Implementing or Challenging Initial Decisions

An initial decision (ID) issued by an administrative judge (AJ) will state if MSPB has jurisdiction, and if jurisdiction is found, the ID will contain conclusions regarding nexus, charges, and penalties – known as an assessment of the "merits" of the case.[169] Among other possibilities, an ID on the merits can state that some charges were sustained but not others. It can state that a penalty was warranted, but not a penalty as harsh as the agency initially implemented. It can support the agency's action entirely. It can order the entire action cancelled.

Depending upon what the ID says, the parties each have decisions to make. If both are satisfied with the outcome, then they comply with the orders set forth in the ID (such as the action standing entirely, being mitigated, or being canceled) and the matter is concluded. But, what if one or both parties disagree with the ID in part or whole?

For the appellant, the questions are then: (1) whether to seek further review; (2) if seeking review, for what issues; and (3) if seeking further review, from whom? (An appellant can file a petition for review (PFR) with the Board, or file for judicial review with the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") without first coming to the Board).

For the agency, the questions are: (1) whether to seek further review (with the Board PFR as the only avenue); (2) if seeking review, for what issues; and (3) what to do about the instructions in the ID in the meantime?

Filing for Review with the Board

Either party that disagrees with the ID can file a PFR with the three-member Board.[170] MSPB's regulations explain the process for the parties to follow.[171] Regardless of whether the agency or appellant files the PFR first, the second party will be given the opportunity to respond. If the second party did not prevail on one or more issues below, that party may also file a PFR (called a "cross-PFR").

As explained in *How a Hearing is Conducted*, the three-member Board has the authority to re-weigh the evidence and reach a different conclusion regarding nearly every aspect of the case, including jurisdiction, charges, and penalties.[172]

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[169] If MSPB lacks jurisdiction, the process ends with that determination and there is no analysis of the merits of the charges, penalty, or nexus. *See Schmittling v. Department of the Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000) (explaining that "without jurisdiction, neither the Board nor this court is empowered to decide the merits of a case").

[170] The three members of the Board are nominated by the President and confirmed by the Senate. No more than two can adhere to the same political party. It takes two members agreeing with each other to decide a case. If there are less than two members in agreement (which can happen when the Board is not fully staffed), the initial decision stands as the final decision of the U.S. Merit Systems Protection Board.

[171] 5 C.F.R. § 1201.114. MSPB's regulations can be found on its website at http://www.mspb.gov/appeals/appeals.htm.

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

On PFR, the Board will look at the issues raised by the parties, but can also address other issues in the ID that it identifies on its own. If the parties do not file a PFR, the ID becomes final on a date set forth in the ID. At that time, the Board has the option to reopen the appeal on its own and reexamine any issue in the case. However, the Board typically opts not to exercise this power absent extraordinary circumstances.

Filing for Review with the Federal Circuit

If the agency does not file a PFR, then the appellant has the option to file an appeal directly with the Federal Circuit once the ID becomes final, bypassing the PFR process.[173] The appellant can also use the PFR process and, if dissatisfied with the PFR result, then proceed to seek judicial review from the Federal Circuit.[174]

In contrast, the agency cannot appeal directly to the Federal Circuit at any stage. The only review opportunity available directly to the agency is the PFR to the Board. However, acting for the Government, the Director of the Office of Personnel Management (OPM) (represented by the Department of Justice) may file a petition for judicial review with the Federal Circuit. OPM must first determine, "in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive."[175] If OPM did not intervene in the case before the Board, OPM must first petition the Board to reconsider its decision and obtain a denial of that petition before OPM can proceed to the Federal Circuit.[176]

Interim Relief

What happens to an employee pending resolution of the PFR? If the ID upholds the agency's action, then the action remains in effect. For example, a removed employee remains removed. However, 5 U.S.C. § 7701(b)(2) instructs that if the ID is in the employee's favor, the employee will obtain the granted relief immediately in most circumstances. This means that if an employee has been removed, the employee will be returned to work. The AJ has the discretion to determine that granting such relief immediately is not appropriate under the circumstances, but the default is that the ID will take effect.[177]

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[173] In a few types of adverse action cases, the appeal would go to a different court than the Federal Circuit. Appeals from actions taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 633a(c)); and section 15(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b)) would go to the appropriate U.S. district court. *See* 5 U.S.C. § 7703(b)(2); 5 C.F.R. § 1201.175. Additionally, if the appeal was filed as an individual right of action, and not as an adverse action appeal, the provisions of 5 U.S.C. § 7703(b)(1)(B) would apply.

[174] 5 U.S.C. § 7703(a)(1).

[175] 5 U.S.C. § 7703(d)(1).

[176] *Id.*

[177] *King v. Jerome*, 42 F.3d 1371, 1373-74 (Fed. Cir. 1994); 5 U.S.C. § 7701(b)(2)(A)(i).

This does not mean that an agency is required to place in the work unit an employee that the agency believes would be unduly disruptive while it seeks a review of the case by the Board. If the agency has concerns about the employee, it has an *unreviewable* authority to keep the employee away pending resolution of the PFR. By statute, the agency "must still give [the employee] all pay, benefits, and other terms and conditions of employment" he would have received if he had worked.[178] But, even if the agency acts in bad faith when deciding to prevent the employee's return to duty during the PFR process, "Congress did not provide for any [MSPB] review of this decision" by the employing agency.[179]

[178] *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994).

[179] *Id.*