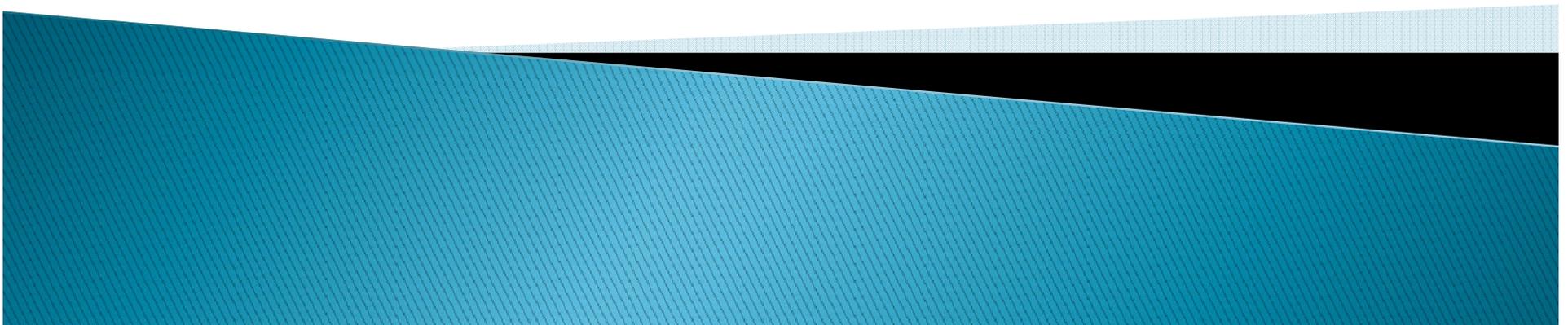
Disparate Penalty Test

- ▶ Step 1: Appellant must show enough similarity between the misconduct and other factors to lead a **reasonable person** to conclude that the agency treated similarly-situated employees differently.
- ▶ Step 2: Then, the agency must prove a **legitimate reason** for the difference in treatment by a preponderance of the evidence.



DISCOVERY

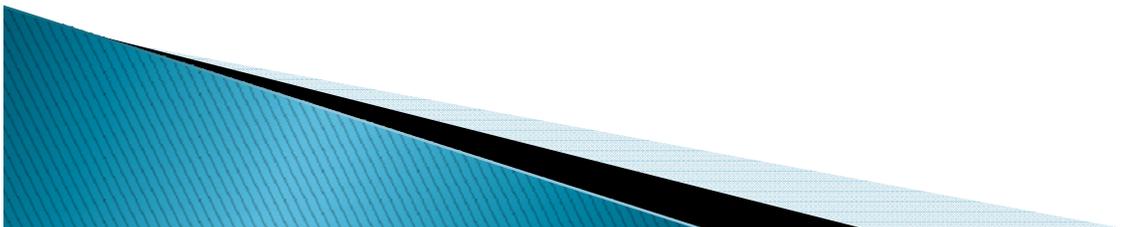
5 C.F.R. § 1201.71, et seq.
Principles, Practices and Pitfalls



Section 1201.71

Purpose

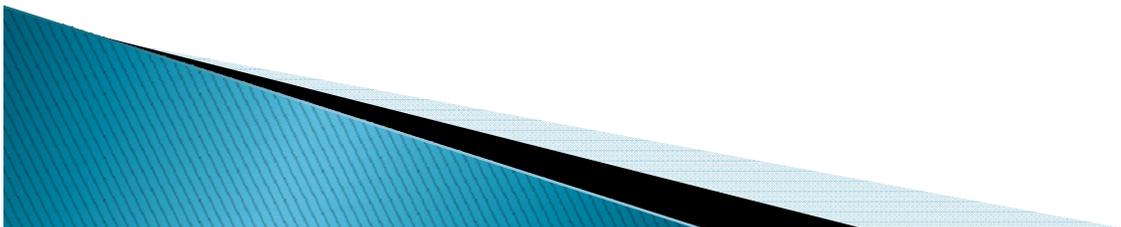
- ▶ Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties.
- ▶ Discovery rules will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case.



Section 1201.72

Scope

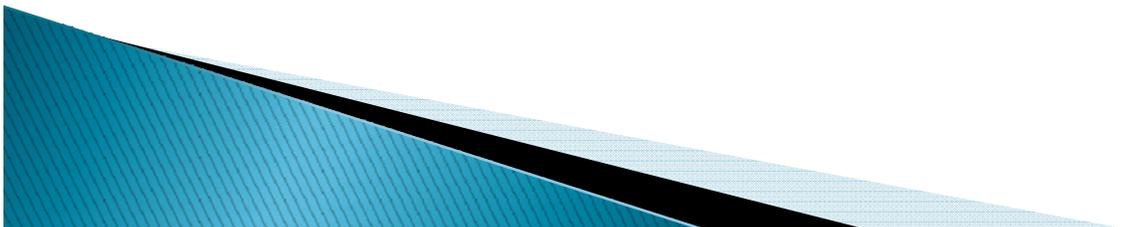
- Discovery is allowed for relevant information, which includes information that appears reasonably calculated to lead to the discovery of admissible evidence.
- The Federal Rules of Civil Procedure (FRCP) are a general guide for discovery in Board litigation, but are not strictly binding.
- Discovery covers any nonprivileged matter that is relevant



Section 1201.72

Scope

- ▶ Discovery requests directed to nonparties are limited to information directly material to the issues in the appeal
- ▶ Judges may limit discovery normally allowed where it is duplicative, obtainable from another source that is more convenient or less expensive, or the burden or expense of the discovery outweighs its likely benefit



Section 1201.73

Procedures

- Parties must serve their initial discovery requests within 30 days after the date of issuance of the acknowledgement order and respond to a request within 20 days.
- Discovery must be completed by the date set by the judge or, by the prehearing conference, if no date is set.
- Before filing a motion to compel the moving party shall discuss the anticipated motion with the opposing party and they must try to reach a compromise or at least narrow the dispute



Section 1201.74

Motions to Compel

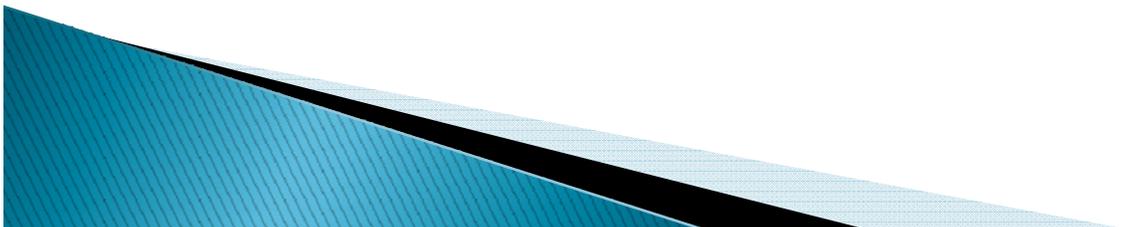
- A motion to compel must be filed within 10 days of the date the answer, or within 10 days after the time for response has expired.
- Opposition to a motion to compel must be filed within 10 days of the date of service of the motion.
- Judges may deny a motion to compel if the movant fails to comply with the requirements of 5 CFR 1201.73(c)(1) (meet and confer) and (d)(3) (10 day filing period).



Section 1201.81

Subpoenas

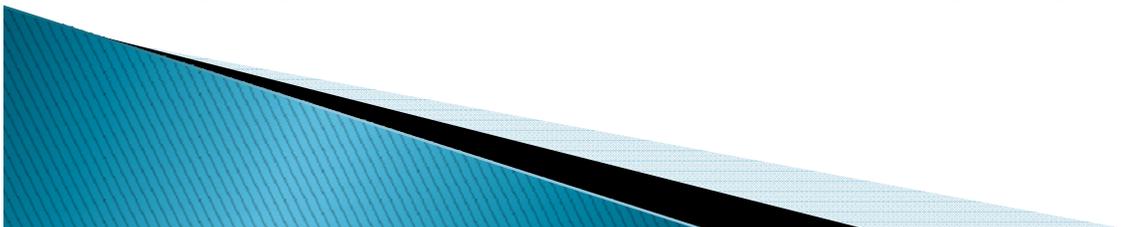
- Under 5 U.S.C. § 1204(b)(2)(A) a judge may issue a subpoena requiring the attendance and testimony of any individual regardless of location and for the production of documentary or other evidence from any place in the United States.
- A subpoena request must show that the evidence sought is directly material to the issues in the appeal.



Sections 1201.83–84

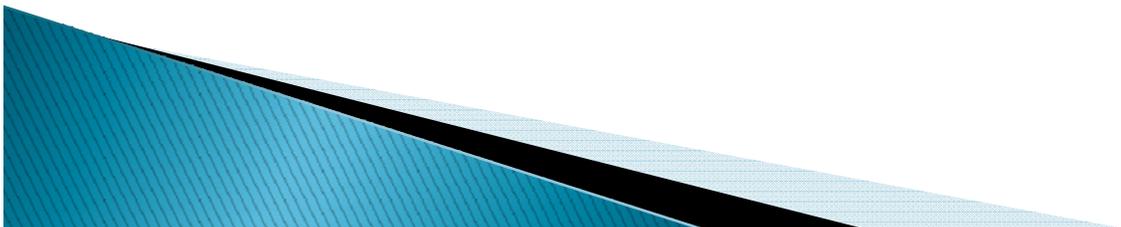
Serving Subpoenas

- The means prescribed by applicable state law are sufficient. The party who requested the subpoena is responsible for seeing it is duly served. If the subpoena is for a person outside the U.S., look to the F.R.C.P. governing service of a subpoena in a foreign country.
- The person serving the subpoena must certify how it was served and that Federal witness fees were offered or paid at the time. Under 28 U.S.C. § 1821, it is \$40 per day plus travel and subsistence expenses in the same amounts payable to a federal employee on official travel.



Discovery Cases

- *Deas v. Dep't of Transp.*, 108 M.S.P.R. 637 (2008).
- The administrative judge ruled the appellant had not made sufficient allegations on discrimination to warrant a hearing on that issue, denied discovery on that issue, and ultimately dismissed the appeal as moot after the agency rescinded the action.
- Held: The record was not developed enough to determine if the action was moot, and the denial of discovery on the discrimination claim was part of the problem.
- “[T]he appellant has yet to allege facts that, if true, would support an inference that the agency’s action of placing him on enforced leave was a pretext for race discrimination. Nevertheless, an appellant is entitled to engage in discovery in attempting to obtain relevant information in support of his discrimination claim. Relevant information includes information that appears reasonably calculated to lead to the discovery of admissible evidence. 5 C.F.R. § 1201.72(a). What constitutes relevant material in discovery is to be liberally interpreted[.]”



Discovery Cases

- *Figueroa v. Dep't of Homeland Security*, 119 M.S.P.R. 422 (2013).
 - The appellant, not a supervisor, alleged he had been subject to disparate penalties and, in discovery, sought “All proposal notices, decision notices, settlement agreements, arbitration awards, last chance agreements or firm choice agreements relating to disciplinary and/or adverse action cases within the Agency nationwide for the past five years relating to any allegation of “Falsification” and/or similar allegations as those in this issue in this appeal for any Agency employee, including supervisors.”
 - The agency objected on the grounds the request was overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.
 - The administrative judge ruled that the appellant was not entitled to discovery regarding supervisors because they were not valid comparators and thus information on them was not reasonably calculated to lead to the discovery of admissible evidence.
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Discovery Cases

- ▶ *Figueroa v. Dep't of Homeland Security*, 119 M.S.P.R. 422 (2013).
- ▶ Held: The administrative judge abused his discretion in denying the motion to compel on the grounds that materials relating to supervisory employees did not appear reasonably calculated to lead to the discovery of admissible evidence.
- ▶ “The scope of discovery is broad.”
- ▶ “What constitutes relevant information in discovery is to be liberally interpreted, and uncertainty should be resolved in favor of the movant absent any undue delay or hardship caused by such request.”
- ▶ Neither the administrative judge nor the full Board addressed the agency’s objections of undue burden or overbreadth.

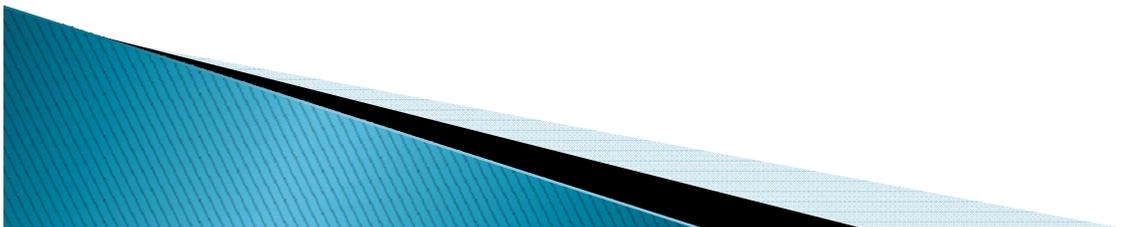


Discovery Cases

- ▶ *Stiles v. Dep't of Homeland Security*, 116 M.S.P.R. 223 (2011).
- ▶ The appellant requested information relating to several positions for which he was not selected, and his request was granted. The administrative judge dismissed without prejudice to allow the parties time to complete the remaining discovery.
- ▶ During that period, the agency did not produce everything the appellant requested. Upon refiling, the appellant did not file a motion to compel or for sanctions for approximately three months, shortly before the hearing. The administrative judge denied the motion.
- ▶ Held: The appellant's delay in filing warranted denial of the motion.
 - ▶ "To the extent that he was dissatisfied with the documents the agency provided, it was incumbent upon him to bring the

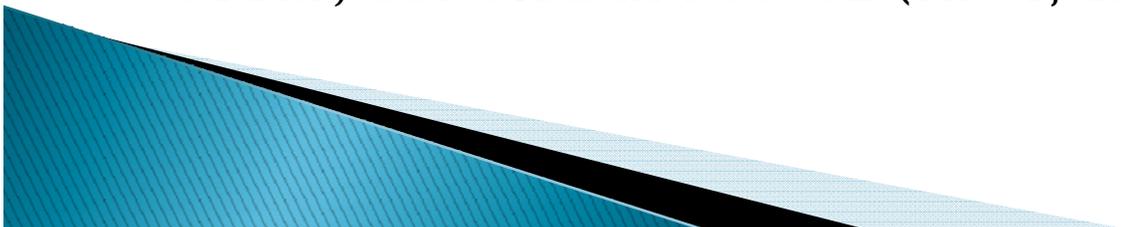
Particular Issues

- ▶ “It is well-settled that a party asserting an evidentiary privilege has the burden of establishing it.” *Gubino v. Department of Transportation*, 85 M.S.P.R. 518, 526 (2000). *See also N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011) (“A party asserting privilege has the burden of demonstrating its applicability”).



The Attorney–Client Privilege

- ▶ “The privilege only applies if: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” *Berkner v. Commerce*, 116 M.S.P.R. 277 (2011) (citing *US v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950)). *See also Interbake Foods*, 637 F.3d at 501–02 (same, citing *United Shoe*).



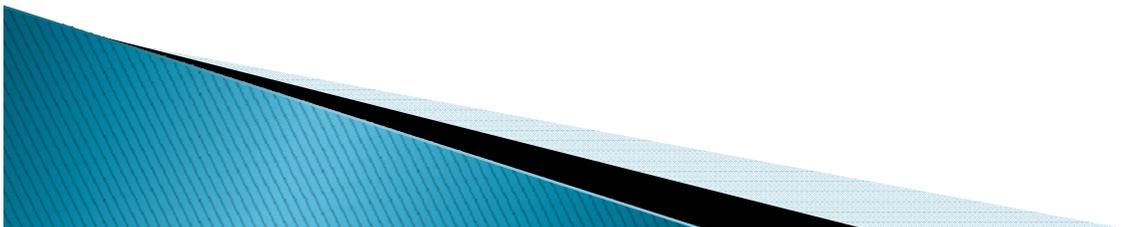
The Work Product Privilege

- ▶ “To establish work product protection, a party must show that (1) the materials sought to be protected are documents or tangible things; (2) they were prepared in anticipation of litigation or for trial; and (3) they were prepared by or for a party or a representative of that party.” *Williams v. Sprint/United Mgmt. Co.*, 245 F.R.D. 660, 668 (D.Kan. 2007). *See also In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1301 (Fed. Cir. 2006) (“Unlike the attorney–client privilege, which protects all communication whether written or oral, work–product immunity protects documents and tangible things, such as memorandums, letters, and e–mails”).
- ▶ “The protection afforded to work product is not absolute. Discovery of such materials may still be obtained by ‘a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent by other means.’ Fed. R. Civ. P. 26(b)(3).” *In Re Subpoena Addressed to the Office of Special Counsel*, 18 M.S.P.R. 454, 459 (1983).



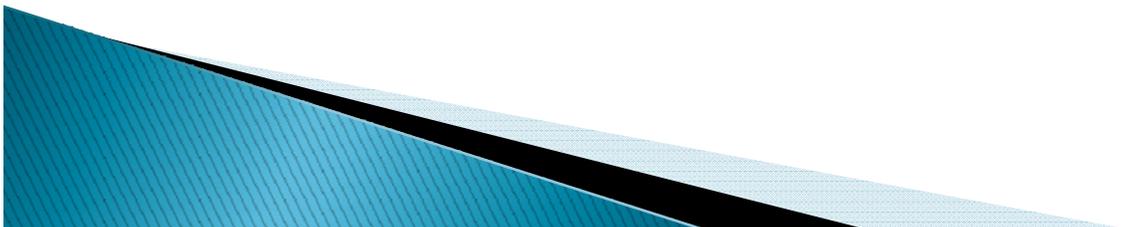
The Privacy Act of 1974 – 5 U.S.C. § 552a

- ▶ “A party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards.” *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987). *See also Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) (holding the Privacy Act does not create an evidentiary privilege and materials covered by it are discoverable); *Johnson v. Folino*, 528 F.Supp. 2d 548, 552 (E.D. Pa. 2007) (same, citing *id.*).



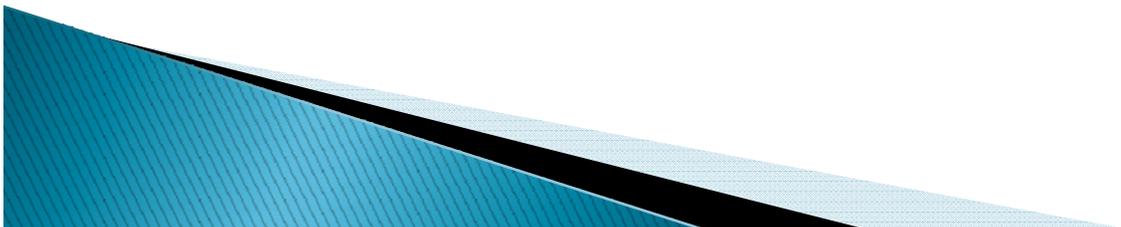
Eaks v. Department of Justice, 18 M.S.P.R. 328 (1983) Privacy Act

- ▶ Where the agency refused to produce information in discovery citing the Privacy Act, the Board held the Act:
- ▶ “forbids agencies that maintain records about individuals from disclosing the information ‘to any person, or to another agency’ without the consent of the individual to whom it pertains. This prohibition on disclosure to third parties, however, applies only to records contained within a ‘system of records’ maintained by the agency. To be recognized as being within a ‘system of records’ for the purpose of the Privacy Act, the records must be retrievable by the individual's name or other identifying particular. Absent inclusion of the records in a system of records, the assertion of Privacy Act protection is groundless. Therefore, prior to the Board's recognition of an agency's Privacy Act claim of protection, the agency has the burden of identifying the existence of the respective system of records.”



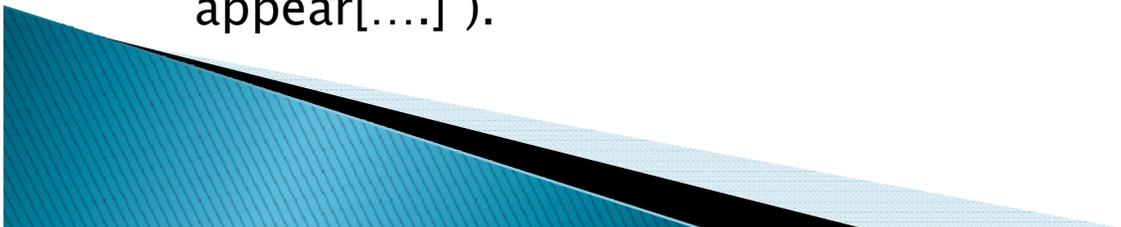
Particular Issues

- ▶ *Eaks v. Department of Justice*, 18 M.S.P.R. 328 (1983) (Privacy Act).
- ▶ “In the instant case, the agency has not proven that the records at issue were kept within a ‘system of records’ under the Privacy Act. It has offered nothing more in support of its resistance to discovery than the conclusory assertion that the Privacy Act prohibits their production. The agency has not shown that the inmate medical files are maintained within a ‘system of records’ for the purpose of the Privacy Act nor has it identified the respective system. Therefore, the agency's defense that the Privacy Act prohibits its disclosure of the inmate records is not established.”



The Privacy Act of 1974 – 5 U.S.C. § 552a

- ▶ The Privacy Act does not bar disclosure of covered information if it is done “for a routine use.” 5 U.S.C. § 552a(b)(3).
- ▶ Many of the records which would typically be sought in a Board appeal (personnel records) are contained in the system of records OPM–GOVT–1, and OPM’s routine use exception states , “These records and information in these records may be used [...] To disclose information to another Federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a Federal agency, when the Government is a party to the judicial or administrative proceeding. ” 77 Fed. Reg. 73694 (Dec. 11, 2012).
- ▶ Many agencies have their own published routine use exceptions which allow for production to the Board. *See, e.g.*, 50 Fed. Reg. 45882 (Nov. 4, 1985) (SBA) (“It shall be a routine use of records maintained by this agency to disclose them in a proceeding before a court or adjudicative body before which the agency is authorized to appear[.....]”).



The Law Enforcement Privilege

- ▶ “The law enforcement evidentiary privilege protects investigative files. [***] Where, as in the instant case, law enforcement evidentiary privilege relates to evidence given by informers, evidence which would tend to reveal law enforcement investigative techniques or sources, and intragovernmental memoranda containing policy-making opinions or recommendations, the privilege claimed is qualified rather than absolute. Such a qualified privilege requires the balancing of conflicting interests and the examination of the files *in camera* to determine the validity of the asserted privilege.” *Beamon v. Dep't of Labor*, 35 M.S.P.R. 15, 20–21 (1987).
- ▶ “To assert a claim of law–enforcement evidentiary privilege, the head of an agency must submit an affidavit setting forth a formal claim of the privilege after personally considering the documents for which the privilege is claimed. In such affidavit, the head of the agency must specifically designate and describe the documents for which the privilege is claimed and state the specific reasons for preserving their confidentiality.” *Id.*



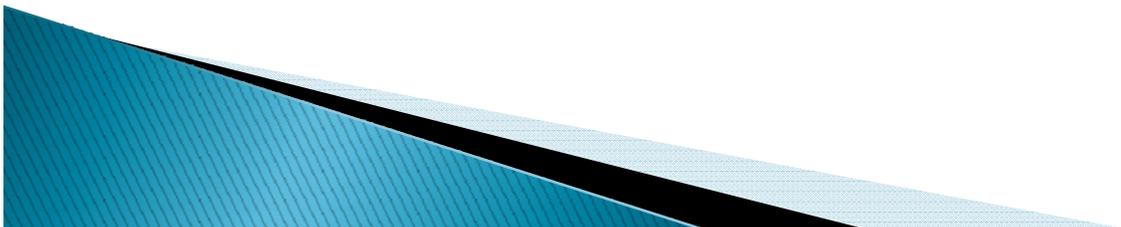
The Deliberative Process Privilege

- ▶ “The ‘deliberative process’ privilege is one of the traditional evidentiary privileges available to the government in civil litigation. It is designed to protect ‘the consultive functions of government by maintaining the confidentiality of advisory opinions, recommendations and deliberations, which comprise the process by which governmental decisions and processes are formulated.’” *Vogel v. Justice*, 9 M.S.P.R. 382, 386–87 (1982). It is a qualified privilege requiring in camera inspection. *Id.*
 - ▶ “[I]f the plaintiff’s cause of action is directed at the government’s intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination.” *In Re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), *aff’d as modified*, 156 F.3d 1279 (D.C. Cir. 1998); *Burka v. New York City Transit Auth.*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986) (“Where the decisionmaking process itself is the subject of the litigation, the deliberative privilege may not disclosure of critical information”).
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Mixed Case Appeal



- ▶ An appeal filed with the MSPB alleging an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information.
- ▶ An employee may file a mixed case complaint with the agency or may file a mixed case appeal directly with MSPB, but not both.



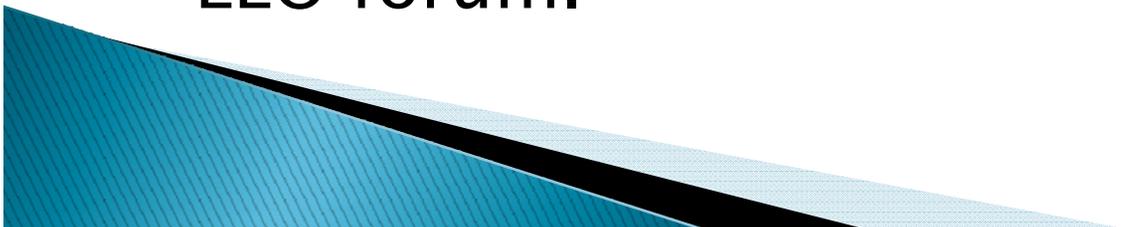
Lethridge v. USPS, 99 M.S.P.R. 675 (2005)

- ▶ While the MSPB case was pending, the EEOC Judge found the appellant was denied a reasonable accommodation but dismissed the proposed removal claim as “inextricably intertwined” with the removal action at MSPB.
- Commission vacated the EEOC Judge’s decision. Ordered all the claims to the MSPB.
- The Board disagreed.



MSPB Jurisdiction is Limited

- Applicable statutes limit the Board's jurisdiction to removals, not proposed removals.
- The Board will not hear matters outside its jurisdiction that are alleged to be inextricably intertwined.
- Claims leading up to an adverse action (hostile work environment, performance ratings, performance improvement plans, details, etc.), will proceed separately in the EEO forum.



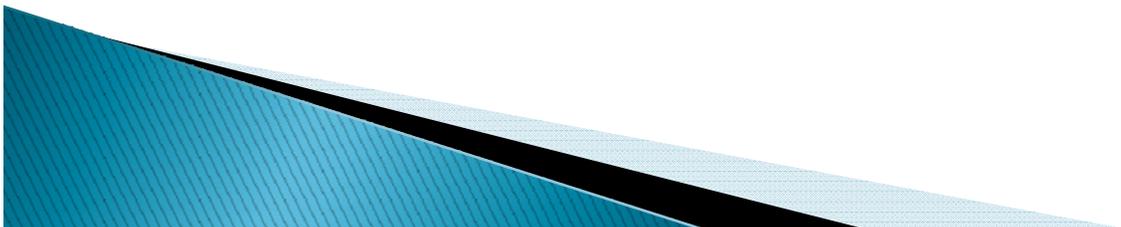
Election Process at MSPB

- Agency decision letter must notify employee of right to file MSPB appeal or EEO complaint. 5 C.F.R. § 1201.21.
- When an employee is subject to an appealable action, he or she may file a timely Board appeal within 30 days, or
- If the employee has filed a timely formal EEO complaint, a Board appeal must be filed within 30 days of the final agency decision or if there has been no decision, anytime after 120 days. 5 C.F.R. § 1201.154(b).



Formal EEO Complaint Filed First

- The MSPB Appeal Form and the agency response file should address whether the appellant has first filed a formal EEO complaint on the same matter before MSPB.
- If so, the agency should file a motion to dismiss the MSPB appeal pending exhaustion of the EEO process. 5 C.F.R. § 1201.154(b). The dismissal will be without prejudice to the appellant filing a new MSPB appeal.



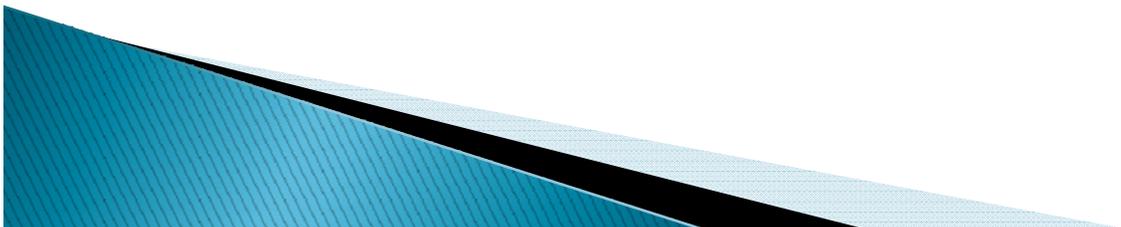
Constructive Actions

- Resignations and retirements are presumed to be voluntary. *See Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987).
- MSPB has authority to decide discrimination only if there is jurisdiction.
- The appellant has the burden to make a nonfrivolous allegation that could establish jurisdiction (i.e., that the resignation or retirement was involuntary) before the AJ will grant a jurisdictional hearing.



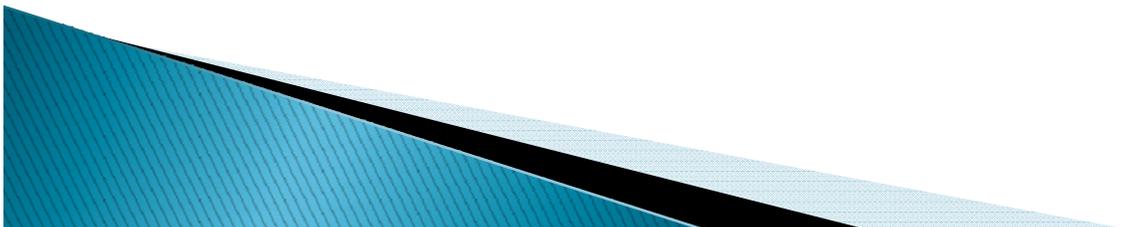
Garcia v. DHS, 437 F.3d 1322 (Fed. Cir. 2006)

- Most resignations and retirements are not constructive removals.
- In constructive actions, jurisdiction is usually determined by involuntariness. AJ will only consider discrimination evidence as background and for how it relates to involuntariness and jurisdiction.
- Only if the appellant is successful in showing jurisdiction after a jurisdictional hearing, will the AJ decide the discrimination issue.



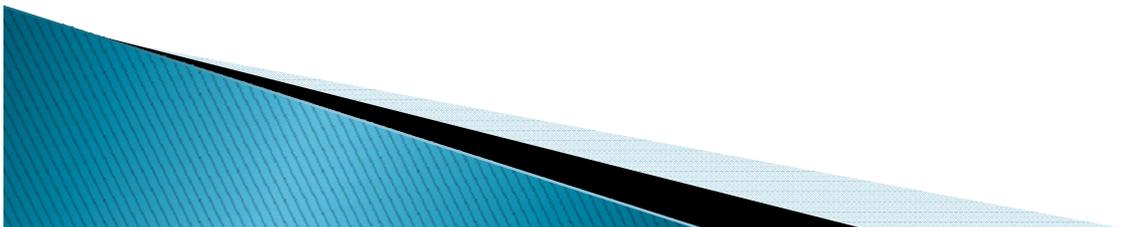
29 C.F.R. § 1614.302(c)(2)(ii)

- When the agency or MSPB Judge questions Board jurisdiction, the agency shall hold the mixed case complaint in abeyance until the MSPB Judge rules on jurisdiction and notify the appellant.
- All time limits are tolled.
- If the Board finds jurisdiction, the complaint is dismissed. If no jurisdiction, the agency recommences processing as a non-mixed case complaint.



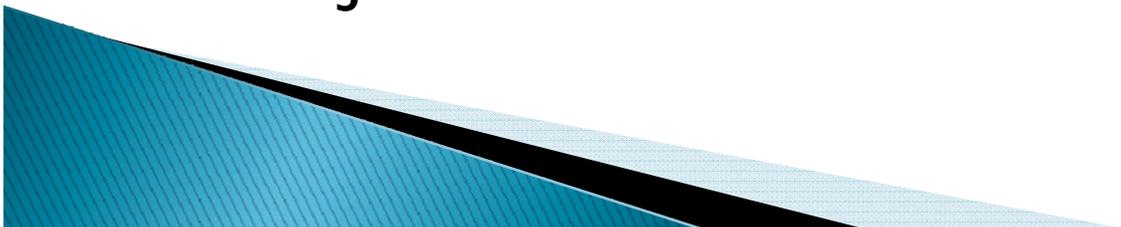
Blount v. Napolitano, 0720070010 (2009).

- ▶ Employee filed an EEO complaint alleging that after his stroke, he was charged AWOL; subjected to a hostile work environment and the agency did not respond to his request for accommodation. He filed for disability retirement.
- ▶ Agency argued that the EEOC lacked jurisdiction because the matter was a mixed case complaint of involuntary disability retirement.
- ▶ The EEOC Judge found jurisdiction on the basis that the constructive discharge was inextricably intertwined with the accommodation issue.



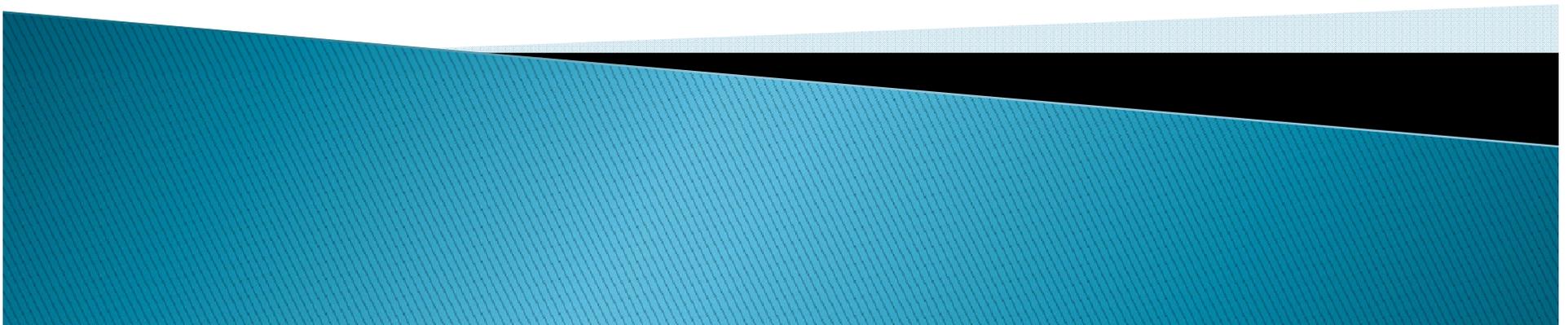
A Direct Consequence of Discrimination

- ▶ The Commission held that the “AJ correctly determined that the constructive discharge claim is inextricably intertwined in the EEO process.”
- ▶ The more appropriate characterization of the issue was whether the constructive discharge was a direct consequence of the lack of accommodation.
- ▶ If so, the case is NOT MIXED. Commission has jurisdiction.



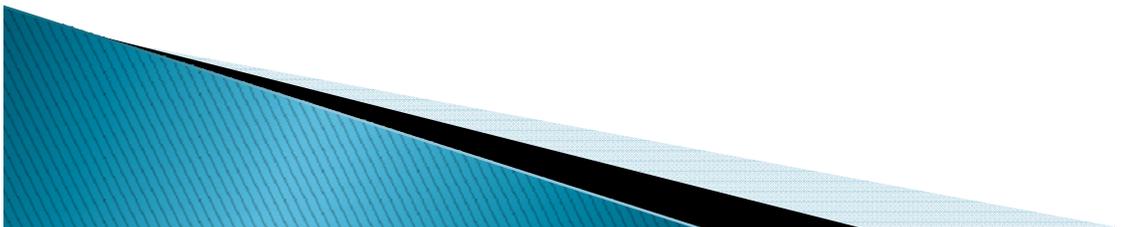
THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012

Congress Makes Some Clarifications, Changes
and Additions
Selected Highlights



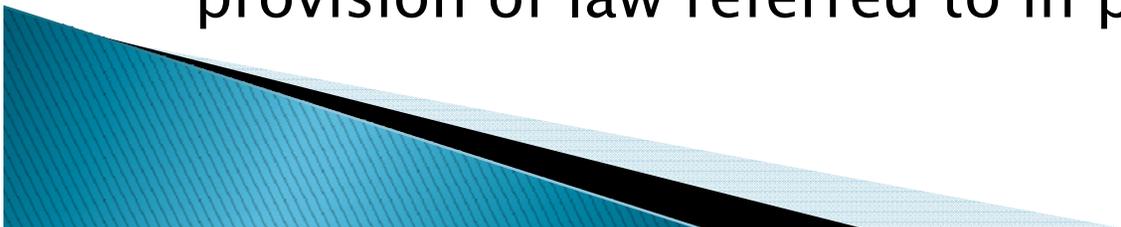
The WPEA

- The Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112–119, 126 Stat. 1465, was enacted on November 27, 2012 and became effective on December 27, 2012.



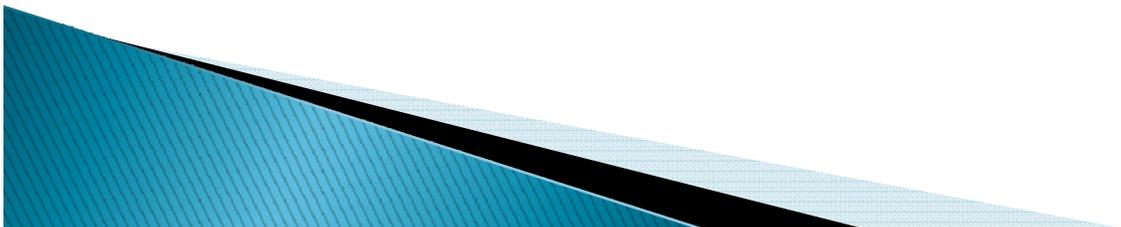
The WPEA Additions

- 5 U.S.C. § 2304 adds whistleblower protections to the entire TSA.
- (a) In General—Notwithstanding any other provision of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—
 - (1) the provisions of section 2302(b)(1), (8), and (9);
 - (2) any provision of law implementing section 2302(b)(1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and
 - (3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).



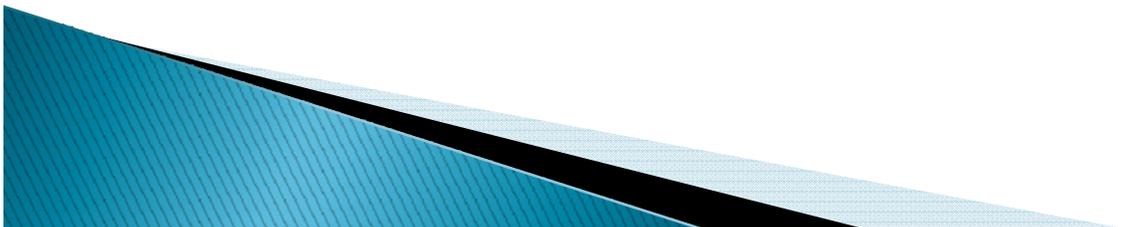
The WPEA Additions

- Adds to 5 U.S.C § 2302(a)(2) that a “disclosure” can be a formal or informal communication or transmission.
- Communications concerning policy decisions may constitute protected disclosures if the employee or applicant providing the disclosure reasonably believes that the disclosure evidences (i) any violation of any law, rule, or regulation; or(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
- The implementation or enforcement of any nondisclosure policy, form, or agreement is a “personnel action.”



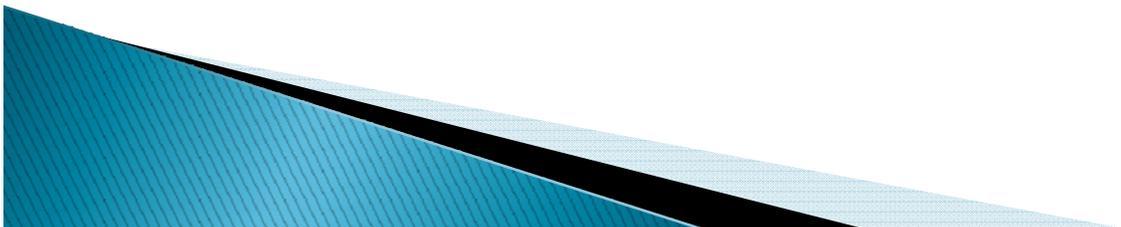
The WPEA Additions

- ▶ Adds to Section 2302(a)(2)(A) that any nondisclosure policy, form or agreement must contain a statement which advises that the nondisclosure policy, form or agreement does not supersede, conflict with or alter the employee's rights to whistleblower protections. Failure to do so is a prohibited personnel practice.



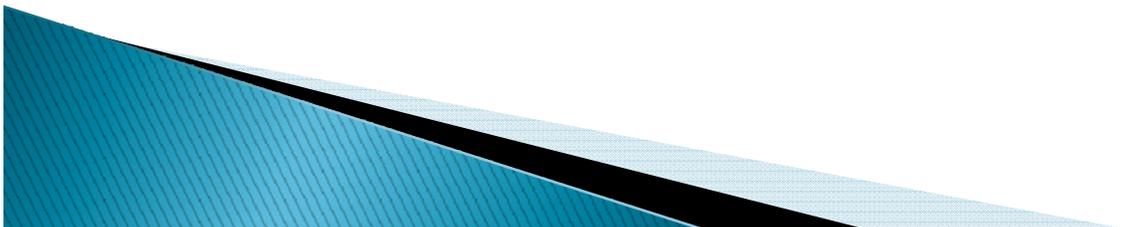
The WPEA Additions

- Adds to Sections 1214 and 1221 of title 5 to provide that an employee may recover reasonable fees, costs, or damages incurred due to an agency investigation that was conducted in retaliation for a protected disclosure.



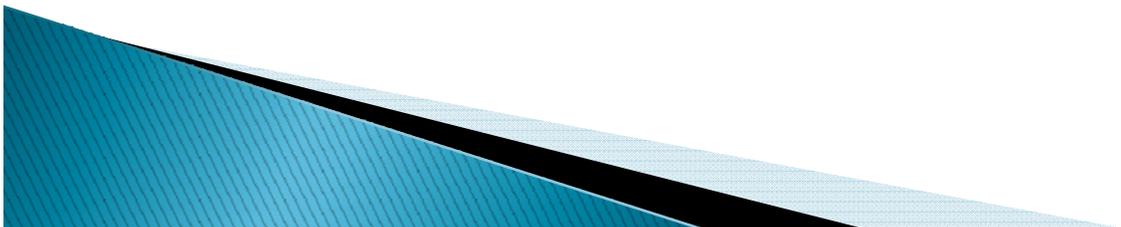
The WPEA Additions

- ▶ Adds compensatory damages (including interest, reasonable expert witness fees, and costs) under 1214(g)(2) and 1221(g)(1)(A)(ii) for a proven violation.
- ▶ Does not set an express cap on damages.



The WPEA Additions

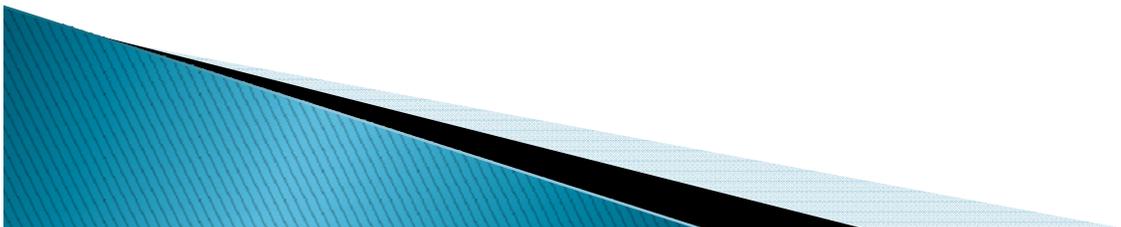
- Adds to 5 U.S.C. § 1221 that an Individual Right of Action (IRA) Appeal may now include prohibited personnel practices found at § 2302(b)(9)(A)(i), (B), (C), or (D);
- (b)(9)(A)(i) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation— with regard to remedying a violation of paragraph (8);
- (b)(9)(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
- (b)(9)(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel;
- (b)(9)(D) refusing to obey an order that would require the individual to violate a law.



The WPEA Changes

- Amends Section 1215(a)(3) of title 5 to authorize the Board to impose a combination of disciplinary actions on an employee –

“if the Board finds that the protected activity was a significant motivating factor, even if other factors also motivated the decision, for the employee’s decision to take, fail to take, or threaten to take or fail to take a personnel action, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.”



The WPEA Changes

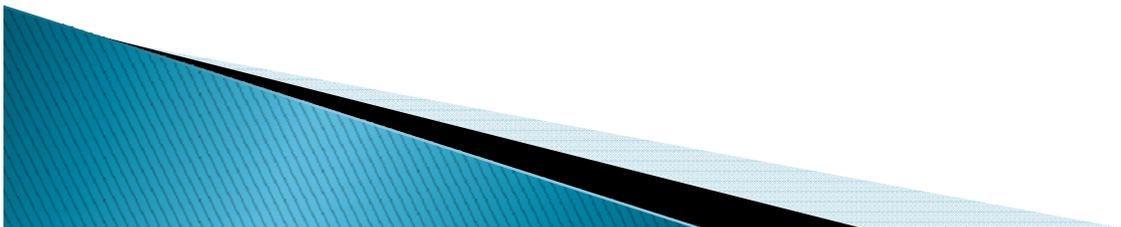
- Amends 5 U.S.C. § 7703(b) to provide that for two years beginning on the effective date of the Act, a petition to review a final order of the Board that challenges the disposition of whistleblower allegations can be filed in any court of appeals of competent jurisdiction.



WPEA Clarifications

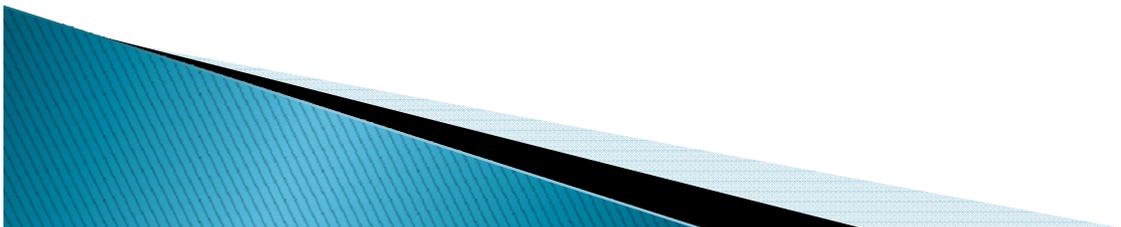
- The preamble to the WPEA states the Act is to:

“amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in non-disclosure policies, forms and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and other purposes.”



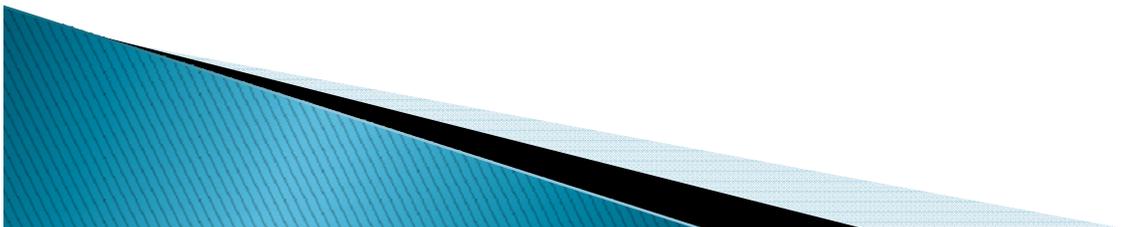
WPEA Clarifications

In *Huffman v. Office of Personnel Management*, 263 F.3d 1341 (Fed. Cir. 2001), the U.S. Court of Appeals for the Federal Circuit held that a disclosure made as part of an employee's normal duties, and through normal channels, e.g., to an immediate supervisor, was not protected under the WPA. It also held a disclosure made to the alleged wrongdoer is not protected.



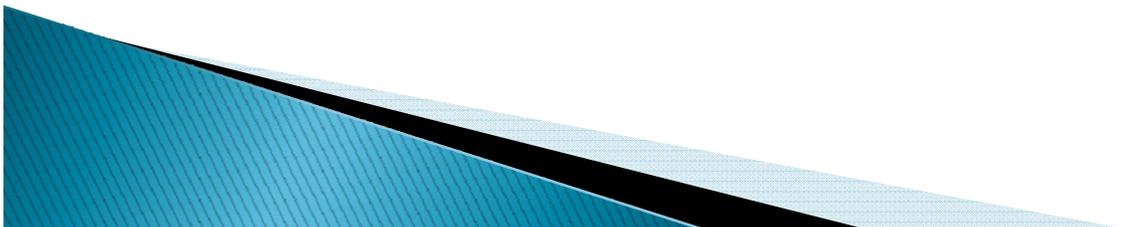
WPEA Clarifications

- 5 U.S.C. § 2302(f)(1) was amended by adding at the end that a disclosure will not be excluded from protection because
- (A) it was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be an employee who has authority to take, direct others to take, recommend, or approve any personnel action
- (B) the disclosure revealed information that had been previously disclosed;
- (C) of the employee's or applicant's motive for making the disclosure;
- (D) the disclosure was not made in writing.
- (E) the disclosure was made while the employee was off duty;
- (F) of the amount of time which has passed since the occurrence of the events described in the disclosure; or
- (f)(2) the disclosure was made during the normal course of the employee's duties.



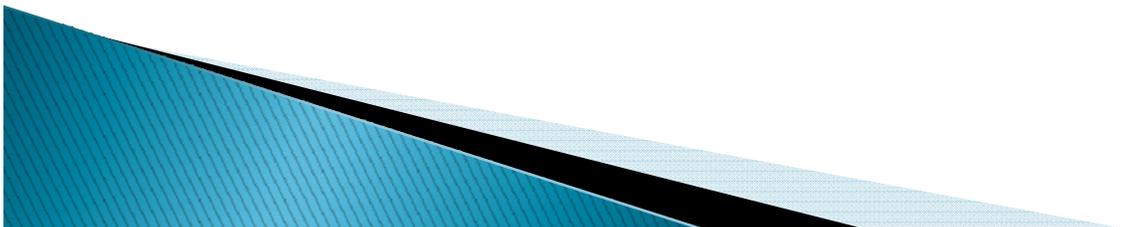
WPEA Clarifications

- ▶ In *Day v. Dep't of Homeland Security*, 2013 MSPB 49 (Jun. 26, 2013) the Board held that the section of the WPEA, Section 101, which overruled *Huffman* and other decisions was not a change to settled law, but merely a clarification, and thus would be applied to currently pending cases, even if they arose before enactment of the WPEA.

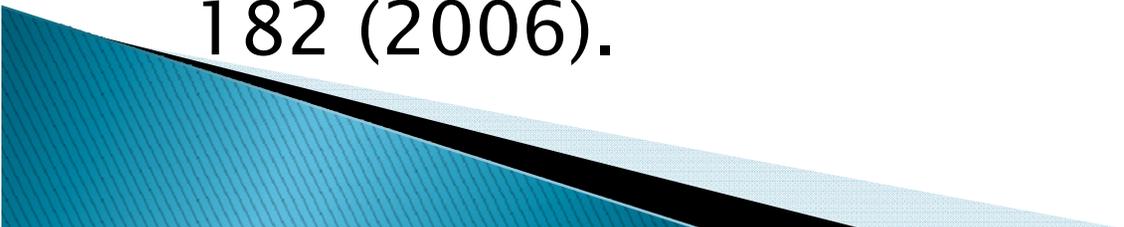


WPEA Clarifications

- In *King v. Dep't of the Air Force*, 2013 MSPB 62 (Aug. 14, 2013), the Board held that the new compensatory damages provision, Section 107(b), could not be applied to cases that arose before the Act's effective date.



Summary Judgment – No Authority

- ▶ When the Board has jurisdiction over an adverse action, the statutory right to a hearing bars summary judgment proceedings. 5 U.S.C. § 7701(a)(1).
 - ▶ The appellant has no right to a hearing on discrimination alone. If the agency cancels the adverse action and the only remaining issue is discrimination, a hearing is not required if there is no genuine dispute of material fact. *Redd v. USPS*, 101 M.S.P.R. 182 (2006).
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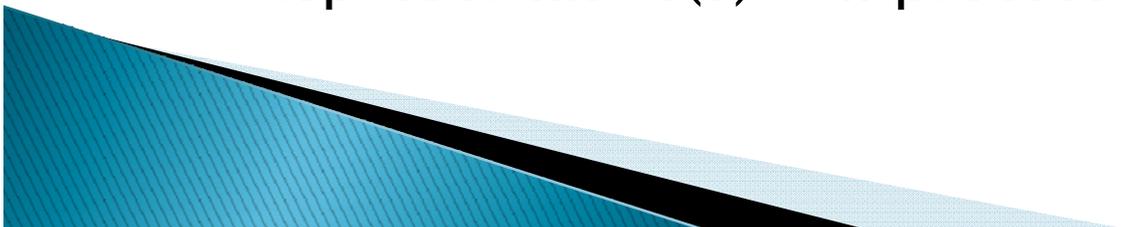
Settlement and Mediation Program

- ▶ The AJ will hold several telephone conferences to discuss settlement with the parties. The Board encourages settlement agreements. AJ may assign a settlement judge.
 - ▶ If the AJ has not made a finding of jurisdiction, the settlement agreement is not enforceable at MSPB.
 - ▶ Mediation Appeals Program (MAP) – Both parties must agree to mediate and voluntarily sign an agreement to mediation.
 - ▶ Mediation is confidential.
 - ▶ MSPB will assign an AJ or HQ attorney as a mediator.
 - ▶ Case processing is suspended during mediation.
- 

Class Appeals

5 C.F.R. § 1201.27

- ▶ One or more employees may file as representatives of a class.
- ▶ Cannot file electronically.
- ▶ Time frames are tolled for individual appeals.
- ▶ AJ must decide the motion in 30 days.
- ▶ AJ is guided, not controlled, by the Federal Rules of Civil Procedure.
- ▶ The AJ will hear the case as a class if:
 - Most fair and efficient.
 - Representative(s) will protect interests of all parties.



Thank You!

