

## Employment and Labor

### Merit Systems Protection Board (MSPB)

The [Merit Systems Protection Board](#) (MSPB) is an appeals board that enables federal employees to challenge certain decisions made by federal agencies where they are or were employed or decisions made by the [Office of Personnel Management](#) (OPM). The MSPB is an independent agency of the Executive Branch that is designed to protect federal employees by hearing and deciding appeals by federal employees involving discipline, removal, lengthy suspensions, performance matters (PIP), whistleblower retaliation, reduction in force, retirement, and many other issues.

### Different Types of MSPB Appeals

The MSPB has the ability to review numerous different types of federal employee appeals, but the most frequent appeals include:

- Removals from the federal service or suspensions of over 14 days;
- Removals (or Reductions in Grade) for unacceptable performance under Chapter 43 of the U.S. Code (performance improvement plans);
- Whistleblower Retaliation cases, also known as Independent Right of Action (IRA) cases;
- USERRA military discrimination cases (appeals under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act [VEOA]);
- Retirement matters involving final determinations that affect current or former federal employees under the Civil Service Retirement System (CSRS) or the Federal Employees' Retirement System (FERS) and the Federal Erroneous Retirement Coverage Corrections Act (FERCCA);
- Suitability Disqualifications;
- Probationary federal employee terminations based on partisan political reasons, marital status or on conditions arising before appointment; and
- Reductions-in-Force (RIF) actions against federal employees and members of the Senior Executive Service (SES).

### The MSPB Appeals Process

It is important to understand that the MSPB appeals process, which begins with the filing of a Form 185 or e-filing, can be very similar to civil litigation, at least in the sense of the procedures used. The major difference between MSPB appeals and traditional civil litigation is the fact that there are significant timing differences in the MSPB appeals, which are mostly completed within 120 to 160 days. In the vast majority of cases, it is very important to have legal representation.

### The Start of an MSPB Appeal

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In most cases, an appeal to the MSPB [must be filed within 30 calendar days](#) of the effective date of the agency's action, if any, or within 30 calendar days after the date of receipt of the agency's decision, whichever is later. The appeal must be filed in the correct regional or field office of the MSPB, which is based on geographic location. Once a federal employee's appeal is filed, an MSPB Administrative Judge will be assigned to hear the case and an Acknowledgement Order will be issued, providing the general ground rules for the MSPB appeals process in the individual's case. The MSPB process can now be initiated online through the [MPSB e-filing system](#).

### **The Discovery Phase of an MSPB Case**

The discovery phase of an MSPB case can be crucial to the successful resolution of a federal employee's appeal to the MSPB. Discovery takes place immediately after the filing of a case with the MSPB and generally must be initiated within 30 days following the issuance of the Acknowledgment Order by the Administrative Judge. In the discovery phase, [the deposition process](#) is extremely important since it is the time where agency officials relevant to a case, and potentially other individual witnesses, can be deposed in an effort to disprove the allegations made against a federal employee or to otherwise support an appeal brought to the MSPB.

In addition, critical evidence in support of an appeal can be gained through traditional discovery techniques at the MSPB, such as through the use of interrogatories, requests for production of documents and requests for admission during the discovery period.

### **Potential Settlement Options for Federal Employees**

[Settlement of MSPB cases](#) is often possible, and clients sometimes find that it is preferable to negotiate a settlement instead of taking their case to a full hearing. Our attorneys can help clients evaluate the potential for settlement of their cases. Our attorneys will also seek settlement offers on behalf of clients or prepare for the hearing process should an acceptable offer not be provided by their agency.

### **The MSPB Pre-Hearing**

If the client decides that settlement is not an option in his or her appeal, then the next stage of the MSPB appeals process is the hearing. At this stage, the parties will first submit their pre-hearing conference submissions, along with their evidence in support of their appeal and prepare for the hearing stage before an Administrative Judge. The Administrative Judge will review the pre-hearing submissions of the parties and decide which witnesses and evidence will be heard at the hearing. By this time, the Administrative Judge will have also set the hearing date.

### **The MSPB Hearing**

Following the pre-hearing conference, the hearing will take place, usually at the appropriate regional or field office of the MSPB, although hearings can also take place in other locations, such as at the agency's location or by video conference.

On the date of the hearing, the parties will typically start with opening statements, and then each party will put forth their case through witnesses and exhibits. Typically, the federal employee, in disciplinary cases, will argue that the Agency has not met their [burden of proof](#) and that the penalty is unreasonable under the [Douglas Factors](#). The parties will generally then offer a closing argument. Following the close of the hearing, a ruling, called an Initial Decision, is issued and usually comes about 1-3 months after the hearing date.

### **The MSPB Petition for Review (PFR)**

If a hearing in an MSPB case does not result in a favorable Initial Decision, a party can appeal the adverse decision to the full MSPB Board for a ruling through filing a Petition for Review (PFR). Generally, a PFR must be filed within 35 days after the date of issuance of the Initial Decision and articulate the errors made in the Administrative Judge's decision.

### **How We Can Help**

Berry & Berry, PLLC, represents federal employees in Appeals and Petitions for Review before the Merit Systems Protection Board throughout the United States. Our attorneys can advise federal employees as they consider filing an appeal with the MSPB or represent federal employees as they undergo the MSPB appeals process. Please [contact us](#) to schedule a consultation with one of our attorneys to discuss your MSPB matter.

### **Helpful Articles on the MSPB Appeals Process**

Some helpful articles on our website discuss various issues within the MSPB appeals process:

[Appealing a Final Agency Decision: MSPB vs. Arbitration](#)

[The Completion and Submission of an MSPB Appeal](#)

[The Importance of Discovery in an MSPB Appeal](#)

[Taking Depositions of Relevant Witnesses During an MSPB Appeal](#)

[The MSPB Pre-Hearing Process](#)

[What to Expect During an MSPB Hearing](#)

Also, please visit our [Merit Systems Protection Board Blog](#) where we discuss current MSPB Appeal issues affecting federal employees.