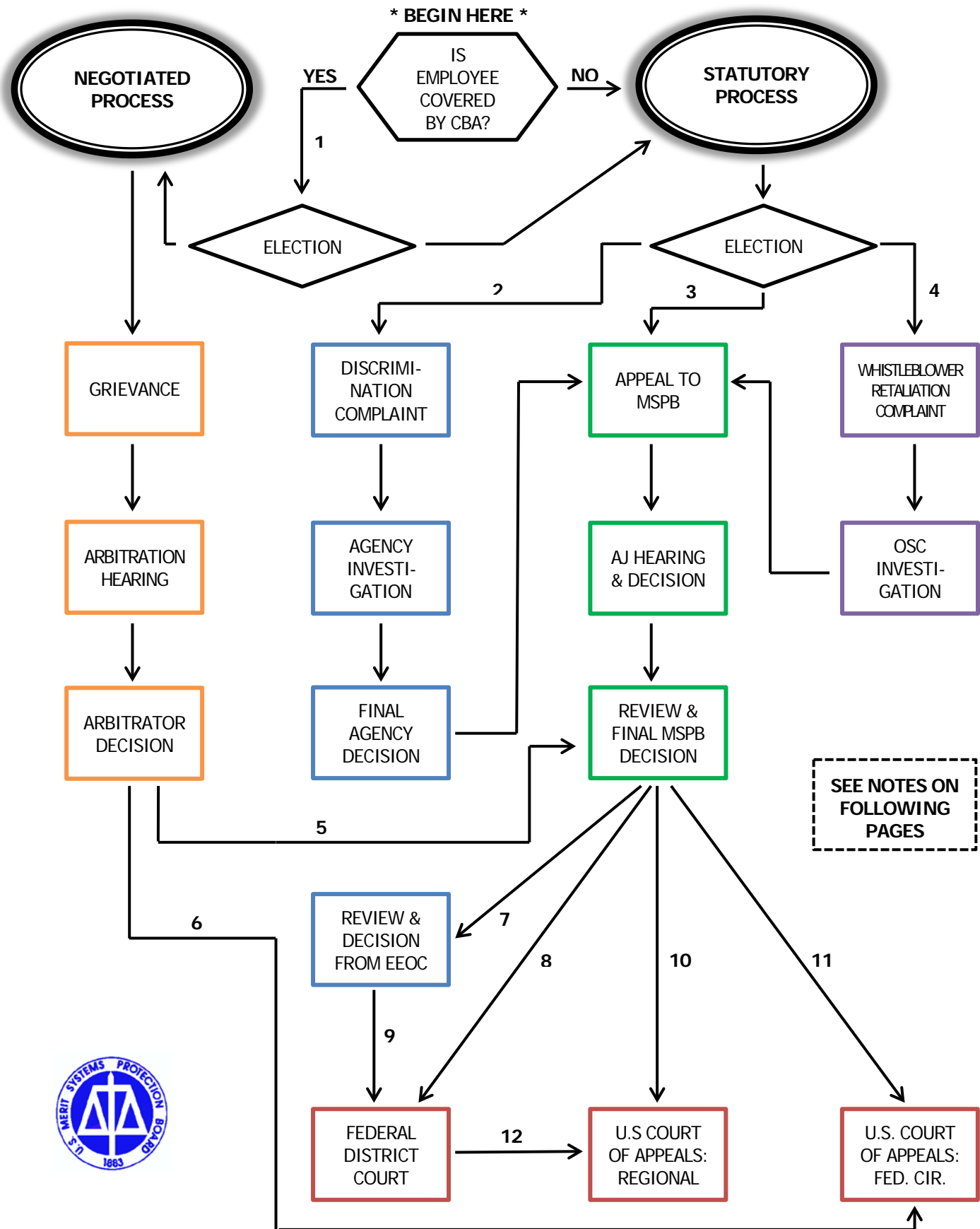


FEDERAL EMPLOYEE REVIEW PROCESSES FOR MAJOR DISCIPLINARY ACTIONS [REMOVAL; SUSPENSION > 14 DAYS; REDUCTION IN GRADE OR PAY]



NOTES

Explanation of acronyms

CBA = collective bargaining agreement
MSPB = Merit Systems Protection Board
AJ = Administrative Judge
EEOC = Equal Employment Opportunity Commission
OSC = Office of Special Counsel

Scope of flowchart

The flowchart depicts the possible paths that an employee might take in challenging a major disciplinary action (removal; suspension of > 14 days; reduction in grade or pay). Most of the paths depicted are available for minor disciplinary actions too (*e.g.*, suspension < 15 days), with the main difference being that review of minor actions is not available before the MSPB except when the employee claims whistleblower retaliation and has first pursued the complaint process at OSC.

Color legend

Orange: Stages of the grievance – arbitration process for employees covered by a CBA.

Blue: Stages of the process for resolving complaints of discrimination.

Green: Stages of the MSPB appeal and review process.

Purple: Stages of the OSC process for handling complaints of whistleblower retaliation.

Red: Possible fora for judicial review following a final administrative decision and for a de novo civil proceeding where discrimination is claimed.

Explanation of numbered paths

1. An employee covered by a CBA who is subjected to a major disciplinary action may elect between the negotiated grievance process and the statutory process. 5 U.S.C. § 7121(e)(1). If the employee chooses the negotiated process and the dispute goes to arbitration, the arbitrator must apply Title 5 of the U.S. Code as interpreted by the MSPB. *See* 5 U.S.C. § 7121(e)(2); *Cornelius v. Nutt*, 472 U.S. 648 (1985).

2. This path is available to an employee who claims that the disciplinary action was motivated by unlawful discrimination. 29 C.F.R. § 1614.302(b). If more than 120 days passes without a final agency decision, the employee may file an appeal with the MSPB, file a civil action in federal district court, or continue to await the final agency decision. 29 C.F.R. § 1614.302(d)(1)(i).

3. This path is available to an employee who has completed probation under a career appointment. The employee may raise a claim of discrimination or whistleblower retaliation in a direct appeal to the MSPB, or may follow path 2 (discrimination complaint) or path 4 (whistleblower retaliation complaint) before appealing to the MSPB. 5 U.S.C. §§ 1214, 1221, 7701(c), 7702; 29 C.F.R. § 1614.302(b). An employee who is dissatisfied with the decision issued by the MSPB AJ may seek review before the full Board within 35 days, or may allow the AJ's decision to become final and reviewable under paths 7, 8, 10, or 11 (as applicable) by letting 35 days pass without seeking Board review. 5 C.F.R. §§ 1201.113, 1201.114.
4. This path is available to an employee who claims that the disciplinary action was taken in retaliation for whistleblowing. 5 U.S.C. §§ 1214, 1221.
5. An employee who claimed discrimination before an arbitrator or who was precluded by the negotiated grievance procedure from raising discrimination before the arbitrator may seek review of the arbitrator's decision before the MSPB. 5 U.S.C. § 7121(d); 5 C.F.R. § 1201.155(c).
6. An employee may seek review of an arbitrator's decision before the U.S. Court of Appeals for the Federal Circuit. 5 U.S.C. §§ 7121(f), 7703.
7. An employee who claimed discrimination in an appeal to the MSPB or in a grievance may seek review of the final MSPB decision before the EEOC. 5 U.S.C. § 7702(b).
8. An employee who claimed discrimination in an appeal to the MSPB or in a grievance may file a civil action in federal district court. 5 U.S.C. § 7703(b)(2).
9. An employee may file a civil action in federal district court following a final decision by the EEOC. See authorities cited in 5 U.S.C. § 7702(a) & (b)(5)(A) and 29 C.F.R. §§ 1614.407 & 1614.408.
10. An employee who claimed whistleblower retaliation may obtain judicial review of a final decision of the MSPB before the U.S. Court of Appeals for the appropriate regional circuit. 5 U.S.C. § 7703(b)(1)(B).
11. An employee may obtain judicial review of a final decision of the MSPB before the U.S. Court of Appeals for the Federal Circuit. Such review may include a claim of whistleblower retaliation but may not include a claim of discrimination. 5 U.S.C. § 7703(b)(1)(A) & (B); *Kloeckner v. Solis*, 133 S. Ct. 596 (2012).
12. An employee who pursued a civil action in federal district court may seek judicial review of the district court decision in the U.S. Court of Appeals for the relevant regional circuit. 28 U.S.C. § 1291.

03/09/2017