

## **OUTLINE OF REMARKS – STEVEN E. BROWN**

### **FEDERAL WORKERS' COMPENSATION LITIGATION GROUP SEMINAR, LOS ANGELES, CALIFORNIA 06/11-12/05**

#### **ADVERSE ACTION MERIT SYSTEMS PROTECTION BOARD APPEALS**

##### Basic outline of jurisdiction

Federal employees <sup>1</sup> who are given serious discipline <sup>2</sup> are entitled to appeal those personnel actions to the U. S. Merit Systems Protection Board. This Board was created in 1978 as part of the Civil Service Reform Act. In any such appeal, the Agency has the burden of proof to show that its action was justified. <sup>3</sup>

##### Basic outline of procedure

An employee is first given a notice of proposed adverse action, with due process rights to respond orally and/or in writing within a given period (usually 15 days). Thereafter, a final decision letter will be issued, providing the employee his/her right to file an MSPB appeal within 30 days of the effective date of the decision.

MSPB provides usable electronic forms online at [www.mspb.gov](http://www.mspb.gov). A printed form is attached to these materials. The appeal can be filed several different ways, including via internet. Once MSPB receives the appeal, an Administrative Judge [AJ] will be assigned and an Acknowledgment Order will be issued by that AJ within two or three days. This order should be read very carefully, as it will contain various time limits within which the parties must complete pre-hearing actions. These may actions include: (1) Agency preparation of the Agency Response File, including a narrative response to the appeal, (2) pre-hearing discovery, (3) motions to dismiss, (4) any special jurisdictional showing required by the AJ.

The MSPB appeals process is very quick, and is sometimes referred to as the “rocket docket”. The entire process, through hearing and decision, takes 120 days. In individual cases, more time can be arranged by stipulation of the parties or through agreement by the AJ, but 120 days is the standard processing time. Because time is so short, a representative must be prepared to move quickly to send out discovery requests,

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<sup>1</sup> Certain federal employees do not have MSPB appeal rights. These include employees of: (1) Department of Homeland Security, (2) Judiciary Branch employees, and (3) Postal employees who are neither preference-eligibles (Veterans) nor supervisors/managers. If proposed revisions to Title V regarding Department of Defense employees, currently being debated in Washington, are adopted, then all civilian DoD employees may lose all or some of their MSPB rights.

<sup>2</sup> Removal, suspension of more than 14 days, demotion, reduction in grade and/or pay, furlough of more than 30 days, etc. See 5 CFR §1201.3.

<sup>3</sup> The Agency's burden of proof varies, depending on whether the action is based on Chapter 75 (preponderance of the evidence burden) or on Chapter 43 (substantial evidence burden).

familiarize him/herself with the facts of the case, and identify any legal issues that will require research or briefing. For example, if an AJ feels there is a legal issue that s/he will have to rule on, s/he will probably ask the parties to brief it within a very short time period.

Discovery at MSPB is problematic since most AJs do not want to get heavily involved in motions to compel. The power to compel discovery responses is much more limited than in federal court, since time is so short; the parties are encouraged to resolve all such disputes informally. Of course, Agencies tend to take advantage of this situation by refusing to provide responses to any request they see as out of the ordinary, or which for tactical reasons they do not want to respond to substantively. Therefore if an essential document must be produced, a question must be answered, or a witness deposition must be accomplished, etc. it is advisable to begin the process immediately.

Hearings in these cases are often very contentious, and the Appellant's representative must be prepared to confront dissembling witnesses and agency representatives who hide documents, try to intimidate witnesses before the hearing, etc. Some agencies utilized HR legal staff as representatives for these cases, while others use personnel specialists or other individuals with little legal training but lots of agency experience.

If the matter proceeds to hearing, the AJ will issue a detailed Initial Decision with his/her rulings and instructions to the parties about possible appeals.

#### Attorney fees and expenses

A successful appeal will entitle the Appellant/employee to reasonable attorney fees and litigation expenses, for which a petition for fees must be filed. After the agency opposes the fee petition and the Appellant replies, the AJ issues an order regarding fees and expenses.

### **DISCRIMINATION COMPLAINTS**

#### Basic outline of jurisdiction

Federal employees who feel they have been discriminated against on the basis of race, sex, age, national origin, skin color, religion, disability, or reprisal for prior EEO [Equal Employment Opportunity] activity are protected from such discrimination by various laws including Title VII of the Civil Rights Act of 1964 as amended, the Rehabilitation Act of 1973 as amended, and the Age Discrimination in Employment Act of 1967 as amended. These comments are limited to Title VII and Rehab Act complaints.

#### Basic outline of procedure – complaint pending at Agency level

A federal employee who wishes to initiate a discrimination complaint must first, within 45 days of the event seen as discriminatory, “request EEO counseling”. Such counseling is provided by his/her employing agency. This request is accomplished by

calling, writing or speaking to someone who is logically connected to the EEO process at the employing agency and stating “I want EEO counseling” or any words so indicating. The agency then provides an EEO counselor who interviews the employee and any relevant supervisory personnel in what is supposed to be an attempt to informally resolve the complaint. Very few complaints are resolved at this stage.

If informal counseling does not resolve the complaint, within 30 days of the request for counseling the employee is given written notice of his/her right to file a formal EEO complaint within a 15-day window. The filing of a complaint is almost always accomplished by filing a form provided by the employer, which includes information about where to file it, etc. If the employer does not timely complete counseling or does not provide a form, the employee can simply write stating his desire to file a formal complaint. Agencies frequently either do not complete informal counseling within the timeframe required or ask the employee to waive the time limit to allow for “mediation”, more time to gather information, etc.; such requests should nearly always be rejected by the employee as delaying tactics.

The Agency has 180 days after the filing of a formal complaint to complete an investigation of the complaint’s allegations and to issue a Report of Investigation [ROI] containing all information gathered during the investigation. This will normally include affidavits from the complainant and witnesses, relevant documents, etc.

#### Basic outline of procedure – complaint before EEOC

If the complaint is not resolved during the formal (investigation) stage, the employee then has the right to file a request for a hearing at the Equal Employment Opportunity Commission [EEOC]. In discrimination cases brought by federal employees, EEOC conducts hearings, as opposed to issuing a “right to sue” letter allowing the employee to sue – as is the procedure for private sector employees. The hearing is requested by simply sending a letter to the local EEOC office, with a copy to the agency, so stating. If the Agency has completed its investigation within the 180-day period, its letter transmitting the ROI to the employee will include instructions on how and where to request an EEOC hearing (among other options).

After requesting an EEOC hearing, the employee and his/her representative should begin preparing for the administrative litigation even before EEOC issues its Acknowledgment Order notifying the parties of procedural deadlines. The Order will provide that discovery must be completed within 90 days, motions for summary judgment (§109(g) motions) must be filed within 15 days thereafter, etc. Any issues rejected and not investigated by the Agency can be revived at this point by filing an opposition to partial dismissal of complaint, on which the AJ will then rule.

Procedure before EEOC, while not quite a lightning-fast as MSPB procedure, is nevertheless quite rapid and requires prompt and thorough action by the representative. For example, short timeframes are given for filing motions to compel, and must be met or the failure to respond to discovery is waived.

Assuming the case survives the Agency §109(g) motion, prior to hearing the AJ will conduct one or more pre-trial conferences (mostly telephonic) in which issues will be specifically identified and eliminated, witnesses will be approved or eliminated, and all documents to be presented at the hearing will be exchanged and identified. The ROI's contents are already part of the hearing record and need not be separately identified or produced.

At the hearing, the only evidence allowed will be evidence relevant to the specific issues identified. Closing statements are usually requested either orally at the end of the hearing or later by phone, or in writing within timeframes specified by the AJ. After all statements have been submitted, the record closes and the AJ begins the process of rendering a decision. This may take several months. Often the AJ will advise the parties either in writing or by phone of his/her intention to rule in a particular way, and invite settlement discussions, attorney fee petitions, etc. at that time.

#### Basic outline of procedure – after EEOC decision

If the AJ's ruling is against the employee in whole or in part, the employee retains the right to file an administrative appeal to the EEOC's Office of Federal Operations [OFO] and/or to the federal court system.

### **RELATIONSHIP BETWEEN MSPB AND EEOC JURISDICTION**

This topic is extremely complex and is beyond the scope of a brief discussion. Suffice it to say that where an allegation of discrimination is made in connection with a challenge to a personnel action that is within the jurisdiction of MSPB, whichever agency acquires jurisdiction first will have the authority to make an initial decision on all issues raised. That decision, however, will be subject to review by the other agency regarding issues within its primary jurisdiction in appropriate circumstances.

### **DISABILITY RETIREMENT**

#### General provisions:

Federal employees who become disabled from performing their regular job, whether or not due to on-the-job injuries, may be eligible for disability retirement. This "early-out" for disability is a program administered by the U.S. Office of Personnel Management, and is available under both retirement systems (CSRS and FERS) set up for federal employees. Federal regulations set out the requirements for a successful disability retirement application, but each case depends on its specific facts and the evidence presented.

### Time for applying:

With certain exceptions, an application for disability retirement must be received by OPM while the employee is still working for the federal government or within one year after employment ends. Specific medical information must be provided to OPM by the applicant. If the applicant is mentally incompetent, the time for filing may be extended. If the employee stops working but remains on the payroll, for example receiving administrative leave, sick leave, annual leave, or leave without pay<sup>4</sup>, the time for filing does not begin to run.

### Relationship to discrimination cases:

Employees who have suffered discrimination typically consider disability retirement programs in two situations: (1) they are being discriminated against, either because of a disability or for some other reason, suffer a work stoppage and must replace lost income, and/or (2) they become emotionally disabled on a long-term basis because of illegal discrimination and lose the ability to work.

### Strategy:

In cases where there appears to be a long-term disability (likely to last one year or more after the disability retirement application is filed), consider discussing with the client the possibility of filing an application. EEO settlements can include provisions that the agency will not contest the application and will state on its portions of the forms that the employee's disability is too severe for it to reasonably accommodate. In mental disability cases, consider asking the client's doctor about the advisability of retirement. Determine whether the client's doctor(s) have already been recommending retirement.

The retirement benefit, once won, lasts a lifetime and can only be terminated if either (1) the employee fully recovers, *i.e.* becomes able once again to perform the full-time, full-duty requirements of the last federal position held, or (2) the employee earns, in any one calendar year, more than 80% of the current pay of the last federal position held.

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<sup>4</sup> (whether or not receiving workers' compensation at times when on LWOP)