

# CHAPTER ONE

## BASICS OF APPEALS AND GRIEVANCES

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Challenges to actions by federal agencies can come from either within or outside the agencies. Challenges from inside the agency begin with either employees acting individually or collectively through their recognized unions. 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 with the Federal Labor Relations Authority. These actions occupy most of our attention in this book, as they are the most likely to involve the federal supervisor.

Just as likely, but of less concern to the individual supervisor, are challenges from outside the agency. Take the US Fish and Wildlife Service, which is constantly being dragged into court by groups throughout the environmental spectrum every time it tries to list or de-list an endangered species. While time consuming, these matters create little concern for the average supervisor, as the mechanisms for dealing with them are at a 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. 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 agency decision on a union grievance might be reviewed by a labor arbitrator.

An appeal goes to an outside agency that has the legal authority to overturn another federal agency. When an agency fires a non-probationer who appeals the action to the MSPB, it hears the case and has the authority to overturn the removal and order remedies.

# BASIC RULES

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

## TIMELINESS

All the mechanisms we'll discuss 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

It is often possible for an employee or union to pick from among alternate appeals mechanisms. 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, or as a grievance under the contract. But employees only get one bite at the apple and must at some point choose the 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 full judicial review of anything a supervisor does. Courts and administrative appeals authorities only have authority over those workplace issues that Congress has given them power to review. Most of what supervisors do on a day-to-day basis is unreviewable by third parties, including courts.

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 to a federal appeals court and tried to drag it into reviewing the merits of the Army's action. The Court of the Appeals for the Federal Circuit dismissed the case on jurisdictional grounds

because the appellant “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 authority over a broad spectrum of employment issues to review, but even EEOC is limited by constraints that will be later discussed.

## **BURDEN OF PROOF**

Even we laypeople involved in deciding employment issues or advising supervisors should familiarize ourselves 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. In any legal dispute, one side bears the burden of proving its case, and if it does not meet the burden under whatever law governs the issue, it loses. To be sure, both sides will be introducing evidence supporting and rebutting various assertions raised. In some cases third parties will use an analytic framework with shifting burdens of production. It’s important to understand who has to prove what during these challenges.

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 documentary, testimonial, or physical evidence. The evidence must show on a 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, its case fails. If the charge is AWOL, it’s not for the employee to prove that he or she was at work on a particular day, it’s for management to prove that he or she was not.

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 appeal mechanisms distinguish between personnel actions and other general management actions. 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 (rehiring an employee formerly in the competitive service);
- 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.

## **EVIDENCE AND STANDARDS OF PROOF**

Burden of proof is what each side in a legal dispute must satisfy a third party under whatever standards the law governing the action establish. Meeting that burden is done with evidence submitted by both sides. Evidence takes three forms: documentary, testimonial, and physical.

- *Documentary evidence* is both hard paper and electronic records: log books of vehicles, reports, letters, emails, text messages, medical reports, memos, and anything else that has been memorialized.
- *Physical evidence* is objects: a bag of drugs, a knife, a blood-stained shirt, and anything else that can be touched, smelled, or seen. Physical evidence is rare in federal administrative cases because of storage and transmission problems, and is usually converted to photographic form.
- *Testimonial evidence* is what people say, usually when testifying before a third party. This is the most common form of evidence and, except in cases where a document by itself is dispositive, is usually the best form of evidence—especially when it makes sense and is offered by somebody who has nothing to gain by lying, shading, or fudging.

### ***Standards of Proof***

So, how many documents and witnesses does it take to prove a factual question? In American law, we have four standards of proof, in descending order: