

CHAPTER ONE

INTRODUCTION

I. CONTENTS OF BOOK

As the title suggests, this book seeks to provide a road map for the numerous employee relations, EEO, and labor relations personnel actions that are taken for or against federal government employees. This “road map” follows an action from the matter appealed (usually a “personnel action” through any appeal or review by third parties, such as the MSPB, FLRA, or court.

II. ORGANIZATION

We have organized this volume by the kind of action taken or appealed, beginning with the agency and through any court processes. For each action, we begin with a narrative and end with a graph or chart.

A. ADVOCACY VALUE FOR REPRESENTATIVES

The purpose of this volume is to provide understanding of the choices or options available within the federal civil service system. When would resort be to OSC or to MSPB, DOL, FLRA, MSPB, or court? When is a choice made between EEO or MSPB; grievance arbitration or EEOC or MSPB? Informed advocates know these options or elections are typically irrevocable and frequently the most important decisions in the process.

B. ADVOCACY VALUE FOR AGENCY AND AGENCY ADVOCATES AND MANAGERS

In reading this book, you should know what you are facing. This may inform your views on resolution. For example, once in the EEO process the final decision is made by the EEOC and, while the employee can go into court, the agency cannot. Also, in actions at the MSPB, the agency, if it loses, can only appeal to court through OPM and with its permission. And, it is important to understand when the employee has made an election, so that the agency can enforce that choice (i.e., an MSPB appeal followed by an attempt to seek arbitration).

CHAPTER TWO

EMPLOYEE RELATIONS / EQUAL EMPLOYMENT OPPORTUNITY

I. MERIT SYSTEMS PROTECTION BOARD (MSPB)—NON-MIXED CASES

The Merit Systems Protection Board (MSPB) was created by the Civil Service Reform Act of 1978 (CSRA). 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 agency—the Civil Service Commission—that was responsible for issuing the regulations that were ruled upon by the hearing officers.

Currently, the MSPB has original jurisdiction (generally actions filed by agencies) as to actions brought by the Special Counsel under certain statutes (i.e., 5 USC 1214, 1215, and 1216) for violations of prohibited personnel practices (stays, corrective action, disciplinary action) and the Hatch Act; removal of SES career appointees; “Actions taken against administrative law judges under 5 USC 7521”; and, review of certain OPM regulations. 5 CFR 1201.2; and 5 USC 1204(f).

Most important, the MSPB has vast appellate jurisdiction (i.e., review of an agency personnel action at the request of the employee), to include, as provided in the MSPB’s regulation at 1201.3:

- (1) *Adverse Actions*. Removals (terminations of employment after completion of probationary or other initial service period), reductions in grade or pay, suspension for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; an involuntary resignation or retirement is considered to be a removal (5 USC 7511–7514; 5 CFR part 752, subparts C and D);
- (2) *Retirement Appeals*. Determinations affecting the rights or interests of an individual under the federal retirement laws (5 USC 8347(d)(1)–(2) and 8461(e)(1); and 5 USC 8331 note; 5 CFR parts 831, 839, 842, 844, and 846);
- (3) *Termination of Probationary Employment*. Appealable issues are limited to a determination that the termination was motivated by partisan political reasons or marital status, and/or if the termination was based on a pre-appointment reason, whether the agency failed to take required procedures. These appeals are not generally available to employees in the excepted service. (38 USC 2014(b)(1)(D); 5 CFR 315.806 & 315.908(b));

- (4) *Restoration to Employment Following Recovery from a Work-Related Injury.* Failure to restore, improper restoration of, or failure to return following a leave of absence following recovery from a compensable injury. (5 CFR 353.304);
- (5) *Performance-Based Actions Under Chapter 43.* Reduction in grade or removal for unacceptable performance (5 USC 4303(e); 5 CFR part 432);
- (6) *Reduction in Force.* Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901); Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 USC 4011);
- (7) *Employment Practices Appeal.* Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104);
- (8) *Denial of Within-Grade Pay Increase.* Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 USC 5335(c); 5 CFR 531.410);
- (9) *Suitability Action.* Action based on suitability determinations, which relate to an individual's character or conduct that may have an impact on the integrity or efficiency of the service. Suitability actions include the cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment. A non-selection or cancellation of eligibility for a specific position based on an objection to an eligible or a pass over of a preference eligible under 5 CFR 332.406 is not a suitability action. (5 CFR 731.501, 731.203, 731.101(a));
- (10) *Various Actions Involving the Senior Executive Service.* Removal or suspension for more than 14 days (5 USC 7543(d) and 5 CFR 752.605); Reduction-in-force action affecting a career appointee (5 USC 3595); or Furlough of a career appointee (5 CFR 359.805); and
- (11) *Miscellaneous Restoration and Reemployment Matters*" (such as a "Failure to afford reemployment priority rights pursuant to a Reemployment Priority List following separation by reduction in force (5 CFR 330.214); [or] Full recovery from a compensable injury after more than 1 year, because of the employment of another person (5 CFR 302.501)."

Other matters within the MSPB's appellate jurisdiction include: appeals under the Uniformed Services Employment and Reemployment Rights Act (USERRA); the Veterans Employment Opportunities Act (VEOA); review of arbitration decisions in which certain prohibited discrimination is alleged; and, other complaints or

appeals in which an employee is alleging “that a personnel action appealable to the Board was based, in whole or in part, on prohibited discrimination.” 5 CFR 1201.3 and 1201.151.

This latter category of cases—appealable actions to the Board that are based, in whole or in part, on prohibited discrimination—are referred to as “mixed cases.” Because the roadmap is different from other actions, the review and appeal procedures for mixed cases are analyzed later in this section under the heading, “[Equal Employment Opportunity Commission \(EEOC\)—Non-Mixed](#).” Likewise, we address several other actions within MSPB jurisdiction including original jurisdiction actions found later in this section under the headings: “[MSPB—Senior Executive Service \(SES\) Actions \(performance-based \[original jurisdiction\], removal or suspension for more than 14 days, RIF, furlough\)](#)” (i.e., appeals from SES employees who are removed for discipline or performance); “[MSPB/OSC](#)” (i.e., actions for stays, corrective action and disciplinary action brought by the Special Counsel 5 USC 1214, 1215 and 1216, for violations of prohibited personnel practices); “[MSPB—Actions Against ALJs](#)”; “[MSPB—Uniformed Services Employment and Reemployment Rights Act \(USERRA\)](#)”; “[MSPB—Veterans Employment Opportunities Act \(VEOA\)](#)”; “[MSPB or FLRA—Grievance-Arbitration](#)” covers appeals from certain arbitration decisions involving claims of prohibited discrimination; appeals from OPM retirement decisions are covered under “[MSPB/OPM](#)”; and, appeals seeking restoration to employment following recovery from a work-related injury in “[MSPB—Restoration Rights After Injury](#).”

In sum, this section covers the review and appeal procedures for the following actions within MSPB jurisdiction: adverse actions (i.e., “terminations of employment after completion of probationary or other initial service period, reductions in grade or pay, suspension for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service” (5 USC 7511–7514; 5 CFR Part 752, subparts C and D); termination of probationary employment (i.e., motivated by partisan political reasons or marital status, and/or if the termination was based on a preappointment reason, whether the agency failed to take required procedures (38 USC 2014(b)(1)(D); 5 CFR 315.806 and 315.908(b)); performance-based actions under Chapter 43 of the CSRA (i.e., “Reduction in grade or removal for unacceptable performance”) (5 USC 4303(e); 5 CFR part 432); reduction in force (i.e., “Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force...”) (5 CFR 351.901 and 22 USC 4011); suitability actions by OPM (or by the agency, if authority was delegated) (5 CFR 731.501, .203 and 101(a)); Denial of a within-grade increase appeal (5 USC 5335(c) and 5 CFR 531.410); and, an employment practices appeal (i.e., “Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service”); and, denial of a within-grade pay increase (5 CFR 300.104). See 5 CFR 1201.3.

Of these actions, the most frequent are adverse actions, which make up more than 50% of cases appealed to the MSPB. The review and appeal process for the actions included in this section is largely the same, once a case gets to the MSPB. However, there are differences at the agency level for some of the actions.

A. AT THE AGENCY LEVEL

For example, “adverse actions” are taken in a two-step process, a proposed action, with a right to reply orally or in writing, followed by an agency decision and then an appeal to the MSPB from that decision. 5 USC 7513. Similarly, suitability actions can be taken by OPM (or delegated to agencies by OPM) and typically involve an investigation, a proposed action if an employee is deemed unsuitable, with a right to answer in writing, followed by a decision (by OPM or by an agency if authority was delegated by OPM), and an appeal to the MSPB. 5 CFR Part 731. But, reductions in force or furloughs occur upon notice to the employee by the agency (not necessarily in two steps). 5 CFR Part 351. And, a within grade increase denial is appealed to the MSPB, only after an initial OPM decision, followed by an unsuccessful request for reconsideration. 5 CFR Part 531. As to employment practices appeals, those are triggered by a claimed lack of a “rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used,” and corresponding notice from OPM of the alleged use of such an employment practice. 5 CFR 300.103 and 104; *Chadwell v. MSPB and OPM*, 629 F.3d 1306 (Fed. Cir. 2010). Moreover, as to probationer terminations, this is typically a one step process, unless the employee is terminated for “pre-employment” reasons, and then the agency is required to effectuate the termination in two steps, a proposal, with a right to apply orally and in writing, followed by a decision; the appeal to the MSPB is from that decision. 5 CFR Part 315, subpart H.

B. APPEALS TO THE MSPB

Each of these actions in this section—adverse actions, performance—based actions, suitability determinations, within-grade increase denials, employment practices by OPM, reductions in force and furloughs of fewer than 30 days, probationary terminations, and suitability determinations—are appealable to the MSPB. Appeals must be filed “no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant’s receipt of the agency’s decision, whichever is later.” The regulation further provides that: “Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days—for a total of 60 days.” 5 CFR 1201. 22(b). When an agency issues a decision notice, it is required to provide information about the time filing period to an applicant or employee. 5 CFR 1201.21.

At the Board, the actions within this section are mostly processed in the same way (i.e., jurisdictional and/or timeliness determination, if applicable, a hearing and an initial decision by the MSPB AJ). Following the initial decision, the parties have review rights.

C. REVIEW AFTER BOARD PROCESSING BY THE AJ

First, if the MSPB AJ dismisses a case because of jurisdiction or a failure to meet the appeal timeliness standards, the appellant may petition for review of the dismissal, an initial decision, to the full Board, a three-person (when fully staffed) panel in Washington, DC, within 35 days of the initial decision. 5 CFR 1201.111. If no petition for review to the full Board is filed, the AJ's initial decision becomes the final decision of the MSPB. Thereafter, the appellant may seek review of the procedural determination in the Federal Circuit Court of Appeals "within 60 days after the date the petitioner received notice of the final order or decision of the Board." 5 USC 7703(b)(1). There, the Board is the named or opposing party. E.g., *Costello v. OSC and MSPB*, 182 F.3d 1372 (Fed. Cir. 1999). And, once the Federal Circuit has made a decision (sometimes after reconsideration *en banc*), the appellant (or the agency through OPM), can seek *certiorari* before the Supreme Court.

But, more typically, instead of bypassing the three-person Board (i.e., allowing the initial decision to become the Board's final decision), the appellant will petition the three-person Board for review of the AJ's initial decision, within 30 days of the "effective date" of the initial decision, before taking an appeal to the Federal Circuit. Also, 5 CFR 1201.118 provides that the full Board may reopen a final decision ("Regardless of any other provision of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law. The Board will exercise its discretion to reopen an appeal only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final.").

If an appeal is decided on the merits, the roadmap is the same, if the appellant seeks review, either first at the Board or first at the Federal Circuit, after allowing the initial decision to become final. The agency, too, can file a Petition for Review to the full Board. 5 CFR 1201.114.

The request for an interlocutory appeal is another circumstance in which a party may seek review of an AJ decision. Although the AJ may certify such an appeal independent of a party's motion. An interlocutory appeal is defined as an "appeal to the Board of a ruling made by a judge during a proceeding." 5 CFR 1201.92. In effect, the appeal is sought from a ruling that does not finally dispose of the appeal. The party seeking the appeal must get "certification" from the AJ that "(a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) An immediate ruling

will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public." 5 CFR 1201.92. The motion for certification must be filed with the AJ "within 10 days of the date of the ruling to be appealed." 5 CFR 1201.93(a), and, if the motion is granted and the appeal certified, the AJ refers the appeal to the full Board. 5 CFR 101.93.

D. APPEALS TO THE FEDERAL CIRCUIT

The appellant may choose to file an appeal from a Board final decision on a non-mixed case to the Federal Circuit Court of Appeals. The process is somewhat different if the final Board decision goes against the agency and the agency wants Federal Circuit review.

If the agency has "lost" and wants review, it can only seek review through OPM; it must convince OPM, which would now be the party, to seek reconsideration of the initial decision "within 35 days after the date of service of the Board's final decision." 5 CFR 1201.119. OPM may file a petition for reconsideration of a Board final decision if he or she determines:

- (1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and
- (2) That the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

5 USC 7703.

After the AJ issues a decision on a reconsideration request, OPM may petition the full Board for review of that final decision, "within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision." 5 CFR 1201.114 (e). OPM is the party at the Federal Circuit. After the Federal Circuit's final decision (sometimes after reconsideration), either party, the appellant or OPM, may seek *certiorari* before the Supreme Court, within 90 days of the judgment sought to be reviewed. 28 USC 2101 (c).

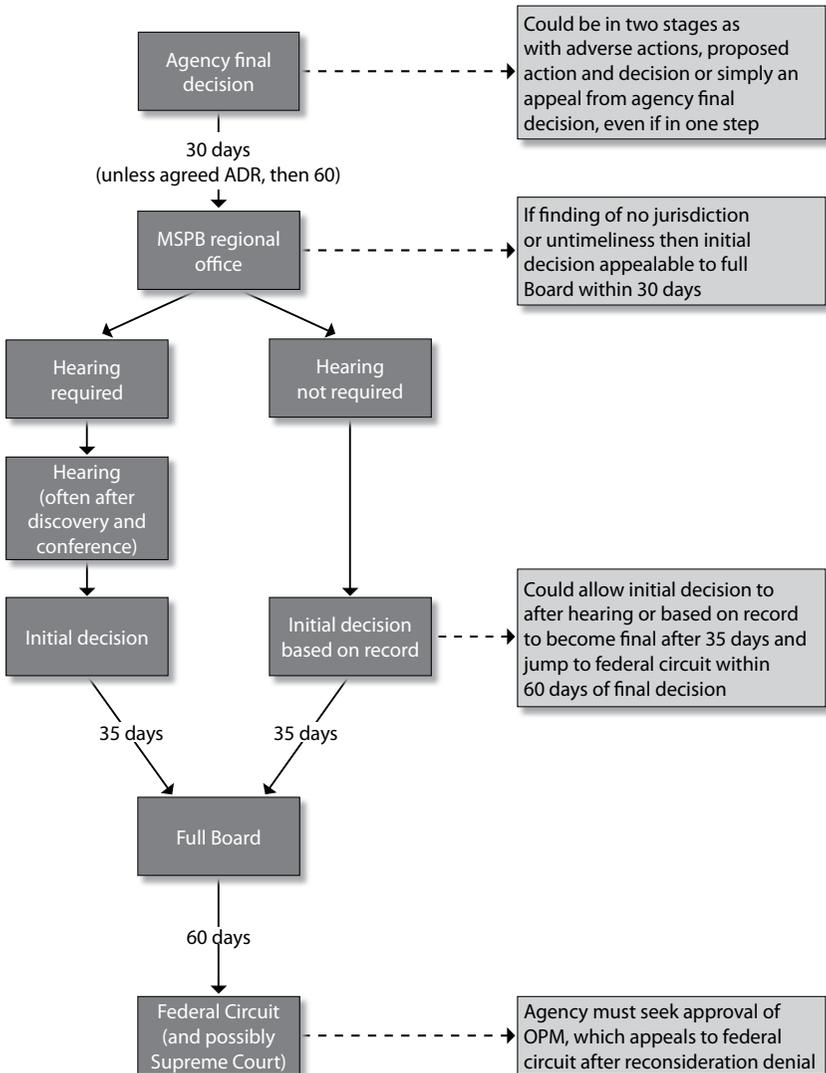
E. FLOW CHART—MSPB ACTIONS: NON-MIXED CASES

The following flow chart illustrates the roadmap for the MSPB actions described in this section.

CHART 1 MSPB REVIEW PROCESS—NON-MIXED CASES

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(Mixed cases shown in [Chart 3](#). This chart also does not depict election of negotiated grievance process, shown in [Chart 14](#).)



II. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)—NON-MIXED

The Equal Employment Opportunity Commission (EEOC) is responsible for administering and interpreting the federal discrimination laws that prohibit employment discrimination on the bases of race, color, religion, national origin, age, disability, reprisal, sex (to include pregnancy), equal pay, and discrimination based on genetic information. Title I of the ADA of 1990; Age Discrimination in Employment Act of 1963; Title VII of the Civil Rights Act of 1964; The Pregnancy Discrimination Act; Genetic Information Nondiscrimination Act (GINA); Equal Pay Act of 1963; and, Sections 501 and 505 of the Rehabilitation Act of 1973.

The EEOC was already in existence at the time of the Civil Service Reform Act (CSRA). However, pre-CSRA federal employee claims of discrimination were not addressed by the EEOC as they are today but instead by Civil Service Commission hearing officers. This changed with Reorganization Plan Number 2, enacted along with the CSRA, and that 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.

It should be noted that the EEOC overlaps with the MSPB, in processing what are known as “mixed cases,” cases in which an employee claims a civil service violation coupled with a claim of discrimination. Those kinds of claims are addressed below under the heading “[MSPB/EEOC Mixed](#).” Here, we describe the processing of a pure or non-mixed EEO case.

The EEOC has set out procedures for filing EEO complaints with federal government agencies. 29 CFR, Part 1614 and the EEOC’s Management Directive 110 (revised August 2015). The process is pretty straightforward and involves the following steps:

1. contact with a counselor
2. resolution and ADR
3. formal complaint
4. acceptance or rejection of formal complaint
5. investigation
6. EEOC hearing or final decision by agency
7. review by EEOC