

MSPB v. Arbitration: Differences Affecting Your Rights

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When facing employment discipline from a federal agency, an employee should be advised of their possible rights to appeal such discipline through the Merit Systems Protection Board (MSPB) or through arbitration. The processes in some respects are similar, but also have important differences. The following is a brief review of the differences in these 2 processes. An employee whose case can be file with the MSPB or in arbitration cannot take the case to both forums. A choice must be made.

This choice is made immediately following the issuance of a final decision. If an employee files a grievance (or for arbitration), he or she cannot then go to the MSPB. Vice-versa, if an employee files with the MSPB, he or she cannot file a grievance or for arbitration. The choice, once made, is not revocable.

Merit Systems Protection Board (MSPB)

The MSPB is an independent agency of the Executive Branch that guards the Federal merit systems by hearing and deciding appeals from Federal employees of removals and other major personnel actions. Only disciplinary actions resulting in discipline of 15 days or more are eligible for MSPB action. The MSPB also handles other issues involving whistleblower appeals, veterans' issues and some discrimination issues. However, it principally exists to evaluate disciplinary action appeals.

Therefore, if your disciplinary case involves a suspension of 15 days up to termination, you can take it to this special court. The MSPB is usually the only avenue of appeal available for supervisors, as they generally have no right to arbitration. However, members of a collective bargaining unit, through their union, can also take their case to arbitration instead of MSPB. There are several differences and some similarities which should be pointed out before an employee makes a decision. The following are some important guidelines for MSPB cases.

1. **Timing:** MSPB usually is a very efficient process in terms of time. You must generally file an appeal with the MSPB within 30 days of the date that your disciplinary action becomes effective. Most of the time, this falls between 30-50 days after you receive the final decision (not the proposal) from your agency. However, each employee's effective date is different, and varies on a case by case basis. After filing with MSPB, you can usually expect a quick turnaround and the immediate appointment of a judge, who will then issue an Acknowledgement Order. Following discovery, the pre-hearing process, the actual hearing and the decision, you can usually expect the MSPB process to take about 6 months. After the hearing, you can expect an initial decision within a few weeks. This

decision can be appealed to the full Board at the MSPB and then to the U.S. Court of Appeals for the Federal Circuit.

2. **Discovery**: This is where MSPB has some advantages over arbitration. There are generally stronger discovery procedures at MSPB for finding out information. Discovery takes place immediately after the filing of a case with the MSPB. In that process, depositions are extremely important. This is where agency officials can be deposed and the process can actually be quite upsetting for them. For example, I have deposed heads of agencies, or with police agencies, chiefs of police, and they generally dislike the deposition process. They have to testify, under oath, about pretty much whatever is asked of them. It is a very adversarial process.

Agency officials do not generally like this process, because they have to testify before a court reporter, take time out of their schedules and usually appear in my law office for between 3 to 8 hours. These depositions are generally an unpleasant situation for these individuals. Depositions are a smart strategic move when settlement is a consideration. Agency officials can be deposed more than once, taking additional time out of their schedules. The Depositions can also provide much needed information about a case which may harm the agency's case. This is the only real advantage of the MSPB process over arbitration.

In addition, written documentation, through interrogatories and production of documents requests can be gained at MSPB during discovery. Production of documents requests can also be gained through union information requests in arbitration, so the processes are similar in this respect.

3. **Probability of Success**: Here is the major disadvantage of the MSPB process. Administrative judges are not as likely to rule in favor of employees as are arbitrators. Common knowledge shows that success rates for employees at MSPB are 20-25% versus perhaps a 35-50% chance of success at arbitration. In other words, arbitrators are more sympathetic judges when evaluating disciplinary cases. MSPB judges are also known for being more pro-government than arbitrators and there is a slightly lesser burden at MSPB (although not clearly stated) for the agency, than at arbitration. That is not to say that bringing a case to the MSPB is hopeless, it is not, and given a good attorney's representation the odds go up, but just to say that MSPB judges are generally less sympathetic than arbitrators in employee disciplinary cases.
4. **Evidence**: At MSPB, the admission of evidence follows more in line with the Federal Rules of Evidence, or the normal rules in most courts. Arbitration hearings have no formal rules of evidence, but some arbitrators enforce rules less strictly than others. The rules of evidence and objections are more strictly enforced at the MSPB. Therefore, it is more

difficult for an agency or an employee to admit questionable or hearsay evidence.

5. **Burden of Proof:** The burden of proof at the MSPB is by a preponderance of the evidence. This means that the agency must prove by 51% of the evidence presented that they committed the wrongful acts alleged in order to prevail. The Arbitration standard is a bit higher, and usually requires “just cause” to uphold the discipline. That standard is explained more in the arbitration section. Needless to say, the agency has a slightly higher burden of proof in arbitration by function of a union contract.

Arbitration

Arbitration is a private process independent of the Federal government through which parties with adverse interests submit their disputes to an impartial third person for resolution and agree to accept the decision of the arbitrator as final and binding. There is no automatic right to arbitration. In order to qualify, your union must authorize arbitration before it becomes an option. Generally, any disciplinary action may be contested through arbitration.

Arbitration applies to all types of disciplinary actions, Letters of Warning, Suspensions or Terminations. It is far more inclusive than MSPB where you can only appeal cases involving more than 14 days of suspension. Arbitration is a right provided through each union collective bargaining agreement. The normal process is that when an employee wants to go to arbitration, that he or she asks their union for permission to do so. A union usually delegates this task to a committee independent of the union leadership, and a decision is made. If the union’s review committee approves the case it moves forward to arbitration. If not, the Employee is left with the choice of pursuing his case at the MSPB.

1. **Timing:** Arbitration is also usually a very efficient process in terms of time if properly followed, although slightly more lengthy than MSPB. Generally, and unique to each collective bargaining agreement, there is a time frame in which to invoke arbitration. Generally, the period is between 5-30 days, based on each contract. Once invoked, the union or the attorney handling the arbitration contacts the arbitration service, either the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA) for a list of arbitrators. Most unions use FMCS in the federal sector. Following this contact, the arbitration service will provide a list of potential arbitrators, usually 7 in number from which to choose.

After the union or designated attorney reviews and researches the list, he or she meets with the agency and selects the arbitrator. In most instances this is accomplished using what is known as the strike through process,

where one side begins and strikes the name of an arbitrator they want to eliminate and vice-versa, until one name remains. That person becomes the arbitrator. The arbitrator is then notified of his or her appointment.

Following notification, the arbitrator contacts the parties and assumes responsibilities for the case from there on. You can expect an arbitrator to have the following 2 months of his or her calendar already booked, so expect a hearing date or dates 2 months from the first contact with the arbitrators. At the hearing, the attorney or union present witnesses and evidence as you would at MSPB, and the hearing is then adjourned. The arbitrator will normally expect you to file arbitration post-hearing briefs (usually quite lengthy 30-40 pages) which detail your side's legal argument and review of the evidence and testimony. This is due normally 30 days after you receive the court reporter's transcripts.

Once the briefs are submitted, the arbitrator then rules on the case 30-60 days later, in a written opinion. The parties then may have additional hearings if the employee is successful on the disciplinary issue for backpay and/or attorney fees. Sometimes these matters are also included in the hearing. Thus, the best estimate, from the date you are disciplined (final decision) is that the arbitration process may take about 9 months from that date to receive a decision from the arbitrator. However, if the matter is not vigorously pursued, the process can drag out much longer.

2. **Discovery**: This is where MSPB actually has some advantages over arbitration. Depositions are generally not available, which is a disadvantage. However, in terms of securing documents, the process, while different, yields the same result as MSPB. If the opposing side does not produce documents pursuant to a union request, he or she will be held responsible by the arbitrator and can be ordered to do so.
3. **Probability of Success**: Common knowledge dictates that success rates for employees at MSPB have generally been about 20-25% versus perhaps a 35-50% chance of success at arbitration (depending on the arbitrator). Of course, the statistical rate of success increases when a lawyer represents an employee in either forum. As I said earlier, arbitrators, if faced with a questionable case, are more likely to hold an agency to their burden of proof than an MSPB judge, in my opinion.
4. **Evidence**: In Arbitration, the admission of evidence follows a more relaxed standard where an arbitrator is more likely to admit hearsay. As opposed to an MSPB judge (who is more strict), an arbitrator is likely to let as much evidence in as possible and then sort it out when making a decision.
5. **Burden of Proof**: The burden of proof at an arbitration hearing for an agency is normally "just cause." Arbitrators tend to make the agency prove that it had just cause to discipline the employee, something which is

usually more than just the preponderance of the evidence, in evaluating their decisions. The end result is that arbitrators, on a case by case basis, can impose (depending on the case) a higher burden of proof for the agency. For example, an arbitrator could impose on an agency a standard of clear and convincing evidence (75%), beyond a reasonable double (95%) (very rare), or preponderance of the evidence (51%), depending on the circumstances in the case and their past rulings. This standard is compared to the MSPB's 51% burden. Most arbitrators, I have found, tend to go somewhere in between preponderance of the evidence and clear and convincing evidence, in making their decisions.

Therefore, in terms of burden of proof, Arbitration has an advantage over MSPB for federal employees.

The following is a short outline of the differences between MSPB and arbitration for common situations:

Action	MSPB	Arbitration
15 days of Suspension to Termination	<ul style="list-style-type: none"> • Full discovery: depositions, production of documents and interrogatories. • Federal Administrative Judge • 6-month decision timeframe • Federal Rules of Evidence • Employer bears burden of proof by preponderance (51%) of the evidence. 	<ul style="list-style-type: none"> • Limited Discovery: Can seek production of documents through union information requests. • Private arbitrator selected by both parties, usually senior attorney or former judge. • 9-month decision timeframe. • Relaxed rules of evidence; most evidence is admitted • Employer bears burden of proof; slightly more difficult standard for employer of "Just Cause" (51-75%) versus simple preponderance of the evidence (51%).