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**THE MERIT SYSTEMS PROTECTION BOARD
"ROCKET DOCKET"**

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Navigating the Administrative Process of the MSPB

The U.S. Merit Systems Protection Board (MSPB) is an independent quasi-judicial agency in the executive branch of the Federal government with limited jurisdiction to review adverse employment actions by Federal agencies. Typically, MSPB cases involve employment termination, demotion or a suspension of 15 days or more. Disability retirement benefits and whistleblower reprisal cases are also significant components of the MSPB caseload.

This article is a general introduction to MSPB administrative procedures; the limited scope of this article prevents a more detailed discussion. The MSPB regulations 5 C.F.R. 1201 are easily available at www.mspb.gov. Another useful resource is the MSPB Administrative Judge's Handbook available at <http://www.mspb.gov/foia/forms-pubs/judgehb.html>.

The MSPB's administrative procedures will be familiar to litigators in Federal courts, but there are a few surprising differences. The biggest surprise may be the settlement or resolution of the case with a written decision by an Administrative Judge within 120 days. The fast pace of MSPB process earned it the reputation as the "Rocket Docket."

A note of caution. Before agreeing to represent an employee before the MSPB be confident the case has substantial merit or your client has the financial resources to fund the litigation. The Board has a well-earned reputation *as a* difficult forum for representing Federal employees. In the past year, difficulty representing Federal employees before the Board reached a new level as the Board aggressively overturned Administrative Judge decisions mitigating discipline and denied or dramatically reduced attorney fees. Until new Board members are appointed, this forum should be selected with great caution and your client fully informed of the limited chance of success.

Jurisdiction

The Board's jurisdiction is set forth at 5 C.F.R. 1201.1 detailing a range of Federal agency personnel actions subject to review by either an Administrative Judge or direct appeal to the three members of the MSPB Board. Below are issues more commonly litigated before the MSPB.

1) Probationary Employees

- a) Termination of employment based on "pre-employment reasons" without due process. 5 C.F.R. 315.806
- b) Termination based on partisan political reasons

c) Termination based on marital status

2) Non-Probationary Employees

- a) Suspension for 15 days or more
- b) Termination
- c) Demotion

3) Whistleblower Reprisal

- a) Direct appeal based on removal, demotion or suspension of 15 days or more.
- b) An "Individual Right of Action" first filed with Office of Special Counsel (OSC) and then later refiled with the Board within 60 days of notice OSC terminated the investigation or after 120 days of inaction by the Office of Special Counsel on the whistleblower complaint. 5 C.F.R. 1209.5-7.

4) Discrimination in violation of the Uniformed Services Employment & Reemployment Rights Act (USERRA), 5 C.F.R. 1208(a) and the Veterans Employment Opportunities Act. 5 C.F.R. 1208.2(b).

Filing Deadline:

An appeal to the MSPB must be filed within 30 days of the effective date of an employment action. The term "appeal" can be misleading because the employee is "appealing" the personnel action. Appeals filed with the Board result in a hearing before an Administrative Judge and may be filed by facsimile, mail, or electronically. An easy to complete appeal form may be found at www.mspb.gov. If either party is dissatisfied with an Administrative Judge's decision, a "Petition For Review" is the name of the pleading filed with the three member Board of the MSPB to challenge the decision.

The Process Once An Appeal Is Filed

Within a week of filing an appeal with the MSPB, the regional or field office will generally issue an Acknowledgement Order controlling the timing of events. The order will state:

- a) The agency must contact the employee's representative within 35 days to define issues, agree to stipulations, and discuss the possibility of settlement.
- b) Initial Discovery Requests must be filed within 25 days of the order.
- c) The agency must provide the Administrative Judge and the employee's representative an extensive "Agency File" within 20 days of the order. See requirements of the Agency File at 5 C.F.R. 1201.25.

Often, within a week of the Acknowledgement Order, the Administrative Judge will issue an Order And Notice Of Hearing And Prehearing Conference establishing:

- a) The date, time and location of the hearing.
- b) Date for filing and the requirements for a Prehearing Submissions.
- c) Date for filing requests for witness subpoenas.
- d) Date and time of the Prehearing Conference.

Rocket Docket Discovery

The MSPB policy goal of resolving cases within 120 days frequently results in hearing dates not more than 90 days after the case is filed. Just as in Federal court, an employee has the right to use discovery tools such as Interrogatories, Request for Production of Documents, Requests for Admissions and Depositions. Unlike Federal court, an employee's only chance to complete the discovery process in the small amount of time available is to file Interrogatories, Request for Documents, Request for Admissions and Notice of Depositions at the same time the appeal is filed or within a few days. Agency responses are due 20 days after service of discovery which is roughly half the time before prehearing submissions must be filed with the Administrative Judge. Any delay in filing discovery may result in the loss of some or all aspects of the discovery process. As discussed below, there is a procedure for a case suspension in order to complete discovery, but it is best not to assume a suspension request will be granted.

In the past, our firm waited for receipt of the Agency File prior to filing discovery, but after being denied the right to complete discovery by this delay, discovery is now filed with the Initial Appeal. Supplemental discovery requests are filed after receipt of the Agency File if appropriate. In any case, discovery must be initiated within 25 days after receipt of the Acknowledgement Order.

Unlike the discovery practice in Federal court, it may not be in your client's best interest to delay filing of a motion to compel discovery by attempting to resolve informally discovery disputes with agency counsel. In our office, we file a motion to compel discovery on the day after discovery is due. We place a courtesy call to agency counsel and send a letter with the motion to compel discovery apologizing for the abrupt approach, but explaining that in the brief time available there is no time for counsel to work out disputes. Typically, an MSPB Administrative Judge will not wait for an agency's response to a motion to compel before scheduling a conference call. In some cases, the conference call has taken place within two days of the filing of the motion to compel. The pace is maddening, but discovery disputes can be resolved and discovery completed in an astonishingly short amount of time.

Pre-Hearing Conference

During the telephonic Pre-hearing Conference, the Judge will rule on the issues, permissible affirmative defenses, documents admitted into the record, and which witnesses will testify. Be prepared to defend vigorously all proposed documentary evidence and proposed witnesses. Offer detailed descriptions of each witness's testimony. You may be surprised by how many proposed witnesses will be struck because a stipulation is adequate, their testimony redundant or on other grounds. Depositions and sworn statements may be admitted as an alternative to testimony if a witness is unavailable. Only documents or witnesses approved at the pre-hearing conference are admissible at the hearing unless good cause is shown.

MSPB Hearing

If the MSPB discovery process felt like the rocket docket, the MSPB hearing may feel like a jump to light speed. MSPB hearings are open to the public, and witnesses are sequestered during the hearing. The rules of evidence are relaxed but not abandoned. Documentary evidence is limited to exhibits approved at the pre-hearing conference so no time is lost marking or admitting documents. Many MSPB Judges do not permit opening statements. This will disappoint advocates who seek to shape an adjudicator's first impression with a compelling opening statement. The agency typically carries the burden of defending the personnel action and has the advantage of presenting its case in chief first.

Most MSPB Judges are extremely liberal on the amount of hearsay evidence and testimony admitted. Acceptance of hearsay testimony is qualified with a statement the Judge will consider the weight to be given the evidence or testimony. The scope of the liberal admission of hearsay evidence requires proper cross-examination to undercut the witness's credibility. Leading questions are too often the direct examination method of agency representatives and should receive vigorous objections. An Administrative Judge has broad discretion to permit leading questions and may do so liberally with an agency representative who appears innocently unable to fashion non-leading questions.

After the agency's case in chief, the employee's case in chief is presented followed by rebuttal opportunities for both parties. At the conclusion of the hearing, Judges often give the parties the alternative of a closing statement at the hearing, a closing statement within a week by telephone conference, or submission of written post-hearing closing statement.

Time Line of an MSPB Case

1. Day one, file the Appeal and Discovery Requests. Indicated Depositions will be conducted within 10 to 30 days of "complete responses to discovery requests." If you do not have the names of the deponents, identify them by their role in the case, e.g. "Proposing Official,"

"Deciding Official," "Human Resources staff member(s) who advised management on the personnel action."

2. Within a week, expect to receive the Acknowledgement Order.
3. Within approximately ten days, expect to receive the Order And Notice Of Hearing And Prehearing Conference.
4. 20 days from date of Acknowledgement Order, the agency is required to file the Agency File. A motion to compel is sometimes necessary for the Agency File.
5. Day 30, file the Motion to Compel Discovery.
6. Around the 35⁶ day, expect a conference call with the Administrative Judge to resolve discovery disputes.
7. 35 days from the date of Acknowledgement Order, discuss with agency counsel issues, stipulations and settlement.
8. Within 60 days of filing the appeal, depositions should be near completion, and requests for witness subpoenas should be filed.
9. Approximately 75 days after the filing of the appeal prehearing submissions will be due.
10. Approximately 80 days from the filing of the appeal a telephonic prehearing conference will be held with the Administrative Judge.
11. Approximately 90 days from filing of the appeal, a hearing will be held before Administrative Judge of the MSPB.
12. Expect to receive a decision by the Administrative Judge dated on or before the 120-day after the filing of the appeal.
13. An appeal (referred to as a Petition For Review) of the Administrative Judge's decision to the three member Board of the MSPB may be filed within 30 days of receipt or within 35 days of the decision. 5 C.F.R. 1201.1143
14. An appeal of the decision by the three member Board of the MSPB may be filed with the Federal Circuit Court of Appeals within 60 days. 5 C.F.R. 1201.120. If a charge of discrimination was at issue, the employee may seek relief in United States District Court solely on the discrimination issue. 5 C.F.R. 1201.120.

Case Suspension To Allow Time To Complete Discovery

In 2003, the MSPB issued new regulations restricting procedures that allowed for suspension of a case to permit parties to complete discovery:

- a) Within 45 days of the filing of an appeal or within 7 days of receiving the Agency File, the parties may jointly request a case suspension. 5 C.F.R. 1201.28
- b) An Administrative Judge may order a 30 day case suspension to allow a party to complete discovery upon a showing of good cause. 5 C.F.R. 1201.28
- c) As an alternative to a case suspension, an Administrative Judge may dismiss the case without prejudice. Typically, a dismissal without prejudice is for less than 90 days and becomes a dismissal with prejudice when the time expires unless a party refiles the appeal. **Diehl v. United States Postal Service**, 86 M.S.P.R. 635

(2001); **Allen V. United States Postal Service**, 2 M.S.P.R. 420, 427 (1980).

Stays of Personnel Actions

An employee may request a stay of a personnel action from an Administrative Judge in a whistleblower case. 5 C.F.R. 1201.1. The Office of Special Counsel's authority to request a stay is broader and extends to any prohibited personnel action. 5 C.F.R. 1201.134. A stay of a personnel action by the MSPB is an extraordinarily rare event.

Settlements Must be Entered in the Record

The MSPB only retains jurisdiction to enforce a settlement agreement if the settlement agreement is entered in the case record. When negotiating a settlement agreement, be sure to include a provision to incorporate the settlement agreement in the record. Without this provision, the client may have difficulty finding a forum to enforce the agreement.

Attorney Fees

An award of attorney fees from the MSPB under title 5 does not follow the same standards as Title VII attorney fee applications. The controlling statute is the Back Pay Act. 5 U.S.C. 5596(a)(A)(ii), 5 C.F.R. 550.803, and §550.807. To demonstrate the right to attorney fees, an employee must demonstrate (1) the employee incurred attorney fees; (2) the employee is a prevailing party; (3) an award of attorney fees is warranted in the interests of justice; and (4) the amount of fees requested is reasonable.

The Interest of Justice standard is perhaps the most difficult standard to address. The Board instructs that factors to be considered for an award of attorney fees are:

1. Whether the Agency engaged in a prohibited personnel practice;
2. Whether the Agency action was "clearly without merit" or "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the Agency;
3. Whether the Agency initiated the action against the employee in "bad faith;"
4. Whether the Agency committed "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee; or
5. Whether the Agency "knew or should have known" that it would not prevail on the merits when it brought the action.

In the past, if one or more of the above Interest of Justice standards was met the likelihood of an award of attorney fees was good. Attorneys seeking attorney fees are advised to closely study the recent Board case law and avail themselves to the guidance in Peter Broida's MSPB Law and Practice (Dewey Publications) before filing a motion for attorney fees. More recently, the Board members denied or dramatically reduced awards of attorney fees by Administrative Judges. This is a departure from past Board case law that acknowledged the difficulty of successfully representing employees before the MSPB by making the standard for an award of attorney fees reasonable.

Appeals of an Administrative Judge's Decision

An appeal of an Administrative Judge's Decision may be filed with the three member Board of the MSPB within 35 days of the decision or within 30 days of receipt of the decision. 5 C.F.R. 1201.114(d). The pleading filed with the Board should be captioned "Petition For Review." Id. The review standard is narrow and defined at 5 C.F.R. 1201.115. Be prepared to demonstrate the decision of the judge was based on erroneous interpretation of statute or regulation, or that new and material evidence is now available, and despite due diligence, was not available when the record was closed.

If the case included a discrimination issue, the Administrative Judge's decision may be appealed to the Equal Employment Opportunity Commission, or a lawsuit may be filed in U.S. District Court based only on the discrimination issue.

Appeals to the Court of Appeals for the Federal Circuit

An appeal of the decision by the three member Board of the MSPB may be filed in the Court of Appeals for the Federal Circuit within 60-days of receipt of the Board's decision. 5 U.S.C. 7703(b)(1); 5 C.F.R. 1201.120.

Mixed Cases: Overlapping EEOC & MSPB Jurisdiction

A federal employee who suffers discrimination may have the right to file a case with either the EEOC or MSPB. The bad news is the processing of a "mixed case" is complex and confusing. A detailed discussion of mixed cases is beyond the scope of this article and we refer you to the resources recommended earlier discussing MSPB Law and Procedure. In short, a federal employee who suffers discrimination and is subjected to a personnel action within MSPB's jurisdiction may elect to file a complaint in the agency EEO process or file an appeal with the MSPB. If the employee elects the agency EEO process, after the completion of the agency's Formal Investigation of the discrimination complaint, the employee may request a hearing before a MSPB administrative judge or file a lawsuit in U.S. District Court on the discrimination issue alone. If the employee has the time, the Formal Investigation of the EEO complaint may provide valuable evidence for use at the MSPB hearing.

Conclusion

I know of no other forum that resolves disputes as significant as an employment termination in so short a time. The current MSPB Board members have made it difficult

for employees to achieve a fair resolution, but maintain hope that with time new members of the Board will be appointed and a more balanced approach may return. Until that time, it may be best to select the MSPB as a forum for a client's case only with the most compelling evidence.