

CHAPTER ONE

A VERY BRIEF OVERVIEW OF BOARD STRUCTURE AND OPERATIONS

My desire is . . . that mine adversary had written a book.

– Old Testament, Job 31:35

I. BOARD BACKGROUND

The Board is a product of the 1978 Civil Service Reform Act, which also brought us the Office of Personnel Management, the Federal Labor Relations Authority, and the Office of Special Counsel. A reorganization plan issued by the President in 1978 placed authority for resolution of federal sector EEO complaints in the Equal Employment Opportunity Commission, removing jurisdiction over those complaints from the late Civil Service Commission.

For more than 25 years the Board has operated in pretty much the same fashion, with many of the same personnel, and with the same basic organizational structure. What it lacks in innovation, it makes up for in regularity. If nothing else, the processes of the Board are reasonably predictable, compared, for example, to the remarkably diverse practices of various offices and judges of the EEOC. MSPB procedures are generally uniform from one section of the country to another. Although judges differ in temperament and ability, they basically perform their work in similar ways and usually with similar, if not entirely predictable, results. Statistical analysis of appeals of judges' decisions to the Board headquarters suggests that the rates of reversals or mitigation of adverse actions and performance-based cases remain about the same from year to year.

Although the Board receives many types of appeals under a variety of federal statutes and regulations of the Office of Personnel Management (OPM) (the organization that supplanted the Civil Service Commission as the promulgator of government-wide personnel rules), for readers of this book, the Board's principal work involves the disposition of adverse actions and performance-based actions, with a smattering of appeals from reductions in force, denials of military preference rights, and appeals involving complaints of whistleblowing reprisal.

Most readers will be involved in defending agency adverse actions, i.e., disciplinary actions taken against employees that range from reduction in grade (demotion), to suspensions of more than 14 days, to removals from the federal service.

The Board operates at two levels, the regional office level and the headquarters level. Appeals ordinarily begin in the regional offices. The Board has regional offices in San Francisco, Chicago, Philadelphia, Washington, D.C. (actually Alexandria Virginia, but the office is entitled the "Washington D.C. Regional Office" just for fun), Dallas, and Atlanta, with field offices in Denver and New York City. Each of these offices is directed by a regional director or chief administrative judge (the terms are interchangeable) who, in turn, supervises a small staff of attorney-examiners who function as administrative judges who adjudicate, with or without hearings, the cases that are brought to their regions by employees. The chief administrative judge also supervises a small supporting clerical workforce, and the chief judge may, on occasion, hear a case; some of the chief judges are quite active and quite able in conducting mediations or settlement negotiations.

After a judge issues a decision on a case, the losing party (and sometimes both parties think that they have lost), can appeal the decision to the second level of the Board, the headquarters operation, which has its offices in Washington. There, three Board members (or, at a minimum, a quorum of two Board members) decide the appeals. Board members are assisted by attorneys employed in the headquarters office in the Office of Appeals Counsel, the Office of General Counsel, and on the immediate staff of each Board member. Each year, the Board adjudicates several thousand appeals throughout the country at the regional and field offices, and another thousand or so appeals are taken from the judges' decisions to the Board's headquarters.

There are other options along the way. Some cases go from judges' decisions to appeals to the Equal Employment Opportunity Commission (EEOC). Some individuals allow judges' decisions, which are known as initial decisions, to become final through the passage of time and then take those cases to the courts, either the United States Court of Appeals for the Federal Circuit on civil service issues, or to federal district courts in cases involving equal employment issues or a mixture of civil service and EEO issues.

However the case develops and, at least within the administrative structure, wherever the case may go after it is initiated with a Board regional office, an agency before the Board, like a corporation in court, needs someone to represent it. You are that special someone. Our purpose is to provide you with the basic information necessary to undertake a Board case with some additional study of the Board's regulatory process and research into the Board's caselaw.

The Board does not require that agency representatives be attorneys. In fact,

there is no statutory requirement that the Board members themselves be attorneys. Judges are required by law, however, to be attorneys, and that is one of the changes that the Civil Service Reform Act of 1978 brought to bear, raising the level of qualifications of judges of civil service cases. The point is that a license to practice law is not required to appear before a Board judge, and there are some agencies that use non-attorney representatives as effectively or more effectively than other agencies use attorney representatives. It is all a matter of training in Board procedures and research, neither of which is particularly complex. With or without a law degree, any individual who is designated as a representative can handle one or a number of Board cases with a reasonable degree of efficiency and effectiveness, if the representative is willing to invest some time studying and understanding the process.

II. AN OVERVIEW OF THE MSPB APPELLATE PROCESS

The Board processes are quite straightforward and they have remained essentially the same for the last quarter century. Ideally, in the typical adverse action, a representative of an agency before the Board would be involved in the development of the case prior to the initiation of the Board appeal, i.e., the representative would be an advisor to management when management decides that it is necessary to develop a proposal to take an adverse action against an employee, and the same representative would be in the position to advise management as the charges are developed, as the employee's reply is given and evaluated, and as the agency final decision is formulated. In many cases, however, the representative is injected into the case after a decision has been made to take an adverse action against an employee, usually removal of the employee from federal service. In these cases, the representative's first contact with the Board will be when he or she is assigned the case and given the Board's acknowledgment order, which contains instructions to the agency on how to respond to the appeal that has been initiated by the employee or former employee.

The acknowledgment order leads to a communication, normally called the agency's response to the appeal, from the agency representative to the Board, with a copy to the employee, advising the Board of the agency representative's identity and contact information. The agency representative complies, or supervises the compilation, of the written response to the appeal, in a format designated by Board regulations and operating instructions, to be submitted to the Board, with a copy to the employee or to the employee's representative. That response will contain the agency's reasons for taking the action and at least some documentary evidence supporting the agency action.

Once the agency files its response to the appeal, there is a period of time allowed for discovery. In Board practice, discovery operates in much the same fashion as discovery conducted in the federal courts under the Federal Rules of Civil

Procedure, although the Board's procedures are somewhat less complicated than those involved in judicial litigation. Discovery is not mandatory— parties engage in discovery if they want to engage in discovery and some parties engage in no discovery at all. Sometimes the discovery is one-sided. Although the discovery can take one or several forms, it usually consists of interrogatories, requests for documents, depositions, and possibly a request for admissions. In cases involving claims for compensatory damages under the civil rights laws (those claims arising as affirmative defenses in adverse action or like appeals), it is possible for the agency, with Board approval, to obtain a medical (physical or psychiatric) examination of an appellant to ascertain the basis of a claim for compensatory damages. The appellant similarly can engage in discovery, with the exception that there does not yet appear to be a reported case that has allowed an appellant to secure a physical or mental medical examination of his or her supervisor (although it would not be a bad idea to permit the practice). [See Chapter 3 "[Discovery](#)."]

Once discovery concludes, or if no discovery is undertaken, the judge will require the parties to organize the case for a hearing, assuming that a hearing has been requested. The parties will be required, by order of the judge, to submit prehearing submissions that contain an explanation of their cases, an enumeration of documents that will be submitted as exhibits, identification of witnesses who will provide testimony, with a brief synopsis of the testimony expected, and at least some explanation of the principal law that governs the disposition of the case.

After the prehearing submissions are supplied to the judge, the judge will convene a prehearing conference, usually by telephone, to discuss with the parties the issues, the governing law, and so that the judge can decide which witnesses will be allowed to testify at the hearing and which documents will be admitted into evidence (a decision that is occasionally deferred until the hearing itself). Along the way, the judge will likely have discussed at least once with the parties, and certainly during the prehearing conference, the possibility of settlement, and the subject of settlement will be of considerable interest to the judge. The Board settles at least 50 percent of cases that are not otherwise dismissed because they are untimely or outside of the Board's jurisdiction. Settlement is a major focus of Board litigation. [See Chapter 5 "[Settlement](#)" and the section in Chapter 6 on "[Prehearing Conference](#)."]

Assuming the case is not settled, the parties will reach the hearing stage. At the hearing, testimony is provided and arguments are made (either orally or through posthearing memoranda or briefs), and the judge finally takes the entire assembled record—the appeal, the response to the appeal, the hearing record, and any written closing statements or briefs—considers the whole matter, and issues an initial decision (a decision from the judge which is subject to appeal to the Board) coming to some result in the case. A judge occasionally will issue a

decision immediately after the close of the hearing, while the parties are still assembled in the hearing room, and that is known as a bench decision. More often, the hearing concludes and a written decision is issued some weeks later. The losing party can appeal the case to the Board headquarters or, depending on the nature of the case and the affirmative defenses presented, take the case to a federal appellate court or a federal trial court. There is the additional possibility of EEOC review in a case involving affirmative defenses of discrimination or reprisal. [See Chapter 7 "[The Hearing](#)."]

The Board's processing of appeals is reasonably quick but, at the same time, it is also rather slow. At the regional level, processing of the case is reasonably quick. Judges are supposed to adjudicate cases, i.e., issue an initial decision, within 120 days from the date the appeal was filed. But once the case is appealed to headquarters, it can languish there anywhere from months to years, depending upon the complexity of the case, the composition of the Board, and factors that cannot be fathomed by outsiders.

Board cases, although reasonably routine in their structure, involve a considerable investment of time by representatives who must assemble materials for discovery and hearing. A representative of an agency before the Board must take the matter seriously. An unwarranted loss of a case before the Board may be impossible to correct on appeal, meaning that the agency wastes considerable funds paying the salaries of those who are employed to defend the appeal as well as in back pay and retirement contributions, and possibly compensatory damages, to the prevailing appellant, not to mention the possibility of significant counsel fees to the appellant's attorney.

To say that cases must be taken seriously is not to suggest that they cannot be taken with a grain of salt. Agency representatives must avoid personifying an appeal as a personal attack upon themselves. An agency representative should be able to maintain a reasonable working relationship, even a cordial one, with opposing counsel and the judge. The Board appellate experience can be interesting and, if not exactly enjoyable, it at least presents an opportunity to offer a necessary and productive service to the agency that employs the representative and, in a very direct fashion, to the managers and executives who operate the agency against which the appeal was filed. [See Chapter 10 "[Miscellany](#)."]