



TULLY RINCKEY PLLC
ATTORNEYS & COUNSELORS AT LAW

What Every Employee Needs to Know in a MSPB Proceeding

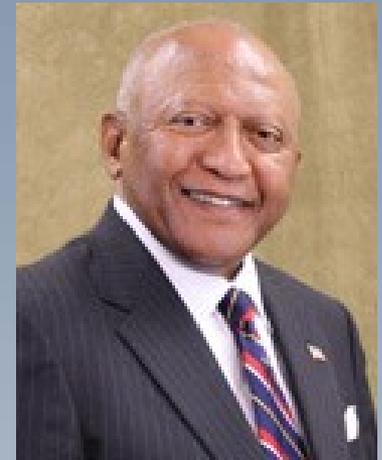
Neil McPhie, Esq.

Tully Rinckey PLLC

1300 Wilson Blvd., Suite 320

Arlington, VA 22209

nmcphie@fedattorney.com





The Merit Systems Protection Board

- The Merit Systems Protection Board is an independent, quasi-judicial federal administrative agency established under the Civil Service Reform Act of 1978.
- The MSPB is charged with protecting federal merit principles by ensuring that federal employees are protected from abuse of these principles by agency management, and by offering guidance to agency supervisors to create a diverse federal workforce that is fairly and effectively managed.



Employees who may appeal adverse actions are:

- Employees in the competitive service who have completed a one year probationary or trial period.
- Veterans preference-eligible employees with at least one year of continuous employment in the same or similar positions outside the competitive service
- Postal Service supervisors and managers, and Postal Service employees engaged in personnel work (other than those in non-confidential clerical positions), who have completed one year of continuous service in the same or similar positions; and
- Excepted service employees, other than preference-eligible, who are not serving a probationary or trial period and who have completed two years of current continuous service in the same or similar positions in an Executive agency.

See 5 USC § 7511(a)



Jurisdiction

- The Board has original jurisdiction over the following types of claims:
 - (1) Actions brought by the Special Counsel under 5 USC 1214, 1215, and 1216
 - (2) Request, by persons removed from Senior Executive Service for performance deficiencies, for informal hearings; and
 - (3) Actions taken against administrative judges under 5 USC 7521
See 5 CFR 1201.2
- The Board has appellate jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation.



The MSPB Process 1

- If agency management has issued a personnel action against an employee, the employee has several choices:
 - If the employee believes he/she was issued the action for discriminatory reasons based on membership in a protected class (i.e., sex, age, race, disability, national origin, religion, etc.) then the employee may file an internal Equal Employment Opportunity (EEO) Complaint with the agency's EEO office.
 - If the employee is a member of a bargaining unit, the personnel action may be covered under a negotiated grievance procedure and may be grieved in accordance with that procedure. Here, if the employee is covered under a "broad scope" contract, then he/she may choose to EITHER file a grievance through the negotiated grievance procedure or file an appeal to the Board, but the employee may not do both.



The MSPB Process 2

- If applicable, file a complaint to the Board:
 - As the Board has jurisdiction over claims based on the procedures outlined in other laws, rules, and regulations, whether the employee may appeal to the board largely depends on the nature of the action and the agency with which the employee is employed.



Federal Employees Ineligible for Appeals

- MSPB rights do not extend to all government employees. A number of employees are ineligible to appeal to the MSPB. Those employees include, in part:
 - Employees whose appointment is made by the President or with the advice or consent of the Senate
 - Employees whose positions are deemed to be confidential, policy-making, or policy-advocating
 - Employees who receives an annuity from CSRS or Foreign Service Retirement and Disability Fund based on employee's service
 - Employees whose positions are within the CIA or GAO
 - Certain Employees whose positions are within the USPS or within the intelligence community.
 - See 5 U.S.C. § 7511(b) for a comprehensive list.



Important Statistics

- Per the Board's 2012 annual report, adverse actions by an agency are the most common type of case heard before the Board.
- Of the adverse action cases heard by the Board, over 60% were settled before adjudication thereby highlighting the importance of retaining counsel.



Case Studies and Important Decisions

Sequestration Furloughs

- *Chandler v. Dep't of the Treasury*, 2013 MSPB 74: The Board held that the Agency had to respond to the Appellant's discovery request as part of her furlough appeal to the Board over the Agency's request for a protective order to protect itself from "harassment, annoyance, undue burden and expense ." Specifically the Board held that the Agency had to provide information on the following:
 - (1) Records relating to employees who have been hired since the time the agency announced the furlough
 - (2) The identity of non-bargaining unit employees who were not furloughed and the payment of overtime to non-bargaining unit employees.
 - (3) Information relating to amount of bonuses and awards issued to management officials from March 1 to end of fiscal year.
 - (4) Information regarding the specific processes the agency applied under 5 USC 7513 (relating to the agency's cause and procedure to issue certain actions)



Case Studies and Important Decisions

Whistleblower Protection

- *Tullis v. Dep't of the Navy*, 2012 MSPB 3: The Board found that the appellant proved that his duties were changed because he questioned the agency's travel practices and reported violations to the IG..
 - Initially, The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant's disclosures to management were not protected because they were made to the alleged wrongdoers, and that the appellant's statements to the IG were not protected because he did not make the statements on his own initiative and his responses to the IG's inquiries were part of his normal job duties.
 - On petition for review, the Board found that the appellant made nonfrivolous allegations of protected disclosures to the IG. The Board first noted that the Whistleblower Protection Act (WPA) refers to "any disclosure," without making a distinction based on who initiated the conversation that led to the disclosures. Thus, the fact that the appellant did not come forward of his own initiative to the IG is not dispositive, or even relevant, in determining whether his disclosures were protected.



Case Studies and Important Decisions

Whistleblower Protection

- *King v. Dep't of the Air Force*, 2013 MSPB 62: This case clarified the issue of retroactive applicability of the Whistleblower Protection Enhancement Act (WPEA) regarding conduct that occurred prior to the WPEA's enactment, finding that the law of the case doctrine is not applicable because the issue of whether compensatory damages are available is not an issue directly, or by necessary implication, decided in the administrative judge's prior decision on the merits.



Case Studies and Important Decisions

Veterans Rights

- *Willingham v. Department of the Navy*, 2012 MSPB 53 (2012): The Board found that the appellant made non-frivolous allegations that a Non-Appropriated Fund Instrumentality (NAFI), the Marine Corps Community Services at Camp Lejeune, NC, is an “agency” for purposes of VEOA. The Board held that NAFI operates as a component of the Marine Corps and so comes within the purview of VEOA, and that DoD administers DoD-wide “policies, procedures, programs, and guidance” for the selection of NAFI employees, so that given the extent to which it is integrated into the DoD civilian personnel system, it should be considered covered by VEOA.



Case Studies and Important Decisions

Mixed Case Appeals

- Johnson v. USPS, 2013 MSPB 68: Board held, consistent with the Supreme Court in Kloeckner v. Solis, 133 S. Ct. 596 (2012), that it will provide notice of mixed-case appeal rights to appellants who allege both discrimination and claims appealable to the Board. However, if after filing the appeal, the appellant withdraws the MSPB claim, the appellant will no longer have jurisdiction before the Board.



When the Need for Counsel Arises

- As the processes and case law illustrates, navigating the MSPB is complex. Therefore, it is wise to retain counsel early on.
 - When the Need for Counsel Arises:
 - The need for representation arises when the employee receives a proposal to take a conduct or performance action.
 - The lawyer may be retained to respond orally and in writing to the proposal.
 - Even if the Deciding Official issues a notice to uphold the proposed action, the lawyer is in a better position to file an Appeal with the Board or negotiate a settlement.



Jurisdiction and Time Limits

- The MSPB's jurisdiction is based on the provisions outlined in other laws, rules, and regulations. As such, it can be unclear whether and when you may appeal your personnel action to the MSPB.
- Furthermore, some statutes require the employee to exhaust other administrative remedies before filing at the MSPB.
- To a non-lawyer, who is unfamiliar with reading laws, it may not be readily apparent if the employee can file at the MSPB and/or when the employee should do so. Therefore, retaining counsel at the outset will help to ensure that an employee is embarking down the right path because, otherwise, the employee may later discover that the appeal was untimely or that the MSPB did not have jurisdiction until many months later, once it has been reviewed by an administrative judge.



Where to File?

- The MSPB and the EEOC have overlapping jurisdiction in some cases and it can be unclear where an employee should file a claim:
 - The EEOC has jurisdiction over claims of discrimination based on an employee's membership in a protected class, including: race, sex, age, disability, national origin, religion, etc.
 - The MSPB's jurisdiction is largely based on other laws, rules, and regulations. However, the MSPB may hear claims of discrimination if the employee is also asserting a claim that it has jurisdiction over, ie, whistleblowing. These cases are termed "mixed" cases. With a mixed case, the employee may have a complaint pending before the MSPB and the EEOC and it may be prudent to consolidate these claims.
 - However, understanding when, and if to consolidate requires examining the governing statutes which is not always clear. Therefore, employing the assistance of a lawyer will help make the process more efficient and easier to understand.



The long road

- The MSPB process can be very long and time consuming, especially if one must exhaust other procedural processes before even filing at the Board.
- Enduring this long process is taxing on both the employee and the agency.
- However, as a lawyer, it is my job to weed through all the procedural rights and deadlines in order to ensure that the process is smooth and that the proper procedures are followed.
- Furthermore, it is better to enlist the assistance of a lawyer at the beginning of the process to make sure all deadlines are met as opposed to after a deadline is missed or a complaint is misfiled because, at that point, it is harder to get the case back on track.



Rules and Regulations

- Much like regular civil litigation, there are rules and regulations that govern the adjudication of MSPB claims.
- There are briefs to file, documents to obtain, and possibly depositions to conduct.
- Often these rules and regulations are not clear to those who do not work in the legal profession.
- However, the repercussion for not following the rules can lead to unfavorable decisions for the employee, including dismissal of claim, or to agency management.
- As such, it is best to retain an attorney who knows the process and can advocate on your behalf.



Your attorney is there to help

- The MSPB only hears a select number of cases
 - As the statistics demonstrated, the Board only grants a select number of PFRs per year.
 - Therefore, as an employee you may want to place yourself in the best possible position to ensure that you are well prepared should you need to file or defend against a PFR.
 - As an employer, the agency must know how to avoid appealable actions and follow proper protocol to ensure merit systems compliance.



A Lawyer Knows the System

- As with most things in life, it is better to get assistance from someone with expertise in a specific area than to try and navigate the often unclear and complex area of MSPB litigation on your own. It is also better for agency management to seek to seek guidance early in order to avoid undue litigation before the Board.



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