The 1978 Civil Service Reform Act mandated harmless error review for all types of procedural errors in civil service adverse action appeals. That mandate has been evaded, eroded, and weakened by 35 years of erroneous decisions. That mandate needs to be renewed.

By John A. Fraser III
In 1978, Congress enacted the Civil Service Reform Act (CSRA), one of the signature reforms of the Carter Administration. Before 1978, an array of minor procedural errors could lead to the reversal of adverse employment actions taken against federal employees. The Civil Service Commission, the district courts, and the Court of Claims all provided open forums in which to challenge adverse personnel actions, including challenges based on highly technical grounds unrelated to the merits. Many of the procedural errors committed by federal personnel managers were harmless to the employee’s substantive rights, however, a type of procedural perfectionism held sway on appeal. Many errors were deemed so serious an affront to the law that no proof of harm was required—and a rule of per se reversal was followed.

In 1978, Congress acted to abolish this doctrine of per se harmful procedural error in civil service adverse action appeals. The Senate committee that drafted the CSRA said that a “central task” of the CSRA was to allow “civil servants to be able to be hired and fired more easily, but for the right reasons.” To accomplish this purpose, Congress acted to repeal the “welter of inflexible strictures that have developed over the years [that threaten] … to asphyxiate the merit principle itself.”

Congress criticized the pre-CSRA approach of the Civil Service Commission and the courts because it deprived agency managers of the necessary tools to manage the federal workforce and because it protected employees who had not been prejudiced in regard to the merits of an adverse action. To achieve reform, the CSRA abolished the Civil Service Commission and created the Merit Systems Protection Board (MSPB) to hear employee appeals. Additionally, under 5 U.S.C. § 7701(c)(2)(A) of the CSRA, Congress directed that “[a]n employee who elects to appeal an agency disciplinary decision to the [Merit Systems Protection Board] must prove that any procedural errors substantially prejudiced his rights by possibly affecting the agency’s decision.”

Congress mandated that the new MSPB conduct all adverse action reviews under the new standard created in § 7701(c)(2)(A). The Supreme Court has stated in analyzing CSRA § 7701, “[w]e do not believe that Congress intended to force the government to retain these erring employees solely in order to penalize the agency for non-prejudicial procedural mistakes it committed while attempting to carry out the congressional purpose of maintaining an effective and efficient Government.”

Procedural perfection is not a permissible goal under the CSRA because per se procedural error is exactly what § 7701(c)(2)(A) of the CSRA was intended to abolish.

The CSRA Created a Single Standard of Review for Procedural Error

When an MSPB appellant alleges that harmful procedural error occurred during the processing of an adverse action, under the CSRA, the analysis of this allegation proceeds down a single, well-worn path. First, the appellant must demonstrate that a procedural error occurred and that the error affected a significant procedural right. The appellant also bears the burden to prove that the error caused prejudice. Once a demonstration of some prejudice and error is entered into evidence, the burden then shifts to the agency to demonstrate that there was no error, or no real prejudice, or that the prejudice was not material to a substantive right, or that the appellant in fact was not materially hampered in regard to the merits of the adverse action. When all of the evidence is consid-
What About Constitutional Due Process Errors?

In 1978, Congress was well aware of the Supreme Court rulings that provided due process protections for the property rights of civil servants. Acknowledging this body of law, the Senate committee that drafted the bill stated in plain terms that the act’s statutory terms intended to protect these due process rights.15

By its plain terms, § 7701(c)(2)(A) requires the appellant to prove harmful error in all cases. There is no exception in the statute for “serious” or “due process” errors that are labeled as having a constitutional dimension.16 In many cases, the MSPB has ruled and the Federal Circuit has affirmed, that alleged constitutional errors must be reviewed for harm or prejudice.17

Congress was well within its constitutional authority to enact a rule of harmless error in civil service cases.18 Procedural errors derived from constitutional standards are routinely reviewed for harmful error in civil and administrative cases of all kinds in the federal courts. For example, the Federal Circuit has held (in another context) that harmless error analysis is appropriate for constitutional claims.19 Further, the Supreme Court has repeatedly held that most due process errors are subject to the harmless error analysis, even in criminal matters.20 The rule of harmless error review has been codified for the U.S. courts in Title 28,21 in the Federal Rules of Evidence,22 the Federal Rules of Civil Procedure,23 and the Federal Rules of Criminal Procedure.24 The rule of harmless error is also mandated by the Administrative Procedure Act.25 Moreover, as part of the harmless error rule, procedural errors are waived in MSPB cases if the appellant does not take procedural steps to preserve the record for review.26

Congress also underlined its intent to require harmless error analysis by confining the MSPB to its stated jurisdiction. The CSRA is a “comprehensive overhaul” of the civil service system.27 The CSRA describes in great detail the permissible claims by federal employees and sources of MSPB jurisdiction.28 Under the CSRA, the MSPB has no authority to create novel interpretations of the CSRA or the Constitution and no power to expand its own jurisdiction.29 Congress thus cut off any possible route for the MSPB to create a rule of per se due process procedural error.

Congressional Intent Meets Stubborn Resistance

Unfortunately, the crystal clear expression of congressional intent in 1978 has been disregarded in a significant number of MSPB and Federal Circuit cases in the past 35 years. Beginning with Sullivan v. Navy Department30 and continuing to Alford v. Dept of Defense,31 the MSPB and the Federal Circuit have reverted to a per se rule in many cases of alleged denial of due process.32 Sullivan offers an example of cases decided under the per se rule where there was no issue of serious misconduct having occurred. In this case, the employee was disciplined for falsifying timesheets, but the court reversed it because of an undisclosed ex parte contact with the deciding official. The court relied only upon a pre-CSRA precedent.

Additionally, in Hodges v. U.S. Postal Service, an employee was suspended from duty as an air marshal because his security clearance was suspended at the early stages of a criminal investigation. The MSPB reversed because the deciding official who suspended the marshal did not have the authority to overrule security officials and reinstate the clearance. In Edwards v. U.S. Postal Service, a supervisor was placed on emergency suspension status without a hearing into the reasons. The board ruled that proper due process requires a hearing before the suspension and disregarded an agency regulation that allowed otherwise.

To err is human, so procedural errors continue to occur. With a federal civilian workforce in excess of 2.7 million and thousands of adverse action appeals filed each year, it is unlikely that procedural errors will ever be eliminated. In Young v. Department of Housing and Urban Development, an arbitrator upheld the termination of an employee who threatened a witness in an agency proceeding. The arbitrator found the procedural errors of the deciding official to be harmless, but the court held that the deciding official’s error of investigating the facts of the case and probing into its circumstances was per se error. The agency and the arbitrator were reversed. Further, in Jenkins v. Environmental Protection Agency, an employee was removed for threatening other employees. The deciding official considered a portion of a published table of penalties that was not cited in the letter proposing the discipline. The MSPB reversed this removal due to the consideration of an agency policy not recited in the proposal letter and did not consider whether the employee deserved to be removed. Importantly, some of these cases contain no mention or discussion of the harmful error standard of the CSRA.33 Alternatively, some cases state that the ruling is based on a precedent decided before the enactment of the CSRA.34

In each such case, it appears that the MSPB or the Federal Circuit are offended that the employing agency has violated an important procedural right and have determined that it is necessary to punish the agency.35 Having decided to send a message to the agency, reversal and reinstatement of the employee with back pay and attorney’s fees is ordered, which forces the errant agency to restart the adverse action or to abandon the proposed discipline.36

These per se error rulings seem to grow from a sense of fundamental “fairness” or a desire to respond to an affront to the dignity of the law. No other pattern of decision emerges from a study of the cases. In essence, the MSPB and the Federal Circuit have decided that the agencies require supervision in addition to that provided by Congress or the President.37

These numerous rulings have not, however, reformed or educated the errant agencies. To err is human, so procedural errors continue to occur. With a federal civilian workforce in excess of 2.7 million38 and thousands of adverse action appeals filed each year, it is unlikely that procedural errors will ever be eliminated. Congress decided in 1978 that punishing the agencies when procedural error has not caused substantive harm to the employee was bad policy. In
the CSRA, Congress had attempted to remove from the MSPB and the federal courts the power to set a different policy on this issue. Where Congress said that it intended to give federal personnel managers the authority to discipline employees for the right reasons regardless of technical procedural errors, the MSPB and the Federal Circuit have decided that Congress was wrong. Technical oversights having zero impact on the merits of the cases continue to cause reversals and reinstatements of employees. Yet, the back pay and attorney fee awards produced are nothing compared to the other costs inflicted on the agencies. As before 1978, federal personnel managers have reason to doubt that they can reliably discipline employees for the right reasons, regardless of technical procedural errors.

This series of per se rulings directly contradicts the CSRA and the Supreme Court ruling in Cornelius v. Nutt. Reversion to a per se rule effectively repeals the harmless error provision of § 7701(c) (2)(A) of the CSRA for those cases where the rule is not applied and stymies the mandate of the statute.

How to Address Years of Error?

There are four means by which to address this state of affairs. First, the agencies that litigate before the MSPB should ask it and the Federal Circuit to correct erroneous interpretations. Second, the Federal Circuit should grant a petition for en banc review of this issue, when an appropriate occasion presents itself. Third, the Supreme Court should grant review of a Federal Circuit decision that squarely presents the issue. Fourth, Congress should draft a more specific harmless error provision in the CSRA.

The Agencies Should Squarely Present the Issue to the MSPB and the Federal Circuit

The CSRA provides that the appellant must show “harmful error in the application of the agency’s procedures in arriving at such decision….” As discussed above, the prejudice that must be shown is not a mere variation from “normal” procedures or a lapse in the technical aspects of the adverse action that is challenged. In MSPB cases, the agencies should demand that the appellant demonstrate that the error caused by the agency official who made the adverse decision to decide the matter differently than had there been no error.

This is an evidentiary question to be decided by a preponderance of the evidence upon the entire record. Agencies should argue that the appellant must demonstrate it is more probable than not that the deciding official would have taken a different approach if the error were corrected. This is a common issue in employment law and civil rights cases, where factual findings on this issue are reviewed under a “clearly erroneous” standard.

In cases applying the CSRA, the MSPB and the Federal Circuit have provided guidance on what types of evidence are admissible to address this factual question. In essence, the appellant must demonstrate that the adverse action is of a different nature or character than what the agency deciding official perceived at the time the decision was made. The agency witnesses, in turn, should offer evidence that they correctly perceived the nature and character of the adverse action and that it was decided under a correct understanding of the facts that bear on the merits. The agencies should then strive to prove that the error would make no difference if the matter were remanded. In other words, Congress directed the MSPB and the parties to focus on the accuracy of the underlying decision. Therefore, the agencies should strive to demonstrate that the correct decision was made.

The Agencies Must Seek Review by the MSPB and the Federal Circuit

To squarely present the issue for ultimate review by higher authorities, the agencies must take on the task of building a factual record of harm at the trial level in each case. Then, they must seek the full cooperation of those portions of the Department of Justice and Office of Personnel Management that represent the public interest before the appeals office of the MSPB and before three judge panels of the Federal Circuit. The legislative history of the CSRA should be briefed in these appeals.

The Agencies Must Build a Case for the Solicitor General to Consider

Petitions for en banc review at the Federal Circuit and for certiorari to the Supreme Court are the province of the solicitor general of the United States. Agencies that wish to persuade the solicitor general to seek the intervention of the entire Federal Circuit or of the Supreme Court must build a complete record and present the harmless error argument at all stages of the case. They must arm the solicitor general with the arguments that will cause the Supreme Court to expend its time on correction of the error, in a situation where there will not likely be a conflict in the circuit courts.

Congress May Again Need to Speak

In the absence of judicial correction of longstanding errors, it may be necessary for Congress to again legislate on the topic of harmless error review in adverse action appeals. In a time of furloughs, sequestration, sustained budget cuts, and headcount reductions, it is a form of waste to place a budget priority on procedural niceties. If an employee’s substantive rights are prejudiced, then correction of the error is a budgetary necessity.

A reenactment of the same language now contained in § 7701(c) (2)(A), with the addition of the words “any of,” would send a loud and clear message that harmless error review is required in all adverse action appeals. While such action should not be necessary, Congress was given Article I powers to legislate and investigate and oversee the operations of government. When legislation is incorrectly administered, corrective legislation is sometimes essential.

Conclusion

Billions of dollars are wasted each year when harmless procedural errors result in the reversal of adverse actions years after the events, giving rise to the claim. The congressional purpose stated in 1978—to give agency management the flexibility to remove employees for the right reasons—has largely been thwarted. This is a form of waste that can and should be fixed.

John A. Fraser III is an attorney employed by the Department of Defense. The views expressed herein are entirely his own. © 2014 John A. Fraser. All rights reserved.

Endnotes

1See Richard A. Merrill, Procedures for

Congress disapproved of this body of civil service law, stating that it intended to eliminate the reversal of adverse actions for “technical procedural oversights.” S. Rep. 94-969, p. 54, 95th Cong., 2d Sess. (1978)(hereafter S. Rep. 94-969). Congress also designed the CSRA to “give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable.” Id. at 51.


15 U.S.C. § 7101(b) explains that a purpose of CSRA is the preservation of the “ability of federal managers to maintain an effective and efficient Government.” The authors of the CSRA said that the provisions of the act were designed to expedite dismissals and fully protect the “due process” rights of employees. S. Rep. No. 95-969, p. 24.

The Senate report also stated, “Henceforth, the Board and the courts should only reverse agency actions under the new procedures where the employee’s rights under this title have been substantially prejudiced.” S. Rep. No. 95-969, p. 5. On page 52, it expressed the intention to “eliminate unwarranted reversals of agency actions” and on page 54, the intention to “avoid unnecessary reversal of agency actions because of technical procedural oversights.”


Congress also required the MSPB to take account of the same harmless error rule in both Chapters 43 and 77 of Title 5, stating that it intended to alter prior review practices in adverse action reviews occurring under both chapters. S. Rep. No. 95-969, pp. 24, 44, 51, and 54.

cornelius, 472 U.S. at 663.

Section 7701(c)(2)(A) provides that “the agency’s decision may not be sustained … if the employee … (A) shows harmful error in the application of the agency’s procedures in arriving at such decision.” In an early CSRA case, Judge Nies of the Federal Circuit carefully analyzed the legislative history of the CSRA and rejected an argument that the denial of a statutory seven-day reply period was per se harmful. Judge Nies ruled that the statute was intended to abolish such arguments. Adams v. Dept of Transportation, 735 F.2d 488, 495-496 (Fed. Cir. 1984)(Nies, J. concurring).

For example, minor imperfections in dates or wording of notices are not considered errors. See, e.g., Haynes v. Department of the Navy, 727 F.2d 1535, 1538-1539 (Fed. Cir. 1984)(mis-statement of the date of the misconduct in notice of removal was harmless error because the employee was aware of the actual date of the misconduct); Greenough v. Dept of the Army, 73 MSPR 648, 655 (1997)(date of the incident was not material in context of this case); Rodriguez v. Dept. of Justice, 117 MSPR 73 (2011), aff’d mem., 493 Fed. Appx. 100 (Fed. Cir. 2012)(non-precedential)(it was not material that the officer was not charged with drawing rather than pointing a weapon).


The Supreme Court has recently remanded the Federal Circuit that when Congress creates a statutory rule of harmless procedural error, the Federal Circuit is not authorized to alter that rule. In Shinseki, Secretary of Veterans Affairs v. Sanders, 556 U.S. 396 (2009), the Supreme Court held that the Federal Circuit erred when it created its own strict harmless error rule and substituted that rule for the statutory rule provided for review of errors in the processing of veterans’ benefit claims. The Supreme Court ruled that Congress had provided
for a harmful error rule by statute and that the Federal Circuit had
impermissibly created a rule that presumed prejudice from any error.

28 U.S.C. § 2111. “On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination
of the record without regard to errors or defects which do not
affect the substantial rights of the parties.”


25 Christian v. United States, 337 F.3d 1338, 1343 (Fed. Cir.
2003), cert denied, 158 L. Ed. 2d 467 (2004) (military reinstituted
salary case).


29 Minn v. MSPB, 742 F.2d 1424 (Fed. Cir. 1984)(MSPB has no jurisdiction to
consider constitutional challenge to reassignment that CSRA does
not assign to its jurisdiction); Moore v. Dept of State, 15 MSPR 488
(1983)(no MSPB jurisdiction to consider constitutional challenge as
to directed fitness examination); Prevee v. Dept. of the Army, 50
MSPR 222, 226 (1991) (“The Board does not have jurisdiction over
all matters that are alleged to be incorrect”).

30 Sullivan v. Dept. of the Navy, 720 F.2d 1266, 1273-1274 (Fed.
Cir. 1983)(relying on pre-CSRA Court of Claims precedents to find
per se harmful error; no discussion of CSRA § 7701).

31 118 MSPR 556, 559-560 (2012)(reversing administrative judge
who found harmless error in due process violation in not considering
reply); Hodges v. USPS, 118 MSPR 116 (2012)(reversing adverse
action for technical violation in consideration of reply); Gray v.
Dept of Defense, 116 MSPR 461, 463-467 (2011)(applying per se
rule to ex parte communications with deciding official); Jenkins
v. EPA, 118 MSPR 161, 164-167 (2012)(reversing adverse action because
deciding official considered section of table of penalties not cited
in the proposal letter); Edwards v. USPS, 112 MSPR 196, 200-202
(2009)(failing to determine prejudice after finding denial of due
process in suspension).

32 See, e.g., Wildberger v. SBA, 1999 U.S. App. LEXIS 17714
(Fed. Cir. 1999)(unpublished)(reversing and remanding because of
possible procedural error).

33 See, e.g., Kelly v. Dept. of Agriculture, 225 Fed. Appx. 880
(Fed. Cir. 2007)(unpublished)(citing Court of Claims case from 1978
to override any proof of harmless error).

34 See, e.g., Boddie v. Navy Dept., 827 F.2d 1578, 1580 (Fed.
Cir. 1987)(concluding that change in the proposing official (not the
deciding official) could have resulted in a greater penalty for the
appellant, who slapped a subordinate, and was not based on a per-
missible reading of a Navy shipyard regulation. While acknowledging
the existence of the harmless error rule, the panel decision found no
means of applying it to the facts).

35 Id.

36 For example, Congress enacted and President Jimmy Carter also
1978, 92 Stat. 1101, (codified at 5 U.S.C. Appendix Section 1 et seq.).

37 For example, Congress enacted and President Jimmy Carter also
1978, 92 Stat. 1101, (codified at 5 U.S.C. Appendix Section 1 et seq.).
The appellant would be well advised to offer evidence as to how she would cross examine such testimony in attempting to prove prejudice. See Drumheller v. Dept. of the Army, 49 F.3d 1566, 1569 (Fed. Cir. 1995)(upholding finding of no denial of due process and no harmful error when appellant was not confronted with all of the evidence in a security clearance revocation appeal. Further, no evidence was offered of an intended cross examination of the additional witness or other harm).

Saphansky v. Department of Transp., 735 F.2d 477, 486 (Fed. Cir. 1984)(en banc) (nothing in the record indicates an impairment of rights); In re Watts, 354 F.3d 1362, 1370 (Fed. Cir. 2004)(Patent Act appeal from USPTO ruling expressed “The question now is whether under these circumstances a remand to the Board is required. In appeals from the Board, as in all other appeals, we must consider whether an error by the Board was harmful error. Section 2111 of the Judicial Code directs us to disregard “errors or defects [in the proceedings] where there is no reason to believe a different result would have been obtained had the error not occurred.

The purpose of this rule is to avoid wasteful proceedings on remand where there is no reason to believe a different result would have been obtained had the error not occurred. ... Thus, to prevail the appellant must not only show the existence of error, but also show that the error was in fact harmful because it affected the decision below.”)(citations omitted); Munoz v. Straum Farms, Inc., 69 F.3d 501, 504 (Fed. Cir. 1995)(“The correction of an error must yield a different result in order for that error to have been harmful and thus prejudice a substantial right of a party).

5 U.S.C. § 7703(d) spells out the authority of the OPB to represent the government’s interest in MSPB proceedings.


Only the Federal Circuit hears appeals from the MSPB, except in cases of alleged discrimination and a narrow class of other statutes. 5 U.S.C. Section 7703(b).

The new statute would provide: “…the agency’s decision may not be sustained … if the employee … (A) shows harmful error in the application of any of the agency’s procedures in arriving at such a decision…”

A 2012 OPM survey found that only 42 percent of government supervisors felt that poor performance was appropriately being addressed within their agency. www.fedview.opm.gov/2010/Reports/SureCompPCT.asp?AGY=ALL&SECT=2 (question 23).