
Appealing a Final Federal Agency Decision: MSPB vs. Arbitration

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When federal employees receive a final federal agency decision sustaining a removal or significant suspension of 15 days or more, there are two possible options if they want to appeal the final decision. The first option is to file an appeal of the removal/suspension decision with the Merit Systems Protection Board (MSPB). The second option is to appeal the removal/suspension decision through the federal employee's union using the applicable grievance/arbitration procedure. Before making a decision on which forum to use, it is very important to speak with an attorney since the decision cannot be changed once it has been made. Each forum has its pros and cons that should be carefully evaluated by a federal employee before proceeding. Furthermore, not every federal employee is eligible for arbitration and not every federal employee is eligible for an MSPB appeal, so the choice could be straightforward depending on the nature of one's federal employment.

Considerations When Seeking Arbitration or Filing an MSPB Appeal

While many federal employees have a choice between arbitration and the MSPB, some do not. While most career (non-probationary) federal employees have the right to appeal a removal or significant suspension to the MSPB, not everyone has the right to take his or her case to arbitration. In order for a federal employee to have the right to pursue his or her case to arbitration, the employee must be represented by a federal sector union that will agree to permit arbitration. If there is no union, then there is generally no right to file for arbitration review of serious discipline; thus, filing with the MSPB is usually the only option for the federal employee.

Federal sector unions, not the federal employee, generally control the ability to go to arbitration, so whether a case can go forward to arbitration is usually up to the union. If a union agrees to take the federal employee's case to arbitration, then all of the other considerations come into play in order for the federal employee to make a well-informed decision about which forum to choose.

Also, federal employees should keep in mind that if they are appealing a suspension of less than 15 days, they may be limited to appealing that decision through arbitration, the Equal Employment Opportunity (EEO) process, or the Office of Special Counsel (OSC) depending on the circumstances. There may be other options available, but federal employees should seek advice from an attorney regarding the correct choice of forums.

In addition to arbitration and the MSPB, there are other potential legal options available, if applicable, for federal employees, such as the filing of a whistleblower retaliation complaint with the OSC or the filing of a complaint of discrimination, retaliation, or harassment through the federal agency's EEO office.

Discovery Differences in Arbitration and MPSB Appeals

Discovery is the process of obtaining information from a federal agency for use in a disciplinary appeal. Both arbitration and the MSPB have specific discovery procedures to assist federal employees in attempting to obtain information for use in their appeals. At the MSPB, more typical discovery procedures, similar to those available in court, govern. A federal employee, generally through his or her attorney, has the ability to take up to 10 depositions, serve production of documents requests, serve interrogatories, and request for admission on the federal agency involved. In general, the MSPB tends to have better discovery procedures (especially the use of depositions) than those available in arbitration.

In arbitration, a federal employee is represented by the union, either through a union-appointed attorney or a union-approved private attorney. The union has the ability to request documents relevant to a disciplinary case on behalf of the affected federal employee. This ability comes through the submission of a union information request pursuant to 5 U.S.C. § 7114(b). Generally, through this information request a union can seek all existing documents, records, and data relevant to the appeal. The one key difference between the MSPB and arbitration in discovery is that there generally is no right to take depositions in arbitration proceedings, to request responses to interrogatories, or to ask for requests for admission.

General Differences Between MSPB and Arbitration Hearings

There are also differences between MSPB hearings and arbitration hearings. For the most part, both the MSPB and arbitration hearings tend to be less formal than regular court proceedings. In our experience, arbitration is clearly the less formal of these two types of hearings.

In an arbitration, the arbitrator who functions as the judge will issue the ruling on the federal employee's appeal in the case. Typically, arbitrators tend to be very experienced attorneys in labor and employment law issues and will be mutually selected by the parties or sit on a regular panel of arbitrators that hear cases between the federal agency and the union. The arbitrator's fee will generally be split between the union and the federal agency unless there is a clause in a collective bargaining agreement (CBA) that states the losing party must pay the entire fee. Typically, unless there is a dispute about whether an issue can be arbitrated, the parties will interact for the first time with the arbitrator on the day of the hearing.

In MSPB appeals, the proceedings are presided by an administrative judge who is assigned to a federal employee's case by the appropriate local or regional office of the MSPB. Unlike arbitration, the parties do not incur a fee for the MSPB appointed administrative judge. At the beginning of the case, the administrative judge will issue an Acknowledgment Order to regulate the timelines for the processing of the appeal. The administrative judge will also meet with the parties, usually by teleconference, to discuss pending motions, settlement negotiations, and pre-hearing issues prior to the hearing.

An MSPB hearing is generally held at the MSPB's local regional office; whereas an

arbitration hearing can be scheduled at any place that the parties agree upon or which is specified in the CBA. Usually, an arbitration hearing takes place at the federal agency. Some MSPB hearings are held by videoconference with the judge in one location and the parties located in a separate location.

Typically, both the MSPB and arbitration hearings 1) begin with opening statements; 2) allow for the use of witnesses, examinations, and cross-examinations by counsels; 3) generally allow for the use of court reporters for the taking of testimony; and 4) allow for the introduction of exhibits into the record. While the MSPB tends to have better discovery procedures, arbitrators tend to be more open to reversing disciplinary cases in general. If an appeal involves a technical error, such as an error in due process, the MSPB may potentially be the better forum.

The parties in an arbitration proceeding usually file their closing arguments in written submissions known as post-hearing briefs. At the MSPB, we submit post-hearing briefs but closing arguments during the hearing might be used as well. We generally prefer to submit written closing arguments because it maximizes the ability of federal employees to prove their case.

Final Decision Timelines at the MSPB and in Arbitration

Generally, it takes about 120-150 days, or more depending on the case, from the filing of an MSPB appeal to reach the MSPB hearing date. Following a hearing, it typically takes between two weeks to two months after the hearing date for a federal employee to obtain a final decision from the administrative judge.

In arbitration, the timeline can be shorter or longer depending on what procedures the parties have in their CBA and the dates that the arbitrator may have available for the hearing. Sometimes, depending on the CBA, the arbitration process must first begin in the grievance process and will ultimately move to arbitration (unless the grievance resolves the matter), causing the process to run longer. On average, we generally find that it takes longer to reach a final decision in the arbitration process than at the MSPB.

Contact Us

We advise federal employees to speak with an attorney to help them determine if arbitration or the MSPB is the right forum for their case. Both types of proceedings can be valuable for a federal employee making a decision to appeal an employer's disciplinary action. We can be reached by telephone at (703) 668-0070 or www.berrylegal.com for additional information or to set up a consultation.

Attorneys

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Practice Areas

Merit Systems Protection Board (MSPB)