

MSPB Practice and Procedures



FOLEY HOAG MSPB Appeals Pro Bono Project – Introduction

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Appeal System Required By Law

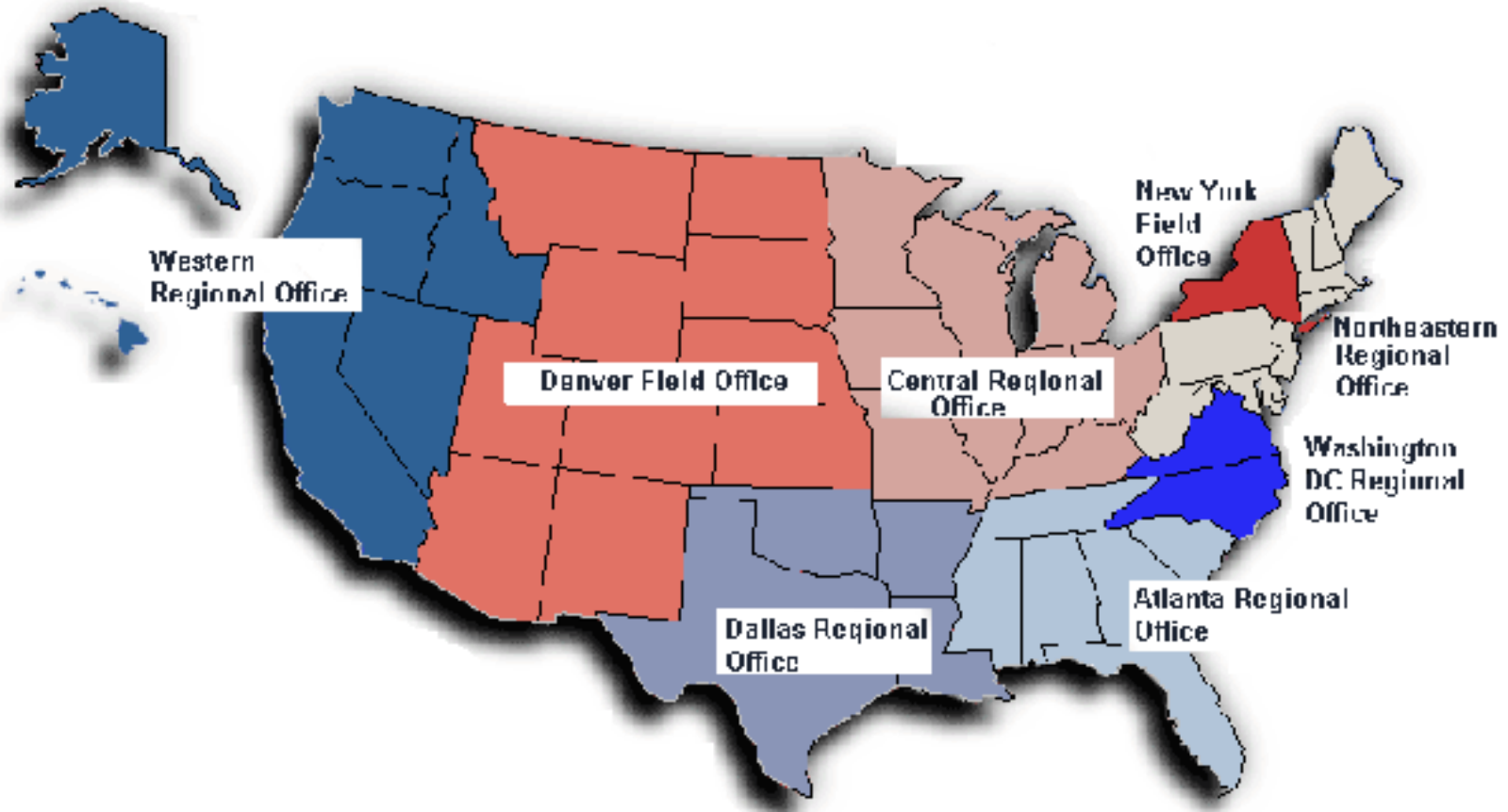
**A tenured public employee has a property interest in his or her employment that cannot be taken away without due process of law- notice, reply, counsel
-- “Some kind of hearing”**

Cleveland Board of Education v. Loudermill,
470 U.S. 532, 538 (1985).

The Merit Systems Protection Board

- **Composed of 3 Presidential appointees; no more than 2 from same political party**
- **Most cases heard first by an Administrative Judge (AJ) in a Regional or Field Office**
- **Full Board review of AJ's initial decision (ID) upon either side's Petition for Review (PFR)**
- **Reviewing court almost always CAFC**

REGIONAL and FIELD OFFICE JURISDICTIONS



Legal Framework of MSPB

- **MSPB established under 5 USC 1201**
- **MSPB regulations at 5 CFR Part 1201**
 - **overhauled November 2012.**
 - **Look to Fed. Reg. or www.MSPB.gov**
- **Jurisdiction only as granted by “law, rule, or regulation.” 5 USC 1204(a)(1).**
- **Created by Civil Service Reform Act of 1978**
 - **split former Civil Service Commission into MSPB, OPM, FLRA, OSC**

No MSPB authority to appoint counsel

- Appellant may have attorney or non-attorney representative of his or her choice (barring conflict), or proceed pro se.
- Representative only required in some cases of mental incompetence. *French v. OPM*, 810 F.2d 1118 (Fed. Cir. 1987). If no representative, must dismiss w/o prejudice (DWOP).

Cases may be complex or have national impact

- *Kloeckner v. Solis*, 133 S.Ct. 596 (2012)
 - MSPB timeliness dismissal of “mixed case” may be appealed to District Court even though discrimination merits not reached
- *Elgin v. Treasury*, 132 S.Ct. 2126 (2012)
 - MSPB dismissal of appeal for lack of jurisdiction must be appealed to CAFC, not District Court, despite claim that military draft is unconstitutional
- DOMA – cases awaiting S.Ct. decision

FOLEY HOAG Notice for Boston area appellants

- Your appeal filed with this office shows you have not designated a representative for your appeal but are representing yourself. In certain limited circumstances, you may be eligible for pro bono representation. Foley Hoag LLP is a private law firm in Boston, Massachusetts that has a Pro Bono Program. Through Foley Hoag's Pro Bono Program, you may be able to receive free legal representation. If you are interested in finding out more about Foley Hoag's Pro Bono Program, you can go to <http://www.foleyhoag.com/practices/litigation/pro-bono>. If you are low-income, live in the Greater Boston area, and think that you might be eligible for pro bono legal services, you may contact Rebecca Cazabon, Foley Hoag's Pro Bono Managing Attorney, for a free legal and income screening, and possible case intake. Rebecca can be reached at rcazabon@foleyhoag.com, or 617-832-1755. Foley Hoag LLP is unaffiliated with the MSPB. The MSPB neither endorses the services provided by Foley Hoag, nor warrants that Foley Hoag will accept representation in a given case.

What kinds of cases?



- Adverse actions (generally for misconduct)—removals, demotions, suspensions more than 14 days [5 USC chapter 75]
- Performance actions [5 USC chapter 43]
- Whistleblower IRAs [5 USC 1221]
- VEOA and USERRA claims [5 USC 3330a & 38 USC chapter 43]
- Retirement cases [5 USC chapters 83 (CSRS) & 84 (FERS)] – including disability retirement.

See 5 CFR 1201.3 for a more complete list. May have to choose among various ways to challenge

Who may appeal?



- Generally only employees with more than one or two years of current service [5 USC 7511]
- Depends on competitive vs. excepted service and whether preference eligible [5 USC 2108]
- Some probationary employees have limited appeal rights [5 CFR 315.806, 315.908]
- Some applicants for positions
- Annuitants/survivors

When is appeal due?



- Generally, within 30 days after the effective date of the action being appealed or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. [5 CFR 1201.22]
- Different time limits if the appellant filed a discrimination complaint with the agency.
- If late, must show good cause (e.g., misinformation about rights, medical issues)
- Some actions have a different limit established by law or regulation (VEOA, WPA IRA) or no time limit (USERRA).

The MSPB process



- Appeal (paper or e-filed)
- Acknowledgment order and agency response
- Preliminary status conference
- Discovery
- Prehearing submissions and conference
- Hearing
- Initial decision - Goal 120 days after filing
- Further review

5 CFR 1201

Appeal Form



- Form asks for basic information relevant to jurisdiction, timeliness, and the issues being raised
- May be filed by e-appeal, fax, mail
- Can opt for electronic filing

Acknowledgment order and agency file



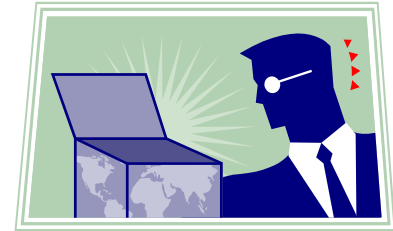
- Identifies jurisdictional or timeliness problems and orders parties to respond (appellant generally has 15 days)
- Generally orders agency to submit its file within 20 days
- Agency file should include most of the key documents



Status conferences

- Often at least one unless appeal is obviously untimely or not within Board's jurisdiction
- Usually telephonic—initiated by agency or judge, or call-in number
- May discuss logistics (schedule, hearing format), merits (issues, discovery disputes), or settlement
- Summary usually prepared—deadline for corrections or objections
- Hearing order with schedule may be issued before or after first status conference

Discovery



- Interrogatories, depositions, requests for production, requests for admissions
- Parties and third parties
- Fed. R. Civ. P. are instructive but not controlling
- May request subpoenas but up to party to serve. Agency has duty to produce agency employees who are witnesses.
- ***Deadlines are tight!*** 5 CFR 1201.73
- 30 days to initiate discovery; 20 days to respond; 10 days for follow-up requests; 10 days for motion to compel from date of objections

Motions [5 CFR 1201.55]



- Generally in writing; must serve on agency
- Contact agency first to find out whether it objects
- Common motions:
 - reschedule or extend a deadline for good cause
 - suspend appeal or dismiss without prejudice
 - compel discovery responses
- Objections due within ten days; judge may schedule status conference to discuss and may grant extensions without waiting for a response

Prehearing submissions and conference



- Written prehearing submissions due before prehearing conference - deadline in hearing order
- ***Must include all affirmative defenses, witness requests, and exhibits***
- Common affirmative defenses: harmful error in application of procedures; discrimination on the basis of race, gender, disability, age, military status, or religion; retaliation for whistleblowing or other protected activities
- Prehearing conference usually held by telephone at least a week before the hearing
- Be prepared to discuss issues, witnesses, hearing exhibits, logistics, and settlement
- Summary of conference prepared—deadline for corrections and objections

Hearing



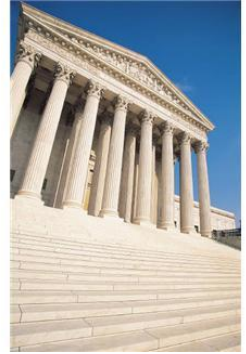
- Hearing may be telephonic, video, or in person
- Venue is usually designated hearing site closest to appellant's work station
- Fed. R. Evidence is guidance, but hearsay generally allowed
- Usually no opening but may be an oral or written closing argument
- Agency generally has burden of proof, usually by a preponderance of the evidence
- Appellant has burden of proof on jurisdiction, timeliness, and affirmative defenses like discrimination
- May order transcript or CD of hearing (fee for transcript)



Initial Decision

- Depending on type of case, judge may:
 - dismiss for untimeliness, lack of jurisdiction, settlement, or voluntary withdrawal
 - affirm, reverse, or mitigate the penalty
 - grant or deny requests for particular kinds of remedies
- Instructions on how to seek enforcement if settled or appellant prevails
- Attorney fees and damages may be awarded in addendum proceeding

Further review



- Initial decision explains appeal rights
- Petition for review with the Board (within 35 days)
- And/or appeal to CAFC
- Other options in cases involving discrimination or whistleblowing claims (Whistleblower Protection Enhancement Act of 2012) (WPEA).

Settlement



- Mediation Appeal Program (MAP); Settlement Judge; or Adjudicating Judge
- More flexibility to design relief in settlement but still must follow the law—e.g., OPM may refuse to implement retirement provisions it finds contrary to law
- If the Board has jurisdiction, settlement can be enforced by Board

Common Settlement Terms



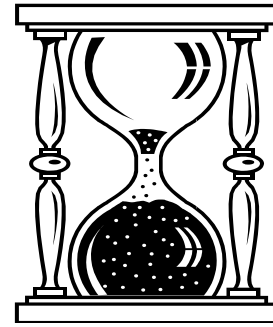
- Removal cancelled -- employee resigns
- Agency assists with OPM disability retirement
- Early retirement
- Employee receives money in exchange for resigning and/or waiving discrimination claims
- Keep employee on rolls for specific time in LWOP to look for other employment
- Attorney Fees

Alternative Discipline—Agree in Writing to:



- Mandated drug testing or EAP counseling
- Employee serves suspension over the course of multiple pay periods to soften financial impact
- Employee serves “paper” suspension without loss of pay

Last Chance Agreements



- Penalty held in abeyance
- If this is another incident as defined by the agreement, the penalty takes effect
- If no further incident during term of agreement, penalty does not take effect
- May include waiver of future MSPB appeal rights

Research



- MSPB website (info sheets, precedential & nonprecedential decisions)
- Statutes (mostly 5 USC)
- Regulations (mostly 5 CFR)
- Published Board Cases - West M.S.P.R.
- Court Cases (mostly Fed. Cir.)
- EEOC guidance/decisions for discrimination issues
- Initial decisions (nonprecedential)
- Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice* (updated annually) & others

The end

- Questions?

