



MSPB RIF appeal training

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Agenda

- Introduction to the MSPB
- Filing an appeal
- Discovery and hearing process
- Q&A



Disclaimers

- No attorney-client relationship, no advice on individual circumstances
- Focus of this training is on process for filing and pursuing appeal, not on the legal issues to be raised in the appeal
- Training is targeted at foreign service officers who have decided to pursue an appeal without a lawyer



Introduction to the MSPB

Introduction to the MSPB



- Created in 1979 as an independent body to hear disputes regarding termination of federal employees and other issues
- Cases filed with the MSPB are called “appeals”
- Appeals are initially heard and decided by administrative judges (AJs)
- Initial decisions are reviewed by the MSPB Board and/or the U.S. Court of Appeals for the Federal Circuit

Who are the judges and board members?

- MSPB administrative judges: about 60 around the country, career civil servants
- MSPB Board: Three board seats, politically appointed, seven-year terms
- Court of Appeals for the Federal Circuit: 12 active judges, sit in panels of three, life tenure





Filing an appeal

Who can file?

- MSPB has jurisdiction to consider claims of improper termination by RIF from most employees, including foreign service officers.
- 22 U.S.C. § 4010a(c): “An employee against whom action is taken under this section may elect either to file a grievance... or to appeal to the Merit Systems Protection Board.... Grievances... shall be limited to cases of reprisal, interference in the conduct of an employee’s official duties, or similarly inappropriate use of the authority of this section.”



Who can file?

- MSPB jurisdiction does not depend on whether an employee is tenured or untenured.
- Retirement does not affect ability to file in many cases.
- Tricky issue: employees who resigned or retired prior to their RIF date.



Getting started

- Appeals generally must be filed within 30 days of termination.
- Appeals are initiated through the MSPB e-appeal system
- Register as a user on the MSPB website
- Log in and select “New Appeal”
- Carefully review and answer questions

Helpful resource:

<https://www.civilservicestrong.org/resources/filing-e-appeal-with-mspb-gov>



Getting started

- No filing fee
- MSPB filings are accessible to parties and their counsel, judges, and MSPB staff.



Form 185

- Do your best to answer every question as accurately as you can. If you are not sure how to answer a question, give the best answer you can.



Form 185 questions

- Boxes 5 and 10 for non-tenured/non-commissioned officers
- Box 6: excepted or other?
- Box 9: What service to include.



Appeal explanation

- See J&H sample
- Generally, employees can raise additional grounds for challenging the RIF not included the initial appeal.
- 5 CFR 1201.24(b): “An appellant may raise a claim or defense not included in the appeal at any time before the end of the conference(s) held to define the issues in the case... However, a claim or defense not included in the appeal may be excluded if a party shows that including it would result in undue prejudice.”





Discovery and hearing process

Discovery

- Discovery is the process of requesting documents and information from an adversary. May also include depositions
- Interrogatory (limited to 25)
- Document requests (limited to 25)
- Requests for admission (limited to 25)
- Depositions (limited to 10)



Discovery

- Discovery goes both ways – agency can ask you for information and documents and can ask to depose you
- Obligation to retain documents



Preparing for a hearing

- Administrative judge will likely hold a pre-hearing conference to discuss procedures
- You can request that the administrative judge order the government to produce government employees as witnesses
- You should collect and organize documents you would like to use as exhibits



Hearing

- At a hearing, parties present witness testimony and documents to the administrative judge
- Judge generally has discretion over what evidence to permit
- Hearings are generally virtual



Decisions

- Administrative judges issue initial decisions after a hearing
- Initial decisions become final after 35 days, if no party seeks review of the MSPB Board
- If the administrative judge rules against an employee, the employee can choose between (1) seeking review by the MSPB Board, and (2) allowing the decision to become final and appealing to Court.



Resources

- MSPB rules: 5 CFR Part 1201,
<https://www.law.cornell.edu/cfr/text/5/part-1201/subpart-B>
- MSPB Judge's handbook:
<https://www.mspb.gov/appeals/files/ALJHandbook.pdf>
- MSPB decisions:
<https://www.mspb.gov/decisions/precedec.htm>
- Civil Service Strong filing guide:
<https://www.civilservicestrong.org/resources/filing-e-appeal-with-mspb-gov>





Q&A

FAQs

- Confidentiality
- Timeline
- Remedies
- Getting a lawyer later

