

A Federal Employee's Guide to Burden of Proof Issues at the MSPB

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When federal employees have disciplinary or adverse action appeals pending before the Merit Systems Protection Board (MSPB), it is important for them to understand how their appeals will be presented to the administrative judge and how a federal agency may attempt to prove its allegations during the hearing process, which is where the issue of burden of proof arises.

The burden of proof is the level of evidence needed to be shown by a federal agency to succeed in its appeal against a federal employee, also known as the Appellant in MSPB cases.

The Burden of Proof Differs in Disciplinary and Performance Cases at the MSPB

The burden of proof needed for a federal agency to prove its case at the MSPB depends on the type of federal employee appeal. Generally, there are two principal types of federal employee appeals: 1) adverse actions (misconduct-based discipline) under Chapter 75 of Title 5 of the U.S. Code and 2) performance actions (performance-based discipline) under Chapter 43 of Title 5 of the U.S. Code.

Each type of appeal has its separate burden of proof. In adverse action cases where an employee has been removed based on misconduct, a federal agency must prove the allegations made against the employee by 51% preponderance of the evidence presented. In cases involving performance actions, such as those involving removals based on the alleged failure of a federal employee to succeed in a performance improvement plan (PIP), the burden of proof is substantial evidence, which is significantly lower than the 51% preponderance standard.

What Federal Employees Should Know About Burden of Proof Issues

The burden of proof in an MSPB appeal is important because it is the legal standard by which the administrative judge will determine whether the federal agency or federal employee succeeds at the MSPB. Given that the MSPB mostly hears disciplinary action cases, the most common burden of proof for MSPB cases is the preponderance of the evidence standard. Below are examples of how the burden of proof differs between adverse action and performance action MSPB cases.

Adverse Action (Misconduct) Burden of Proof

Suppose that a federal employee has been charged with insubordination for allegedly misusing his or her government credit card. The supervisor has issued the federal employee a 30-day proposed suspension and then a deciding official hears the case. Ultimately, the deciding official decides to uphold the proposed suspension and sustains the full 30-day

penalty. The federal employee then appeals the suspension to the MSPB. During the MSPB appeal, the federal agency must prove that it is more likely than not (by 51% of all of the evidence presented) that the employee misused his or her government credit card. Evidence presented typically entails testimony from any witnesses (likely both the supervisor and the Appellant and perhaps others) and relevant exhibits (e.g., emails and other correspondence). At the end of the hearing process, whichever side has produced more evidence (from the administrative judge's view) will prevail in the MSPB appeal.

The key to responding to a federal agency's attempt to meet its burden of proof in a MSPB disciplinary case is to focus on the charges and specifications that have been alleged. In our experience, the entire appeal centers on the language used by the federal agency in the charges and specifications. The more that a federal employee is able to disprove portions of the charges and specification(s), the more difficult it will be for the federal agency to meet its 51% burden of proof in disciplinary cases.

Performance Action Burden of Proof

Performance actions are different from disciplinary actions. The latter generally require a lower burden of proof under Chapter 43 of the U.S. Code. Suppose that a federal employee has a negative performance review or evaluation. That employee is then informed that the federal agency would like to place him or her on a performance improvement plan (PIP) to help him or her succeed. Suppose that the length of the PIP is 90 days. The federal employee is then given a number of purported goals to reach within that time period. The federal employee goes through the PIP and ultimately does not succeed and is proposed for removal. The deciding official then removes the employee, who then appeals the decision to the MSPB. During the MSPB appeal, the federal agency will have to prove that there is "substantial evidence" to support its action.

Substantial evidence means evidence that a reasonable person, considering the evidence as a whole, might accept as adequate to support a conclusion even though other reasonable persons might disagree. While the legal description of this legal standard can be confusing to federal employees, it generally means that a federal agency may prevail in its MSPB appeal by providing less evidence than is required for an adverse or a disciplinary action appeal under the preponderance standard. For this type of performance case, a federal agency must generally prove, by substantial evidence, that it 1) set up an OPM approved performance appraisal system; 2) communicated objective and reasonable written performance standards and the critical elements prior to the beginning of the PIP; 3) warned the federal employee of his or her inadequacies during the PIP; and 4) counseled the federal employee and afforded him or her a meaningful opportunity for improvement.

In performance action cases, the Appellant's burden is higher to disprove the allegations of substandard performance, so a full effort must be made to attempt to defeat performance action cases under Chapter 43. In such cases, our attorneys tend to focus on attempting to disprove the 4 elements mentioned above, especially elements 2 and 4, and to prove that the federal employee performed above the unacceptable level during the PIP.



Contact Us

When a federal employee is involved in an MSPB appeal, it is important for him or her to obtain legal representation as soon as possible. Our attorneys stand ready to advise individuals on issues involving MSPB appeals and the required burden of proof. Please contact Berry & Berry, PLLC at (703) 668-0070 or www.berrylegal.com to schedule an initial consultation.

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Practice Areas

Merit Systems Protection Board (MSPB)