



**INTRODUCTION TO
MERIT SYSTEMS
PROTECTION BOARD
PRACTICE AND
PROCEDURE**

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MSPB JURISDICTION

Adverse Actions:

- Removals
- Suspensions of 14 days or more
- Indefinite suspensions lasting longer than 14 days
- Reductions in grade or pay
- Furloughs of 30 days or more

MSPB JURISDICTION CONT'D

Other Agency Actions:

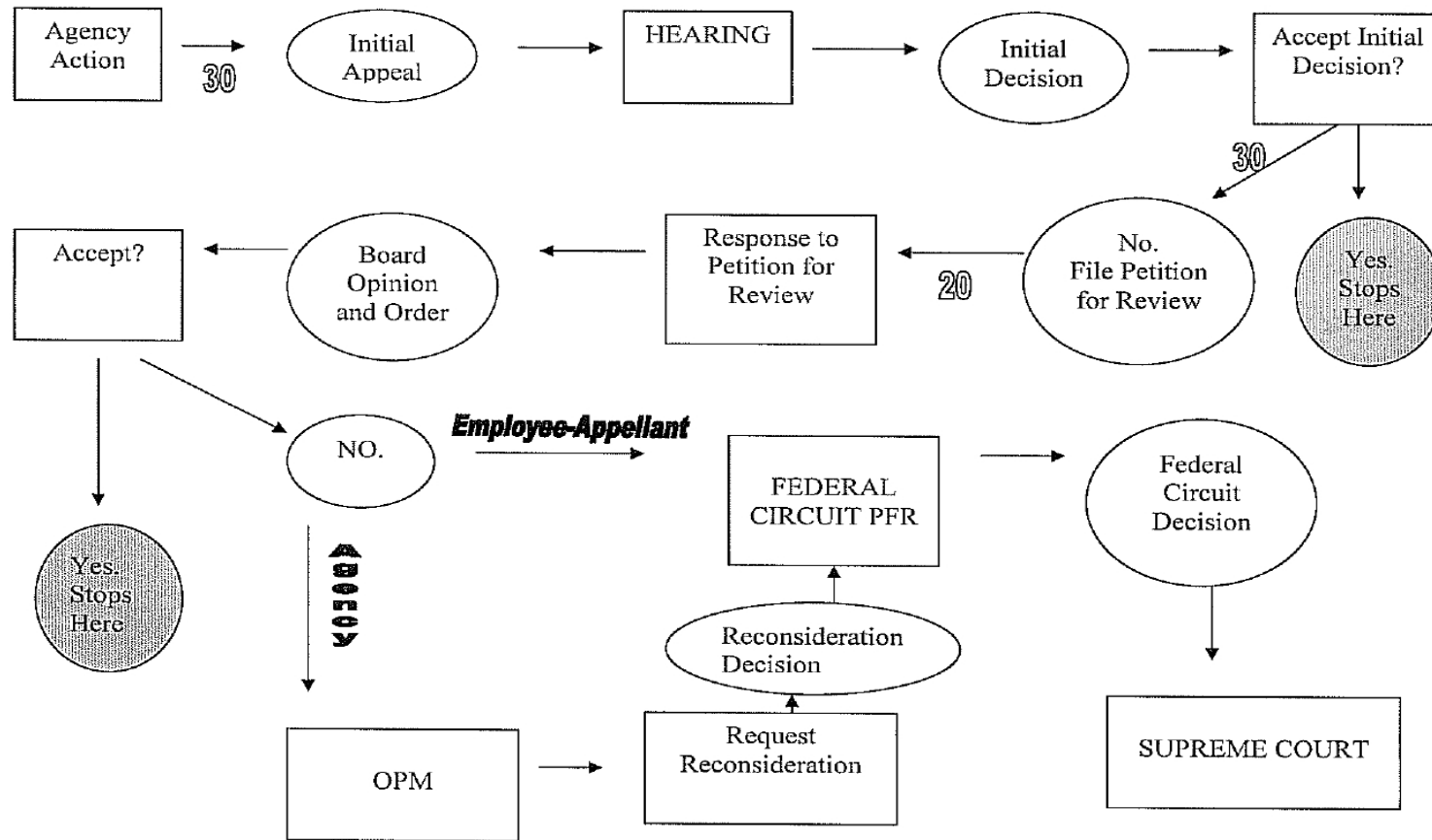
- Performance based removals or reductions in grade
- Denials of within grade salary increases
- RIF actions
- OPM suitability determinations
- OPM determinations regarding retirement
- Denial of reemployment rights
- Termination of probationary employees under very limited circumstances
- Complaints of discrimination related to other actions that invoke MSPB jurisdiction

For Full Appellate and Original Jurisdiction of the Board
See 5 C.F.R. 1201

WHO CAN FILE

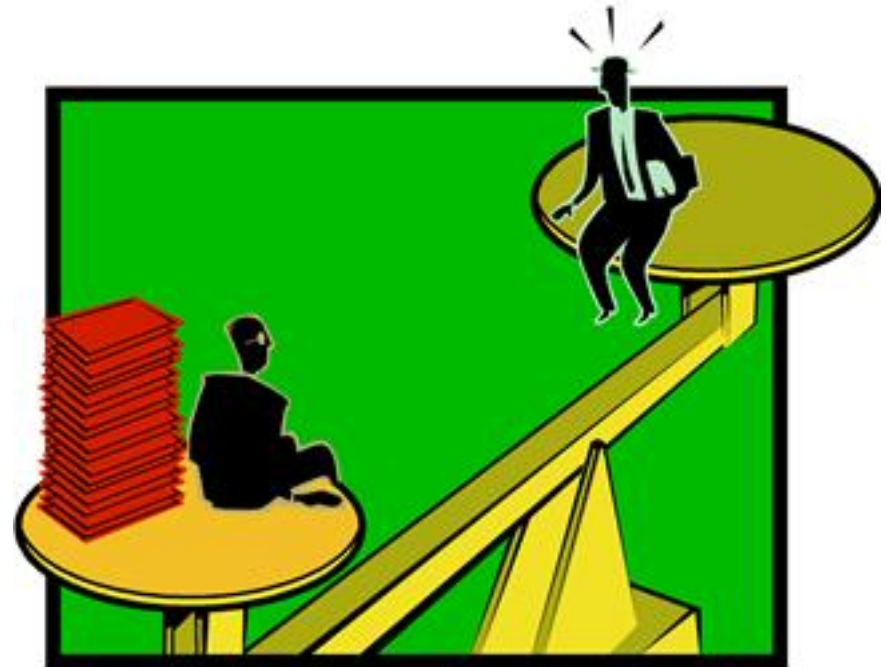
- Employees in competitive service who have completed a 1 year probationary period.
- Veterans Preference eligibles with at least one year continuous employment in the same or similar position outside competitive service.
- Excepted service employees, other than preference eligibles, who are not serving a probationary period and who have completed two years of continuous service in the same or similar positions in an Agency.

APPEAL PROCESS



Did you know?

Less than 2%* of Appeals filed with the MSPB result in a successful decision for the employee.



It is very important to present the best case possible from receipt of the proposed action.

*Fiscal year 2008,
<http://civilservicechange.org/?p=2347>

PROPOSED ADVERSE ACTION

Now what?



Constitutional Due Process Rights

Due Process Requires:

1. Notice
2. Right to Respond
3. Impartial Decision

Proposal Letter provides employee with:

1. Notice of the charges
2. Evidence to support charges
3. Explains employee's right to respond.

Failure to provide due process is grounds for reversal of the action. However, Agency may simply rescind and reissue the action.

Responding to the Proposed Action

- Protect the Record - anything written or said will be made available to the Administrative Judge if an Appeal is filed.
- Recommend that Employee accept at least some level of responsibility where misconduct is undeniable. Do not be evasive - "I don't remember" at the proposed stage will not help later.



FINAL AGENCY DECISION

The decision letter must provide notice of the employee's appeal rights including:

1. the time limits for filing an appeal with the MSPB (30 days)
2. the address of the appropriate Board regional office for filing
3. a copy or access to a copy of the Board's regulations
4. a copy of the appeal form
5. notice of any rights under the negotiated grievance procedure.

Where is the appropriate regional office?



FILING AN APPEAL

What does the legal department need from you?

At least **fifteen days** before the appeal is due:

1. A New Case Intake Sheet
2. The Proposed and Final Decision Letters
3. A draft appeal form filled out by the employee
4. A signed appeal
5. A signed designation of representative
6. Any additional relevant documentation.

Remember -- keep copies of all documents submitted to the legal staff.



FILING AN APPEAL CONT'D

- Appeals typically must be filed within 30 days of the effective date of the Agency action.
- The filing date is determined by the date the appeal is postmarked, faxed, filed electronically, or submitted to a commercial delivery service.
- Failure to timely file an appeal will most likely result in the MSPB dismissing the case unless you have ***good reason*** for the delay. This is a very difficult standard to meet.

Initial Case Processing

- **Acknowledgement Order** (issued within 3 days of filing):
 - Set forth responsibilities of the parties related to discovery and motions practice.
 - Although it is a form order, the acknowledgement order must be read carefully to assure that parties are meeting any non-standard requirements set forth by the Administrative Judge.

- **Show Cause Order**: issued when after initial review the Administrative Judge has reason to believe that the MSPB does not have jurisdiction. For example - if the matter is untimely filed or if the appealing employee is probationary.

Agency Appeal File

Within 20 days of the acknowledgement order, the Agency provides to the Administrative Judge its response to the appeal and the Agency Appeal File.

The Appeal File includes a written response to the appeal and documentary evidence used by the Agency to support its action.

Discovery

During discovery the parties exchange and documentation information prior to the hearing.

Initial Disclosures:

- List of all documents and witnesses currently known to the parties

Written Discovery Requests:

- Interrogatories, request for production of documents, requests for admissions

Depositions:

- Interview on the record

Motion to Compel Discovery:

- when other side fails to timely respond



Pre-Hearing Procedure

- Status Conference
- Settlement Conference
- Settlement Judge

- Pre-Hearing Submissions
 - Facts
 - Issues and Defenses
 - Exhibits
 - Witnesses
 - Subpoena Requests
 - Relief requested

Hearing

- Before an Administrative Judge
- A court reporter is present
- Witnesses are sequestered
- May be in person or via video conference. Telephonic hearings are not allowed unless agreed to by the Appellant.
- Typically there is no oral opening or closing statements.

Burdens of Proof

Agency Must Prove:

Agency must prove that it was justified in taking its action. If Agency meets its burden, Judge will uphold decision unless there was harmful error.

Appellant Must Prove:

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Appellant must prove that matter is within the board's jurisdiction and that the matter was timely filed.

Appellant must prove affirmative defenses- i.e. discrimination.

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Mitigation of the Penalty

The penalty must be within the bounds of reason.

Where the MSPB sustains a charge and underlying specifications, it will defer to an agency's penalty decision unless the penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." *Jones v. U.S. Postal Service*, 106 LRP 57001, 103 MSPR 561 (MSPB 2006).

- An agency has primary discretion in maintaining employee discipline and efficiency. The MSPB will not displace management's responsibility but will instead ensure that managerial judgment has been properly exercised. *Jones v. U.S. Postal Service*, 106 LRP 57001, 103 MSPR 561 (MSPB 2006).



Initial Decision

Administrative Judge's Initial Decision Includes:

- Findings of jurisdiction and timeliness
- Factual background
- Analysis and findings
- A decision may:
 - dismiss the appeal
 - affirm the agency action
 - reverse the agency action
 - or mitigate or modify the penalty
- Finality Date
- Interim Relief
- Notice of Review Rights

Petition for Review

- Must be filed within 35 days of the date of the Initial Decision
- Review occurs when:
 - there is new significant evidence that was not available when the record closed before the administrative judge despite the due diligence of the appealing party.or
 - the judge's decision is based upon erroneous interpretation of law or regulation.
- Full Board may grant, deny, modify or remand.



Alternatives to Discipline

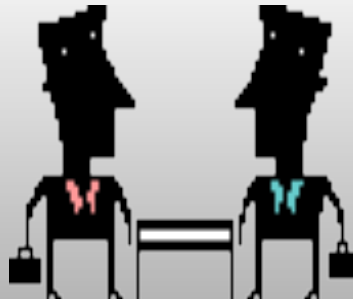
Last Chance Agreements/Abeyance

- Should be reviewed by the legal department if possible
- Usually waives rights to further appeal.
- In order to overcome LCA at the MSPB, the Appellant must prove:
 - he complied with the LCA;
 - the agency materially breached the LCA or acted in bad faith;
 - he did not voluntarily enter into the LCA; or
 - the LCA resulted from fraud or mutual mistake.

Settlement

Must be entered into the record to be enforced by MSPB

- Given low likelihood of success at a hearing, should be seriously pursued by the Appellant.
- Settlement judges and mediation programs available



For More Information:

www.mspb.gov