

CHAPTER 1

THE ESSENCE AND IMPORTANCE OF EFFECTIVE ADVOCACY

It is helpful to have the law, rules, regulations, and decisions on your side. But more often than not, it is advocacy that wins your cases. That is what this book is about.

Advocacy is influencing and persuading, selling your case, and making heard your arguments and evidence. It is weaving a tapestry of fairness, justice, and equity: What is the right thing to do? It is making a mosaic of dependability and reliability: That the right thing can be done.

Advocacy is an art, not a science. Unlike process and procedure, advocacy is not spelled out in regulations or rules. Unlike process and procedure that is fairly straightforward and easy to follow, good advocacy is elusive and difficult. It is effectively and efficiently accomplishing all the important and unimportant things, and all the defined and undefined things. It is presenting your case clearly, concisely, and convincingly. With this text, we seek to set forth a step-by-step, hands-on guide for doing that.

Winning advocacy techniques are especially critical in Merit Systems Protection Board litigation as well as in arbitration, the primary venues addressed in this volume. MSPB and arbitration hearings often involve someone's career and livelihood. These hearings often impact the ability of a federal manager to discharge properly his responsibilities. These factors often put center stage all the drama, feelings, and emotions of a Greek tragedy. There is much at stake.

MSPB and arbitration litigation has fewer and more relaxed rules and procedures than does civil or criminal litigation. Relevant and nonrepetitious evidence is usually admitted, and pure evidentiary considerations go, for the most part, not to admissibility but to weight. Hearsay is generally accepted in these hearings. Hearsay considerations of quality and reliability go to the weight to be afforded hearsay evidence. Persuasive advocacy is even more critical in establishing the reliability and enhancing the quality of evidence.

Board and arbitration hearings are "judge-alone" or "bench trials." That means that effective advocacy starts at the inception. The judge or fact-finder must be provided a sense of professionalism, reliability, and credibility, which starts with the notice of appeal and the notice of appearance, if not before. As to the MSPB, a poorly conducted pre-charge investigation or a poorly drafted notice of proposed adverse action will put the agency playing catch-up. A poorly completed employee response to the proposed action may well put the employee in a catch-up mode.

I. REMEMBER WHAT YOU HAVE

Some judges and arbitrators are more inclined to mitigate a penalty than other judges or arbitrators. The agency must try to highlight the seriousness of the misconduct. A few judges and arbitrators seldom find for the employee. The employee must try to pound home the injustice. A few take the easy way, using so-called demeanor or credibility determinations to make a decision appeal proof. The representative needs to motivate the fact-finder to get into the documents and to closely weigh the actual testimony. But good or bad (and most are good), the judge is last real person that the agency and the employee can come face-to-face with and have somewhat of an open discussion with. After that, it is just a cold record and a paper exercise. The judge is the focal point of good advocacy, and that is where the case must be won.

Although we discuss advocacy before subsequent reviewing bodies in later chapters (that is, the full Board, the FLRA, and the courts), a losing party faces an uphill battle in those forums, a battle that is not statistically promising. Subsequent review at the full Board or at the FLRA is not promising in that most initial decisions issued by the Board judge or arbitrator are upheld. Typically, the standard of review is deferential. If the matter goes to the Federal Circuit, as with MSPB review, things do not improve. For one thing, absent a case of extreme overall importance to federal government personnel law (i.e., in the opinion of OPM), the agency cannot appeal. Only the employee can appeal. Employees lose virtually all appeals to the Federal Circuit. Some years the government wins 96–98% of appeals from Board decisions, and the court often uses summary affirmance to find for the government on a record that would seem to preclude any way to write a decision favorable to the government. That statistic makes one inarguable point: The Federal Circuit does not seem to act as an error-correction court on appeals from Board decisions. The court seems to evidence little interest in the correctness of Board decisions but for a handful of cases where a broad principle (usually in the nature of due process) is enunciated for the Board to follow or where an employee has been obviously treated more than unfairly or unconscionably.

Only certain cases that go to arbitration will find their way to court and sometimes (unless the ace is one that was within the Board's jurisdiction) only when they involve an unfair labor practice finding. The review is expensive, consists of a paper-only review, and usually with deferential consideration of the arbitrator's finding below. Statistics are not favorable to the petitioning party. Cases in which the review is a trial *de novo*—such as in EEO discrimination cases—underscore the need for both the agency (without appeal rights) and especially the employee to do their best before the judge, given the enormous investment of time and expense of a new presentation.

Most Board judges and arbitrators do a good job and usually get it right. That is where the case must be won. Effective advocacy is the way to win.

II. ADVOCACY, THOROUGH RESEARCH, AND FACT-FINDING

Good advocacy requires technique. It is a skill set. But without thorough research and fact-finding, advocacy is ineffective. So the advocate must know the facts as well as the law.

Perhaps the most important and yet most overlooked part of the process is the initial fact gathering. Find the facts first. The facts drive the process and dictate the consequence. In adverse actions, the charge must fit the facts. Too often agencies rush to a proposal with little or no fact finding. Few things are more important. While discovery is available at the MSPB, a bad charge cannot typically be fixed. Patchwork is even more unlikely in arbitration, where agency discovery prehearing is not part of the process and union “discovery” is limited to document requests. The party that has command of the facts has the advantage. We discuss the initial fact-finding in [Chapter 5](#).

The task is to clearly present those facts to the deciders. The court, the Board, and most arbitrators with federal sector experience know the law, and the law is almost always clear. But the court, the Board, and the arbitrator do not know the facts. Good advocacy is persuasively delivering those facts in a clear and concise manner. That is the principal task of the advocate. The advocate must know the facts: what witnesses know, what the documents say. We discuss good fact-finding techniques in [later chapters](#).

Thorough fact-finding is driven by one’s theory of what happened and law dictates what is pertinent to that theory. If an employee is suspected of falsification, the representative or fact-finder must know the elements of a falsification charge, the nuances of that charge, the common defenses, the pitfalls, and the applicable case law. The advocate must also be familiar with the process in arbitration or at the MSPB.

There are several invaluable resources available to research the law applicable to any particular problem, issue, or charge and the particular processes. The MSPB has an excellent [website](#). It contains Board decisions as well as an excellent search engine that allows you to search decisions for applicable case law on any charge. The Board posts a weekly update on new decisions and notices any changes in regulations and laws. The Board’s site also contains the Board’s regulations from 5 CFR Part 1201 and other applicable regulations, and also makes available the *MSPB Judges’ Handbook*.

The FLRA publishes decisions and arbitration regulations on its [website](#) and provides a valuable “[Guide to Arbitration Under the Federal Service Labor-Management Relations Statute](#).” OPM’s [website](#) contains information, with links to regulations applicable to adverse actions and performance based actions, as well as to Title V, the basic statutory law governing adverse actions and other matters often implicated in hearings. [Dewey Publications](#) offers many subject-specific books on federal sector employment, EEO, and labor law.

Several invaluable books on adverse actions, performance based actions, and Board process include (1) *A Guide to Merit Systems Protection Board Law and Practice*, (2) *MSPB Charges and Penalties, a Charging Manual*, (3) *Adverse Actions and Performance-Based Actions*, and (4) *Principles of Federal Sector Arbitration Law*. These are just four of many outstanding books offered by [Dewey Publications](#).

III. ABOUT THIS BOOK

The next two address the fundamentals of the MSPB ([Chapter 2](#)) and arbitration ([Chapter 3](#)). We discuss certain proof requirements in [Chapter 4](#) and the pre-MSPB or pre-arbitration process at the agency in [Chapter 5](#). Then, we turn to “discovery” at the MSPB and its limited equivalent—Section 7114 union requests—in arbitration in [Chapter 6](#). The Chapters 7–10 concern certain advocacy aspects—motion practice, direct and cross, and openings and closings—that cut across MSPB and arbitration practice. We conclude with [Chapter 11](#) on settlement, an important part of both the MSPB and arbitration process.

Let us begin.

CHAPTER 2

BOARD FUNDAMENTALS—PROCESS AND PROCEDURES, LAWS AND REGULATIONS, AND HOW THEY CAN WORK FOR YOU

The purpose of this chapter is to discuss the Merit Systems Protection Board (MSPB or Board), the way cases get to and are processed by the Board, the kinds of cases the Board handles, its rules and regulations, and the overlap with other and the election of remedies (for example, grievance arbitration and EEOC mixed case processing). We begin by describing the way in which the Board was created.

I. HOW THE MSPB CAME ABOUT: THE CSRA

The MSPB was created by the Civil Service Reform Act of 1978. Before the CSRA, employees had the right to appeal certain actions to hearing officers at the Civil Service Commission. These hearing officers had limited authority and worked for the same agency—the Civil Service Commission—that was responsible for issuing the regulations that were ruled upon by the hearing officers. Now, we could go on about the unfairness of this system—and also about the perceived difficulty in firing poor performers, another consideration in changing the law and establishing a new agency to adjudicate civil service cases under revised statutes that emphasized constitutional due process guarantees.

There were several other agencies and processes created or reorganized by the CSRA. So another way to look at the CSRA—and to understand the role played by the MSPB—is by understanding the agencies and processes, to include the MSPB, that were created or reorganized by this new law, and the way in which these agencies and processes intersect with or are separated from the MSPB. Keep in mind that Congress was attempting to ensure that employees got one chance for substantive review and that cases were not proceeding simultaneously in several venues.

A. MERIT SYSTEMS PROTECTION BOARD

The MSPB can review and rule on (that is, it has appellate jurisdiction over) certain decisions made by federal agencies. More than 50% of MSPB appeals involve reviews of the more significant discipline decisions made by agencies—appeals from removals, demotions, and suspensions of more than 14 days. A few of the other kinds of agency decisions reviewed by the MSPB include within grade increase denials, performance-related firings, removals, and actions taken during a reduction in force. The MSPB will also sometimes get involved in EEO and whistleblower reprisal cases and review decisions under relatively new statutory rights given to veterans and preference eligibles (veterans who served at particular times). Cases decided by the MSPB can be reviewed by the Federal Circuit Court of Appeals (with OPM going to bat for the agency). EEO cases are an exception, which are ultimately appealed to a federal district court by the employee, sometimes after going through the EEOC.

The MSPB rules and decides through its three Board members in Washington, D.C., who have delegated hearing authority to administrative judges located in the Board's regional and field offices around the country. More about the judges and Board members [later](#).

B. FEDERAL LABOR RELATIONS AUTHORITY

The Civil Service Reform Act created the Federal Labor Relations Authority (FLRA) as a new agency. It was given jurisdiction over labor-management relations for non-postal employees and was vested with the authority to supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit. It was also given jurisdiction to conduct hearings and resolve complaints of unfair labor practices, and to resolve exceptions to certain arbitration awards. The FLRA was modeled on the National Labor Relations Board (NLRB), which is responsible for private sector and U.S. Postal Service labor relations.

The jurisdiction of the FLRA and the MSPB are mutually exclusive. The FLRA cannot consider a case or an unfair labor practice claim raised in connection with an action that is appealable to the Board. Even actions decided by an arbitrator and covered under 5 USC Sections 4303 (performance) and 7512 (adverse actions) cannot be reviewed by the FLRA. A final FLRA decision concerning ULP complaints can be appealed to a regional federal court of appeals.

C. GRIEVANCE-ARBITRATION

Under the CSRA, a union and agency can agree that certain matters, normally within the jurisdiction of the MSPB (RIF, WIG actions), will be exclusively decided through the negotiated grievance-arbitration process. (Obviously, there are many other things that are covered by a typical negotiated agreement.)

Some actions within the MSPB's jurisdiction cannot be exclusively limited to grievance-arbitration. These matters include actions covered by Section 4303 (performance), Section 7512 (adverse actions), and any appealable action involving a claim of prohibited discrimination. If such an action falls within the coverage of a grievance procedure negotiated under 5 USC Section 7121, the aggrieved employee, at his option, may raise the matter *either* under the appellate procedures (to the Board) *or* under the negotiated grievance procedure as an arbitrable matter. (Just as with some other CSRA sections, this election procedure does not apply to Postal Service employees.) The employee must elect which course of action he or she wishes to pursue. This is done by timely filing a notice of appeal or timely filing a grievance in writing under the negotiated grievance procedure. If the employee attempts to do both, he or she is bound by whichever was filed first. See 5 USC 7121.

In actions that could have been appealed to the Board but for which arbitration is elected, an arbitrator has an obligation to follow the same “substantive” rules as the Board does in reviewing an agency action. See *Cornelius v. Nutt*, 472 U.S. 648 (1985).

There are several appeal routes, depending on the kind of case. For those cases that are within the MSPB jurisdiction and where the case involves a prohibited discrimination issue, the employee can appeal to the full Board in Washington D.C., and then seek review at the EEOC and after a final administrative decision, can file in federal district court. If the case is within the Board’s jurisdiction but does not involve a discrimination issue (or if the discrimination issue is dropped), the employee, union, or agency (with OPM’s intervention) can seek review in the Federal Circuit Court of Appeals. Otherwise, the agency or the union can file an exception to the arbitrator’s award with the FLRA within 30 days. If the FLRA’s final order involves an unfair labor practice, either party may appeal to the federal circuit.

D. OFFICE OF PERSONNEL MANAGEMENT

Office of Personnel Management (OPM) was another new agency created by the Civil Service Reform Act. Under the CSRA, the OPM is assigned the lead in the personnel administration area. As such, it issues regulations that flesh out actions appealable to the Board (for example, 5 CFR Part 432 performance regulations) and that the Board will frequently interpret. OPM has authority to take actions, which themselves are appealable to the Board and for which OPM is consequently the party defending the appeal (for example, Part 731 Suitability appeals, Part 831 Disability Retirement appeals).

OPM, as the representative of the United States government (as well as personnel head), is authorized to intervene as a matter of right in any Board proceeding that involves the interpretation of an OPM rule or regulation. 5 USC Section 7701 (d)(1); 5 CFR Section 1201.34 (b). OPM also has been given authority to appeal Board initial decisions and also to ask the full Board to reopen or reconsider decisions. This authority includes cases in which the OPM Director is of the opinion that an MSPB decision is erroneous and will have a substantial impact on civil service law, rule, or regulation. 5 USC Section 7701 (e) and 7703 (d). Likewise, OPM (but not the agency party) is provided authority to appeal Board decisions to the Federal Circuit Court of Appeals. 5 USC Section 7703(d).

E. OFFICE OF SPECIAL COUNSEL

The CSRA established the Office of Special Counsel (OSC) but made it a part of the MSPB. Later, however, the 1989 Whistleblower Protection Act established OSC as a separate agency.

The CSRA (and the Whistleblower Protection Act of 1989, and 1994 amendments) authorized OSC to investigate claims of prohibited personnel practices (such as whistleblower reprisal) as well as perform other functions not directly related to the topic at hand (such as safe channel for whistleblowers, Hatch Act investigations). Consistent with its prohibited personnel practice (PPP) responsibility, OSC will sometimes intervene in Board proceedings, seek disciplinary action against employees who have allegedly committed PPPs, seek stays to protect employees from PPPs, and serve as a first step for employees who want a hearing before the MSPB on certain claims of whistleblower reprisal (IRA appeals). These authorities and responsibilities in connection with the MSPB—and most involve whistleblower reprisal actions—are discussed more fully [below](#).

F. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) is responsible for administering and interpreting the federal discrimination laws, which prohibit employment discrimination on the bases of race, color, religion, national origin, age, disability, reprisal, and equal pay. The EEOC was already in existence at the time of the CSRA. Before the CSRA, federal employee claims of discrimination were not addressed by the EEOC as they are today, and instead were heard by the Civil Service Commission hearing officers. This changed with Reorganization Plan Number 2, issued by the President upon enactment of the CSRA, which transferred certain functions and responsibilities relating to equal employment opportunity in the federal civil service from other agencies to the EEOC. Because the EEOC has responsibility for the private sector as well, the Office of Federal Operations (OFO) was established within the EEOC and given responsibility for federal employment.

When Congress established the MSPB to handle civil service issues in the CSRA, it was faced with a problem—how would cases be handled when the employee raises a discrimination issue coupled with a civil service issue (that is, a case that falls within the jurisdiction of both the MSPB and the EEOC)? An example: a competitive service non-probationary employee is fired for insubordination and claims that the firing was due to sex discrimination. Congress could have allowed separate appeals and hearings but that would risk duplication and inconsistent results. Instead Congress established special processing procedures for a “mixed case,” which allows both the EEOC and the MSPB to weigh in on the discrimination issue. See 5 USC Section 7702.

In mixed cases, if the employee files a formal complaint of prohibited discrimination with the agency before filing an appeal to the Board, the Board cannot exercise its jurisdiction until the agency has issued a decision or otherwise resolved the complaint. If neither has occurred within 120 days, the employee may then file an appeal to the Board at any time thereafter or within 30 days after the resolution or final agency decision on the EEO complaint. Or, an employee can go directly to the MSPB—without going through the agency’s EEO process—and raise the EEO claim as an “affirmative defense.” We will discuss affirmative defenses [later](#).

Once the discrimination issue is before the Board’s administrative judge—either after going first through the agency or going directly to the MSPB—the Board will process the case just like any other case, except that it will make a decision on both the civil service and the discrimination issues. If the employee is dissatisfied with the MSPB’s final decision on the discrimination issue, the employee can ask the EEOC to review the Board’s decision. The EEOC, through its Office of Federal Operations, may concur in the Board’s decision or disagree with the Board and send it back to the MSPB. The Board may then concur and adopt in whole the decision of the EEOC, reaffirm the decision of the Board, or revise and reaffirm the decision of the Board. If the Board reaffirms its decision, with or without modification, the matter must be certified to a Special Panel established in accordance with 5 USC Section 7702(d). The Panel must review the administrative record and issue a final decision within 45 days of certification of the matter to it by the Board. This “mixed case” process will be [discussed later](#) in more detail.

The appeal from an EEOC final decision (either in a mixed or a nonmixed case) is by the employee, not the agency, to the federal district court.

II. A CLOSER LOOK AT THE MSPB'S ORGANIZATION AND STAFF

The Board is organized on two levels: (1) its headquarters in Washington, D.C., and (2) the regional or field operations. It is a small agency with fewer than 200 employees nationwide.

Appeals are processed, heard, and decided initially in the regions. The three-member Board itself acts as an appellate body, reviewing initial decisions from the regions based on the record developed at the regional level. In the deciding and processing of an appeal, you generally will have direct personal contact with an administrative judge and the staff in the regional and field offices and only contact through written submissions with the Board members and their staff at headquarters.

A. THE REGIONAL AND FIELD OFFICES

The eight field and regional offices are located around the country. There are six regional offices, located in Alexandria, Virginia (referred to as the "Washington Regional Office"), Philadelphia (the "Northeastern Regional Office"), Chicago (the "Central Regional Office"), San Francisco (the "Western Regional Office"), Dallas, and Atlanta. There are two field offices, one in Denver and one in New York. Denver reports to San Francisco and New York to Philadelphia.

Adjudication of appeals begins at one of the eight regional or field offices. These offices are staffed by a cadre of administrative judges (AJs or judges) who are excepted-service attorney-examiners, generally at the top levels of the government's General Schedule pay system. The support staff in each office consists of paralegal clerks and legal clerks. Generally, one clerk is assigned to several judges. The heads of the regional offices have two titles, Chief Administrative Judge (CAJ) and Regional Director (RD). The heads of the two field offices are CAJs only. The CAJ and/or RD in each office supervises the AJs and the support staff. The CAJ may or may not have his or her own caseload.

An AJ issues an "initial decision" that must contain analysis, findings of fact, and conclusions of law. An initial decision becomes a final decision of the Board unless it is appealed by either party (or the Board reopens the case on its own motion, which happens rarely). An appeal to the three-member Board in Washington, D.C., is called a Petition for Review (PFR) and is based on the record developed at the regional level.

B. HEADQUARTERS

The three Board members are appointed by the President for seven-year terms and, by law, the Board must be bipartisan. This means that, during a Republican administration, two members of the Board are Republicans and one is a Democrat, and vice-versa. One of the three is appointed by the President as the MSPB Chairman, and is responsible for directing Board administrative operations. The other two are designated as the Vice-Chair and "the Member."

The three Board members have, in addition to their own personal legal assistants, numerous headquarters employees located in two offices who directly assist in the adjudication of PFRs. Employees in the office of the Clerk of the Board docket PFRs, handle routine processing matters while a PFR is pending, and issue the Board's final decisions. Employees in the Office of Appeals Counsel (OAC) receive a PFR after the Clerk docketed it, analyze the case, and write a proposed decision which is sent to Board members. Decisions issued by the three-member Board are entitled "Opinions and Orders" (O&Os). For years, the Board issued regular O&Os and short-form decisions. These short-form decisions contained little or no facts or analysis. More recently, in addition to O&Os, the Board has begun issuing nonprecedential decisions, often containing factual and legal analysis. The nonprecedential decisions are being used in place of the short-form decisions, so that the parties have a better understanding of the basis for disposition of a PFR.

The Board's final decisions—short form, nonprecedential or O&Os—may be reviewed by either the EEOC and then District Court (if they involve an issue of prohibited discrimination) or the U.S. Court of Appeals for the Federal Circuit (the Federal Circuit). Federal Circuit decisions in Board cases may be reviewed by the U.S. Supreme Court, at the Supreme Court's discretion. Only a tiny number of Board cases have been heard by the Supreme Court during the Board's nearly 30-year history.

C. HOW THE MSPB PROCESSES AND DECIDES AN APPEAL

While we describe the processing of the appeal below as it is typically seen by the two parties, we wanted to briefly look at the appeal processing, as it actually occurs inside the Board.

An appeal is filed in the regional or field office by mail, personal delivery, fax, or electronic mail. Board regulations establish the content of the appeal. The Board supplies an appeal form that can be used. The appeal can be filed electronically through a digital format. Once filed, a regional or field office employee examines the appeal, fills out a case-processing sheet, and gives the appeal to the Chief Administrative Judge. The CAJ assigns a judge to the case, and returns the appeal to the judge or to an employee who assists the judge (a paralegal or law clerk) for preparation of an order acknowledging the appeal. The judge signs the acknowledgment order and an employee serves the appeal on the agency and the acknowledgment order on both parties. The appeal is now "docketed" and entered into the Board's computerized case-tracking system. This system requires an entry for every event in the life of the appeal. Any Board employee may enter the case-tracking system at any time and get detailed information on any appeal, including what pleadings have been filed by whom, when the hearing was held, or which office has the case file.



Practice Tip

AJs look for a way to quickly understand the appeal that has been assigned. Many AJs will look first at the proposal letter to get a sense of the background. (Decision letters are typically too basic.) Better written proposals give agencies an advantage. Well written appeal forms can do the same thing for employees. In our experiences, appeals are seldom well written and contain little helpful substantive information but include a lot of venting. Our advice for agency representatives: tell your story strongly and concisely in the proposal. Our advice for employees: use more substance and less emotion in the initial appeal form.

The appeal remains with the assigned AJ until he or she issues an initial decision. The AJ has 120 days from receipt to hear and decide each appeal. The 120-day requirement is mandated by statute for all cases involving prohibited discrimination (“EEO issues”) and by Board policy for all other cases.

Within a week or so of the appeal, a judge will be assigned and the judge will issue and acknowledgment order. The order will notice the applicable regulations and require several key things to be done in accord with stated time limits: designation of representatives, submission of an agency file containing the pertinent documents, initial disclosures (identifying people and documents with information about the adverse action), and initiation of settlement discussions, among others.



The agency file should contain all the pertinent and helpful documents, all indexed and brought to life through a narrative statement that refers to the applicable law and sets out clearly all pertinent facts. Facts win cases. The statement should read like an opening brief, not a reference to the agency documentation.

The date of the acknowledgment order starts the running of a 25-day period to initiate discovery. Discovery may be barred if not initiated within this period. Discovery is typically undervalued and under used. Discovery as well as an informal investigation should be undertaken in most complex cases. The agency controls most witnesses and most documents and has presumably done already at least an informal investigation. The need for the employee to conduct some discovery is readily apparent. The agency knows only what it learned from its informal investigation and perhaps from the employee’s reply, if he made one. The agency should do some discovery to make certain it knows what the employee will say before the agency hears it at the hearing on the case before the AJ. The problem with Board discovery is that it moves quickly and must usually be usually completed about 65 days after the appeal is filed. We discuss discovery in more detail in later chapters.



Discovery should be initiated immediately. It is often necessary to notice depositions before paper discovery (interrogatories, requests for documents, requests for admissions) has been completed.

If the employee has requested a hearing, at some point thereafter the judge will issue a standardized order and notice of hearing and prehearing conference no later than 15 days prior to the date set for hearing. See 5 CFR 1201.41(b)(12), .51 (2001); *Judges’ Handbook*, Ch. 4, § 4; Ch. 9, § 2. Judges are admonished to issue the prehearing notice as early as practicable so as to provide the parties with the dates by which they have to complete their discovery. Scheduling is generally unilateral and without consultation with the parties. The standard MSPB prehearing order sets the dates for the prehearing conference and hearing, requires prehearing submissions, and sets the agenda for the prehearing conference. The following is a typical prehearing order from MSPB:

ORDER AND NOTICE OF HEARING AND PREHEARING CONFERENCE

The hearing in this appeal will be held:

Date: _____

Time: _____

Location: Merit Systems Protection Board

If appellant fails to appear without good cause, the appeal will be decided without a hearing. If the agency representative fails to appear, the hearing will, absent extraordinary circumstances, proceed as scheduled.

PREHEARING SUBMISSIONS

The agency and appellant are ORDERED to file the following by _____.

- (1) A statement of facts and issues (appellant must include any and all defenses);
- (2) A list of all agreed upon material facts;
- (3) A list of witnesses with a brief summary of the expected testimony of each witness; and,
- (4) A copy of exhibits accompanied by an index identifying the documents. You must separately mark for identification each and every document. Appellant must mark exhibits by letter, the agency by number. Documents previously submitted to the Board by either party are already a part of the record and are not to be offered as exhibits. You must separately mark for identification each and every document in the lower right hand corner.

NOTE: In presenting evidence at the hearing, you will be limited by your prehearing submissions, except for good cause shown. For example, an unlisted witness will usually not be permitted to testify.