

MSPB Decision Quality Improves at Cost of Adjudication Timeliness

By Mathew B. Tully

The U.S. Merit Systems Protection Board (MSPB) and its reviewing court are increasingly seeing eye to eye on issues involving federal employment law. Consequently, the independent quasi-judicial agency charged with protecting federal merit principles is also getting slower at delivering justice.

In fiscal year 2011, 98 percent of MSPB's cases were not changed (i.e., dismissed or affirmed) on review by the U.S. Court of Appeals for the Federal Circuit, according to the agency's FY 2011 Performance and Accountability Report. This MSPB decision quality rate not only was significantly higher than the 2010 fiscal year's rate of 92 percent but was also its highest rate in six years. Fiscal year 2004's rate was 95 percent.

This improved decision quality has come at a price, namely case processing delays. In announcing the report, MSPB said "we did not achieve our adjudication timeliness goal due to greater emphasis on decision quality and adjudication process transparency, and the lack of resources to fill vacancies." For example, the average case processing time for petitions for enforcement was 288 days – 88 days over the target. MSPB also noted decision quality "can vary considerably from year to year."

The Federal Circuit closed 219 appeals originating from MSPB appeals in fiscal year 2011, and of those only five were reversed, according to court statistics. Even the decision quality of MSPB administrative judges improved, with the board remanding or reversing only 7 percent of their decisions in fiscal year 2011, compared to 10 percent the previous fiscal year, according to the MSPB report.

However, no one is perfect, especially the MSPB's administrative judges and board members. I should know because in February 2011 the Federal Circuit vacated the MSPB's ruling in *Erickson v. U.S. Postal Service* and remanded the case to the board. This case involved an Army Special Forces sergeant who had been terminated from his job with the U.S. Postal Service while he was on active duty abroad. Disagreeing with MSPB, the Federal Circuit ruled that a service member did not waive his reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) by expressing dissatisfaction with an agency and not immediately appealing his removal.

This decision actually marked the second time in so many years that the Federal Circuit remanded *Erickson* to MSPB. Another case in which the Federal Circuit delivered a precedential decision vacating and remanding an MSPB appeal was *Ward v. U.S. Postal Service*. In this case, the appellate court found that a deciding official's consideration of information not mentioned in a Notice of Removal could constitute a violation to an

employee's due process rights guaranteed by the Fifth Amendment.

MSPB's latest performance report illustrates why it is crucial for federal employees to aggressively pursue appeals to personnel actions. It is getting tougher to prevail on appeal. Nevertheless, perseverance pays off too, as demonstrated by the federal employee in Erickson. Representation by a federal employment law attorney with experience in appellate law is also vital.

Federal employees who have been suspended, removed, demoted or furloughed, have 30 days after the effective date of an action or an agency decision to file an appeal to MSPB. Depending on when an initial decision is issued and received, eligible employees have 30 to 35 days to file for a Petition for Review (PFR). There is a 60-day deadline, starting after the issuance of the board's final decision, for filing appeals to the Federal Circuit. Federal employees who believe they were wrongfully subjected to an adverse action should immediately contact a federal employment law attorney.

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