The Administrative Judge

When an employee files an appeal with MSPB, the hearing official is usually an administrative judge (AJ), but can be an administrative law judge (ALJ). ALJs are selected for – and removed from – their own positions under a different set of rules than AJs in order to ensure that the ALJs can operate with a greater level of independence.[148] Some types of cases are required, by statute, to use an ALJ.[149] In other cases, a regulation establishes the use of the ALJ because the agency issuing the regulation exercised the discretion given to it by a statute to set forth the rule that an ALJ would be used.[150] Nearly all adverse action cases – whether taken under chapter 43 or 75 of title 5 – are heard by an AJ not an ALJ. For ease of discussion, we will refer to the hearing official as an AJ, even though in some rare cases it may be an ALJ performing the duties. The AJ has the responsibility to create MSPB's official record of the case, conduct the hearing, and issue a decision.[151]

Pre-Hearing Activities

The appellant is not required to ask for a hearing in order to have the appeal decided upon by the AJ. When the appellant believes the written record contains all the necessary information, the appellant can waive the right to a hearing and ask for a decision based on that written record.[152]

Prior to the hearing – or issuance of the decision if a hearing is not held – the parties will engage in discovery and the AJ will hold a conference with the parties.[153] While these activities are performed in accordance with MSPB regulations, they are consistent with the general practices performed in civil litigation. In other words, MSPB has tailored the process to its responsibilities under chapter 77 of title 5 and the constitutional due process requirements for the interests at stake. MSPB's process bears a strong

[148] *See* 5 C.F.R. § 930.201-211 (explaining the ALJ employment rules). In contrast, an AJ employed by MSPB is subject to the same regulations and statutes for selection and removal as other MSPB attorneys (such as those who represent MSPB before the courts and those who advise Board members on cases where the Board renders its own decision). Unlike an ALJ, the term "administrative judge" is a job title describing duties, not a separate class of employee.

[149] *See, e.g.*, 5 U.S.C. § 1215(a)(2)(c) (statute granting the employee the right to appear before the Board or an ALJ in a disciplinary action brought by the Office of Special Counsel).

[150] *See, e.g.*, 5 C.F.R. § 1201.13 (MSPB regulation establishing that cases involving MSPB employees will be heard by an ALJ with limited Board review because of the Board's commitment to reducing its influence in a case where it may inherently have a potential interest in the outcome).

[151] 5 C.F.R. § 1201.41.

[152] *Ahlberg v. Department of Health and Human Services*, 804 F.2d 1238, 1243 (Fed. Cir. 1986). An appellant may only waive his right to a hearing by clear, unequivocal, or decisive action. Further, the waiver must be an informed one. An appellant's waiver of the right to a hearing is informed when he has been fully apprised of the relevant adjudicatory requirements and options in his case. *Campbell v. Department of Defense*, 102 M.S.P.R. 178, ¶ 5 (2006).

[153] Discovery is the process by which each party requests evidence from the opposing party. If a party refuses to provide information requested in discovery, the other party may ask the AJ to compel the refuser to produce the information. MSPB's discovery rules and processes are located at 5 C.F.R. § 1201.71-.75.

resemblance to the activities that take place under the Federal Rules for Civil Procedure in a Federal district court, but does have distinct differences.[154]

During the pre-hearing conference, the AJ will, among other things: (1) explain MSPB's procedures to the parties; (2) facilitate discovery; (3) identify, narrow, and define the issues; (4) obtain stipulations; (5) discuss the possibility of settlement; (6) rule on witnesses; and (7) rule on exhibits.[155]

The AJ has wide discretion to exclude witnesses if the AJ determines their testimony would be irrelevant, immaterial, or repetitious.[156] The AJ has similar authority to rule on the admission of exhibits and other evidence.[157] In order to obtain reversal of an initial decision on the ground that the AJ abused his discretion regarding witnesses or the admission of evidence, the petitioning party must show on review that relevant evidence, which could have affected the outcome, was disallowed.[158] For more on the process for reviewing initial decisions, *see* *Implementing or Challenging Initial Decisions*.

Assessing the Evidence

Regulations and case law grant the hearing official extensive discretion in managing the case.[159] However

[154] *See Spezzaferro v. Federal Aviation Administration*, 807 F.2d 169, 172, n.1 (Fed. Cir. 1986) (noting that "MSPB proceedings are not governed by the Federal Rules of Civil Procedure"); *Tinsley v. Office of Personnel Management*, 34 M.S.P.R. 70, 75 (1987) (explaining that the Board regards the Federal Rules of Civil Procedure as instructive, rather than controlling).

[155] An exhibit is a document entered into the record as evidence. Physical objects (such as a weapon or drugs) will typically not be admitted into the record, and instead a description stipulated by the parties will be used. *See* U.S. Merit Systems Protection Board, *Judge's Handbook*, Ch. 10 § 14(g).

[156] *Bowen v. Department of the Navy*, 112 M.S.P.R. 607, ¶ 17 (2009), *aff'd*, 402 F. App'x 521 (Fed. Cir. 2010).

[157] *See Wagner v. Environmental Protection Agency,* 51 M.S.P.R. 337, 353 (1991) (explaining that even if the AJ erred in accepting the appellant's exhibits, the agency has not shown how its substantive rights were prejudiced, and thus there was no need to resolve whether the AJ had, in fact, erred), *aff'd*, 972 F.2d 1355 (Fed. Cir. 1992).

[158] *Vaughn v. Department of the Treasury*, 119 M.S.P.R. 605, ¶ 12 (2013); *Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶ 12 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005). *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (holding that an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

[159] Among other things, AJs have the discretion to: grant additional time for discovery; grant a hearing request when the law does not automatically provide for one if the AJ deems it appropriate to resolve the case; determine the location for hearings; determine if the public should have access to the hearing; reject or grant motions to compel for discovery; determine the number of technical advisors that may participate; rule on the presence of any security officers in the hearing room; permit oral or written closing statements; retain withdrawn exhibits; decide if names in the public record should be sanitized to protect personal privacy; seal a file or portion thereof; and request interlocutory appeal decisions from the Board. (When names are sanitized, it is often to protect innocent third parties. For example, if an employee is fired for reasons related to an allegation of molesting a child who is a relative, then naming the offender in the case title has the side effect of also putting the victim's identity in the public record. Such cases will use the name "Doe" in lieu of the employee's actual name. The victim's names in the initial decision may be replaced by initials or other letters or numbers that would protect the person from public identification. Similarly, a portion of a file may be sealed to protect the confidentiality of certain documents. An interlocutory appeal occurs when there is an issue of law (unrelated to the merits of the case) and confirming the AJ correctly interpreted the law will materially advance the further administration of the case. The AJ has discretion to certify the question and situations warranting such certifications are rare.) For more on how AJs perform their duties, *see* U.S. Merit Systems Protection Board, *Judge's Handbook*.

this discretion is not unlimited.[160] The actions of the AJ cannot be "arbitrary, capricious, not in accordance with the law or in contravention of procedures required by law, rule or regulation."[161]

To ensure that the AJ's decisions are not arbitrary, the AJs must follow certain guidance in assessing the evidence. For example, when assessing the credibility of a witness, the AJ must use the *Hillen* factors, so named for the case in which the Board instructed:

> To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors. . . must be considered in making and explaining a credibility determination. These include: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.[162]

Once the AJ has applied the Hillen factors, great deference is given to the AJ's conclusions about witness credibility when those conclusions are based on an assessment of witnesses' demeanor. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") has instructed that, once the Board chooses to use its regulations to delegate the power to conduct the hearing to an AJ, "the MSPB is not free to overturn an administrative judge's demeanor-based credibility findings merely because it disagrees with those findings."[163] The court held that this limitation on the Board comes "from a fundamental notion of fairness[.]"[164]

This does not prevent the Board from correcting findings by the AJ that are incomplete, inconsistent with the weight of the evidence, or do not reflect the record as a whole.[165] Similarly, when a decision is

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[160] *See, e.g., Whitmore v. Department of Labor*, 680 F.3d 1353, 1370 (Fed. Cir. 2012) (holding "that it is an abuse of discretion to categorically exclude all witnesses offered to testify as to evidence" of a relevant issue); *Chudson v. Environmental Protection Agency*, 17 F.3d 380, 385 (Fed. Cir. 1994) (holding that the AJ abused her discretion by not permitting the appellant to elicit testimony from two individuals with personal knowledge relevant to the issue under appeal and a third witness who had expert testimony to offer).

[161] *Tiffany v. Department of the Navy*, 795 F.2d 67, 70 (Fed. Cir. 1986) (citing 5 U.S.C. § 7703).

[162] *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

[163] *Haebe v. Department of Justice*, 288 F.3d 1288, 1299 (Fed. Cir. 2002). *See, e.g., Leatherbury v. Department of the Army*, 524 F.3d 1293, 1306 (Fed. Cir. 2008) (finding "that the Board failed to give the AJ the deference required by *Haebe* and impermissibly reversed the AJ's credibility determination").

[164] *Cf., International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (explaining that to be Constitutional, the exercise of jurisdiction over a party cannot "offend 'traditional notions of fair play and substantial justice.'")

[165] *Faucher v. Department of the Air Force*, 96 M.S.P.R. 203, ¶ 8 (2004). *But see* 38 U.S.C. § 713 (removing from the Board the authority to review a decision reached by an AJ for a case involving an SES employee in the Department of Veterans Affairs when title 38 is used to take the action).

based upon facts and not the demeanor witnessed by the AJ, "the Board is free to re-weigh the evidence and substitute its judgment for that of one of its administrative judges."[166] This authority to re-weigh the evidence and reach a different conclusion applies to all issues in the case, including jurisdiction, charges, and penalties.[167]

In order to enable the Board and its reviewing court to review the decision reached by the AJ, the AJ's decision on the case is required to include, among other things: (1) the AJ's findings of fact and conclusions; and (2) the reasons for those findings and conclusions.[168] This document is known as the "initial decision" because it is subject to further review. To learn more about the process for reviewing the initial decision, *see* *Implementing or Challenging Initial Decisions*.

[166] *Long v. Social Security Administration*, 635 F.3d 526, 530 (Fed. Cir. 2011) (citing *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1304 (Fed. Cir. 2008)).

[167] *See Tierney v. Department of Justice,* 717 F.3d 1374, 1378 (Fed. Cir. 2013) (explaining that, with the exception of credibility determinations, "[t]he Board is generally free to substitute its judgment for that of the AJ").

[168] 5 C.F.R. § 1201.111(b)(1)-(2).