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Director of Legal Services Neil McPhie, Esq. discusses MSPB AJ dismissal rate with cyberFEDS

MSPB AJ dismissal rate goes up as number of cases drops

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DID YOU KNOW?

Merit Systems Protection Board administrative judges dismissed initial appeals at a higher rate in 2013 than in 2003, according to data gathered by the law firm Tully Rinckey PLLC. The MSPB dismissed 62 percent of 5,757 initial appeals in 2013 compared to 52 percent of 6,601 initial appeals in 2003, Neil McPhie, the director of legal services at Tully Rinckey, told cyberFEDS®

.The statistics were provided by the MSPB in response to a Freedom of Information Act request and collected from the MSPB's annual reports, he said. It's important for agencies to be aware of these numbers because a higher dismissal rate indicates an increased likelihood of winning on appeal, McPhie said. And knowing the dismissal rates for particular types of actions can help agencies avoid surprises about the administrative judges' decisions. The breakdown

In FY 2013, the MSPB's highest dismissal rates, McPhie said, were for the following types of initial appeals: Incorrect retirement plans under the Federal Erroneous Retirement Coverage Corrections Act (94 percent).

Those falling into the "other" category, including restoration of duty, miscellaneous, reemployment priority, employment practices, and others (92 percent).

**Termination of probationary employees (91 percent).
Individual right of action appeals (85 percent).
Reduction in force appeals (83 percent).**

These statistics indicate that agencies have a high likelihood of success when employees appeal their retirement plan placement, probationary termination, whistleblower, or reduction in force status, McPhie explained. In contrast, the MSPB's lowest dismissal rates in 2013, McPhie said, involved the following types of appeals: Civil Service Retirement System overpayments (52 percent).

Adverse actions (51 percent).

Federal Employee Retirement System overpayments (43 percent).

Uniformed Services Employment and Reemployment Rights Act (40 percent).

Performance actions (29 percent).

These cases tend to have issues of fact that require a decision on the merits, said McPhie. Untimeliness and jurisdiction

Regardless of the type of appeal, the grounds for dismissal are most commonly untimeliness or lack of jurisdiction, McPhie said. Generally, the burden is on the employee to ensure the initial appeal is timely filed -- usually 30 days after the effective date of the action being appealed unless an exception applies. The employee also has the burden of proving the MSPB has jurisdiction over the type of action involved in the appeal. For example, the reason for a 91 percent dismissal rate of appeals involving the termination of probationary employees is because the MSPB only has narrow jurisdiction over probationary employees. Generally, they can only appeal if the termination is based on marital status, partisan political viewpoints, or pre-appointment conditions, McPhie said. In the end, whether a case is dismissed "depends on the individual facts and circumstances," he said. "The cases that tend to go to the MSPB are somewhat in the middle and can be argued for one side or the other, while the strongest cases are settled and the weakest cases are dismissed," he added.

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