

## Taking Depositions of Relevant Witnesses at the MSPB

February 6, 2014

Our law firm represents federal employees in their Merit Systems Protection Board (MSPB) appeals involving serious disciplinary actions (e.g., suspensions, removals, demotions), retirement matters, whistleblower appeals, USERRA appeals, and other types of cases. During the litigation phase at the MSPB, it can be extremely important to depose key witnesses with knowledge of a case in order to present the best case before the administrative judge. In particular, a deposition is simply a legal procedure where an attorney questions a relevant witness, under oath (and before a court reporter) about their knowledge of facts relevant to the case. Depositions are part of the MSPB discovery process.

### Depositions in MSPB Appeals

The MSPB permits both an employee and a federal agency to take depositions of relevant witnesses during the discovery process. The taking of depositions is often a very important step in preparing for the hearing before an MSPB administrative judge. Depending on the individual nature of a federal employee's case, we often recommend to our clients that they have us depose key witnesses in their appeal. Doing so can potentially increase a federal employee's ability to obtain a positive settlement or hearing result in a case if important facts are uncovered during the process.

Here is an example of the usefulness of the discovery process: Suppose that a federal employee has been wrongly accused of conduct unbecoming for using profanity during a meeting toward a supervisor. In this example, the employee is ultimately terminated (following the proposal and final decision process) as a result of these allegations. However, four other employees were present who would be able to testify that the employee did not use profanity during the meeting and was otherwise professional. It can often be the case that these types of witnesses do not wish to get involved in providing statements to the employee while he or she is going through the disciplinary process. As a result, it is often the word of the employee accused of misconduct versus the word of the supervisor at the disciplinary action stage. However, when an employee's attorney is able to take the deposition of these employees under oath, the truth often comes out and can make a significant difference in a case.

In the above example, deposing some or all four of these witnesses under oath could establish that the conduct unbecoming allegations were false, which would clearly be important to use in the appeal and could cause the agency to even reverse its earlier decision to terminate the employee.

### MSPB Deposition Process

Usually, the deposition (and the full discovery process) begins shortly after an MSPB is filed.

Following the filing of an appeal, the federal employee and agency will receive a copy of the Acknowledgment Order from the MSPB administrative judge that sets the procedures in the processing of the MSPB appeal. In discovery, a federal employee is typically allowed to take up to 10 depositions in an MSPB case. It is not common to take 10 depositions in an MSPB appeal, but it can happen in complex or factually-detailed cases. If a party needs to take more than 10 depositions, then the party must generally seek permission from the assigned administrative judge. Typically, an employee may take anywhere between four and six depositions during the appeals process depending on the allegations.

If the deponent is employed by the federal government, a federal employee's attorney will "notice" the deposition by contacting the agency's counsel and will then attempt to set the date and time for the deposition. If the agency counsel is not cooperative or objects to producing a particular witness, a Motion to Compel, which is a submission to the MSPB judge, may be used to obtain the witness' attendance. If the witness is not employed by the federal government and does not voluntarily agree to be deposed, the employee may likely have to move for a subpoena from the MSPB administrative judge to obtain the witness' deposition.

### **Taking the MSPB Deposition**

MSPB depositions are similar to those that arise in general civil actions. A deposition can last anywhere from 30 minutes to several hours, depending on the case and the nature of the facts that each witness is privy to. Usually, it is important to be as efficient as possible in questioning these witnesses. Obviously, those witnesses with more knowledge of information related to the appeal (e.g., the investigator, a direct witness or the Agency's Deciding Official) may require more time than witnesses with minor roles. Once the deposition has been scheduled, it is important to make arrangements for a court reporter to record the deposition. Depositions can take place in person, by telephone, or by video.

When a deposition takes place, the attorney for the federal employee will usually begin with background questions and then move to questions regarding the witness' factual knowledge in a case. The agency's attorney will usually be present to represent employees of the agency and may object to some questions asked. Generally, even if an agency attorney objects, the witness must still answer the questions posed. There are a few exceptions, but these are rare and mostly involve privilege issues (attorney-client, physician-patient, etc.). Generally, taking a break in the middle of a deposition is not permissible, but breaks may be taken if a witness needs to use the restroom or needs a moment to compose himself or herself.

Following the questions asked by the federal employee's attorney, the agency's attorney may also ask questions of the witness, but this option is rarely taken. The agency normally would prefer to do this outside of the deposition room if the witness is still employed by the agency. Following the completion of a deposition, the witness (or deponent) will be asked by the court reporter whether he or she wishes to review his or her deposition transcript for correctness—only for corrections as to what was actually said, not

supplementary information or to change the answers given— when it is printed or if he or she wishes to waive this requirement.

If the witness wishes to review the deposition transcript, arrangements will need to be made to have that witness review a copy of the deposition transcript. If the witness has any changes to the deposition transcript, the court reporter will need to make the necessary changes and eventually provide a final copy of the deposition transcript for later use in an MSPB hearing. In our practice, depositions tend to be the most important form of discovery in MSPB appeals.

### **Contact Us**

When a federal employee has filed an MSPB appeal it is important for his or her to obtain legal representation, especially when the taking of depositions will be needed. Our law firm stands ready to represent federal employees in MSPB appeals and discovery efforts. We can be contacted at [www.berrylegal.com](http://www.berrylegal.com) or by telephone at (703) 668-0070.

### **Attorneys**

John V. Berry

### **Practice Areas**

Merit Systems Protection Board (MSPB)