

PRO BONO TRAINING

May 2013

AUDIO/VIDEO RECORDING

Transcribed for the
Merit Systems Protection Board

Transcript 1 of 1

By: Mary E. Dring

Burke Court Reporting, LLC

1 In addition, I wanted to let folks know that we
2 are recording the training, and the microphones are on, so
3 just keep that in mind. If people could put their phones
4 on vibrate or shut them off that would be great. And if
5 you have a question I think -- I'm not sure if the judges
6 would prefer us to ask during the presentation, or if it
7 would be preferred to wait at the end, but we can let you
8 both know -- let us know what you prefer.

9 We will also have this recording available to
10 folks afterwards. And I know a few of you -- a few
11 associates weren't able to attend today so you'll be able
12 to view it later.

13 I think that's about it, so Jonathan wants to
14 come up and say a few words.

15 MR. KESELENKO: Thanks. Good morning, Your
16 Honors down in Philadelphia.

17 My name is Jonathan Keselenko; I'm a partner
18 here at Foley, and we're very excited about this program
19 and the potential both to help the individuals who we
20 would be representing, and also the opportunity for
21 associates to be involved in this and get some good
22 experience, involved with regard to the representation.

23 I don't have much to add to what Rebecca said.
24 Again, we're delighted to have this program hopefully get
25 underway as quickly as possible after the training session

1 ends.

2 If any of you here in the room have questions
3 about this internal to Foley, ask Rebecca or I after the
4 training. If you have questions about the training
5 itself, I don't know if the judges would like us to hold
6 questions or what not, but I suspect it will be somewhat
7 an interactive process, and let's get going. Thanks.

8 JUDGE BOULDEN: Thank you.

9 Good morning everybody, we're really glad that
10 you're here today. I'm Bill Boulden, the Chief
11 Administrative Judge for the Northeastern Regional Office.
12 And with me is Judge Craig Berg, who's one of our great
13 judges here in Philadelphia, and also one of our trained
14 mediators, and I'll be talking a little bit more about our
15 settlement program, but we do try to settle as many cases
16 as we can, so Judge Berg is one of those special mediators
17 that we have.

18 We really appreciate Rebecca's efforts on this
19 project. And it began really with -- I think it's Phillip
20 Swain, one of your partners, was speaking with Deborah
21 Miron who's our Chief Judge for the MSPB and our Director
22 of Regional Operations. And they were sitting with one of
23 the judges from the Court of Appeals for the Federal
24 Circuit at a Federal Bar Association meeting, and they
25 began discussing how important it is for the MSPB to have

1 pro bono counsel for some of our appellants.

2 So I had some e-mail exchanges with Mr. Swain,
3 and then Rebecca and I talked and had some e-mail
4 exchanges and she's done a lot of work on this. And I
5 think a nice connection is that Claire Laporte, who I
6 understand is your pro bono partner, knows Deborah Miron
7 and also Jim Eisenmann, who's now our Executive Director,
8 who all have been involved together on committees with the
9 Federal Bar Association, so it's -- as I said it's a nice
10 connection there.

11 We'll definitely try to do this in an hour and a
12 half; there's a lot of material on the slides and we won't
13 go into detail on everything that's on the slides but
14 they're certainly for your information. And there's other
15 ways that you can get other information that I'll talk
16 about.

17 We would be happy to take questions any time if
18 there's something that's really burning that you don't
19 want to forget about. We'll be happy to have you ask the
20 question while we're speaking.

21 So I'm going to go first and talk about the
22 basic -- the history of the Board a little bit and what
23 the Board is and the kinds of cases that we hear. And
24 then after that, Judge Berg is going to talk in some more
25 detail about adverse actions, which are -- have been, I

1 guess historically, sort of, our bread and butter.
2 "Adverse actions," meaning basically a charge of
3 misconduct of some kind and then an action such as
4 termination following the misconduct.

5 So that's our plan. I'll try to do my portion
6 in about a half an hour, and I think Craig also will do
7 that, and then if we don't have questions in the meantime,
8 if there's questions at the end we'll be happy to address
9 those.

10 The MSPB -- there's a great deal of information
11 on our website, so just as an initial thing I would tell
12 you that you can go on the website, which as you can
13 imagine is just mpsb.gov, and there's lengthy discussions
14 about the Board's process, the kinds of cases that we
15 hear. There's actually a video presentation of a mock
16 hearing so that you can see what a hearing is like.

17 And there are also what we call "Information
18 Sheets" which have been written by judges throughout the
19 country. And they address specific areas of the law, so
20 that if you were presented with a particular kind of case,
21 you could just go on the website and look at this
22 information sheet and it would give you a two-page
23 synopsis of what that area of the law is about.

24 So if you -- I remember from law school, I'm
25 looking at the slide that says "Appeals System Required by

1 Law." I remember in law school the *Loudermill* case, which
2 is cited here for you as standing for the proposition of
3 "some kind of hearing", if you recall that from your law
4 school days.

5 This is the case that the Board often cites and
6 it essentially held that a tenured public employee had a
7 due process right. In other words, a property right
8 interest in their employment, which could not be denied
9 without "some kind of hearing", as the Supreme Court said
10 and so this is, sort of, the bedrock case for the Board's
11 jurisprudence.

12 Over time the statutes at 5 USC, in two of our
13 biggest areas the basic things that you would think about
14 is due process, notice, a right to respond, a written
15 decision, et cetera are actually in the statute itself.

16 In other areas it's really a question of the
17 Supreme Court and other case law that Judge Berg will be
18 talking to you about, but as we talk about the Board, it's
19 always a good idea to keep in mind this old *Loudermill*
20 case.

21 So I wanted to tell you a little bit about the
22 Merit Systems Protection Board itself. The Board is made
23 up of three presidential appointees who are in Washington,
24 no two -- no more than two of whom may be from the same
25 political party; so it's truly a non-partisan organization

1 in that sense.

2 Generally the chair, right now Susan Grundmann,
3 generally the chair would be the same party as the
4 President, but not necessarily, and the other two board
5 members may or may not, but as I said at least one is
6 going to be from another political party.

7 Most of the cases are heard first out in the
8 regions by Administrative Judges such as ourselves, and we
9 hold full trials, except for the absence of a jury; but
10 other than that it's really a full trial that you might
11 see in any other setting. Most of the offices have
12 courtrooms. Occasionally we might have a hearing in a
13 conference room if there's no courtroom available.

14 There's about -- there are eight regions or
15 field offices at the Board, and there's about 67 judges by
16 last count throughout the country, and the Administrative
17 Judges issue what are called "initial decisions" after the
18 hearing. But the initial decisions, unlike some agencies,
19 the initial decisions actually become final unless one
20 side or the other files some sort of appeal from our
21 decision, so many of the Administrative Judges decisions
22 actually become the decision of the Board.

23 Either side can file an appeal to the Board
24 members, who essentially, sort of -- you can think of as
25 the Appellate body of the MSPB, and usually that's a

1 record review. Sometimes the Board has held hearings.
2 This Board in particular has held a few hearings recently.

3 And/or it's not necessary to appeal to the
4 Board. Many parties do. But there's also an appeal to
5 the Federal Courts following a final board decision, as I
6 said, which might be the AJ's decision, or if there was an
7 appeal to the Board, it would be the Board's decision.

8 Our reviewing court is almost always the Court
9 of Appeals for the Federal Circuit, and I'll talk about
10 the exceptions in a few minutes, but the nice thing about
11 that for me, and I think for practitioners, is we really
12 have a very unified body of law in most cases. So that
13 it's not necessary to go around to different district
14 courts or different circuit courts of appeal to try to
15 figure out what the law is in that particular circuit, but
16 instead the Federal Circuit speaks, you know, for the
17 entire process.

18 The Board also is reported in a West reporter
19 service, the "Merit Systems Protection Reporter" service,
20 so probably not in your -- in Foley Hoag's library, but
21 certainly in major libraries and obviously available
22 online, as well. So I think that -- it makes it easy in
23 terms of figuring out what the law is.

24 I've shown you on the next slide just a quick
25 view of the regions in the country, and you'll see that

1 Boston is in the Northeastern region, obviously, and the
2 Northeastern region has seven judges, plus myself. And we
3 also have a field office in Manhattan with five -- four
4 judges and a Chief Judge for that field office.

5 We used to have an office in Boston years ago
6 but the case -- caseload had really dwindled to some
7 degree in Boston and it was decided that that office would
8 be abolished. So in terms of the cases that you might
9 have, you would most certainly be hearing -- having the
10 case heard by one of the judges here in the Philadelphia
11 office. We might travel up there in person or we might do
12 a hearing by video. In some very simple cases we might
13 even -- a retirement case, for example, it might be by
14 telephone.

15 So the next slide, I wanted to just give you a
16 little sense of where the Board fits in the legal
17 framework and the Board is actually a creature of
18 statutes, as most federal administrative agencies are. So
19 you see that it's set out in 5 USC section 1201 and we
20 have very extensive regulations in the Code of Federal
21 Regulations under part 1201 that talk about our
22 jurisdiction. Talk about our process in great detail.
23 Talk about the appeal process. So it's really -- if you
24 have an MSPB case you really need to get into the CFRs at
25 Part 1201.

1 Just to let you know, the Board just had a very
2 large overhaul of our regulations, and until the next set
3 of Federal Regulations are issues next year, you need to
4 look at the Federal Register version of the Board's
5 regulations to make sure that you have the latest version
6 for the rest of this year. And again, that can be found
7 on the Board's website without any problem. You can just
8 link right to the next regs.

9 So the Board's jurisdiction, as most federal
10 agencies are, being a creature of statute, we're a limited
11 jurisdiction organization. We only can hear cases that
12 are -- that we're designated to hear by statute or some
13 law or rule. So that means that there's a number of
14 hurdles that appellants have to meet in order to be able
15 to have their case heard before us, and I'll talk about
16 this a little bit further, but they have to be in the
17 right kind of agency.

18 They have to be -- have the right kind of status
19 as an employee. It has to be an action over which we can
20 hear. And it has to be filed timely. So you'll see that
21 there are a number of potential jurisdictional or
22 timeliness problems that would be presented to us with
23 appeals. And we try to alert the parties immediately upon
24 getting the appeal if we think there's some sort of an
25 issue that we might not have jurisdiction or the appeal's

1 not timely, and I'll talk about that a little bit more.

2 Just to let you know where the Board -- you'll
3 see the Board's seal goes back to 1883, and that's because
4 that's when the Pendleton Act was enacted. And you might
5 recall that President Garfield was assassinated by what
6 the history books call it -- was a "disappointed office
7 seeker." And because of that, Teddy Roosevelt decided
8 that we needed a statutory basis for a career federal
9 service, not one based on patronage, and one that was
10 based on merit. So that's where the "merit system" comes
11 from, going back to 1883.

12 Now, we were actually created as an entity in
13 the Civil Service Reform Act in 1978. I think this was
14 the Carter administration. The Civil Service Commission
15 had been around for a long time, but the Civil Service
16 Commission brought charges and basically was reviewing
17 itself in discipline actions, and it was deemed that that
18 was really a conflict. So through President Carter and
19 Congress, the Civil Service Commission was cut up into a
20 number of sub-agencies and I've listed them there for you,
21 because you may -- you may come in contact with these.
22 You may know some of them now. But if not, you'll come
23 into contact with these in terms of Board cases. So
24 obviously there's the Merit Systems Protection Board.

25 The old Civil Service Commission really now is

1 OPM, the Office of Personnel Management, which we get
2 involved with in retirement appeals. So I'll talk about
3 that a little bit more. But those are where our
4 retirement appeals come from.

5 There's the FLRA, which you may know about that
6 deals with union issues with federal employees.

7 And there's the Office of Special Counsel, OSC.
8 And this is an agency that is setup to investigate and
9 prosecute violations of Whistleblowing reprisal. And
10 there's a connection with the MSPB that I'll talk about in
11 a few minutes. But that's an organization that you'll
12 also run into.

13 And also don't forget about the EEOC, which
14 deals with discrimination. And there's a federal
15 component to the EEOC, and there's a crossover with us
16 because discrimination may be brought up as an affirmative
17 defense in MSPB cases.

18 In other words, if we have a removal action that
19 we have jurisdiction over, the employee often will raise
20 discrimination. So they'll say even if the Agency can
21 prove that I was AWOL, for example, the reason the Agency
22 brought this against me is because, you know, I'm over 40,
23 or you know, I'm in some other protected category. Or
24 perhaps disability discrimination was involved. So that's
25 called a mixed case because there's a mix of

1 discrimination and an action that we have jurisdiction
2 over and it gets complicated but all of these agencies you
3 may run into as you're dealing with Board cases.

4 So this next section that I want to talk about
5 is, sort of, my pitch for why it's so important for
6 counsel to be involved in our cases. But you should be
7 aware that there's actually no requirement for counsel,
8 and the Board has no authority to appoint counsel. So
9 it's not a criminal jurisdiction, obviously, so there's no
10 right to counsel and we can't go out and find counsel for
11 appellants.

12 They obviously can have counsel if they want.
13 And some appellants are represented by non-attorney
14 counsel. Some are represented by union representatives,
15 for example. Or in retirement cases they may even be
16 represented by a friend or a spouse. Or they'll be
17 proceeding pro se.

18 So the -- to me the issue with that is the
19 Board's law and this area has, since 1978, has become
20 increasingly complex and I'll talk about that in a few
21 minutes. But it has become complex. It's difficult, I
22 think, for non-attorneys to navigate the process and keep
23 up with the latest case law.

24 There's one area where counsel is required,
25 although again the Board can't appoint this counsel, but

1 you'll see the *French* case that's cited there on the
2 slide, and this is a disability retirement case where the
3 appellant missed the filing deadline and claimed that they
4 missed the filing deadline because they were mentally
5 incompetent. And the Federal Circuit rightfully obviously
6 said, well, we can't have mentally incompetent people
7 having to prove their own mental incompetence. Obviously,
8 that just seems impossible and unfair. So in that one
9 limited area appellants must have counsel and we try to
10 find counsel for them, but if we can't, then we just have
11 to dismiss the case without prejudice until they can
12 locate counsel or our efforts are successful.

13 So I talked about the complexity a little bit
14 and I just wanted to highlight that for you, because last
15 term kind of amazingly enough two MSPB cases ended up at
16 the Supreme Court. So -- and this had to do with the
17 rights to appeal beyond the Board's decision. So you'll
18 see that obviously this is something way beyond the can of
19 the average pro se appellant to figure out.

20 But the first case, this -- and this involved
21 mixed cases, this is why I wanted you to understand mixed
22 cases, the Board dismissed a mixed case as untimely filed.
23 And the exception for our usual jurisprudence of going to
24 the Federal Circuit Court of Appeals is that if there was
25 discrimination alleged in a mixed case the appellant can

1 choose to pursue the discrimination or must pursue the
2 discrimination if they won in court in the district court
3 of pertinent jurisdiction. The Federal Circuit Court of
4 Appeals does not deal with the discrimination aspect of
5 these cases.

6 So the Board dismissed the case as untimely.
7 And the Eighth Circuit said, well, this -- the Board
8 didn't get into the discrimination issue, so therefore the
9 proper place for this appeal is the Court of Appeals for
10 the Federal Circuit. And the Supreme Court disagreed and
11 said even if the Board didn't address the merits of the
12 discrimination claim, if discrimination was alleged it
13 belongs in the district court like any other mixed case
14 would belong.

15 In the other case, the *Elgin* case, it's actually
16 in the First Circuit and Mr. Elgin actually started his
17 appeal in our office here in Philadelphia. But he was
18 terminated when OPM discovered that he had not registered
19 for the draft, as required, to be a federal employee and
20 one of our judges had the case and decided that we
21 couldn't delve into OPM's discretion. OPM can waive that
22 requirement of registering for the draft under some
23 limited circumstances and they didn't waive it in that
24 case. So our judge dismissed the case saying that we
25 couldn't delve into that.

1 And then Mr. Elgin joined a group of appellants
2 or petitioners in the First Circuit who alleged that the
3 draft-- the registering for the draft was unconstitutional
4 because only men were required to register. And this then
5 went to the First Circuit Court of Appeals and they -- the
6 First Circuit said no, this can only go to the Court of
7 Appeals for the Federal Circuit; we can't look at this
8 because this was an MSPB matter.

9 So once again, this went all the way to the
10 Supreme Court. And the Supreme Court, in this instance,
11 decided that yes, the Court of Appeals for the Federal
12 Circuit is the only venue for this sort of case, despite
13 the unconstitutionality claim, and that obviously the --
14 as a Court of Appeals, the Federal Circuit has the power
15 to rule a statute unconstitutional, as any other federal
16 circuit court of appeals would. So that case was sent
17 back to the -- remanded to go to the Court of Appeals for
18 the Federal Circuit.

19 So you can see from those two cases how complex
20 this process is, requiring two Supreme Court decision just
21 last term, and there are others through the years that
22 have gone to the Supreme Court regarding the Board.

23 Not only are the cases complex and obviously the
24 cases are important personally to the appellants and
25 important to the agencies and important to the taxpayers,

1 et cetera, but there's also some -- sometimes some
2 national impact in what the Board does. And I just wanted
3 to highlight, for example, the Defense Of Marriage Act
4 cases.

5 Two of the appellants that were part of the
6 challenge to the constitutionality of DOMA in the First
7 Circuit, Mr. Harra and Mr. Koski actually were both
8 appellants also in this office before they joined that
9 case of the First Circuit. So obviously the Board does
10 not declare statutes unconstitutional and DOMA does seem,
11 on its face, to bar spousal annuity benefits, for example,
12 or other federal benefits for same sex married couples.
13 But obviously these cases are now all pending what the
14 Supreme Court does.

15 One of the important issues for Mr. Harra was a
16 question of timely notification to OPM of his post-
17 retirement marriage. And there's a timeliness requirement
18 for that, and of course the question is if you have a
19 post-retirement marriage recognized by Massachusetts but
20 not recognized by the federal government is there a
21 requirement to notify OPM of the marriage when the
22 marriage is not deemed to exist for federal purposes under
23 DOMA? So those issues and others I think will be
24 presented shortly when the Supreme Court issues its
25 decision.

1 And again, I think in Mr. Harra's case, if I'm
2 not mistaken, the First Circuit kicked him out of the, or
3 removed him from the, First Circuit case involving the
4 constitutionality of the Defense Of Marriage Act, holding
5 that since he had gone to the MSPB in this office, his
6 right of appeal for that entire case was with the Federal
7 Circuit Court of Appeals, including the constitutionality
8 issue, so he has a case, I think, pending there on hold
9 also.

10 But again, just to highlight some -- the
11 significance of some of these cases for you, you may have
12 also been hearing about the furlough issues with the
13 sequester, and so for those who really haven't heard of
14 the MSPB, all of a sudden we're in the national news again
15 because furloughed employees can appeal to the MSPB.

16 Actually, Rebecca and I talked about this and we
17 thought it probably wasn't something we wanted to hit
18 Foley Hoag with for this project, since it's kind of a
19 unique blip, bump in the road for us in terms of these
20 cases. And we're not exactly sure how they're all going
21 to trickle through the system. But I don't -- I don't
22 think their plan is to have you hear those cases, but just
23 to let you know this is the kind of thing that sometimes
24 gets national attention for us.

25 Flipping over to the next page, I just wanted to

1 highlight for you the notice that is going to go out to
2 pro se's who are from the Boston area when we get an
3 appeal. So you'll see Rebecca's there as the point of
4 contact and she'll be the gatekeeper for these cases.

5 What we are -- what we're going to do is include
6 this notice in every appeal that comes to us from the
7 Boston area where someone has not designated that they
8 have counsel when they file their appeal with us. And we
9 looked at the statistics over the last two years and it
10 looked like roughly 16 or so appellants from the Boston
11 area every year filed pro se with us. So we're not
12 anticipating a huge number of cases, but certainly still
13 very important for us.

14 And I guess I should note -- I meant to let you
15 know that the Board is trying to expand this pro bono
16 program nationwide in a number of different areas through
17 law schools and law firms and it's very near and dear to
18 our chair's heart, as well as Deborah Miron's. And so
19 we're really pleased to have Foley Hoag be part of that
20 national effort.

21 So let me just tell you a little bit about the
22 kinds of cases that you could expect to see in -- with
23 appellants that come before us. And as I was saying
24 before, the person needs to be the right employee, the
25 right agency, the right kind of action, and be timely.

1 So, sort of, the first two bullets there, the adverse
2 actions and the performance cases, those are really what
3 the MSPB was created for back in 1978.

4 The Civil Service Commission used to be able to
5 hear any kind of adverse action; a reprimand, a bad
6 performance appraisal, et cetera, something that might --
7 you might think of as fairly minor. And the Board was
8 created to hear just the big -- the big misconduct or
9 performance actions, so that meant someone who was fired
10 or demoted or suspended for 15 days or longer, and not
11 those other relatively minor kinds of actions. And also
12 to hear performance cases where someone could be fired or
13 demoted because of poor performance. So those are your
14 first two bullets there.

15 Those kinds of actions start with the Agency.
16 The Agency gives the employee notice, for example that,
17 you know, "We're charging you with having struck your
18 supervisor." The employee gets an opportunity to reply in
19 writing and/or in person. Then they get what we call the
20 decision letter. So there's a proposal notice, the reply,
21 a decision letter, and then after the decision letter is
22 issued they have to tell the employee "You can appeal to
23 the MSPB." At that point we get the case.

24 Now, the other -- the next two bullets are --
25 these are avenues of appeal that were added later to our

1 jurisprudence after the Civil Service Reform Act, and
2 they're really requests for correction action. They're
3 not initiated by the Agency. In other words, there's no
4 notice and an opportunity to reply. Instead, the employee
5 believes that there's been some sort of adverse personnel
6 action or a benefit of employment that they've been denied
7 and they're alleging that it's because they were a
8 whistleblower or because they're a veteran or because, you
9 know, they're currently in the reserves, and they bring
10 that to us. So it's a different -- as you see, the
11 posture of that case is different. It's not -- it's not
12 initiated by the Agency, it's initiated by the employee.
13 So that's what we mean.

14 The "IRA" is an Individual Right of Action. The
15 "VEOA" is a Veteran's Employment Opportunity Act case, and
16 that's an action brought in which the employee alleges
17 that their veteran's preference rights have been violated.
18 And "USERRA" is a mouthful that's the Uniformed Services
19 Employment and Reemployment Rights Act, and that's the
20 veteran's discrimination act; you probably should think
21 about it that way..

22 Now, the important thing with those kinds of
23 cases are particularly with the whistleblowers and the
24 veterans preference cases there is an exhaustion
25 requirement before the employee can come to us. There's

1 not an exhaustion requirement with USERRA cases. But in
2 the case of whistleblowers they have to go to the Office
3 of Special Counsel, this is the OSC that I was mentioning
4 to you before. They must try to get OSC to grant them
5 relief and if OSC does not grant them relief then they're
6 given a "Right to Sue" letter, if you will, to come to the
7 Board.

8 And the same in the VEOA context; the employees
9 must go to the Department of Labor and again request that
10 they investigate and grant them relief. If the Department
11 of Labor does not grant them relief then again they can
12 come to the Board.

13 And then then the third category of cases that
14 we hear are retirement cases and those cases require the
15 employee to have what we call a reconsideration letter
16 from the Office of Personnel Management. And those cases
17 can involve a request to retire on disability. There
18 might be a request to simply be allowed to retire. There
19 are disputes about who is entitled to annuity benefits.
20 Sometimes there's a family dispute because of who the
21 employee designated when they first came into the -- to
22 employment and they never changed it. So they might have
23 an old girlfriend or boyfriend, for example, and now the
24 family -- you know, the wife 30 years later obviously
25 wants to be the beneficiary. And there are overpayment

1 claims that we get from OPM or from people that usually
2 it's because they were granted disability and they got a
3 huge payment from Social Security Disability and they owe
4 a lot of money back to the federal government.

5 In any event, all of those retirement sorts of
6 cases, the way that process works is the employee will
7 have an initial decision from OPM that's adverse to them.
8 They request reconsideration. And OPM issues what we call
9 a reconsideration decision, and it's that letter that they
10 must have before they can come to the Board.

11 This is a category that we probably -- there's a
12 good likelihood that in many of those cases that the
13 appellant, especially if it's a spouse, for example, may
14 well meet your category for income. Many people in those
15 cases find themselves in really difficult financial
16 straits.

17 So let me -- I'm just looking at the time here.

18 JUDGE BERG: It's 20 of.

19 JUDGE BOULDEN: Okay. All right, so I'm -- I
20 can probably --

21 I'll finish up quickly then --

22 JUDGE BERG: Yeah.

23 JUDGE BOULDEN: -- because I don't want Craig
24 not to have a chance.

25 But I would just recommend if you get cases,

1 you've got to delve into what their specific employment
2 status is. The key document, you may have seen these or
3 you may not have, but there's an -- there's a form
4 called -- in the government there's always a form; it's an
5 SF-50 or an SF-52, Standard Form. And this is the
6 document that has all of the pertinent information about,
7 you know, someone's -- what the legal basis for their
8 appointment was, what retirement system they're in, what
9 their agency is, whether they have veterans preference or
10 not. There's a lot of important information there.
11 That's a good key to use when you're trying to figure out
12 exactly what the person's status is.

13 So let me talk about the process very quickly
14 from what you would see. When the appeal is filed with
15 us, we respond within two to three business days, which is
16 quick, I think, with an Acknowledgement Order. And the
17 Acknowledgment Order goes back to the employee or the
18 appellant and to the Agency. And if we've identified a
19 timeliness or jurisdiction issue, we'll highlight it in
20 the Acknowledgement Order, what the law is, why we think
21 there's an issue and it puts both sides on notice and
22 gives them a chance to respond quickly about that. So you
23 should look for that.

24 We often -- we usually have some sort of status
25 conference with the parties. There's full discovery under

1 the Board's rules, which can be very quick, and you should
2 take a look at those deadlines very carefully. We have a
3 pre-hearing conference, which is usually by telephone and
4 that's a very key stage in the process because any
5 defenses or issues or witnesses that are not identified by
6 the pre-hearing conference will almost always not be
7 allowed to be raised later, so that's a very important
8 part of the process. As I said we have hearings if the
9 appellant requested a hearing. A hearing's not required
10 and it's the appellant's right to have a hearing or not.

11 The initial decision is issued -- our very
12 strong goal is to issue the initial decision by the Judge
13 within 120 days after the appeal was filed. So you can
14 see that that's a very quick turnaround time. That
15 includes discovery, the entire hearing, the Administrative
16 Judge writing a very detailed decision, so it's a very
17 fast process.

18 There are -- there is a suspension program, if
19 the parties think they need more time, so a case can be
20 suspended. Sometimes cases are dismissed without
21 prejudice if there's a good reason to do that. So there
22 are some "escape hatches," if you will, from the 120 days,
23 but we issue at the regional level the great majority of
24 cases within 120 days.

25 So I guess the other thing I wanted to mention

1 is that the Federal Rules of Evidence are -- and the rules
2 with regard to discovery are instructive for us, they're
3 not required, so hearsay is technical admissible, although
4 its weight has to be carefully considered. So you will
5 not necessarily have the very, very strict rules that you
6 might have in Federal District Court for the Rules of
7 Evidence, but nevertheless, you know, we still all look to
8 those rules; the 404(b) exceptions, the hearsay, et
9 cetera, all those things. So I mean, you should expect --
10 you should expect something that looks like a very serious
11 hearing process if you get to the hearing stage.

12 The only other thing I wanted to mention, I
13 guess before I let Judge Berg start is we do encourage the
14 parties, although it's adversarial, we encourage voluntary
15 discovery and we encourage cooperation with regard to
16 motions. So it is possible to file a motion to compel
17 discovery but you'll see when the Agency responds to the
18 Acknowledgement Order that they will give you what they
19 consider to be the key documents in the case. So they
20 will turn over right away, within 20 days of the appeal,
21 you'll see the proposal notice, you'll see the appellant's
22 reply, you see the decision letter, you'll see the basic
23 evidence that they used; so those things come to you very
24 quickly.

25 In a retirement case OPM will turnover its --

1 the basis of its action very quickly. So you'll have all
2 those things.

3 Then we encourage voluntary discovery. We can
4 issue subpoenas for depositions, for court appearance if
5 necessary. We encourage the parties to work it out. We
6 don't -- you don't need to file your discovery with us;
7 it's a voluntary process until one party or the other
8 disputes what the other side did, and then obviously you
9 can file a motion to compel and we'll get involved.

10 With motion practice there -- you know, there's
11 often motions for maybe a delay of some kind. A motion to
12 compel, as I said. Maybe a motion to suspend. We ask the
13 parties to try to, again, at least talk to each other and
14 say, "Look, I'm going to file -- the appellant is very
15 ill," or "their spouse is very ill. We need -- we're
16 going to need some extra time. We're going to file a
17 motion to suspend." We ask both parties to just touch
18 base with the other side first and tell us whether the
19 other side objects. If the other side doesn't object then
20 it's probably a much easier matter for us to rule on. But
21 it's very helpful for us if in the motion we're told that
22 you've contacted the other side and the other side does or
23 does not object.

24 The -- I just wanted to mention quickly the
25 suspension or the settlement program. We do encourage

1 settlement. About roughly 50 percent I would say of the
2 cases nationwide settle that we -- that we have
3 jurisdiction over. You know, they're headed toward the
4 hearing process.

5 You can -- the adjudicating judge can discuss
6 settlement with you. The parties sometimes waive ex parte
7 communicates with the judge to encourage discussions. You
8 can seek a judge other than the adjudicating judge to talk
9 about settlement. Or you can go through the Mediation
10 Appeals Program, the MAP Program, which Judge Berg is one
11 of the mediators for, and this really takes the case
12 completely off of the adjudication docket and you'll have
13 an in-person mediation. I think the goal probably within
14 30 to 60 days and many cases settle through that program.
15 And it's been really, really an excellent settlement
16 program.

17 So don't be surprised if early on the judge gets the
18 parties together and says, "Where is this case settlement
19 wise?" And you know, maybe in the first status conference
20 the judge may be already talking about settlement.

21 I've included in the slides some of the, sort
22 of, common things that the parties settle for so that
23 might give you some ideas of what's possible. Sometimes
24 the appellant simply wants a "clean record" as we call it,
25 so they don't have a record of having been fired.

1 Sometimes it involves a lot of money if the Agency wants
2 the appellant to withdraw their discrimination claims, for
3 example, so we see sometimes a lot of money in these
4 cases. Sometimes there's a "Last Chance Settlement
5 Agreement" where the employee comes back to work with the
6 idea that if they get in trouble again that they can be
7 terminated without going back to the Board. So there's a
8 number of -- and there's other creative avenues that can
9 be pursued.

10 And just speaking of money quickly, the Board --
11 if an appellant is the prevailing party, both in our
12 regular jurisprudence and under the Whistleblower
13 Protection Act and in the veterans area, damages are
14 available, including many times full back pay with
15 interest, restoration of all benefits. And if a
16 discrimination or whistleblowing reprisal has been found,
17 there may be a follow-on proceeding for damages. So these
18 can involve -- there can be some real financial
19 consequences to these cases.

20 So that's really all -- I know that's quick and
21 I hope I didn't go through it too quickly, but there's a
22 lot of other information on the slides and as I said on
23 the Board's website. And again, we're really -- we're
24 hoping, I think, Rebecca can clarify this but I think
25 we're hoping to put the notice for Boston appellants in

1 acknowledgement orders within a couple of weeks here. So
2 hopefully we'll start getting some appellants shortly.

3 So thank you very much again for doing this and
4 for giving your time today.

5 JUDGE BERG: Okay, before I start I just want to
6 make -- because we can't really see what's on there,
7 does -- is this other slide show up yet or do I need to
8 give you a minute --

9 MS. CAZABON: (Inaudible) working on it so --

10 JUDGE BERG: Okay.

11 MS. CAZABON: Yeah, we're almost there. You
12 should go ahead; we'll get it up soon.

13 JUDGE BERG: Okay. Yeah, I'll just start and
14 then hopefully you'll be right behind me.

15 I also -- I want to reiterate what Judge Boulden
16 said, we really do appreciate you engaging in this
17 project. It's very helpful to us to have the appellants
18 represented. You know, our job is to make a good record
19 and to hopefully, you know, get the evidence we need to
20 make the right decision, and it's very helpful for us to
21 have, you know, good attorneys like you all are involved.
22 And obviously even more importantly it's, you know, it's
23 great for the appellants; they really, you know, benefit
24 from -- will benefit from your help.

25 Just to start, the first slide -- substantive

1 slide, just should say "Adverse Actions." And I looked
2 this up; in 2012 48 percent of the case that we received
3 nationwide were adverse actions. I think that's probably
4 down a little bit from what it used to be because we now
5 have -- there's some other statutes that have created
6 appeal rights for us, but it's still really by far the one
7 area that, you know, in which we get the most appeals. So
8 it's likely that a significant number of cases that you
9 would get would be adverse actions I would assume.

10 And when we say "adverse actions" we're talking
11 about, as the slide says, removal, and I think Bill said,
12 reduction in grade, reduction in pay, furlough of 30 days
13 or less, and suspensions of more than 14 days. So I
14 think, you know, obviously you'll see when you get the
15 case, you know, when someone comes to you that, you know,
16 one of these, if it's an adverse action, has to be in
17 place.

18 Reduction in grade and reduction in pay, you'll
19 see sometimes people will say they got demoted. What
20 we're really looking at for jurisdictional purposes is was
21 there, you know, was their grade reduced or was their pay
22 reduced. Usually it would be both. There are cases that
23 are exceptions where an agency tries to give someone,
24 let's say, saved pay, which means their pay doesn't go
25 down but there's a grade reduction. That's still

1 appealable and vice-versa. But that's really what we're
2 looking at to make sure it's within our jurisdiction.

3 Or a reassignment at the same grade and pay.
4 While it might be something that an employee does not want
5 would not be appealable to us, you know, absent some
6 exceptions, which, you know, which are probably beyond
7 what we want to talk about.

8 So that's -- those are the types of cases that
9 would come in for adverse actions.

10 I mean, furloughs, again as Bill said, we really
11 don't see those. You're not going to be involved in the
12 sequester furloughs. Furloughs of more than 30 days are
13 within our jurisdiction under a reduction in force. And I
14 would also say the likelihood that you're going to see
15 something like that is slim and none.

16 The next slide, "Burden of Proof," in adverse
17 actions the Agency has the burden to prove the charge, and
18 the burden is by preponderance of the evidence. And so I
19 have it quoted here, "The degree of relevant evidence a
20 reasonable person considering the record as a whole would
21 accept as sufficient to find a contested fact is more
22 likely to be true than untrue." And I think for short --
23 for your purposes, you know, for shorthand, the way a lot
24 of us look at this is really "more likely than not".

25 You know, it's obviously, you know, you know

1 that there are other -- in other areas of the law there
2 are other standards, other burdens. You know, obviously
3 criminal, beyond a reasonable doubt. We -- and in other
4 areas of the law. We have some cases that are clear and
5 convincing evidence is the burden; that's an Individual
6 Right of Action appeal. That's a higher burden.

7 You know, this burden, again, we really -- the
8 way I look at it is really if it's a tie, if I really
9 can't determine that it's more likely than not then the
10 appellant would win. So that's -- that's really what
11 you're looking at and you want, you know, from your
12 purposes, you know, you're going to be trying to prevent
13 the Agency, obviously, from meeting that burden.

14 The next slide, "Types of Charges," and I -- and
15 I'm going to go through some of these a little bit quickly
16 because we probably don't have time to go through all of
17 it, and I should have said at the beginning this is
18 really, I think we created this also as a reference for
19 all of you so you can go back and look at it later if need
20 be.

21 The other purpose really also, you know, when I
22 created this was thinking issue spotting things that
23 might, you know, would kind of, get in your head so that
24 when you get a case you would see that, you know, here are
25 some issues that I have to be aware of.

1 So types of charges that we see, number one, the
2 "Descriptive and specific charge," that's really, you
3 know, a charge which has a label, and that's probably, you
4 know, the most common we would see. And the example would
5 be maybe theft or you know, we see conduct unbecoming a
6 federal employee, things like that, so that would be a
7 charge with a label.

8 We get cases also somewhat frequently with what
9 we would call "Generic charge," and that would really be a
10 charge like improper conduct, inappropriate conduct,
11 unacceptable conduct. Something like that would be very
12 generic and you know, we would really be looking at what
13 the specifics are underneath that, so that the label
14 doesn't really tell us a lot.

15 A "Narrative charge," something I think that's
16 pretty rare these days, it's a charge where there's really
17 no label and the Agency would really just put in their
18 notice, they would just, sort of, launch into "Here's what
19 you did wrong" and just explain it in narrative fashion.

20 The parts of a charge, again, as I said, the
21 label -- the Agency would -- chooses the label and that's
22 what they're stuck with. That's what they have to prove.

23 When we say "specifications" what we're talking
24 about is the description underneath the label. So you
25 know, for example if it's -- if it's theft, if the

1 charge -- if the label is theft, under it you would have
2 specifications. There could be more than one instance
3 where the Agency believes the employee has stolen
4 something and they would usually list them one after
5 another, and I would say, you know, "On June 22nd you,"
6 you know, "you were spotted with copper tubing," or
7 whatever it is. It would specify what the charge is.

8 "Legal elements," when we talk about that also
9 we, you know, we all go back to law school. You know what
10 the -- what we're talking about when we say "elements."
11 For example, the theft example, the Agency would have to
12 prove that there was an appropriation or deprivation of
13 property of another with intent to permanently deprive.
14 It's going to be, for our purposes it's going to be
15 government property for the most part. It's rare that we
16 see anything other than that. But that's the legal
17 elements. And again, if that's the charge the Agency
18 chose to bring, that is -- they're going to have to prove
19 those elements. Even if they prove part of it, but not
20 all, that's not enough and the charge would fail.

21 The next page, something that Bill touched upon
22 briefly and I think is something very important to be
23 aware of when you get these cases is the due process
24 issues.

25 So first, as Bill said under the statutes at 5

1 USC 7513, what the employee's entitled to, notice and
2 opportunity to be heard, 30 days advanced written notice,
3 a reasonable time to answer orally and in writing, and it
4 actually specifies there has to -- the minimum time is
5 seven days. The employee has a right to representation
6 and the Agency would need to write -- give -- provide a
7 written decision that explains the reasons for taking the
8 action.

9 And these are all things that are absolute
10 requirements. If the Agency fails in any of these, you
11 know, there's a very good chance, you know, absent some
12 obscure argument to the contrary that the action will
13 simply be reversed. So these are really things you want
14 to look at and make sure, you know, that the Agency met
15 its requirement to provide this type of due process.

16 The next page, also "Due Process," I put these
17 two cases at the top of the page, these are also going to
18 be very important. If there are any potential due process
19 issues in cases that you would be handling.

20 *Stone* and *Ward*, these are Federal Circuit cases.
21 Essentially what they said is that the -- we call it the
22 "Deciding Official" is the person who signs the decision
23 letter, whose making the decision, the final decision for
24 the Agency, may not consider new and material information
25 without providing it to the appellant and giving the

1 appellant a chance to respond. So that's definitely
2 something that as of late comes up very frequently.

3 The *Ward* case came out in 2011 and added to the
4 *Stone* case from about 12 years before. Originally, the
5 way we looked at it and we thought the court was really
6 saying that this only pertained to the charges and if
7 there was an error with respect to the penalty
8 determination we looked at that more as a harmful
9 procedural error analysis. The Court has made it clear in
10 *Ward* that it's a due process situation. So as I said, it
11 applies to evidence on the merits and the aggravating
12 factors considered in the penalty determination.

13 So the Agency just, in short, in each case -- in
14 each adverse action is going to be required not only to,
15 you know, assess the charge but the deciding official also
16 has to go through a list of factors that pertain to the
17 penalty and evaluate them. And then the Agency would be
18 required to come in and support the penalty determination,
19 as well.

20 So in essence, this due process issue is -- the
21 Agency can -- that deciding official really should be
22 deciding these issues, sort of, in a vacuum. I mean, the
23 appellant will come in and either do an oral or written
24 response, or both, and after that the deciding official is
25 really not supposed to go back and, you know, talk to

1 anyone or get additional evidence. If they do -- they can
2 do it, but if they do it they would need to then
3 supplement the proposal notice and provide additional
4 notice of what conversation they had or what additional
5 evidence they looked at to the appellant and give the
6 appellant a chance to respond.

7 And I think a lot of agencies are really just
8 becoming aware of this. And this comes up very
9 frequently. Sometimes it comes up in the middle of a
10 hearing and we -- you know, we become aware that a
11 deciding official, you know, did a whole investigation
12 after the fact, and in many cases that's going to be
13 enough for us to just reverse the action. So something
14 important to look at.

15 So I put in some common charging issues.
16 Without going into great detail, but this is something
17 you -- you know, when you're look -- when you have a case
18 and you're looking at the charges, something that does
19 crop up, "splitting of a charge." So that's probably not
20 something that's going to come up frequently.

21 But, for example, in this *Burroughs* case that we
22 put in as an example, the charge was directing
23 unauthorized use of government materials, manpower and
24 equipment for other than official purposes. Not really a
25 wise charge for an agency to bring because they have to

1 prove every aspect of that.

2 And in that case they proved all of it except,
3 the Administrative Judge found that the actions were
4 actually for an official purpose. So they may have been,
5 you know, improper but they were used -- it was, I think
6 some equipment and manpower and materials that were used
7 for an actual project, but the judge sustained the charge
8 anyway, saying that, you know, enough of it -- essentially
9 split the charge and said enough of it was proven and
10 separated it out. The Court said we cannot do that so
11 it's now clear, the -- you know, the charge, as I said
12 before, the Agency brings a charge, they've got to prove
13 every aspect of it. Every element.

14 "Merger," an agency can take -- frequently there
15 will be one serious incident that the -- that will concern
16 an agency. They will investigate it and decide that
17 there -- they can bring multiple charges. For example,
18 you know, criminal conduct sometimes would lead to, you
19 know, an appellant being -- an employee being
20 incarcerated. The Agency looks into it and decides, "We
21 have to do something. We have to charge them with this
22 criminal conduct in some way." They can also charge AWOL
23 if the employee doesn't, you know, is absent and doesn't
24 have leave that's granted.

25 So that is okay. However, sometimes the Agency

1 will really try hard to pile on charges and we will merge
2 charges if they're based on the same conduct and proof of
3 one charge automatically constitutes proof of the other
4 charge. So that's merger.

5 "Multiple specifications," this is important to
6 just keep in mind. If there is a single charge and
7 multiple specifications, proof of one specification will
8 mean that the charge is sustained. So sometimes agencies
9 will, for -- using the AWOL example, they'll bring an AWOL
10 charge and there will be 20 days, for example, and if they
11 only prove 10 days the charge is still sustained. Doesn't
12 mean that we don't look at the fact that some of the
13 specifications were not proven and that factor that in at
14 times with respect to the penalty. But you know, the
15 charge itself is sustained.

16 "Lesser included offenses," really not something
17 that comes up too often, but just to be aware we are not
18 able to eliminate elements of a charge brought by an
19 agency. If it's -- again, same concept, if a charge is
20 brought that's the charge the agency has to prove.

21 The next slide, "Criminal Offenses," this
22 actually is something that comes up fairly frequently. A
23 federal employee is charged with a criminal act. If the
24 Agency chooses to also charge -- if the Agency has a
25 concern with that and also chooses to take administrative

1 action and charge the employee with the criminal offense,
2 they have to prove the elements of that offense. So it's
3 really something I think most federal agencies are trying
4 to get away from. If they're smart now they can just
5 bring an improper conduct charge and just explain what
6 happened and, you know, they wouldn't be required to prove
7 all those elements.

8 But in addition, keeping in mind when there's a
9 criminal -- when there's an issue with criminal charges
10 against someone who might be a client of yours, you have
11 to look and see what the charge is. The Agency has to
12 make a decision, are they going to charge -- you know, if
13 it's something where they feel we really can't have this
14 person in the workplace, we have to bring a charge, they
15 have to decide are they going to charge the person with
16 the underlying conduct or are they going to indefinitely
17 suspend the person, which is -- there's a provision for
18 that. And then wait it out. And then really try and
19 terminate the person based on conviction. So these are
20 just issues that crop up if there's involvement -- you
21 know, criminal charges that are involved here.

22 If they -- you know, there's downsides for the
23 Agency to waiting for a conviction because then they never
24 know, it could be reversed on appeal and then their
25 charge, which is based on, you know, the fact that the

1 court initially convicted the person, is also
2 automatically going to be reversed. So these are just
3 some of the issues to keep in mind when there's a criminal
4 matter involved.

5 The next slide, just loaded words. Words that
6 you should be aware of when you're looking at a charge and
7 figuring out what exactly the Agency meant. There's words
8 that we look at -- the Board looks at that imply
9 intentional misconduct.

10 When we see in a charge "knowingly,"
11 "willfully," -- "threatened" is, sort of, a separate word
12 that's part of a separate type of charge, which I'll get
13 to briefly if we have time. But you know, there are a
14 number of types of charges that you or the agencies use
15 these words and then automatically, you know, you would be
16 aware that the Agency has to prove intent.

17 When we're trying to figure out, and when you're
18 trying to figure out, what the charge -- you know, what
19 the Agency's required to prove when it brings a specific
20 charge, if it's confusing, which does happen, and
21 everybody's trying to figure out and parse the charge, the
22 Board will look at the -- has said it will look at the
23 structure and language of the proposal notice. So we
24 really consider that to be the main charging document. I
25 mean, we will also, if that's not clear, there will be

1 other things that we would look at, as well, but that's
2 the principle document. So that's what you would want to
3 look at in figuring it out if you have an issue there.

4 Then I just really put in some charges that I
5 think are common that you might see. So, first, you know,
6 these are charges that we see frequently that agencies
7 bring that require proof of intent. And as it says here
8 at the top, "Intent's a state of mind generally proven by
9 circumstantial evidence." You know, as we know it's rare
10 that you're going to get the case where the person
11 expresses an intent -- the intention in some overt way, so
12 it's really the surrounding circumstances that the Agency
13 needs to present to establish that the intent was present.

14 So I gave some examples here. I think we're --
15 we wanted to leave you some time to ask questions, I won't
16 go through all of them.

17 "Theft" is something I mentioned before.

18 "Threat," something to keep in mind. If you see
19 a charge that includes the word "threat" it's very likely
20 the Board is going to look at -- you know, the Agency may
21 try and get out of having to prove a threat, but you'll
22 want to look at it and see if you can hold them to that
23 standard. And if they -- if so, there's a test that the
24 Federal Circuit has told us to follow, reasonable person
25 test, and I have listed here the things that, you know, we

1 would look at, the listener's reactions, apprehension of
2 harm, speaker's intent, circumstances, and whether the
3 threat was conditional. And these cases can get very fact
4 specific, obviously, but there are circumstances.

5 You might have a client who makes, you know, a
6 very -- says something that, you know, is really seemingly
7 terrible on the surface and, you know, it turns out it was
8 said, you know, in gest or it was said in a psychiatrist's
9 office or something like that. So these are the factors
10 you really want to look at.

11 "Insubordination" is something we see
12 frequently. Just the thing to keep in mind is this is --
13 the Agency does have to prove intent, willful and
14 intentional, as opposed to a failure to follow
15 instructions, which is another charge we see frequently
16 where the Agency does not have to prove intent.

17 "Falsification" also an intent charge that the
18 Agency, if they use the word "false" in any way -- I mean,
19 I put one case here, this *George* case, which was my case,
20 and was very confusing the way the charge was set out.
21 But the Board believed that the Agency -- because the
22 Agency used some form of the word "false" that the -- that
23 intent was required to be proven.

24 And the other thing to keep in mind with an
25 intent charge, falsification charge, they don't have to

1 prove actual intent. They can prove reckless disregard
2 for the truth. So it's not, you know, as we all learned
3 in law school, the different, you know, levels of proof,
4 that there's -- it's not a negligence -- negligence would
5 not be enough; it would have to be reckless disregard. Or
6 actual intent for any of these charges.

7 The next page, charges with elements that don't
8 require intent, these are just again, these are examples
9 of -- so that you'll recognize things if you're
10 representing someone in an adverse action case.

11 "Misuse of government property" you know, really
12 explains there what it is. That's something that we do
13 see frequently and it's something, you know, an agency
14 finds out an employee is, you know, has a side business
15 and is using their computer. You know, they do a search
16 on the computer and find out there's all sorts of, you
17 know, stationery and you know, thousands of e-mails
18 conducting a side business. They might -- one of the
19 charges they might bring is misuse of government property.
20 And you know, misuse of the telephones.

21 Government charge card, we see that frequently.
22 People have a government charge card, it's supposed to be
23 used for travel, and instead are out charging things left
24 and right, which is definitely a no-no. But these
25 charges -- this does not require specific intent to prove.

1 "AWOL," another one you should be well aware of,
2 that's a charge that we see very frequently. The Agency
3 has to prove that the employee was supposed to be at the
4 duty station, that he or she wasn't there, and that the
5 absence was either not authorized or the employee
6 requested leave and the denial of the request was proper.

7 And then I have the -- I didn't spell this out
8 entirely but it says, "If based upon a denial of LWOP,"
9 that refers to leave without pay, "the Board will
10 determine whether the denial was reasonable." So
11 sometimes employees run out of leave, they you know,
12 either can't be at work or want to take leave. You know,
13 sometimes they just don't show up, but other times they
14 ask for leave without pay. And we would look -- there's
15 some discretion but we would also look just to make sure
16 that the denial of leave without pay is reasonable.

17 The FMLA issues that I've put here, the Agency
18 has the burden.

19 If you go to the next slide, "Failure to follow
20 leave requesting procedures." This explains the FMLA a
21 little better, which stands for Family Medical Leave Act.
22 Some of you may have heard of it or have some familiarity
23 with it. So this charge, the "failure to follow leave
24 requesting procedures" is really a charge agencies bring
25 because they're concerned that an AWOL charge will be

1 overturned on appeal.

2 If the employee brings in medical evidence, the
3 Board -- I think the Board has gone back and forth on
4 this, but I know that, you know, there have been times
5 where the Board will accept medical evidence that shows
6 that sick leave, let's say for example, or even leave
7 without pay, should have been granted, and you know, we
8 can, you know, accept that even at the appeal stage.

9 So you know, supervisors feel obviously that's,
10 and agencies feel that's not fair, so they will frequently
11 bring this charge, "failure to follow leave requesting
12 procedures," and so they just have to show that they had a
13 procedure, the employee knew the procedure and failed to
14 follow it.

15 And this is also where these Family Medical
16 Leave Act issues come in. With any charge that's
17 attendance related the -- if there's a Family Medical
18 Leave Act issue, the Agency has the burden on that. So
19 that's important to note. It's not an affirmative
20 defense. If the employee at some point requested Family
21 Medical Leave Act and, you know, was denied that's
22 something the Agency would have to show, that that was a
23 proper denial. Or you know, other circumstances that
24 arise under the FMLA, a couple of which I have put in
25 here.

1 So just something to be aware of if you end up
2 with an employee whose had illnesses or family problems
3 and is terminated or there's some other action taken
4 against.

5 "Failure to follow instructions," as I said before,
6 that's a non-intent charge. Similar to insubordination
7 but easier for the Agency to prove. And they do have to
8 prove that there were proper instructions given so that
9 does come up at times. You know, there are some
10 exceptions and it's -- you know, obviously a supervisor
11 can't ask an underling to do something that's unsafe. Or
12 you know, there's a few other exceptions but something you
13 want to look at, whether it was a proper instruction
14 given.

15 The next slide, just a couple more charges
16 that -- a few more charges that I thought you should just
17 be aware of their existence; "Lack of Candor," agencies
18 use this when they -- essentially when they really can't
19 prove falsification. They're concerned that they won't be
20 able to prove intent.

21 In my experience where this would come up would
22 be that the Agency's concerned with something, they're
23 conduct -- something an employee's done, they're
24 conducting an investigation, you know, they have somebody
25 that is questioning the employee at length and the

1 employee's answering the questions and they can't really
2 prove that they -- that they lied in any of the answers,
3 but you know, the employee left something out that was
4 very important, maybe that wasn't responsive exactly to a
5 question, but that clearly should have been something that
6 was volunteered by the employee.

7 So it's kind of a tough charge to even put your
8 hand on what the elements are as -- our reviewing court in
9 this *Ludlum* case I cited, has said that the elements
10 depend on the context and the conduct. So it's really
11 generally better to disclose. Agencies do use it where --
12 where they could have used falsification, where it is
13 something where they're really claiming that it was -- it
14 was a false response but they're just not convinced they
15 can prove intent.

16 "Unauthorized use of government vehicle," that's
17 brought this way, just "unauthorized use," there's no need
18 to prove intent. But there's a mandatory 30-day
19 suspension under the statute that I listed here if it was
20 willful or done with reckless disregard. So that's
21 important to note if you get -- see a charge like that,
22 you have to see did the Agency charge it under the
23 statute, in which case they do have to prove that it was
24 willful. If they didn't, there is no intent and there's
25 no requirement that it -- that the suspension or whatever

1 adverse action they take be 30 days at minimum.

2 The others, I won't really go into, "Sexual
3 harassment," I think is something we don't see too often
4 these days, but just there for your edification.

5 I guess the one that we probably do see a little
6 bit more, I don't think we see really the quid pro quo
7 type of sexual harassment almost ever, at this point, at
8 least.

9 We do see more of the hostile working
10 environment type of sexual harassment, so I put that as
11 the last sentence there, that the conduct -- "The Agency
12 has to prove the conduct was offensive based on the
13 victim's sex, unwelcome and sufficiently severe or
14 pervasive to interfere with the victim's job performance
15 or create an abusive work environment." So that's
16 probably what we would see most of the time.

17 We -- the one thing to note about sexual
18 harassment is a lot of agencies have their own rules on --
19 you know, that prohibit sexual harassment. And when they
20 bring a charge like this, it's important to look at
21 whether they're charging the employee with breaking the
22 internal rules or sexual harassment under Title VII. And
23 the Board has said that if it's really -- if their
24 internal rules basically track Title VII, they're going
25 to, you know, go with the Title VII standard of proof.

1 So it's just something to look at. It does come
2 up in these cases, as what is -- you know, what is the
3 burden because sometimes the agencies don't even realize
4 it, what they're actually -- you know, what their burden
5 would be and, you know, what the basis for the charge is.

6 And finally, "Approved leave," just something to
7 be aware of. There is this one exception, generally a
8 federal agency cannot take action against an employee
9 after they've approved leave. There is this one exception
10 in the *Cook* case here, I won't -- you know, it's there for
11 you to look at. It's very narrow but it does come up.
12 I've had a number of these cases where it really was
13 someone who's, you know, out of the work place for a long
14 time and the Agency just feels it needs to replace this
15 person. They've approved their leave for whatever reason
16 for a lengthy period but really just want to take an
17 action. So that's there in case you ever see that.

18 And I think that's about all I have for adverse
19 actions.

20 JUDGE BOULDEN: Right.

21 JUDGE BERG: I didn't get into really the
22 penalty part, so that's something we, sort of, left out.
23 You know, but it's something -- there is a case called
24 Douglas v. Veterans Administration, that is you want to
25 look at what the factors are that an agency needs to

1 consider when determining what the reasonable penalty is,
2 you should look at that case. I think it's 5 MSPR 3 --

3 JUDGE BOULDEN: It's in the 5, right.

4 JUDGE BERG: -- 380 or something like that. But
5 you'll see it if you handle a case like this and the
6 penalty's an issue, you'll definitely see a reference to
7 that case.

8 And I think that's all I have.

9 JUDGE BOULDEN: Okay.

10 JUDGE BERG: So we have hopefully a little time
11 for questions, right?

12 JUDGE BOULDEN: Yeah.

13 MS. CAZABON: Great. Thank you so much. I
14 again, I want to thank Judge Boulden and Judge Berg for
15 doing this training for us today and putting together
16 these terrific materials.

17 Just to let folks know in addition to the
18 PowerPoint slides, we've also provided you with an appeal
19 form, which I recommend everyone read.

20 And in addition, you know, we're going to
21 support you here internally. We'll have plenty of partner
22 supervision, and hopefully if there's enough interest and
23 we have enough cases we'll be able to have some small
24 group discussions and periodic meetings to talk about the
25 issues and the cases.

1 And as Judge Boulden mentioned, I hope that in
2 the next probably -- by mid-May or at least late May we'll
3 start taking these cases.

4 So I wanted to see if people here had any
5 questions? Brian?

6 BRIAN: Is there a regular Bar Association or
7 regular lawyers who do these types of cases that -- I'm
8 just envisioning taking one of these cases and not knowing
9 what a brief is supposed to look like necessarily or
10 exactly what type of stage I'm in in a certain case and
11 what's going to happen next. Are there regular
12 practitioners or Bar Association that we might be able to
13 consult once in a while if we get stuck in one of these
14 cases?

15 JUDGE BOULDEN: There are certainly some major
16 players that we see in D.C. in particular and in Boston,
17 actually. There's the Lafferty Law Firm we see often.
18 But I don't know if there's actually an MSPB Bar, per se.
19 I think there's a federal employment bar, Passman & Kaplan
20 in Washington, D.C., for example, is involved in that.

21 Peter Broida, I don't know if you know his name,
22 actually writes a compendium of, sort of, the history of
23 Board cases over time.

24 I don't know, Craig, do you know of any?

25 JUDGE BERG: I don't -- yeah, other than that I

1 mean, I know obviously there's a federal employment bar,
2 but I don't think there's anything more organized than
3 that, really.

4 JUDGE BOULDEN: Yeah.

5 MS. CAZABON: All right, looks like we have
6 another question.

7 UNIDENTIFIED SPEAKER: Hi. I just had a quick
8 question. Do the usual rules of privilege and disclosure
9 and things like that apply? It seems like they would.

10 JUDGE BOULDEN: Yes.

11 UNIDENTIFIED SPEAKER: To any client.

12 JUDGE BOULDEN: Um-hmm.

13 MS. CAZABON: Anything else?

14 (No response.)

15 MS. CAZABON: Okay, looks like all questions
16 have been answered. So thanks again, Judge Boulden and
17 Judge Berg. We look forward to taking on these cases.
18 And you know, we really appreciate the time you put into
19 doing this presentation.

20 JUDGE BOULDEN: Yeah. Could I just mention one
21 thing? I forgot to tell everybody, the Board has a very
22 sophisticated electronic filing process and you'll see
23 it's referred to there on the paper form, but most -- many
24 attorneys today are filing electronically the appeal
25 itself. And also if you register as a e-Filer there --

1 all of your pleadings can be done electronically and
2 you'll be served electronically by the other side if they
3 do it, too. So it's a pretty sophisticated system I think
4 you'll find.

5 MS. CAZABON: Great. Well, thanks again.

6 JUDGE BOULDEN: Okay, thank you.

7 JUDGE BERG: Thank you.

8 (Whereupon, the above audio was concluded.)

CERTIFICATION

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