



**TULLY RINCKEY** PLLC  
YOUR LAWYERS FOR LIFE - 1888LAW4LIFE.COM

## **Tully Rinckey PLLC's Neil McPhie, Esq. tells Federal Times retirement appeals will be key for the MSPB**

**Timing is everything: MSPB braces for involuntary retirement appeals**

**Neil A.G. McPhie, Esq. Director of Legal Services**

**By: Neil McPhie, Esq.**

**April 7th, 2014**

Timing is a crucial factor when it comes to deciding when to retire. It is also important when it comes to how older workers perceive their retirements. In fact, research has shown that retiring sooner than expected makes older workers two times more likely to perceive their retirements as being forced, compared to those who retire on time. With the Government Accountability Office recently reporting that 600,000 of the federal government's permanent career employees will become eligible for retirement by 2017 – up from 270,000 in 2012 – there is a strong possibility that after these employees retire, some will end up believing they were forced out. One study, for example, showed that nearly a third of older workers surveyed believed their retirements were forced. In its draft Strategic Plan for FY2014-2018, the Merit Systems Protection Board (MSPB) warned that it anticipated an "[i]ncrease in appeals workload due to increased retirements (e.g., benefits claims and alleged forced retirement cases)." There are many reasons why workers may believe they were forced to retire. Disability and illness tend to be the leading causes for involuntary retirement, as Canadian researchers have noted. So far as the MSPB is concerned, involuntary retirement is akin to removal, making it an appealable adverse action. While I was

serving as MSPB chairman, the Board pointed out in *Mc Corcle v. Department of Agriculture*

(2005) that “[a]llegations of coerced resignations or retirements tend to fall into one of two scenarios: when the agency has proposed or threatened an adverse action and the employee resigns or retires in the face of the impending action; or when the agency takes actions that make working conditions so intolerable that the employee is driven to an involuntary resignation or retirement.” Another type of coerced resignation or retirement, which I fear will become more common as agencies lose years of institutional knowledge through retirements, involves agency misinformation. In an opinion I co-authored for *Paige v. U.S. Postal Service*

(2007), the Board noted, “a resignation is involuntary if the agency made misleading statements upon which the employee reasonably relied to his detriment.” If an employee’s retirement decision was based on misinformation, he or she must keep in mind that the agency’s excuse for providing the incorrect information is largely irrelevant. As the Board explained in *Paige*,

“[t]he appellant, however, need not show that the agency intentionally misled him. . . . That is, the agency could have provided the misleading information negligently or even innocently; if the appellant materially relied on the misinformation to his detriment, his resignation is considered involuntary.” The Board has repeatedly stressed, as it did in *Coufal v. Department of Justice*

(2004), that “[t]he touchstone of the ‘voluntariness’ analysis and the common element in all Board cases involving alleged involuntary resignations or retirements is that factors have operated on the employee’s decision-making processes that deprived him or her of freedom of choice.” With the positive perception of a retirement largely riding on when federal employees retire, they must not let agencies get away with forcing them to leave the federal civil service before the time that is right for them. This is one freedom federal employees do not want to lose, because the quality of their golden years may hinge on it.