

Elements/Issues in MSPB Appeals¹

Appeal Type	Jurisdictional Elements			Non-Jurisdictional Elements	
	Who are You Element	What Happened to You Element	Required Allegation Regarding Merits	Claim Processing Rules	Merit Issues
Adverse Action Appeals under 5 U.S.C. § 7513 .	Must be “employee” under 5 U.S.C. § 7511 .	Subjected to one of the 4 personnel actions listed in 5 U.S.C. § 7512 .	None.	None.	<ol style="list-style-type: none"> 1. Whether action taken was for such cause as will promote the efficiency of the service. 2. Whether agency provided employee with required procedures.
Retirement Appeals under 5 U.S.C. §§ 8347(d) & 8461(e) .	Must be a person to whom the federal retirement laws apply (e.g., employee, annuitant, survivor or former spouse of deceased federal employee).	OPM has made a final decision affecting the appellant’s rights or interests under the federal retirement laws.	None.	None.	Numerous substantive merits issues under 5 U.S.C. chapters 83 and 84 and OPM’s implementing regulations.
IRA Appeals under 5 U.S.C. § 1221 .	Must be employee, former employee, or applicant for employment in a covered agency.	Agency took, failed to take, or threatened to take one of the personnel actions lists in 5 U.S.C. § 2302(a)(2)(A) .	Must allege that whistleblowing or other protected activity was reason for personnel action(s).	<ol style="list-style-type: none"> 1. Must exhaust administrative remedy before OSC; only whistleblowing or other protected activity and personnel actions brought to OSC’s attention are properly before the Board. 5 U.S.C. § 1214(a)(3). 2. Must file IRA appeal within 60 days of receiving OSC’s termination letter. 	<ol style="list-style-type: none"> 1. Whether the appellant engaged in whistleblowing or other protected activity. 2. Whether protected disclosure(s) was a contributing factor in one or more personnel actions. 3. If first two elements proved, whether agency proved by clear and convincing evidence that it would have taken same action(s) in absence of protected disclosure(s).

¹ Note: This document was developed by a working group comprised of MSPB employees and has been posted on the MSPB website (www.mspb.gov/regulatoryreview/index.htm) to facilitate public review and comment pursuant to a Notice published in the Federal Register on November 8, 2013. 78 FR 67076.

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VEOA Appeals under 5 U.S.C. § 3330a(a)(1)(A) (non-selection, violation of veterans' preference).	Must be a "preference eligible" as defined in 5 U.S.C. § 2108 .	Non-selection for civil service position in an executive branch agency. [Section 3330a(a)(1) does not reference any particular personnel actions or decisions, but is part of Subchapter I of Chapter 33, "Examination, Certification, and Appointment."]	Must allege that agency violated appellant's rights under statute or regulation relating to veterans' preference.	<ol style="list-style-type: none"> 1. Must file timely complaint with DOL and exhaust that process. 2. Must timely file Board appeal. 3. Challenged action must have taken place on or after the enactment of the VEOA (Oct. 30, 1998). 	Whether agency has violated appellant's rights under statute or regulation relating to veterans' preference.
VEOA Appeals under 5 U.S.C. § 3330a(a)(1)(B) (right to compete).	Must be a "veteran" as defined in 5 U.S.C. § 3104(f)(1) .	Non-selection for civil service position in an executive branch agency.	Must allege that agency violated appellant's rights under 5 U.S.C. § 3304(f)(1) , i.e., that agency denied the appellant the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.	<ol style="list-style-type: none"> 1. Must file timely complaint with DOL and exhaust that process. 2. Must timely file Board appeal. 3. Challenged action must have taken place on or after the enactment of the VEOA (Oct. 30, 1998).* 	Whether agency violated appellant's rights under 5 U.S.C. § 3304(f)(1), i.e., that agency denied the appellant the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

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USERRA Appeals under 38 U.S.C. § 4324 (b)-(c).	Must be person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service.	Federal executive agency or OPM denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment.	Must allege that Federal executive agency has failed or refused, or is about to fail or refuse, to comply with the provisions of 38 U.S.C. chapter 43.	<u>Optional</u> exhaustion with Department of Labor. If an appellant goes to DOL, must exhaust that remedy. After exhaustion, can file appeal with the Board or seek OSC's assistance. 38 U.S.C. §§ 4322 (e), 4324 (a).	<ol style="list-style-type: none"> Whether agency denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of that membership, application for membership, performance of service, application for service, or obligation. 38 U.S.C. § 4311(a). Whether agency discriminated in employment against or took any adverse employment action against any person because that person has engaged in any of 4 specified protected activities. 38 U.S.C. § 4311(b). Whether the agency failed to honor its reemployment obligations. 38 U.S.C. §§ 4312-15.
Termination of probationary employment under 5 C.F.R. § 315.908 (b) (probationary supervisor or manager).	Must have been serving a probationary period as a supervisor or manager.	Agency terminated probationary appointment as supervisor or manager and assigned appellant to a nonmanagerial or nonsupervisory position.	Must allege that action taken for partisan political reasons or marital status.	None.	Whether action was taken for partisan political reasons or marital status.

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Termination of probationary employment under 5 C.F.R. § 315.806 .	Must be a person serving a probationary period under an appointment in the career or career conditional service or reinstated to such service.	Agency terminated employment during probationary period.	Must allege <u>either</u> that: 1. Termination was motivated by partisan political reasons or marital status; or that 2. Termination was taken for pre-appointment reasons and agency did not comply with the procedural requirements of § 315.805 (notice of reasons and an opportunity to respond).	None.	If terminated for post-appointment reasons, whether termination was motivated by partisan political reasons or marital status. If terminated for pre-appointment reasons, whether the agency complied with procedural requirements of 315.805. Whether the termination was based on discrimination because of race, color, religion, sex, or national origin, age, or disability. (This issue can only be adjudicated in connection with one of the previous two issues.)
Restoration Appeals under 5 C.F.R. § 353.304(c) (partial recovery from compensable injury).	Must have been absent from position because of compensable injury and have recovered sufficiently to return to duty on a part-time basis, or in a position with less demanding physical requirements than those previously required.	Agency must have denied appellant restoration.	None.	None.	Whether denial of restoration was arbitrary and capricious.

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Restoration Appeals under 5 C.F.R. § 353.304 (full recovery from compensable injury).	Must have been absent from position because of compensable injury and fully recovered.	Agency restored or failed to restore appellant to employment, or failed to return appellant following a leave of absence.	None.	None.	Whether restoration was improper.
Performance-Based Actions under 5 U.S.C. § 4303(e) .	Must be employee who is a preference eligible, in the competitive service; or in the excepted service and covered by subchapter II of chapter 75.	Reduced in grade or removed.	None.	None.	<ol style="list-style-type: none"> 1. Whether agency's performance standards approved by OPM. 2. Whether agency's performance standards were valid. 3. Whether agency communicated standards and elements at beginning of performance appraisal period. 4. Whether agency warned the appellant of the inadequacies of her performance during the appraisal period and gave her an opportunity to improve. 5. Whether appellant's performance remained unacceptable in at least 1 critical element.

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Reduction in Force Appeals under 5 C.F.R. § 351.901 .	Must be employee in the federal executive branch or employee outside the executive branch who is subject by statute to competitive service requirements or determined by appropriate legislative or judicial administrative body to be covered.	Furloughed for more than 30 days, separated, or demoted by a reduction in force.	None.	None.	Numerous, including whether action taken for proper reason, whether competitive area and level and retention standing properly determined, whether assignment rights honored.
Employment Practice Appeals under 5 C.F.R. § 300.104 .	Candidate for federal employment.	Employment practice was applied to appellant.	Believes that an employment practice which was applied to him or her by OPM violates a basic requirement in § 300.103 .	None.	Whether employment practice violates a basic requirement in § 300.103 Whether application of employment practice was the reason for the nonselection.
Suitability Actions under 5 C.F.R. § 731.501 .	Applicant, appointee, or employee. 5 C.F.R. §§ 731.102 & .301 .	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.	None.	None.	Whether one or more charges brought by OPM or agency is sustained.

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WIGI Denials under 5 C.F.R. § 531.410 (d) (acceptable level of competence).	1. Must be employee under 5 U.S.C. § 2015 who is classified and paid under the General Schedule. 5 C.F.R. §§ 531.203 , 402 . 2. Meets requirements for within grade increase under §§ 531.404 -405.	Agency head or designee has issued a reconsideration decision denying a within grade pay increase on the basis that the employee is not performing at an acceptable level of competence.	None.	Employee must make timely request for reconsideration. 5 C.F.R. § 531.410 (a).	Whether the employee performed at an acceptable level of competence.
SES: Removal or Suspension under 5 U.S.C. § 7543 (d) and 5 C.F.R. § 752.605.	Must be career appointee in the SES.	Removal or suspension exceeding 14 days.	None.	None.	Whether agency had proper basis for action, i.e., misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.
SES: Reduction-in-force action under 5 U.S.C. § 3595 .	Must be career appointee in the SES who has successfully completed probationary period.	Removal from SES.	None.	None.	Whether the reduction in force complies with the competitive procedures required under subsection (a).
SES: Furlough under 5 C.F.R. § 359.805 .	Must be a career appointee in the SES.	Subjected to furlough (the placing of an appointee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons).	Must express belief that requirements of Subpart H or agency procedures have not been correctly applied.	None.	Whether requirements of Subpart H or agency procedures have been correctly applied.

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Reemployment priority rights pursuant to a Reemployment Priority List under 5 C.F.R. § 330.214 .	Must be registrant under Reemployment Priority List.	Non-appointment.	Must express belief that the agency violated appellant's reemployment rights under Subpart B by employing another person who otherwise could not have been appointed properly.	Must have timely registered under 5 C.F.R. § 330.206 .	Whether agency violated appellant's reemployment rights under Subpart B by employing another person who otherwise could not have been appointed properly.
Restoration Appeal under 5 C.F.R. § 302.501 .	Must be individual who is covered by 5 U.S.C. § 8101(1) and is entitled to priority consideration (see 5 C.F.R. § 302.103).	Non-appointment.	Must present factual information that his or her restoration rights were violated because of the employment of another person.	None.	Whether appellant's restoration rights were violated because of the employment of another person.
Reinstatement under Foreign Service Act (5 C.F.R. § 352.508).	Must be a "person" in one of the categories listed in § 352.502 who has applied for reinstatement.	Agency determination that an employee who has applied for reinstatement is not eligible for reinstatement.	Must consider that reinstatement was not in accordance with 22 U.S.C. § 2151 et seq. and Subpart E .	None.	Whether appellant's reinstatement was in accordance with 22 U.S.C. § 2151 et seq. and Subpart E.
Reemployment under 5 C.F.R. § 352.209 .	Must be an "employee" within the definition of 5 C.F.R. § 352.204(a) .	Agency denied request for reemployment by former or successor agency.	None	Must comply with time limits of 5 C.F.R. § 352.207.	Whether agency violated employee's reemployment rights under Subpart B.
Reemployment after Detail or Transfer to International Organization under 5 C.F.R. § 352.313 .	Must be an employee who has been detailed or transferred to an international organization under 5 U.S.C. §§ 3343 & 3581-84 .	Agency denied application for reemployment.	Must allege that the agency failed to comply with provisions of 5 U.S.C. §§ 3343 or 3581-84 or of Part 352.	Must comply with time limits of § 352.312 .	Whether agency failed to comply with provisions of 5 U.S.C. §§ 3343 or 3581-84 or of Part 352.
Reemployment under Indian Self-Determination Act (5 C.F.R. § 352.707).	Must be an "employee" under 5 C.F.R. § 352.703(a) .	Agency denied request for reemployment.	Must consider that reemployment not in accordance with Subpart G .	Duration of reemployment rights limited by § 352.704 . Must seek reemployment within limits set forth at § 352.705 .	Whether reemployment was in accordance with Subpart G .

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Reemployment under 5 C.F.R. § 352.807 .	Must be an employee or former employee under § 352.803(c) who has left federal employment to be employed by the American Institute in Taiwan.	Agency denied request for reemployment.	Must express belief that agency's decision on his or her request for reemployment violated Subpart H .	Employee must comply with conditions set forth in §§ 352.804 and .806 .	Whether agency's decision on appellant's request for reemployment violated Subpart H .