

## **THE U.S. MERIT SYSTEMS PROTECTION BOARD (MSPB) Overview of Employee Rights and MSPB Procedure**

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### **I. MSPB ORGANIZATION.**

- A. **The Merit Systems Protection Board** ("MSPB" or "Board") is an independent agency which has authority for overseeing the Federal merit system and adjudicating cases brought before it, pursuant to that authority. Specifically, it is responsible for: (1) hearing and adjudicating cases within its jurisdiction; (2) ordering Federal agencies to comply with its orders and decisions and taking action to enforce compliance; (3) conducting special studies relating to the civil service; and (4) reviewing Office of Personnel Management ("OPM") rules and regulations. 5 U.S.C. 1204(a).
- B. The Board is composed of a Chairman, a Vice Chairman, and a Member appointed to seven year terms by the President, by and with the advice and consent of the Senate. 5 U.S.C. §§ 1201-1203.
- C. The MSPB's headquarters offices are in Washington, D.C. These include the Office of General Counsel, Office of Regional Operations and the Office of Appeals Counsel. The Board's headquarters office is responsible for processing cases over which the Board exercises original jurisdiction. It also processes petitions for review of appeals heard and decided by the regional offices.
- D. The Board has three regional offices and two district offices responsible for processing and hearing cases over which the Board exercises appellate jurisdiction. The region and district Offices, along with their geographic jurisdictions, are listed in the Board's regulations at 5 C.F.R. Part 1201, Appendix H.

## II. THE OFFICE OF SPECIAL COUNSEL.

- A. **The Office of Special Counsel ("OSC")** is an independent agency which is responsible for: (1) protecting employees, former employees, and applicants for employment from prohibited personnel practices; (2) receiving and investigating allegations of prohibited personnel practices, and, where appropriate, bringing petitions for stays, petitions for corrective action, and complaints for disciplinary action; (3) receiving and reviewing whistleblower disclosures and, where appropriate, forwarding them to the Attorney General or an agency head for investigation; (4) reviewing regulations issued by OPM; and (5) conducting investigations of Hatch Act violations, improper withholding of information under the Freedom of Information Act, or activities prohibited by any civil service law, rule, or regulation. 5 U.S.C. §§ 1212, 1216.
- B. The OSC is headed by the Special Counsel, who is appointed to a five year term by the President with the advice and consent of the President. 5 U.S.C. § 1211.
- C. The main offices of the OSC are in Washington, D.C. All complaints falling within the jurisdiction of the OSC are filed with the Washington office. They are reviewed by a Complaints Examining Unit, which determines which matters warrant further investigation. Those cases are referred to the Investigations Unit. If a case is brought before the Board, it is handled by the Prosecution Division. Matters which do not fall within the OSC's jurisdiction may be referred, as appropriate, to the Attorney General or to the head of an agency for investigation.
- D. The OSC has two field offices, located in Dallas and San Francisco. These offices are responsible for investigating and prosecuting cases referred to them by the Complaints Examining Unit.

### III. MSPB JURISDICTION.

- A. The MSPB was established by Congress to bear and decide appeals from certain personnel actions.
1. The Board's jurisdiction is limited to those matters over which it has been granted jurisdiction by statute or regulation. Saunders v. Merit Systems Protection Board, 757 F.2d 1288 (Fed. Cir. 1985); Shaw v. Department of the Navy, 39 M.S.P.R. 586, 588-89 (1989); Lizut v. Department of the Army, 30 M.S.P.R. 119 (1986).
  2. The Board does not have jurisdiction over all actions that are alleged to be incorrect. Marren v. Department of Justice, 49 M.S.P.R. 45, 51 (1991); Hipona v. Department of the Army, 39 M.S.P.R. 522, 525 (1989)
  3. The Board's jurisdiction is determined by the nature of the action **at the time the appeal is filed**. Berteletti v. United States Postal Service, 45 M.S.P.R. 1, 6 (1990); *see also*, Mayronikolas v. United States Postal Service, 39 M.S.P.R. 442, 444 (1989).
  4. The Board can be divested of jurisdiction if the underlying action is completely rescinded and the appellant is restored to the status quo ante. Mulherin v. Department of the Air Force, 45 M.S.P.R. 289 (1990); Mayronikolas v. United Postal Service 39 M.S.P.R. 442 (1989).
  5. The burden is on the party seeking Board review to prove, by a preponderance of the evidence, that the Board has jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i); Cox v. Merit Systems &otcction Board, 817 F.2d 100, 101 (Fed. Cir. 1987); Stern v. Department of the Army, 699 F.2d 1312, 1314 (Fed. Cir.), *cert. denied* 462 U.S. 112 (1983); Robins v. Department of Justice 48 M.S.P.R. 644, 648 (1991); Denny v. Department of the Nappy, 43 M.S.P.R. 123, 127 (1990).

- B. To establish MSPB jurisdiction, a party must show that the action is one over which the Board has been given jurisdiction by law, rule, or regulation (subject matter jurisdiction) and that the party seeking MSPB review in one who is authorized to bring an action (standing).
- C. The Board exercises original jurisdiction over certain cases in which no formal agency action has been taken. A decision by the Board is usually required before the action can be taken by the agency. The Board also exercises original jurisdiction over cases brought by the OSC. Original jurisdiction cases are usually filed with and processed by the MSPB's headquarters. Such cases include:
1. Actions against Administrative Law Judges. 5 U.S.C. § 7521.
  2. Proposed performance-based removals from the Senior Executive Service ("SES") to a position in the civil service outside of the SES. 5 U.S.C. § 3592.
  3. Review of OPM regulations. 5 U.S.C. 1204(a)(4) and (f).
  4. Actions brought by the OSC.
    - a. Cases alleging Hatch Act violations by Federal and certain state employees. 5 U.S.C. § 1216(a)(1) and (2).
    - b. Cases alleging that an agency, or an agency's employees, have committed prohibited personnel practices.
      - (1) The OSC may bring a corrective action case against the agency seeking to compel the agency to correct the alleged prohibited personnel practice. 5 U.S.C. § 1214(b)(2)(B).
      - (2) The OSC may bring a disciplinary action case against agency employees seeking to discipline them for committing prohibited personnel practices. 5 U.S.C. § 1215(a)(1)(A).

- (3) At any time, the OSC can request a stay of a pending personnel action from the MSPB if it determines there are grounds to believe that a prohibited personnel practice was involved. 5 U.S.C. § 1214(b)(1).

D. The MSPB exercises **appellate jurisdiction** over cases where some statute or regulation has conferred jurisdiction. 5 U.S.C. § 7701.

1. The bulk of the Board's appellate jurisdiction case load is concentrated in the following types of cases:

a. Chapter 75 actions: Conduct-based adverse actions, such as removals, suspensions, and demotions. Covered actions include:

(1) Removals from Federal service and suspensions for more than 14 days taken against employees in the SES. Covered employees are SES employees who have completed their probation or who were covered under 5 U.S.C., Chapter 75, Subchapter 11 immediately before their appointment to the SES. 5 U.S.C. §§ 7541-7543.

(2) Removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs for 30 days or less. 5 U.S.C. sec. 7511-7514.

b. Chapter 43 actions: Performance-based removals and demotions. 5 U.S.C. sec. 4301-4305. This covers all Federal employees except administrative law judges, SES employees, employees in the Foreign Service, FBI employees, DEA SES employees, certain VA employees, Presidential appointees, and employees outside the competitive service who are excluded by the OPM.

2. The MSPB also exercises appellate jurisdiction over these less common types of cases:
  - a. RIF of a career appointee in the SES. 5 U.S.C. § 3595.
  - b. Denial of a within grade increase ("WIGI") for a General Schedule ("GS") employee. 5 U.S.C. sec. 5335.
  - c. Denial by OPM of an individual's claim under the Civil Service Retirement System.
  - d. OPM determination of the factors used to evaluate applicants for employment. 5 C.F.R. § 300.104.
  - e. Disqualification of an employee or applicant for employment because of a suitability determination. 5 C.F.R. § 731.401.
  - f. Termination of a probationary employee for political partisan affiliation or marital status discrimination. 5 C.F.R. §§ 315.806 and 315.908.
  - g. RIF resulting in removal, reduction in grade or furlough for more than 30 days. 5 C.F.R. § 359.901.
  - h. Furlough of a career SES appointee. 5 C.F.R. § 359.805.
  - i. Failure to restore to employment following military service or recovery from a compensable injury within year. 5 C.F.R. sec. 353.401.
  - j. Denial of restoration rights because of the employment of another person when an appellant is entitled to priority employment consideration after a RIF or recovery from a compensable injury. 5 C.F.R. §§ 302.501 and 330.202.
  - k. Failure to reinstate after service under the Foreign Assistance Act of 1961. 5 C.F.R. 353.508.

- l. Failure to reemploy after movement between executive agencies during an emergency. 5 C.F.R. § 352.209.
    - m. Failure to reemploy after detail or transfer to an international organization. 5 C.F.R. 352.318.
    - n. Failure to reemploy after service under the Indian Self-determination Act. 5 C.F.R. 352.707.
    - o. Failure to reemploy after service under the Taiwan Relations Act. 5 C.F.R. § 352.807.
  3. Whistleblower cases. The MSPB also has jurisdiction over **Individual right of action** ("IRA") cases under the Whistleblower Protection Act ("WPA").
- C. Employees covered. An individual's standing to bring an appeal depends on the subject matter being appealed. The appropriate authorizing statute or regulation is critical. For example, in a Chapter 75 case, the following employees have standing to appeal:
  1. NonProbationary employees in the competitive service.
  2. Veterans preference eligibles in the excepted service who have completed one year of continuous service.
  3. Excepted service employees who are covered by subchapter H of Chapter 75. This means the employee has completed two years of current continuous service in the same or similar position or is not serving in a probationary or trial period under an initial appointment pending conversion to the competitive service. Certain exclusions exist for excepted service employees serving under 10 U.S.C. § 1590 in a military intelligence activity.
  4. Postal Service employees with veteran's preference rights.

#### IV. PROCESSING AN MSPB CASE.

##### A. Agency action/Pre-appeal stage.

1. A critical stage of the case. This is where harmful errors occur that are difficult or impossible to correct later.
2. Get legal or subject matter expertise at this stage.
3. In particular, look at:
  - a. Has the case been properly charged? The MSPB does not believe in "lesser included offenses" and will not find the appellant guilty of what the agency should have charged.
  - b. Is there adequate proof of the charges?
  - c. Have the Douglas factors been considered and properly documented?
  - d. Has minimal Due Process been afforded the employee, i.e., notice and an opportunity to be heard?

##### B. Employee Appeal of Agency Action.

1. Timeliness. (5 C.F.R. § 1201.22)
  - a. Within 30 days of the effective date of the Agency decision?
  - b. If the appeal is from a final decision or reconsideration which does not set an effective date, the appeal must be filed within 35 days of the date the decision is issued.
  - c. The filing of a timely appeal is not a jurisdictional requirement; an employee may move for a waiver of the time limits for "good cause."

- d. Administrative Judge or Board may decide to accept appeal filed outside the time limits even in the absence of a motion to waive the limits if they determine the existing record establishes "good cause" for doing so.

## 2. Content.

Note: IRA cases under the WPA have a different, statutory time limit. The appellant has 60 days from the date the OSC determines it will not pursue the case to file an IRA. The MSPB has held that this time limit is jurisdictional and cannot be waived, even for good cause.

- a. No required format for the appeal. (Board has the form on-line and it can be downloaded).
- b. The appeal must contain all information required by 5 C.F.R. § 1201.24(a).

## C. Regional MSPB Office sends out an Acknowledgement Order for agency reply and order and notice of hearing as well as prehearing conference.

1. Do not miss deadlines in Acknowledgement Order.
2. An order and notice of hearing and prehearing conference will follow the Acknowledgment Order. Typically there will be one or more pre-hearing telephonic conferences with the AJ.

## D. Agency reply to Appeal.

1. Timeliness. (5 C.F.R. § 1201-22)
  - a. Within 20 days of the Board's Acknowledgement Order.

- b. If filed by mail:
  - (1) Date of the postmark is the date of filing.
  - (2) If no postmark is evident, the date of filing will be 5 days prior to receipt by the Board.

2. Contents of Agency Reply. (5 C.F.R. § 1201.25)

- a. Reply must contain all information required by 5 C.F.R. § 1201.25(a).
- b. Agency should carefully review at this time whether any grounds for dismissal exist, such as does the MSPB have jurisdiction over the appeal, does the appellant have standing to appeal, is the appeal timely.

E. Discovery. (5 C.F.R. §§ 1201.71 - 1201.75)

- 1. Scope: Any non-privileged matter which is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. The Federal Rules of Civil Procedure ("Fed.R.Civ.P.") are used for guidance.
- 2. Purposes of Discovery:
  - a. MSPB rule. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case.
  - b. Discovery also helps to:

- (1) Narrow the issues;
- (2) Limit factual disputes;
- (3) Obtain evidence;
- (4) Pin down witness testimony;
- (5) Minimize the possibility of surprise;
- (6) Aid the parties in settlement.

3. Types of Discovery:

a. Written Interrogatories.

- (1) Must be answered under oath. Note: the attorney for the agency should never sign the answers to interrogatories unless he or she is a witness and has personal knowledge of the facts being sworn to.
- (2) MSPB rules allow for interrogatories against non-party agencies and individuals.

b. Depositions.

- (1) Testimony given under oath.
  - (a) Transcribed or tape recorded.
  - (b) May be used at hearing if deponent is "unavailable."
- (2) Parties or non-parties may be deposed.

c. Requests for Production of Documents.

- (1) Requests must be reasonably specific.
- (2) Response must be in writing. See Miller v. Office of Personnel Management, 7 M.S.P.R. 469,474, 7 M.S.P.R. 333 (1981)

- (3) 5 C.F.R. § 1201.62 essentially adopts the Jencks rule. After an adverse witness has testified the advocate should ask the Administrative Judge to direct the opposing party and the witness to produce any statements made by the witness concerning the subject matter of the case.

d. Requests for Admissions.

- (1) Served on other parties only.
- (2) Used to get other parties to admit matters of fact, the application of law to the facts, and the genuineness of documents.
- (3) Response must either state an objection to the request, admit or deny the fact, etc., or indicate a lack of knowledge. Party cannot claim a lack of knowledge sufficient to admit or deny the request unless he states he has made a reasonable inquiry and still cannot admit or deny.
- (4) Failure to respond does not constitute a binding admission of the fact as under the Fed.R.Civ.P.. 5 C.F.R. 1201.72(c).
  - (a) But the requestor may seek an order to compel a response.
  - (b) Any matter admitted pursuant to an order of the Administrative Judge to respond to a Request for Admissions is conclusively established and made a part of the record, unless the AJ allows withdrawal or amendment of the admission.

4. Time Constraints.
  - a. Requests for Discovery must begin within 25 days of MSPB order to the agency to produce the agency file and response.
  - b. Responses to Discovery Requests must be made within 20 days of the discovery request.
  - c. Motions to Compel Discovery must be made within 10 days of the response or expiration of response date.
  - d. Responses in Opposition to Motion to Compel Discovery must be made within 10 days of the motion to compel.
  - e. All discovery must be completed within the time designated by the Administrative Judge but not later than 65 days after filing of the appeal.
  
5. Special discovery: Physical and Mental Examination of Persons. See Rule 35 Fed.R.Civ.P..
  - a. An Administrative Judge has no authority to order a witness who is neither a party or person under the legal control of the party to undergo a psychological examination or sign an authorization for release of medical information. Helman v. Department of the Army, 23 M.S.P.R. 164, 168 (1984).
  
  - b. An Administrative Judge has the discretion to deny an agency request to have an appellant submit to a medical examination. Loots v. Department of the Army, 42 M.S.P.R. 571, 579-80 (1989). (But if the appellant is seeking compensatory damages, the AJ typically grants the agency request.)

E. Motions. (5 C.F.R. § 1201.55)

1. Procedures:

- a. Except for motions made at prehearing conference or hearing, all motions must be in writing, include a statement of supporting reasons, be filed with the Administrative Judge or the Board, and be served on all parties.
- b. Motions for extension of time, postponement of hearing, and other procedural motions must be discussed with other party and state whether there are any objections.
- c. Objections to motions must be filed within 10 days of service of the motion.

2. Typical motions:

- a. Motion to dismiss appeal.
- b. Motion for extension of time to file pleadings.
- c. Motion to change venue.
- d. Motion to compel discovery.
- e. Motion to impose sanctions for failure to comply with an order of the Administrative Judge.
- f. Motion to postpone hearing (declaration or affidavit required).
- g. Motion for issuance of a subpoena.

F. Hearing.

1. Scheduling.

- a. Hearing date is set by the Administrative Judge in the Notice of Hearing.
- b. Not earlier than 15 days after the Notice unless the parties agree.
- c. The Administrative Judge may change the hearing date by subsequent notice.

2. Access to the Hearing.

- a. Open to the public.
- b. But, Administrative Judge can close all or part of the hearing if it is in the best interests of the appellant, a witness, the public or other affected persons.

3. Order of Proceedings.

- a. General Rule - Agency presents its case first then the appellant presents evidence.

Note: The regulations are silent on the issue of rebuttal. The agency may or may not be allowed rebuttal at the discretion of the AJ.

- b. The appellant presents evidence first in hearings convened on issues of
  - (1) Jurisdiction;
  - (2) Timeliness;
  - (3) OPM dismissal of an application for retirement benefits;
  - (4) Where the only factual dispute concerns an affirmative defense.

- c. The Administrative Judge has the discretion to vary the order of proceedings when appropriate.
4. Burden and Degree of Proof.
- a. **Chapter 75** (misconduct) cases.
    - (1) Burden is on the agency to prove all elements of the offense.
    - (2) Degree of proof required - Preponderance of the evidence.
      - (a) 5 C.F.R. § 1201-56(c)(2) defines "preponderance of the evidence" as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.
      - (b) The Board has said "preponderance of the evidence exists when such evidence has, when considered and compared with that opposed to it, more convincing force and produces in the mind of the trier of fact a belief that such evidence is more likely true than not true."  
Johnson v. Department of the Air Force  
13 M.S.P.R. 236, 238 (1982)  
[citations omitted].
  - b. Chapter 43 (performance) cases.
    - (1) Burden is on the Agency to prove all elements of the action.
    - (2) Degree of proof required - Substantial evidence.

- (a) 5 C.F.R. § 1201.56(c)(1) defines "substantial evidence" as that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.
- (b) In Parker v. Defense Logistics Agency, 1 M.S.P.R. 505, 517-31 (1980), the Board observed that the definition provided in § 1201-56(c)(1) incorporated the test defined in Universal Camera v. NLRB, 340 U.S. 474, 477: "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.... Accordingly, it...must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."
- c. Appellant's Burden: The appellant has the burden of proof, by a preponderance of the evidence, as to:
  - (1) Issues of jurisdiction.
  - (2) Timeliness of filing.
  - (3) Affirmative defenses, including:
    - (a) Harmful procedural errors;
    - (b) Prohibited personnel practices;
    - (c) Actions taken which are not in accordance with law.

5. Evidence (5 C.F.R. §§ 1201.61 through 1201.64).

- a. The Federal Rules of Evidence are not strictly followed.

- b. Basic standard for admission of evidence is "relevance."
  - (1) Evidence can be rejected by AJ if it is "irrelevant, immaterial, or unduly repetitious."
  - (2) Hearsay evidence is admissible - The hearsay nature of evidence goes to the weight of the evidence, not its admissibility. See Borninkhof v Department of Justice, 5 M.S.P.R. 77 (1981).
- c. Collateral estoppel applies. See Otherton v. Department of Justice, 711 F.2d 267 (1983); Raymond v. Department of the Army, 34 M.S.P.R. 476 (1987); Rodriguez-Ortiz v. Department of the Army, 46 M.S.P.R. 546 (1991).

## 6. Witnesses.

- a. Agency employees.
  - (1) Generally the appellant will ask the Agency to make available any employees he wishes to call as witnesses.
    - (a) If the Agency refuses to comply the appellant may request the Administrative Judge to direct the Agency to produce the witnesses. 5 C.F.R. § 1201.41(b)(10).
    - (b) The Agency is required to produce the witness or furnish sworn statements in lieu of testimony when requested to do so by the AJ. 5 C.F.R. § 120.133.
- b. Non-agency employees.
  - (1) It is the responsibility of the parties to secure the presence

of their respective non-agency witnesses, through subpoenas if necessary. Hernandez v. United States Postal Service 12 M.S.P.R. 275 (1982).

- (2) Subpoenas for those witnesses who are not currently Federal employees are obtained by means of motions submitted to the AJ. 5 C.F.R. § 1201.81(a).
  - (a) The motion will be ruled upon by an Administrative Law Judge or a Board member, not an AJ.
  - (b) The motion must be supported by a "showing that the evidence sought is relevant and that the scope of the request is reasonable." 5 C.F.R. § 1201.81(c).
- (3) Responsibility for serving of the subpoena lies with the party initiating the request. A subpoena may be served by any person at least 18 years of age who is not a party, including a private process server or other person authorized to serve process in actions brought in state courts of general jurisdiction or in Federal courts. 5 C.F.R. § 1201.83.

c. The appellant as a witness.

- (1) The appellant may testify as a matter of right. Joshua v. Social Security Administration, 2 M.S.P.R. 280, But see Perez v. Department of the Air Force, 37 M.S.P.R. 32 (1988).
- (2) Although the appellant may elect not to testify in his own behalf, he may not, absent a Fifth Amendment challenge, prevent the Agency from calling him as a witness in the Agency's case. Lateef v. Department of the Interior, 5 M.S.P.R. 664, 667(1981); Presley v. Veterans Administration, 15 M.S.P.R. 559, 560-61 (1983). The Board

has squarely held that the appellant may be called as an Agency witness. O'Neil v. Department of Transportation, 12 M.S.P.R. 212, 216, (1982).

- (3) If the appellant fails to list himself as a witness in the list of proposed witnesses, an administrative judge may properly deny the appellant the opportunity to testify at the hearing. Perez v. Department of the Air Force, 37 M.S.P.R. 32, 37-38 (1988).

7. Record of Hearing.

- a. Following the presentation of evidence the parties may ask Administrative Judge to keep the record open for additional evidence.
- b. Administrative Judge usually relies on an audio tape of hearing.
- c. Purchase of transcript.
  - (1) Prices range from \$1.50 to \$3.00 per page. (A one day hearing will result in about 200-300 pages of transcript.
  - (2) Can purchase portions of a transcript.
  - (3) Agency produced transcripts are not part of the record.
  - (4) Appellant is not entitled to a copy of an agency produced transcript.
  - (5) Motion to correct transcript must be filed with the AJ within 10 days of receipt of the transcript. 5 C.F.R. §1201.53(d).

G. Post-Hearing Considerations.

1. Hearing can be reopened only on the basis of new and material evidence not discoverable through due diligence at time of hearing.
2. Post-hearing briefs are permitted at the discretion of the Administrative Judge,

3. Administrative Judge decisions are not precedential.
4. The Administrative Judge decision becomes final 35 days after it is issued, unless a petition for review ("PFR") is filed with the MSPB. 5 C.F.R. 1201.113.
5. Petitions for Review ("PFR").
  - a. Must be filed within 35 days of the issuance of the Administrative Judge's initial decision.
  - b. Cross petition for review must be filed within 25 days of receipt of the petition for review.
  - c. Petition may be filed by:
    - (1) Agency
    - (2) Appellant
    - (3) Director of OPM
    - (4) Special Counsel
    - (5) Permissive intervenor
  - d. Criteria for Review.
    - (1) New and material evidence that, despite due diligence, was not available at the hearing.
    - (2) The Administrative Judge's decision was based on an erroneous interpretation of statute or regulation. (Misapplication of a precedential decision is also a basis for a PFR).
    - (3) Note: Erroneous factual findings by the AJ, based on the record as a whole, will only be reviewed by the

Board where the party seeking review sets forth specific and detailed citations to the transcript in support of its argument. See Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133 (1980), affd. 669 F.2d 613 (9<sup>th</sup> Cir. 1982). The Board cannot disregard credibility findings of an AJ without articulating the reasons for its decision. Jackson v. Veterans Administration 768 F.2d 1325 (Fed. Cir. 1985)

- e. Interim Relief.
- (1) Although a timely filed petition for review stays the finality of the Administrative Judge's decision, the agency must comply with any order for interim relief or certify that the employee's return or presence would cause an undue disruption to the work environment. 5 U.S.C. § 7701(b)(92); 5 C.F.R. § 1201.115(b); Ginnochi v. Department of the Treasury, 53 M.S.P.R. 62 (1992).
  - (2) If agency makes certification, it must still provide employee with all pay and benefits.
  - (3) Evidence of compliance with interim relief or certification must accompany PFR or be filed with Board within the time limits for filing a petition for review. 5 C.F.R. § 1201.115(b)(1) and (2); Purdy v. Department of the Air Force, 53 M.S.P.R. 693, 696 (1992).
  - (4) Failure to comply with interim relief requirements will result in a dismissal of the petition for review. 5 C.F.R. § 1201.115(b)(4); Dean v. Department of the Air Force 50 M.S.P.R. 103, 105 (1991).
- f. Agency's full compliance with the AJ's decision before it becomes final renders the agency petition for review moot. See Anthan v. Department o Transportation, 10 M.S.P.R. 408, 409. This is not implementing the interim relief set forth in the initial decision.

- g. Place of filing petitions and cross petitions for review:

The Clerk of the Board  
Merit Systems Protection Board  
1120 Vermont Avenue, N.W., Suite 802  
Washington, D.C 20419

- h. Responses to a petition for review must be filed within 25 days of receipt of the petition.
- i. If the Board grants review, it writes a full opinion. If the Board denies review, it usually states the reason in a summary decision (called a short form "O&O".)

#### H. Board review of the Administrative Judge decision.

##### 1. Procedure.

- a. Case is assigned to an attorney-examiner in the MSPB Office of Appeals.
- b. Draft opinion is written and coordinated with higher level attorneys in the Office of Appeals and possibly the General Counsel's Office.
- c. Draft opinion is circulated among the Board members for their vote.
- d. The opinion is either adopted by the members or sent back to the Office of Appeals for revision.

##### 2. Effect of Board decision.

- a. Board opinions and orders have full precedential effect.
- b. Noncompliance with a final Board order is remedied by a Board request to the

Comptroller General to withhold the salary of the Agency official failing to comply. Such requests may be made only after enforcement procedures under 5 C.F.R. 1201.182 and 1201.183.

- I. EEOC and Special Panel Review (Mixed Cases).
  1. If the appeal contains an allegation of discrimination, it is a "mixed case."
  2. Appellant can seek review of MSPB determinations on the discrimination issues by the EEOC. The EEOC will review and either agree or disagree with the MSPB. If it disagrees, it will send the case back to the MSPB.
  3. MSPB will either accept or reject the EEOCs review. If it rejects, the case is sent to a Special Panel made up of a member from the EEOC, the MSPB and the President. Decisions of the Special Panel are binding upon the EEOC and MSPB.

## **V. JUDICIAL REVIEW OF BOARD DECISIONS.**

- A. Appeal may be filed by:
  1. The employee/appellant
  2. The Director of OPM
    - a. Agency must ask OPM to file an appeal of the Board decision through OPM's Office of the General Counsel or Appellate Policies Division.
    - b. OPM will only appeal cases with significant government-wide implications.
    - c. OPM appeal must be preceded by the Board's denial of an OPM petition for reconsideration in any case where OPM has not previously intervened.
    - d. Note: DOJ will represent OPM/Agency in the appeal.

- B. Criteria for Judicial Review [See 5 U.S.C. § 7703(c)].
  - 1. Board decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
  - 2. Procedures required by law, rule, or regulation were not followed.
  - 3. Board decision was not supported by substantial evidence.
- C. Appeal must be filed within 30 days of the Board's final decision.
- D. All appeals must be taken to the Federal Circuit Court of Appeals unless it is a "mixed case" processed under 5 U.S.C. § 7702.

## **VI. ATTORNEYS FEES.**

- A. Appellant must file motion for attorney's fees with the Administrative Judge within 20 days after the decision becomes final. 5 C.F.R. § 1201.37(a)(2).
- B. Administrative Judge forwards the motion to the Agency.
  - 1. Agency has 20 days from receipt of the motion to respond. 5 C.F.R. § 1201.37(a)(2).
  - 2. Administrative Judge usually decides motion without a hearing, on the basis of written submissions.

- C. Criteria for awarding attorneys fees.
1. There must be an attorney-client relationship.
  2. Appellant must be the prevailing party.
    - a. Appellant must obtain "all or a significant part of the relief sought." Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983); McIver v. Department of the Interior, 45 M.S.P.R. 68, 70 (1990).
    - b. A "final MSPB decision" is not required if the relief obtained by the Appellant is "causally related to the initiation of the appeal, e. g., the appeal is resolved by a settlement agreement. Hodnick v. Federal Mediation and Conciliation Service, 4 M.S.P.R. 371, 374-75 (1980).
    - c. Appellant may be a prevailing party under a settlement agreement if the employee obtains the relief sought. Carpenter v. Bureau of Alcohol, Tobacco & Firearms, 5 M.S.P.R. 422 (1981); Cuthbertson v. Merit Systems Protection Board, 784 F. 2<sup>nd</sup> 370 (Fed. Cir. 1986).
  3. An award of attorneys fees is warranted in the "interests of justice". Allen v- United States Postal Service, 2 M.S.P.R. 420 (1980).
    - a. Agency action was a Prohibited Personnel Practice under 5 U.S.C. §302(b). (But, see f, below, on discrimination).
    - b. Action was clearly without merit, wholly unfounded, or the appellant is substantially innocent. Sterner v. Department of the Army, 711 F. 2<sup>nd</sup> 1563 (Fed. Cir. 1983).
    - c. The action was brought in bad faith.

- d. The action involved gross procedural error.
- e. The agency knew or should have known that it would not prevail.

Note: If the Agency action is found to have discriminated against the Appellant in violation of the Civil Rights Act of 1972 or the Rehabilitation Act of 1973, then the interest of justice standard is not applicable. Rather, attorneys fees are paid in accordance with provisions of those statutes. In essence, the appellant need only be the prevailing party to obtain fees.

- 4. The amount of fees must be "reasonable."
  - a. Burden is on the Appellant to prove the reasonableness of the fees.
  - b. Normally fees are calculated by multiplying a reasonable hourly rate by a reasonable number of hours worked to arrive at a lodestar figure. See Johnson v. Georgia Highway Express, 488 F. 2<sup>nd</sup> 714 (5<sup>th</sup> Cir. 1974). This figure may then be adjusted upward or downward, depending on such factors as:
    - (1) Quality of representation;
    - (2) Unusual time constraints;
    - (3) Unusual unpopularity of the case;
    - (4) Degree of success or results obtained;
    - (5) The delay in receipt of fees.
  - c. But, note, factors such as complexity of litigation, novelty of issues, and quality of representation are normally reflected in the hourly rate and number of hours worked. Blum v. Stenson, 465 U.S. 886, 898-900 (1984).
  - d. Attorneys fees may not include elements which are normally considered as "costs," such as:
    - (1) Expenses paid to third parties, eg., witness fees and expenses, investigation expenses, deposition expenses, costs of charts and maps. See O'Donnell v. Department of the Interior, 2 M.S.P.R. 445, 456(1980) and Bennett v. Department of the Navy, 699 F.2d 1140 (Fed. Cir. 1983).

- (2) Photocopying expenses. See Koch v. Department of Commerce, 19 M.S.P.R. 219, 222 (1984) (overruling prior board case law.
- (3) "Taxable costs." See Bennett v. Department of the Navy, 699 F. 2<sup>nd</sup> 1140 (Fed. Cir. 1983); Helt v. Veterans Administration, 34 M.S.P.R. 165, 170 (1987).
- (4) Hearing transcripts. See May v. Department of Transportation, 28 M.S.P.R. 357, 365 (1985).
- (5) Interpreters. See Wonder v. Department of Energy, 35 M.S.P.R. 209, 211 (1987). (Costs of interpreters not payable where case is settled and there is no indication that attorney could not adequately communicate with client or that issues were unusually complex). But, note, the MSPB did not reach the issue of whether fees would be payable if case had gone to hearing. Questions of reasonable accommodation or equal protection might be involved.
- (6) Secretarial costs are not recoverable as a general rule. Russell v. Department of the Navy, 43 M.S.P.R. 157, 165 (1989). But, secretarial work performed by outside service and separately billed is recoverable.

Note: If the Agency action is found to be discrimination in violation of the Civil Rights Act of 1964 or the Rehabilitation Act of 1973 then appellant is entitled to attorneys fees and "costs." See Mitchell v. Department of Health and Human Services, 19 M.S.P.R. 206, 215-16 (1984) and Civil Rights Act of 1991.

## **VII. RESEARCH, REFERENCE AND TRAINING RESOURCES.**

### **A. Training.**

1. Government Training Institute programs (Basic MSPB Advocacy, Advanced MSPB & EEOC Advocacy, Annual National MSPB Symposium, Charges & Penalties Program, etc. (GTI's webpage at <http://www.govtrain.org> has links to the MSPB home page and many other federal personnel and EEO sites.

2. OPM's annual SOELR (Symposium on Employee Labor Relations). OPM's website is: <http://www.opm.gov>.

B. Research Systems.

1. *United States Merit Systems Protection Board Reporter* (M.S.P.R.) - West publication with Key Number system and Digest available. Current. Is not the official reporter but treated as such..
2. *Federal Merit Systems Reporter* (FMSR) - Bound volumes with loose leaf supplements. This is a current system which contains both summaries and full text opinion. The system includes a numerical index similar to the West Key Number system and a subject matter index.
3. *IHS Personnel CD Rom and On-Line System*. On-line and CD-ROM only. Full text of MSPB and Federal Circuit court decisions.

C. Internal MSPB Efforts.

1. MSPB Home Page: (<http://www.mspb.gov>). Contains:
  - a. Office of Appeals Counsel Weekly Summary - Compilation of the most significant decisions, published by the MSPB.
  - b. Board Decisions - As they are issued, placed on the Board's Home Page.
  - c. Board forms and regulations.
  - d. MSPB Judges' Guide (July 1998 edition)

C. General Reference.

1. MSPB regulations - 5 C.F.R. Parts 1200 through 1210. The procedural regulations at Part 1201 are a must.
2. *Representing the Agency Before the United States Merit Systems Protection Board*, by Harold Ashner, published by Dewey Publications (republication of a former OPM book).
3. *A Guide to Merit Systems Protection Board Law and Practice*, Peter Broida, Dewey Publications, 1993.