CHAPTER ONE
Basics of Appeals and Grievances

Challenges to actions by federal agencies can come from either within or outside the agencies. Challenges from inside the agency can come from either employees acting individually or collectively through their recognized unions. For example, individual employees in the competitive service who are past probation can challenge their removals through individual appeals to the Merit Systems Protection Board. Or, a federal employee union could challenge management's unilateral implementation of new working conditions with an allegation of an unfair labor practice filed to the Federal Labor Relations Authority. These actions will occupy most of our attention in this book, as they are the most likely to involve the federal supervisor.

Just as likely, but of much less concern to the individual supervisor, are challenges from outside the agency. The US Fish and Wildlife Service, for example, is constantly being dragged into court by various groups throughout the environmental spectrum every time it tries to list or de-list an endangered species. While time consuming and vexatious, these matters create little concern for the average supervisor, as the mechanisms for dealing with them are at a much higher level in the agency.

DEFINITION AND DISTINCTION

Broadly defined, grievances and appeals are legal mechanisms that employees can use to challenge the actions of federal supervisors and agencies. A grievance is the formal expression of dissatisfaction and request for relief from an individual employee or employee union that stays entirely within the agency. With one partial exception that will be discussed later, once the agency issues its final decision, the employee or union cannot proceed further or seek judicial relief. For example, an administrative grievance by a non-unionized employee over a letter of reprimand stops at some point within the agency—usually at the level of commanding officer, regional director, or equivalent—and the employee cannot legally pursue the matter further.

An appeal, on the other hand, does go to an outside agency that has the legal authority to overturn another federal agency. For example, when a non-probationer is fired and appeals the action to the MSPB, it hears the case and has the authority to overturn the removal.

BASIC RULES

Before examining how federal employees can challenge management, review the basic rules that govern all appeals and grievances in federal service.

Timeliness

All the mechanisms discussed here have time limits that prevent an employee from bringing stale actions. Employees filing EEO complaints must do so within 45 days of the alleged discriminatory incident. Grievances filed by unionized employees under collective bargaining agreements typically must be filed within seven to ten days. The MSPB rigidly enforces its own 30-day deadline.

Election

In many cases it is possible for an employee or union to pick from among alternate appeals mechanisms. For example, an employee in the competitive service past probation, who is also covered by a union contract, and who is fired can challenge the action as an EEO complaint, an appeal to the MSPB, as a grievance under the contact, or in some cases as a charge of unfair labor practice to the FLRA. But employees only get one bite at the apple and must at some point choose which route they will take. These employees cannot have concurrent appeals over the same employment issue, nor can they initiate a case with a new tribunal after they have firmly and finally lost before another one.

Limited Review

Among the many myths of federal employment is that any employee can walk into any state or federal court and file a suit commanding a full judicial review of anything a supervisor does. Courts and appeals authorities only have authority over those workplace issues that Congress has given them power to review. In fact, most of what supervisors do on a day-to-day basis is simply unreviewable by third parties.

For example, in *Burroughs v. Dept. of Army*, 116 MSPR 292 (2011), an unsuccessful applicant for an aerospace engineer position with the Army appealed to the MSPB alleging a variety of unfair acts and practices in the selection. The MSPB rejected his appeal without looking at the merits because no law or regulation gave the Board jurisdiction over the allegations:

> [T]he Board does not have jurisdiction over all matters involving a federal employee that are allegedly unfair or incorrect; rather, the Board's jurisdiction is limited to those matters over which it has been given jurisdiction by statute or regulation.

Not satisfied, the appellant went up to the next level and tried to drag it into reviewing the merits of the Army's action. In the federal court, that next level, appellant came to the same result. In *Burroughs v. MSPB*, No. 2010-3180 (Fed. Cir. 2011), the Court of the Appeals for the Federal Circuit dismissed the case on jurisdictional grounds because, "Mr. Burroughs does not cite any law, rule, or regulation authorizing his appeal."

Several of the appeals tribunals, most conspicuously the Equal Employment Opportunity Commission, have been given a broad spectrum of employment issues to review, but even EEOC is limited by constraints that will be discussed in more detail later.

Burden of proof

Even lay supervisors should familiarize themselves with the concept of burden of proof. All the mechanisms explored here have well-established rules, many of which detail the burdens of proof of the opposing parties. The idea is that each side has the sole burden of proving certain elements of its case, and if it does not meet the burden, it loses that issue and, if the case depends on the disposition of that issue, so goes the case. The burdens of proof are allocated differently in different cases, but it is important to understand who has to prove what.

For example, in an MSPB appeal from a removal of a non-probationer, the agency has the burden of proving, among other elements, the basic facts of the offense with physical, documentary, or testimonial evidence. The evidence must show that indeed on this particular date and at this time, the employee did this or that. And even if the employee introduces no evidence, if management does not introduce sufficient evidence to meet its burden, the case fails.

On the other hand, in the exact same case, if the employee feels that he or she was discriminated against because of one of the seven EEO factors, then he or she has the burden of proving that. It is not for management to prove that it did not discriminate, rather it is the employee who must prove that it did. Or if the employee feels that the agency did not follow the correct procedures, the employee must raise the issue, prove the agency committed the error, and show that the error affected the outcome.

Personnel Actions

Some of the appeal mechanisms distinguish between personnel actions and other general management actions. For example, whistleblower protection is only extended to federal employees whose protected disclosures resulted in a "personnel action." Federal civil service law defines a personnel action as one of the following:

- Appointment;

- Promotion;
- Any disciplinary action formal or informal;
- Detail, transfer, or reassignment;
- Reinstatement;
- Restoration—several different laws and regulations require agencies to restore employees to duty who have been separated for different non-prejudicial causes;
- Reemployment;
- Official performance evaluation;
- Decision concerning pay, benefits, awards, or career-enhancing training;
- Requiring psychiatric testing or examination; and
- Any significant change in duties, responsibilities, or working conditions.

Standards of Proof

Burden of proof refers to who must prove what. Standards of proof refer to how much evidence it takes. In U.S. law, there are four standards of proof, in descending order:

- Proof beyond a reasonable doubt;
- Clear and convincing evidence;
- Preponderance of the evidence; and
- Substantial evidence.

Proof beyond a reasonable doubt is the standard of proof that is used in criminal cases. Clear and convincing evidence is generally an appellate standard that is occasionally used in federal personnel cases. Preponderance of the evidence is the standard used in civil cases and is used in virtually all federal appeals and grievance cases. Substantial evidence, the lowest of the four, is also an appellate standard but is also used in the review of so-called Chapter 43 actions that demote or remove employees for failing in their performance standards.

Since virtually all the cases use the preponderance of the evidence standard, I want to make sure you have a good lay understanding of it. The MSPB regulations at 5 CFR 1201.56, define it as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue."

Two key concepts in that sentence are crucial. "Reasonable person" means what makes sense, what is plausible, and what is logical. For example, the Boston police arrested a National Park Service employee for running a bookie operation at a park based upon a coworker reporting him to the police. Four days after the arrest, the employee who had gone to the police received a phone message on his answering machine that said, "The clock is ticking."

The Park Service fired the bookie for threatening his coworker, and the evidence before the MSPB was close. The Park Service brought in several officials, including two Park Service law enforcement officers, who knew the bookie and testified that it was his voice on the tape. The employee, however, denied that it was his own voice, offered his own statement to that effect, brought in a statement from a coworker supporting him, and introduced some sort of alibi evidence that he was somewhere else when it happened.

The MSPB, though, found a preponderance of the evidence and sustained the charge. Part of the reason was the common sense question that a "reasonable person" would ask: Why would anybody else have called this guy and left that type of message? While by itself it did not prove the case, it only made sense that the bookie was the only person with the motive to have called.

The other concept is that the contested fact is "more likely true than untrue." One attorney put it best when she compared it to having scales of equal weight, with the preponderance of the evidence being simply a feather on one side of the scale—just enough to tip the balance ever so slightly.

For example, in the Park Service case in Boston, even though the evidence was conflicting, a law enforcement officer's direct sensory observations are usually better honed that those of the rest of us, and what motive was there for them to lie under oath and perjure themselves? Simply keep in mind that when you are dealing with this preponderance standard that it is not a difficult burden.

Procedural Error

A common element of many appeals or legal challenges to agency actions is an allegation that the agency violated whatever procedural requirements govern the action. For example, the law on removing non-probationers prohibits the agency from removing an employee fewer than 30 days from the date that he or she received the formal letter of proposed removal to which the employee may reply orally or in writing. Every now and then, a federal personnel specialist comes along who cannot count out 30 days accurately and sets the removal date 29 days after the proposal.

So the employee appeals, let us say to the MSPB, and can prove that the agency did not wait the entire 30 days before the required minimum effective date. So what happens? Does the employee get reinstated because of a clerical error?

No. If the facts are no more than I described above, the MSPB will acknowledge the error and simply order the agency to pay the employee for the days of pay caused by its miscalculation. The MSPB uses what it calls the "harmful error" rule and will only overturn an agency action for procedural error if the employee can prove that the error affected the substantive outcome of the case.

The MSPB regulations in 5 CFR 1201.56(b) define harmful error as,

> Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

In the situation of the 30-day period being shortened, the employee still was able to reply to the official charges, the deciding official still considered the same evidence and arguments submitted by the employee, and the deciding official still would have made the same decision. The procedural error simply shortened the number of days the employee was on the rolls after the decision had been made. The error did not affect the outcome of the case.

On the other hand, in an Air Force case, the procedures required that the proposing official on a removal be the first-level supervisor. When a higher level manager who would be the overall deciding official found that the supervisor of an employee who failed a drug test was only thinking of proposing a long suspension, the higher official changed the proposing official to one more amenable to proposing removal. The MSPB reversed the removal because, in this case, it did affect the outcome.

Other appeals authorities follow variations of the rule. They will not void an agency action simply because it violated a procedure—whether internal or government-wide.

Exhausting Administrative Remedies

Courts are routinely harassed by federal employees who have appeal rights over some issue who decide to choose the judicial express line and file a lawsuit in court rather than go through a potentially tortuous administrative appeals. The courts routinely send these employees to the back of the line based on a doctrine the lawyers call "exhaustion of administrative remedies."

What this doctrine says is that courts have no express line, and that if the government has set up an administrative process to hear your complaint, you must go through it before you can go into court. The idea is that, with only rare exception, the Executive Branch must be given the opportunity to resolve and

decide the matter before the federal courts intervene. This is especially vexing for complainants in EEO cases where the administrative steps can drag out for years. It does, however, serve as a reality check on exuberant complainants.

Right to Representation

All the mechanisms discussed here allow employees the right to be represented by anybody they choose: attorneys, non-attorneys, coworkers, union officials, family, or friends. Although several of the tribunals allow employees who prevail to be reimbursed for attorney fees in limited situations, the employee must bear all costs of representation. If you have not dealt with representatives before, a few points are worth keeping in mind.

Do not let representatives come between you and the employee. They do not play the same role as attorneys do in criminal cases. In federal appeals cases, they advise employees, file necessary documents, talk to supervisors, and perform a variety of other representational functions. They do not act as an intermediary between management and its employees.

So-called *Weingarten* rights (named after a private sector Supreme Court decision that was adopted into the statute governing federal sector labor relations) provide unionized employees with the right to request union representation during investigative interviews when the employee has a reasonable belief that the information developed in the interview could lead to disciplinary action against himself. But though the representative can speak with the employee and even talk with the supervisor, the employee must still answer the questions. The representative cannot answer for the employee, although the representative may counsel the employee, nor can the employee refuse to answer (assuming none of the questions are about criminal activity). For another discussion of these rights, see the Dewey Publications book, *Labor Relations for Supervisors and Managers*.

In many non-*Weingarten* discussions, employees will refuse to speak with supervisors unless their representative or a witness is present. I tell the supervisors the same thing: supervisors have an absolute right to speak with an employee under whatever conditions they wish, and employees do not have a right to a representative or witness whenever they choose.

Avoid employee representatives. Just as employees do not have the right to dictate to you when they choose to speak with you, you are under no obligation to speak with employee representatives outside of the following situations: formal replies to proposed adverse actions, discussions about resolutions of grievances, formal discussions with unionized employees about working conditions or grievances, and answering questions during administrative hearings. If they call you or try to talk with you outside of one of those situations, politely refuse and refer them to your agency's own legal counsel or HR staff.

Supervisory Immunity and Liability

I do not want to go into detail about this, nor am I qualified to give you any legal advice. Talk with your agency's lawyers for detailed information and guidance. I will take a few minutes to cover three essential points about the basic essentials of what can happen to you personally for what you do as a supervisor.

All appeals, complaints, and grievances are against the agency, not against a particular employee or supervisor. For example, that MSPB case I cited earlier about the applicant for the aerospace engineer job with the Army was "*Burroughs v. Dept. of Army*" not Burroughs versus the supervisor who made the selection, or Burroughs versus the poor personnelist who set the minimum qualifications for the position.

To be sure, the employees appealing will make specific accusations against specific supervisors whom they feel responsible for the actions they are challenging. In EEO cases, they are even solicited to name the responsible management officials for the acts of alleged discrimination. The appeals and complaints are still against the agency, which, with the exception below, bears all costs and other legal liabilities for the action.

Agencies have full authority to and often do discipline supervisors and managers for actions against employees that rise to the level of misconduct. These actions are not based upon the mere fact that the agency lost an appeal, but because the underlying facts show that the supervisor's acts clearly constituted actionable misconduct.

As a general rule, supervisors are immune from civil suits brought by employees against them in their personal capacity for actions within their supervisory authority. It is not wholly uncommon for federal supervisors to be sued in their personal capacity in civil courts by employees or outside groups, and the procedures for handling them are fairly routine. When a supervisor is sued as a result of a work-related matter, the supervisor provides the complaint and summons that was served on him or her to agency counsel, who then turns the problem over to the Justice Department through the local office of the United States Attorney. The Department of Justice, which is tasked with representing all federal agencies in all courts, makes a routine motion to the court that the agency be substituted for the supervisor, telling the court that the supervisor was acting within the scope of his or her official duties. Such motions are almost always granted as long as the action was within this scope of duties.

For example, let us say you did indeed discriminate against somebody while hiring and the facts of the case clearly prove that you did. The employee now sues you in your personal capacity, but your agency will be substituted as the defendant because even though what you did was illegal discrimination, part of