



# TULLY RINCKEY<sup>PLLC</sup>

ATTORNEYS & COUNSELORS AT LAW

## GUIDE

### FILING AN APPEAL WITH THE U.S. MERIT SYSTEMS PROTECTION BOARD (MSPB)

#### Washington, DC Office

815 Connecticut Ave NW Suite 720  
Washington, D.C. 20006

To schedule a consultation, call (202) 787-1900

**A GUIDE TO FILING AN APPEAL  
WITH THE U.S. MERIT SYSTEMS PROTECTION BOARD (MSPB)**

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## **I. WHAT IS THE MSPB?**

The MSPB is an independent, quasi-judicial agency in the executive branch that serves as the guardian of federal merit systems.<sup>1</sup> The MSPB's mission is to protect Federal merit systems and the rights of individuals within those systems.<sup>2</sup> The primary reason for creating the MSPB's jurisdiction was to protect against partisan political and other prohibited personnel practices.<sup>3</sup> Key MSPB activities to this end include adjudicating individual employee appeals and conducting merit systems studies.<sup>4</sup> In addition, the MSPB reviews the significant actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit.<sup>5</sup>

## **II. WHAT TYPES OF ACTIONS CAN BE BROUGHT BEFORE THE MSPB?**

For the MSPB to have jurisdiction over any appeal of a personnel action, it must possess jurisdiction over both the action and the employee filing the appeal. Approximately 2 million Federal employees, or about two-thirds of the full-time civilian work force, currently have appeal rights to the MSPB.<sup>6</sup> Employees eligible to appeal specific actions vary in accordance with the law and regulations governing those actions. In some cases, classes of employees, such as political appointees, are excluded.<sup>7</sup> Employees of specific agencies, such as the intelligence agencies and the General Accounting Office, are excluded with respect to certain actions.<sup>8</sup>

Generally, employees who may appeal adverse actions and performance-based actions are those in the competitive service who have completed a probationary period and those in the excepted service (other than the Postal Service) with at least two years continuous service. Postal Service employees who may appeal adverse actions are preference-eligible employees

with one year continuous service and certain Postal Service supervisors, managers, and employees engaged in personnel work.

#### A. THE MSPB'S ORIGINAL JURISDICTION

The MSPB has original jurisdiction over some matters, meaning that the MSPB can be the very first agency to review a case. Consult 5 C.F.R. § 1201.2 for a list of claims over which the MSPB has original jurisdiction, which include the following:

- (1) Actions brought by the Special Counsel;<sup>9</sup>
- (2) Requests for informal hearings by persons removed from the Senior Executive Service for performance deficiencies;
- (3) Actions taken against administrative law judges.<sup>10</sup>

#### B. THE MSPB'S APPELLATE JURISDICTION

The MSPB also has appellate jurisdiction, because the MSPB can review decisions that have been made from within the MSPB or from other agencies. The MSPB was created to streamline Federal personnel management, and therefore Congress did not make all personnel actions appealable to the MSPB. Some actions that are not appealable to the MSPB may therefore be appealed to the Office of Personnel Management (OPM) or may be covered by agency grievance procedures.

The MSPB's jurisdiction includes certain actions involving removal, reduction in grade or pay, suspension, furlough, reduction-in-force actions, negative determinations of competence, determinations affecting retirement rights or interests, disqualifications, terminations, demotions,

failure to restore, and failure to re-employ. You can consult section 5 C.F.R. § 1201.3 for a complete list of actions over which the MSPB has appellate jurisdiction, which include the following:

- (1) Reduction in grade or removal for unacceptable performance;<sup>11</sup>
- (2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service;<sup>12</sup>
- (3) Removal, or suspension for more than 14 days, of a career appointee in the Senior Executive Service;<sup>13</sup>
- (4) Reduction-in-force action affecting a career appointee in the Senior Executive Service;<sup>14</sup>
- (5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee;<sup>15</sup>
- (6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employees' Retirement System;<sup>16</sup>
- (7) Disqualification of an employee or applicant because of a suitability determination;<sup>17</sup>
- (8) Termination of employment during probation or the first year of a veterans readjustment appointment when:
  - (i) The employee alleges discrimination because of partisan political reasons or marital status; or

- (ii) The termination was based on conditions arising before appointment and the employee alleges that the action is procedurally improper.<sup>18</sup>
- (9) Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status;<sup>19</sup>
- (10) Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force;<sup>20</sup>
- (11) Furlough of a career appointee in the Senior Executive Service;<sup>21</sup>
- (12) Failure to restore, improper restoration of, or failure to return following a leave of absence an employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) following partial or full recovery from a compensable injury;<sup>22</sup>
- (13) Employment of another applicant when the person who wishes to appeal to the MSPB is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury;<sup>23</sup>
- (14) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961;<sup>24</sup>
- (15) Failure to re-employ a former employee after movement between executive agencies during an emergency;<sup>25</sup>

- (16) Failure to re-employ a former employee after detail or transfer to an international organization;<sup>26</sup>
- (17) Failure to re-employ a former employee after service under the Indian Self-Determination Act;<sup>27</sup>
- (18) Failure to re-employ a former employee after service under the Taiwan Relations Act;<sup>28</sup>
- (19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service;<sup>29</sup>
- (20) Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service;<sup>30</sup>
- (21) Appeals under the Uniformed Services Employment and Reemployment Rights Act;<sup>31</sup>
- (22) Appeals under the Veterans Employment Opportunities Act;<sup>32</sup>
- (23) Appeals involving an allegation that the action was based on appellant's 'whistleblowing'.<sup>33</sup>

### C. WHISTLEBLOWER APPEALS

Whistleblowing means disclosing information that you reasonably believe is evidence of a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.<sup>34</sup> It is a

prohibited personnel practice for an agency to take, threaten to take, propose, or not take a personnel action because of whistleblowing activities.<sup>35</sup> You are protected if you make such a disclosure to the Special Counsel, the Inspector General of an agency, or another employee designated by an agency head to receive such disclosures.<sup>36</sup> You are also protected if you make such a disclosure to any other individual or organization (e.g., a congressional committee or the media), provided that the disclosure is not specifically prohibited by law and the information does not have to be kept secret in the interest of national defense or the conduct of foreign affairs.<sup>37</sup>

The Office of Special Counsel has jurisdiction over prohibited personnel practice complaints with respect to a broad range of personnel actions, including appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training.<sup>38</sup> There are two kinds of whistleblower appeals. The principal difference between the two is in the way they reach the MSPB.

#### i. OTHERWISE APPEALABLE ACTION

In the first kind of case, the individual is subject to a personnel action that is directly appealable to the MSPB, and the individual claims that the action was taken because of whistleblowing.<sup>39</sup> This kind of case is referred to by the MSPB as an "otherwise appealable action," and the individual may file an appeal directly with the MSPB after the action has been taken.<sup>40</sup>

#### ii. INDIVIDUAL RIGHT OF ACTION

The second kind of case was created by the Whistleblower Protection Act<sup>41</sup> and is referred to as an "Individual Right of Action." In this kind of case, the individual is subject to a personnel action and claims that the action was taken because of whistleblowing, but the action is not one that is directly appealable to the MSPB.<sup>42</sup> In this kind of case, the individual can appeal to the MSPB only if he files a complaint with the Special Counsel first and the Special Counsel does not seek corrective action on the individual's behalf.<sup>43</sup>

An individual who is subject to a personnel action that is directly appealable to the MSPB and who claims that the action was taken because of whistleblowing, may choose to file a complaint with the Special Counsel rather than appeal to the MSPB.<sup>44</sup> If the Special Counsel does not seek corrective action on his behalf, the individual may then appeal to the MSPB. While this is considered an "otherwise appealable action," the time limits for filing are the same as for an "individual right of action."<sup>45</sup>

#### D. MILITARY LEAVE (BUTTERBAUGH) APPEALS

In *Butterbaugh v. Dep't of Justice*,<sup>46</sup> the U.S. Court of Appeals for the Federal Circuit held that agencies were not entitled to charge employees' military leave accounts for days when they would not otherwise have been required to work at their Federal civilian jobs.<sup>47</sup> By law, federal employees who work for agencies that are covered by this section are to be given up to 15 days of paid leave a year to attend training sessions required of them as members of military reserves or the National Guard.<sup>48</sup> Until 2000, the Office of Personnel Management interpreted the law as providing 15 calendar days of leave each year, rather than 15 work days, and federal agencies therefore generally followed the practice of charging employees' military leave accounts for

absences on non-workdays (e.g., weekends and holidays) when those days fell within a period of absence for military training. In *Butterbaugh*, the court said that this was improper.

If a Federal agency incorrectly charged you military leave for non-workdays so that you were required to use annual leave or leave without pay for any period for which you should have been able to use military leave, the MSPB may order compensation for the resulting lost wages or benefits. In addition, the MSPB may order the correction of military leave records by your civilian employing agency, the Defense Finance and Accounting Service (DFAS), and any other relevant agency.

#### E. VETERANS EMPLOYMENT OPPORTUNITIES ACT OF 1994 (VEO)

The Veterans Employment Opportunities Act of 1998 or VEOA is a federal law that provides certain federal employees and applicants with a means of redress in the event that a federal executive agency violates an employee's or applicant's veterans' preference rights.<sup>49</sup> Because VEOA primarily concerns the rights afforded to preference eligibles, i.e., individuals entitled to veterans' preference, generally, only preference eligible employees and applicants are entitled to file VEOA appeals.<sup>50</sup> However, a non-preference eligible individual who has been separated from the armed forces under honorable conditions after 3 years or more of active service may file a VEOA appeal if the individual alleges that an agency has denied the individual the opportunity to compete for a vacant position for which the agency is accepting applications from outside its non workforce.<sup>51</sup>

If the MSPB determines that an agency has violated an individual's rights under a statute or regulation relating to veterans' preference, VEOA provides that the MSPB shall order the agency to comply with the statute or regulation it violated and award the individual compensation for

any loss of wages or benefits the individual suffered due to the violation. The individual is also entitled to be awarded reasonable attorney fees, expert witness fees, and other litigation expenses. Furthermore, if the MSPB determines that the agency knew or showed reckless disregard as to whether its conduct was prohibited by statute or regulation, VEOA provides that the MSPB shall award the individual an additional amount equal to backpay.<sup>52</sup>

#### F. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

The Uniformed Services Employment and Reemployment Rights Act of 1994 or USERRA is a federal law designed to encourage non-career service in the uniformed services by minimizing the disadvantages to civilian careers and employment which can result from such service; to minimize the disruption to the lives of persons performing service in the uniformed service by providing prompt reemployment of such persons upon their completion of military service; and to prohibit discrimination against persons because of their service in the uniformed services.<sup>53</sup>

There are two types of cases that fall within the MSPB's jurisdiction under USERRA. The first type is a reemployment case, in which an appellant claims that a federal agency has failed to comply with its obligations to reemploy the appellant after he or she has completed a period of military service. The second type is a "discrimination" case, in which an appellant claims that a federal agency has denied the appellant initial employment, reemployment, retention in employment, promotion, or any "benefit of employment" on the basis of the appellant's military service.<sup>54</sup> In addition, the MSPB has jurisdiction to adjudicate USERRA reprisal claims, that is, claims that an agency has discriminated or taken an adverse employment action against an

appellant in reprisal for: (1) an action to enforce a right under USERRA; (2) the provision of testimony or a statement in a prior USERRA proceeding; (3) participation or assistance in investigating a USERRA claim; or (4) the exercise of a right under USERRA.<sup>55</sup>

If the MSPB determines that an agency has not complied with USERRA with respect to the employment or reemployment of the appellant, the MSPB will enter an order requiring the agency to comply with the provisions it violated and to compensate the appellant for any loss of wages or benefits the appellant suffered as a result of the agency's violation. In addition, if the MSPB issues an order in the appellant's favor, it has the discretion to award the appellant reasonable attorney fees, expert witness fees, and other litigation expenses.<sup>56</sup>

#### G. WHAT THE MSPB DOES NOT DO

The MSPB specifically does not:

- ❖ Hear and decide discrimination complaints except when allegations of discrimination are raised in appeals from agency personnel actions brought before the MSPB. That responsibility belongs to the Equal Employment Opportunity Commission (EEOC).
- ❖ Negotiate and resolve disputes, unfair labor practice complaints, and exceptions to arbitration awards. That responsibility belongs to the Federal Labor Relations Authority (FLRA).
- ❖ Provide advice on employment, examinations, staffing, retirement and benefits. That responsibility belongs to the Office of Personnel Management (OPM).
- ❖ Investigate allegations of activities prohibited by civil service laws, rules or regulations. That responsibility belongs to the Office of Special Counsel (OSC).

- ❖ Hear or decide claims of whistleblowing reprisal filed by employees of, or applicants for employment with, the Federal Bureau of Investigation (FBI). That responsibility belongs to the U.S. Department of Justice, Office of Attorney Recruitment and Management (OARM).
- ❖ Have jurisdiction over non-Federal appeals from private industry, local, city, county, or state employees.<sup>57</sup>

### **III. WHO CAN APPEAL TO THE MSPB?**

Congress granted appeal rights to the MSPB to only certain employees and over certain personnel actions, and the Office of Personnel Management (OPM) has provided appeal rights in other limited situations. Your right to appeal to the MSPB will depend on whether you meet the definition of an “employee” under the applicable law<sup>58</sup> and whether you meet the requirements of any OPM regulation that grants additional appeal rights. Basically, you must be an individual who is not on a temporary assignment or on probation. Whether you are an “employee” with appeal rights will depend in part also on whether you are in the competitive service<sup>59</sup> or the excepted service.<sup>60</sup> The Standard Form 50 documenting your appointment in the Federal service will reflect whether you are in the competitive or excepted service. All employees of the U.S. Postal Service and the Tennessee Valley Authority are in the excepted service. Therefore, it is important to note that not every federal employee has a right to appeal to the MSPB.

Probationary employees do not have a statutory right to appeal to the MSPB. If you are a preference eligible in the excepted service and you have not completed one year or more of

current, continuous service in the same or similar position, you may not appeal your termination to the MSPB. If you are a non-preference eligible in the excepted service and you have not completed two years or more of current, continuous service, in most circumstances you may not appeal your termination to the MSPB. There are no regulatory appeal rights for excepted service employees terminated during probation. You may, however, have the right to file an Equal Employment Opportunity complaint, a grievance, or a request for corrective action with the Office of Special Counsel. You should quickly attempt to determine whether such options exist before you file an appeal, because frequently the type of review you seek first constitutes an “election of remedy” that may limit or preclude other review options.

However, probationary employees in the competitive service or serving under a Veterans’ Recruitment Appointment (VRA) do have limited appeal rights to the MSPB by regulation.<sup>61</sup> VRA appointees have the same regulatory rights of appeal to the MSPB as competitive service employees terminated during probation.

#### **IV. WHERE DO YOU FILE THE APPEAL?**

You must file an appeal with the MSPB's regional or field office serving the area where your duty station was located when the action was taken, or, if the appeal relates to a final decision of the Office of Personnel Management regarding retirement benefits, or an adverse suitability determination, with the regional or field office that has jurisdiction over the area where you live. A listing of MSPB regional and field offices is available at the MSPB Website ([www.mspb.gov](http://www.mspb.gov)), and specific locations and personnel can be found at <http://www.mspb.gov/contact/contact.htm>. It is important to note that you can file your appeal electronically at this address:

<https://e-appeal.mspb.gov/>

## **V. WHAT INFORMATION MUST BE SUBMITTED TO BEGIN AN APPEAL?**

An appeal must be in writing and contain all the information specified in the MSPB's regulations.<sup>62</sup> Using the MSPB's Appeal Form or its e-Appeal Online application will ensure that all required information is provided, but using the form is not required. It is important to remember that filing a new appeal is just the beginning of the adjudication process that results in a decision.

### **A. FILING A "NOTICE OF THE DECISION TO TAKE THE ACTION BEING APPEALED"**

In addition to the information required by MSPB's regulations, the only document required to be filed with most appeals is the "notice of the decision to take the action being appealed."<sup>63</sup> In IRA, VEOA and USERRA appeals, evidence that the administrative process has been exhausted is also required.<sup>64</sup> Although other documents may be filed with the appeal, the MSPB would prefer that other documents not be filed with the appeal. As explained below, the agency must file all documents contained in the agency record of the action. Filing numerous documents with a new appeal usually duplicates documents that will be filed by the agency.

Filing the "notice of the decision to take the action being appealed" officially starts the appeals process.<sup>65</sup> With this notice, you must also file specific information about yourself and why you are asking for an appeal, specifically:

- (1) The name, address, and telephone number of the appellant, and the name and address of the agency that took the action;

- (2) A description of the action the agency took and its effective date;
- (3) A request for hearing if the appellant wants one;
- (4) A statement of the reasons why the appellant believes the agency action is wrong;
- (5) A statement of the action the appellant would like the judge to order;
- (6) The name, address, and telephone number of the appellant's representative, if the appellant has a representative;
- (7) The notice of the decision to take the action being appealed, along with any relevant documents;
- (8) A statement telling whether the appellant or anyone acting on his or her behalf has filed a grievance or a formal discrimination complaint with any agency regarding this matter; and
- (9) The signature of the appellant or, if the appellant has a representative, of the representative. If the appeal is electronically filed, compliance with § 1201.14 and the directions at the MSPB's e Appeal site (<https://e-appeal.mspb.gov>) satisfy the signature requirement.<sup>66</sup>

You do not need to file additional documents with the MSPB initially, because the agency whose decision you are appealing is required to submit all documents within its own record of the action. In addition, both parties will have several opportunities to provide additional evidence and argument as the appeal proceeds toward a decision.<sup>67</sup>

**B. ADDITIONAL DOCUMENTATION REQUIREMENTS FOR CERTAIN  
CLAIMS**

In Individual Right of Action (IRA)<sup>68</sup>, Veterans Employment Opportunities Act (VEOA),<sup>69</sup> and Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>70</sup> appeals, you must submit certain evidence in addition to all nine items required as discussed in this guide's Section V(A) (above).

**i. INDIVIDUAL RIGHT OF ACTION (IRA) APPEALS, INCLUDING  
CLAIMS OF RETALIATION FOR WHISTLEBLOWING**

To pursue an IRA appeal at the MSPB, you must first seek corrective action from the Special Counsel and submit evidence that the appeal is timely filed. You must submit all nine § 1201.24(a) items required as discussed in this guide's Section V(A) (above). In addition, you will have to submit additional information and argument evidencing whistleblowing, including the names and positions held by any employee who took contested action and a chronology of facts concerning the actions. Some complaint forms that you would have submitted to the Special Counsel will already contain some of this information and may satisfy that requirement.<sup>71</sup>

**ii. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT  
RIGHTS ACT (USERRA)**

To pursue a USERRA appeal at the MSPB, you must submit all nine § 1201.24(a) items required as discussed in this guide's Section V(A) (above). In addition, you will have to supply

information describing your participation in uniformed service as well as your basis for appeal.<sup>72</sup> You do have the option to file and pursue your complaint with the Secretary of Labor and then either appealing to the MSPB or asking the Secretary to refer your complaint to the Special Counsel. Do note that if you pursue your claim before the Secretary, different rules for starting the appeal apply.

If you pursue your complaint to the Secretary and subsequently appeal to the MSPB, you would have to file evidence that the Secretary's efforts have not resolved the complaint.<sup>73</sup> If you pursue your complaint to the Secretary and then ask the Secretary to refer your complaint to the Special Counsel, and you receive notice that the Special Counsel will not represent you before the MSPB, you may appeal to the MSPB and you must submit evidence of Special Counsel's decision.<sup>74</sup>

### iii. VETERANS EMPLOYMENT OPPORTUNITIES ACT (VEOA)

To pursue a VEOA appeal at the MSPB, you must first pursue a resolution with the Secretary of Labor under 5 U.S.C. § 3330a(a).<sup>75</sup> Before pursuing your claim at the MSPB, you must submit evidence to the MSPB that the Secretary did not resolve the complaint and that you submitted an intent to appeal to the Secretary. In addition, you must submit all nine of the items required as discussed in this guide's Section V(A) (above), and you will have to submit evidence or argument that you were eligible for preference and a statement identifying the statute granting you that preference.<sup>76</sup>

### iv. REQUEST FOR REGULATION REVIEW

You must submit a request for regulation review, which includes your contact information and signature, a citation of the regulation you are challenging, a detailed statement describing why the regulation or its implementation would require an employee to commit a prohibited personnel practice, identification of that prohibited personnel practice, and a description of the action the requester would like the MSPB to take.<sup>77</sup> A request for regulation review that involves the duty of an employee with the authority to take, direct others to take, recommend, or approve a personnel action must identify the law or regulation that has been or would be violated and explain the violation. The request must also identify the merit system principles at issue and an explanation of the way in which the law or regulation at issue implements or directly concerns those principles.<sup>78</sup>

### C. REMEDIES AVAILABLE

The MSPB does not itself cancel an improper agency action; rather it orders the agency to do so.<sup>79</sup> Aside from its authority to direct an agency to reverse an appealed action, the MSPB also has the authority to order the award of back pay and benefits,<sup>80</sup> in accordance with the Back Pay Act.<sup>81</sup> Therefore, it is imperative that in your appeal, you clearly state the remedy you are seeking from the MSPB.

## VI. BY WHEN MUST YOU FILE AN APPEAL?

### A. MOST APPEALS

In most types of cases, including most appeals from agency or alternative dispute resolution cases, an appeal must be filed within 30 calendar days of the effective date of the action, if any, or within 30 calendar days after the date of receipt of the agency's decision, whichever is later.<sup>82</sup>

However, when an appellant and agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, the time limit for filing the appeal is extended by 30 days, for a total of 60 days.<sup>83</sup>

#### B. IRA APPEALS

If you are filing a whistleblower appeal after first filing a complaint with the Office of Special Counsel (OSC), your appeal must be filed within 65 days of the date of the OSC notice advising you that the Special Counsel will not seek corrective action or, within 60 days after the date you receive the OSC notice, whichever is later.<sup>84</sup>

#### C. USERRA APPEALS

USERRA appeals have no time limit for filing.<sup>85</sup>

#### D. VEOA APPEALS

You must first file a complaint with the Secretary of Labor and allow the Secretary at least 60 days to try to resolve the matter. On the 61st day, you may file an appeal with the MSPB. However, once you receive notice that the Secretary has been unable to resolve the matter you have 15 days in which to file your appeal with the MSPB.<sup>86</sup>

### **VII. CAN YOU DESIGNATE A REPRESENTATIVE?**

A party to an appeal may be represented in any matter related to the appeal.<sup>87</sup> Parties may designate a representative, revoke such a designation, and change such a designation in a signed submission to the MSPB.

#### A. WHO YOU MAY DESIGNATE AS A REPRESENTATIVE?

You may choose any person, who is willing and able, to represent you before the MSPB, or you may choose to represent yourself.<sup>88</sup>

#### B. HOW YOU MAY DESIGNATE A REPRESENTATIVE?

Any designation of a representative must be in writing and signed by the appellant.<sup>89</sup> No particular format is required, although the MSPB does provide a template form.<sup>90</sup>

### VIII. WHAT HAPPENS AFTER YOU FILE AN APPEAL?

After you have submitted your initial documents for appeal, the appeal is docketed and assigned to an Administrative Judge (AJ) for adjudication. The AJ who has been assigned to the case will issue an Acknowledgment Order to both the appellant (and his or her representative, if any) and the agency. After this initial response from the MSPB, the AJ will issue notices and orders informing you what additional information must be filed and when. The AJ will likely hold status or prehearing conferences to narrow and clarify the issues in the appeal. Following a hearing, or the close of the record when an appeal is decided on the written record, the AJ will issue an initial decision. The initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the AJ's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests.<sup>91</sup> The decision will also contain certain information about interim relief and availability of further review.<sup>92</sup>

#### A. INITIAL APPEAL PROCESS<sup>93</sup>

Read the Acknowledgment Order carefully because it contains important information about timeliness or jurisdiction (if apparent from the appeal), requesting a hearing, designation of a representative, settlement, discovery, motions and responses to motions, general instructions

about filing pleadings before the MSPB, the need for a certificate of service for every pleading you file with the MSPB, and a citation to the MSPB's regulations. For agencies, there is also a Schedule that instructs the agency how to compile its response to the appeal. There are also deadlines in the Order with which both parties must comply. The MSPB's policy is to adjudicate cases in 120 days or less so it is important that you comply with the deadlines.

The Acknowledgement Order transmits a copy of the appeal to the agency and directs the agency to submit a statement explaining the reason for taking the personnel action or decision being challenged and to submit to the MSPB all documents contained in the agency's record of the action. If there are questions relating to the timeliness of the appeal, or whether the action or decision complained of is within the MSPB's jurisdiction, the Acknowledgment Order will request that you submit evidence and argument on these matters in an order.

## B. STAY REQUESTS

A stay request is a written request to delay the effective date of a personnel action that is being threatened, proposed, taken or not taken where the employee believes the action is retaliation for his whistleblowing.<sup>94</sup> Thus, this is applicable only to claims by whistleblowers.<sup>95</sup> You may request a stay at any time after you become eligible to file an appeal of the action at issue with the MSPB, but no later than the deadline for discovery to be completed in the appeal.<sup>96</sup> You may file your request before, with, or after you file an appeal of that action with the MSPB. The action must constitute a "personnel action."<sup>97</sup>

You must file a stay request in the appropriate regional office<sup>98</sup> by mail, facsimile, by commercial or personal delivery, or by electronic filing.<sup>99</sup> At the same time you file your stay request with the MSPB, you must serve a copy of it on the agency's local servicing personnel office or the agency's designated representative, if any. At that time, you must also submit a Certificate of Service stating how, when, and on whom you served the stay request. The format you use is not important, but it must include the information set out in MSPB regulations.<sup>100</sup> You may also include documentary evidence that supports the stay request. Make sure your stay request is complete because, typically within 10 business days after the request is received, the AJ assigned to decide it will rule on the request based on its contents and the agency's response, if one is filed. The AJ may hold a hearing on the stay request, but in most cases, the request will be decided based on the request and the agency's response.

If the AJ grants a stay, he will issue an Order which must specify the effective date and length of the stay. A stay remains in effect for the time specified by the AJ, until the MSPB issues a final decision on the appeal of the stayed underlying personnel action, or until the MSPB vacates or modifies the stay (whichever occurs first). An agency must comply immediately with any Order that grants a stay. The parties can seek review of an Order on a stay request only after the AJ rules on the appeal of the underlying personnel action.

### C. MOTION PRACTICE

You would file a written motion in your appeal.<sup>101</sup> A motion is a type of pleading where you are requesting the AJ to do something. All motions must be in writing except those made during a prehearing or status conference or a hearing. A motion must be served on all other parties by

mail, facsimile, commercial or personal delivery, or by electronic filing, and a certificate of service, stating when and how service was made, must accompany each copy served. There are certain motions an agency may file to try to have an appeal dismissed, such as for untimeliness (the appeal was not timely filed), lack of jurisdiction (the MSPB has no authority to hear the appeal), failure to state a claim (you cannot obtain effective relief, even if your statements are accepted as true), or mootness (the MSPB cannot grant any additional relief). Motions to dismiss for untimeliness, lack of jurisdiction, and failure to state a claim, if granted, mean that the appeal is dismissed without granting you any relief. A motion to dismiss the appeal as moot, on the other hand, means that the agency believes it has totally rescinded the action you are appealing and you received all of the relief to which you are entitled.

There are numerous other motions that may be filed by both parties, including: motion for an extension of time or postponement of conference/hearing,<sup>102</sup> to compel discovery,<sup>103</sup> to strike a pleading,<sup>104</sup> to quash a subpoena,<sup>105</sup> to disqualify a representative<sup>106</sup> or an AJ,<sup>107</sup> to intervene,<sup>108</sup> to substitute a party,<sup>109</sup> to consolidate/join appeals,<sup>110</sup> for sanctions,<sup>111</sup> for a protective order,<sup>112</sup> for an interlocutory appeal,<sup>113</sup> to suspend adjudication for 30 days,<sup>114</sup> and to dismiss the appeal without prejudice.

Finally, unless the AJ tells you otherwise, you have 10 calendar days from the date the motion is served to file with the MSPB any response or objection to the motion. However, an AJ may grant or deny a motion for extension of time to file pleadings without any opportunity to respond.

#### D. DISCOVERY

Discovery is the procedure by which you may ask questions, or obtain documents or answers from the opposing party or third parties in order to "discover" information that is calculated to lead to the discovery of admissible evidence. A party must make its first discovery request within 25 days following the date of the AJ's Acknowledgment Order in the case. Otherwise, the request will be considered untimely (late), and the other party may be excused from having to answer it.

Following receipt of a discovery request, a party must respond to it within 20 days after the date of service. If the response is inadequate, or if the discovery request is ignored, the party that made the discovery request may file a "Motion to Compel Discovery" with the AJ. A Motion to Compel Discovery must be filed within 10 days after the objection or nonconforming response is served, or within 10 days after the time limit for response has expired. If the AJ concludes that the discovery request was legally proper, he or she will issue an "Order to Compel Discovery." If the response to this order is inadequate, or if the Order to Compel Discovery is ignored, the party that made the discovery request may file a "Motion for Sanctions" with the AJ. The AJ may, after considering any response to the motion, impose legal sanctions on the party which failed to comply with the order. After the initial discovery request, a party may file follow-up discovery requests within 7 days of the date of service of the prior response.

A party can use any type of discovery authorized by the Federal Rules of Civil Procedure. The most common types are: (1) requests for production of documents, (2) written interrogatories, (3) requests for admission, and (4) depositions. Do not file copies of initial requests for discovery or responses to discovery to the AJ unless it is as an attachment to a

motion to compel or as a hearing exhibit or part of your final submission in a case decided on the written record. The AJ expects you to cooperate timely and voluntarily in the exchange of information with limited intervention by the administrative judge.

Read the AJ's discovery regulations to make sure you are aware of the time limits for discovery and ensure that your discovery requests and responses comply with the regulations. The most common two reasons a discovery request is improper or unenforceable is that it is either overbroad or irrelevant. A request is overbroad when it asks for a lot of extraneous information, such as when an appellant appealing a suspension for filing a falsified travel voucher asks for copies of all travel vouchers submitted by agency employees for the past two years. Complying with that request would be very burdensome on the agency, would adversely impact on the privacy of other agency employees, and would provide a lot of information not related to that employee's case. Usually a discovery request seeking information about what happened to you, or directly concerning you will be fine. The problem is when the request starts asking for a lot of information about other people, or about what happened to them.

## **IX. COMMON REASONS FOR REJECTION OF APPEAL**

Below is a list of the most common reasons why appeals are rejected by the MSPB. In order to assure that your appeal is properly filed, you should comply with the requirements of 5 C.F.R. § 1201.24(a) and attempt to avoid these common errors. Doing so will allow the MSPB to begin processing your appeal as soon as it is received.

- (1) The appellant's appeal is premature because the MSPB received the appeal prior to the effective date of the action being appealed or prior to the agency issuing a final decision concerning the appellant's performance, conduct, or reduction-in-force status.<sup>115</sup>
- (2) The appeal is filed by someone other than the appellant, his or her representative, or a party properly substituted.<sup>116</sup>
- (3) The appeal does not contain the appellant's name, address, and telephone number, and/or does not identify the name and address of the agency that took the action being appealed.<sup>117</sup>
- (4) The appeal does not contain a description of the agency's action and its effective date.<sup>118</sup>
- (5) If the appeal is not electronically filed, it lacks the signature of the appellant or, if the appellant has a representative, of the representative.<sup>119</sup>
- (6) If the appeal is not electronically filed, the appellant did not file two copies of the appeal and all attachments with the appropriate MSPB office.<sup>120</sup>
- (7) Pleadings and attachments were not filed on 8.5 by 11-inch paper, and no good cause was provided.<sup>121</sup>
- (8) The appellant checked multiple actions being appealed, and indicated only one effective date or no effective date at all for the appealed actions.

(9) The appellant filed a stay request but did not submit evidence that the employing agency was served a copy of the request.<sup>122</sup>

## **X. HOW CAN YOU APPEAL A FINAL MSPB DECISION?**

### **A. RIGHT TO A PETITION FOR REVIEW**

You or your adversary may file a Petition For Review (PFR) with the Clerk of the MSPB in Washington, D.C., if dissatisfied with an initial decision by the MSPB. There is also an alternative option of filing a petition with the United States Court of Appeals for the Federal Circuit under that Court's guidelines, or, in cases involving allegations of discrimination, to the Equal Employment Opportunity Commission or to a U.S. District Court.<sup>123</sup>

The PFR must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.<sup>124</sup> The MSPB must be able to ascertain from the PFR whether there may be a serious evidentiary question justifying a complete review of the record; only then will the MSPB undertake the burden of a complete review of the record. The petitioning party must, as the regulation plainly states, explain in the petition why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error.<sup>125</sup> A PFR may be granted, meaning allowed for review, where (1) new and material evidence is now available that, despite due diligence, was not available when the record closed, or (2) the decision of the judge was based on an erroneous interpretation of a statute or regulation.<sup>126</sup>

Once the petition has been granted, the law provides that an agency's decision may not be sustained by the MSPB if the appellant shows:

- (A) harmful error in the application of the agency's procedures in arriving at such decision, meaning that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error;
- (B) that the decision was based on any prohibited personnel practice; or
- (C) that the decision was not in accordance with law, which is proven only if there was no legal authority for the action.<sup>127</sup>

#### B. HOW TO FILE A PETITION FOR REVIEW

A PFR must be filed with the Clerk of the MSPB within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. A cross petition for review must be filed within 25 days of the date of service of the petition for review. (A pleading is considered to be a cross PFR when one party has already submitted a PFR and the other party also objects to some aspect of the initial decision.) Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition.<sup>128</sup>

#### **XI. PURSING YOUR APPEAL THROUGH MEDIATION: AN ALTERNATIVE TO THE APPEAL<sup>129</sup>**

As an alternative, the MSPB also offers a Mediation Appeals Program (MAP) to resolve the issue in lieu of filing an appeal. MAP offers the services of the MSPB's trained and certified

Mediators as an alternative to the formal appeal processes and procedures of the MSPB's regulations. Mediators facilitate a discussion between the parties to help them identify issues and barriers to agreement that will aid in resolving their disputes and settling the appeal quickly, economically, and to the benefit of all concerned. MAP is free, easy and confidential. Both parties must agree to its use before the appeal will be accepted for the MAP process, and both must agree on its resolution before any settlement is concluded. Unlike the traditional appeal process, the parties control the result of the case under the skilled guidance of the Mediator, who will play no role in deciding the appeal should accord not be reached.

For more information on how to pursue your claim through MAP, please refer to the informational brochure listed on the MSPB website.

## XII. REFERENCES

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<sup>1</sup> U.S. Merit Systems Protection Board, About MSPB, <http://www.mspb.gov/About/about.htm> (*last visited* January 12, 2011).

<sup>2</sup> *Id.*

<sup>3</sup> U.S. Merit Systems Protection Board, How to File an Appeal, <http://www.mspb.gov/appeals/appeals.htm> (*last visited* January 12, 2011).

<sup>4</sup> U.S. Merit Systems Protection Board, About MSPB, <http://www.mspb.gov/About/about.htm> (*last visited* January 12, 2011).

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Merit Systems Protection Board, Jurisdiction, <http://www.mspb.gov/About/jurisdiction.htm> (*last visited* January 12, 2011).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. §§ 1214, 1215, 1216.

<sup>10</sup> 5 U.S.C. § 7521.

<sup>11</sup> 5 C.F.R. § 432; 5 U.S.C. 4303(e).

<sup>12</sup> 5 C.F.R. § 752(c)-(d); 5 U.S.C. §§ 7511-7514.

<sup>13</sup> 5 C.F.R. § 752(e)-(f); 5 U.S.C. §§ 7511-7514.

<sup>14</sup> 5 U.S.C. § 3595.

<sup>15</sup> 5 C.F.R. § 531.410; 5 U.S.C. § 5335(c).

<sup>16</sup> 5 C.F.R. §§ 831, 839, 842, 844, 846; 5 U.S.C. §§ 8347(d)(1)-(2), 8461(e)(1); 5 U.S.C. § 8331 note, Federal Erroneous Retirement Coverage Corrections Act.

<sup>17</sup> 5 C.F.R. § 731.501.

<sup>18</sup> 5 C.F.R. § 315.806; 38 U.S.C. § 2014(b)(1)(D).

<sup>19</sup> 5 C.F.R. § 315.908(b).

<sup>20</sup> 5 C.F.R. § 351.901.

<sup>21</sup> 5 C.F.R. § 359.805.

<sup>22</sup> 5 C.F.R. § 353.304.

<sup>23</sup> 5 C.F.R. §§ 302.501, 330.209.

<sup>24</sup> 5 C.F.R. § 352.508.

<sup>25</sup> 5 C.F.R. § 352.209.

<sup>26</sup> 5 C.F.R. § 352.313.

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- <sup>27</sup> 5 C.F.R. § 352.707.
- <sup>28</sup> 5 C.F.R. § 352.807.
- <sup>29</sup> 5 C.F.R. § 300.104.
- <sup>30</sup> 22 U.S.C. § 4011.
- <sup>31</sup> 38 U.S.C. §§ 4301-4333.
- <sup>32</sup> 5 C.F.R. § 1201.3(b)(1).
- <sup>33</sup> 5 U.S.C. §§ 2302(b)(8), 1221(a).
- <sup>34</sup> See 5 C.F.R. § 1209.4(b); U.S. Merit Systems Protection Board, Questions and Answers About Whistleblower Appeals, <http://www.mspb.gov/appeals/whistleblower.htm> (*last visited* January 12, 2011).
- <sup>35</sup> See 5 C.F.R. §§ 1209.1, 1209.2, 5 U.S.C. § 2302(a)(2).
- <sup>36</sup> *Id.*
- <sup>37</sup> *Id.*
- <sup>38</sup> See 5 C.F.R. § 1209.2(b).
- <sup>39</sup> See 5 C.F.R. § 1209.2(b)(2); U.S. Merit Systems Protection Board, Questions and Answers About Whistleblower Appeals, <http://www.mspb.gov/appeals/whistleblower.htm> (*last visited* January 12, 2011).
- <sup>40</sup> U.S. Merit Systems Protection Board, Questions and Answers About Whistleblower Appeals, <http://www.mspb.gov/appeals/whistleblower.htm> (*last visited* January 12, 2011).
- <sup>41</sup> Public Law 101-12 (1989).
- <sup>42</sup> See 5 C.F.R. § 1209.2(b)(1).
- <sup>43</sup> U.S. Merit Systems Protection Board, Questions and Answers About Whistleblower Appeals, <http://www.mspb.gov/appeals/whistleblower.htm> (*last visited* January 12, 2011).
- <sup>44</sup> *Id.*
- <sup>45</sup> *Id.*
- <sup>46</sup> 336 F.3d 1332 (Fed. Cir. 2003).
- <sup>47</sup> *Id.* at 1333-34.
- <sup>48</sup> 5 U.S.C. § 6323.
- <sup>49</sup> 5 U.S.C. §§ 3330a-3330b.
- <sup>50</sup> 5 U.S.C. § 3330a(a)(1)(A).
- <sup>51</sup> 5 U.S.C. §§ 3330a(a)(1)(B); 3304(f)(1).
- <sup>52</sup> 5 U.S.C. § 3330c.
- <sup>53</sup> 38 U.S.C. § 4301.
- <sup>54</sup> *Clavin v. U.S. Postal Serv.*, 99 M.S.P.R. 619 , ¶ 5 (2005).
- <sup>55</sup> 38 U.S.C. § 4311 (b).
- <sup>56</sup> 38 U.S.C. § 4324 (c).

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- <sup>57</sup> U.S. Merit Systems Protection Board, About MSPB, <http://www.mspb.gov/About/about.htm> (*last visited* January 12, 2011).
- <sup>58</sup> 5 U.S.C. § 7511(a)(1).
- <sup>59</sup> 5 C.F.R. § 212.101.
- <sup>60</sup> 5 C.F.R. § 213.101.
- <sup>61</sup> 5 C.F.R. § 315.806.
- <sup>62</sup> *See* 5 C.F.R. §§ 1201.24 (most appeals); 1209.6 (individual right of action (IRA) appeals, which involve claims of retaliation for whistleblowing); 1208.13 (Uniformed Services Employment and Reemployment Rights Act (USERRA)); 1208.23 (Veterans Employment Opportunities Act (VEOA)); 1203.11 (request for regulation review).
- <sup>63</sup> 5 C.F.R. § 1201.24(a)(7).
- <sup>64</sup> U.S. Merit Systems Protection Board, How to File an Appeal, <http://www.mspb.gov/appeals/appeals.htm> (*last visited* January 12, 2011).
- <sup>65</sup> 5 C.F.R. § 1201.24(a)(7).
- <sup>66</sup> 5 C.F.R. § 1201.24(a).
- <sup>67</sup> U.S. Merit Systems Protection Board, How to File an Appeal, <http://www.mspb.gov/appeals/appeals.htm> (*last visited* January 12, 2011).
- <sup>68</sup> *See* 5 C.F.R. §1209.6.
- <sup>69</sup> *See* C.F.R. §1208.23.
- <sup>70</sup> *See* C.F.R. §1208.13.
- <sup>71</sup> *See* 5 C.F.R. § 1209.6(a).
- <sup>72</sup> *See* 5 C.F.R. § 1208.11(a)(2).
- <sup>73</sup> *See* 5 C.F.R. § 1208.11(a); 38 U.S.C. § 4322.
- <sup>74</sup> *See* 5 C.F.R. § 1208.11, 13(a).
- <sup>75</sup> *See* 5 C.F.R. § 1208.21.
- <sup>76</sup> *See* 5 C.F.R. § 1208.23(a).
- <sup>77</sup> 5 C.F.R. § 1203.11(b)(1).
- <sup>78</sup> 5 C.F.R. § 1203.11(b)(1).
- <sup>79</sup> *See* 5 U.S.C. § 1204(a)(2).
- <sup>80</sup> *See* 5 C.F.R. § 550.801; *Robinson v. Dep't of Army*, 21 M.S.P.R. 270, 272-73 (1984).
- <sup>81</sup> 5 U.S.C. § 5596.
- <sup>82</sup> *See* 5 C.F.R. § 1201.22(b)(1).
- <sup>83</sup> *Id.*
- <sup>84</sup> *See* 5 C.F.R. § 1209.5.
- <sup>85</sup> *See* 5 C.F.R. § 1208.12.

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- <sup>86</sup> 5 C.F.R. § 1208.22.
- <sup>87</sup> 5 C.F.R. § 1201.31(a).
- <sup>88</sup> *See* 5 C.F.R. § 1201.31.
- <sup>89</sup> *See* 5 C.F.R. § 1201.31.
- <sup>90</sup> *See* 5 C.F.R. § 1201.31.
- <sup>91</sup> *See* 5 C.F.R. § 1201.111(b); *Spithaler v. Office of Personnel Mgmt.*, 1 M.S.P.R. 587, 589 (1980).
- <sup>92</sup> *See* 5 C.F.R. § 1201.111(b).
- <sup>93</sup> *See* 5 C.F.R. § 1201.1 et. seq.
- <sup>94</sup> *See* 5 C.F.R. § 1201.134.
- <sup>95</sup> *See* 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209(c).
- <sup>96</sup> 5 C.F.R. § 1209.5.
- <sup>97</sup> *See* 5 U.S.C. § 2302(a)(2).
- <sup>98</sup> 5 C.F.R. § 1201.4(d).
- <sup>99</sup> 5 C.F.R. § 1201.14.
- <sup>100</sup> 5 C.F.R. § 1209.9(a).
- <sup>101</sup> *See* 5 C.F.R. § 1201.
- <sup>102</sup> 5 C.F.R. § 1201.55(a),(c).
- <sup>103</sup> 5 C.F.R. § 1201.73.
- <sup>104</sup> 5 C.F.R. § 1201.43.
- <sup>105</sup> 5 C.F.R. § 1201.82.
- <sup>106</sup> 5 C.F.R. § 1201.31.
- <sup>107</sup> 5 C.F.R. § 1201.42.
- <sup>108</sup> 5 C.F.R. § 1201.34.
- <sup>109</sup> 5 C.F.R. § 1201.35.
- <sup>110</sup> 5 C.F.R. § 1201.36.
- <sup>111</sup> 5 C.F.R. § 1201.43.
- <sup>112</sup> 5 C.F.R. § 1201.55(d).
- <sup>113</sup> 5 C.F.R. § 1201.91-93.
- <sup>114</sup> 5 C.F.R. § 1201.28.
- <sup>115</sup> *See* 5 C.F.R. § 1201.22(b).
- <sup>116</sup> *See* 5 C.F.R. §§ 1201.35, 1201.24(a).
- <sup>117</sup> *See* 5 C.F.R. § 1201.24(a)(1).

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<sup>118</sup> See 5 C.F.R. § 1201.24(a)(2).

<sup>119</sup> See 5 C.F.R. § 1201.24(a)(9).

<sup>120</sup> See 5 C.F.R. § 1201.26(a).

<sup>121</sup> See 5 C.F.R. § 1201.26(c).

<sup>122</sup> See 5 C.F.R. § 1209.8(c).

<sup>123</sup> 5 U.S.C. § 7703.

<sup>124</sup> See 5 C.F.R. § 1201.115(a).

<sup>125</sup> See *Weaver v. Dep't of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (*per curiam*).

<sup>126</sup> See 5 C.F.R. § 1201.115(d)(1).

<sup>127</sup> See 5 U.S.C. § 7701(c)(2).

<sup>128</sup> 5 C.F.R. § 1201.114(d).

<sup>129</sup> U.S. Merit Systems Protection Board, The Mediation Appeals Program, <http://www.mspb.gov/appeals/mediationappeals.htm> (*last visited* January 12, 2011).