

MSPB Advocacy

Description: This is a class for those who represent parties before the MSPB. It can be adapted to particularly suit Agency or Employee representatives. There is an emphasis on practical exercises. The class culminates with a mock hearing, where the course participants play witnesses and advocates. The topics covered include the Civil Service Reform Act, MSPB regulations, other related laws (EEO laws, whistleblower reprisal); charges and penalties; taking discovery (e.g., conducting and defending depositions, writing and responding to interrogatories, etc.); pre hearing conferences; analyzing evidence; selecting, preparing, presenting and cross examining witnesses; moving documents into evidence; making opening and closing statements; making objections or offers; motion practice; appeal; post hearing issues; and other matters.

Length: 3 or 4 days.

TABLE OF CONTENTS

- A. Introduction And Overview To Representing The Agency Before The MSPB
- B. Statutory And Regulatory Base Of The Appeals System
 - 1. Civil Service Reform Act
 - 2. MSPB Regulations
 - 3. Other Relevant Statutes And Regulations
 - 4. The Agencies, Processes And Their Relationships

- A. MSPB
- B. EEOC
- C. OPM
- D. OSC
- E. Grievance-Arbitration
- F. FLSA
- G. Other

C. MSPB: A Closer Look

- 1. Introduction
- 2. The Processing Of A Typical Appeal
 - a. The Parts Of The Process

Appeal Filing

Acknowledgment Order

Timeliness

Jurisdiction

Response To Appeal

Record Cases

Hearing Cases

Discovery

Order And Notice Of Hearing And Prehearing Conference

The Agency Response To The Order

The Prehearing Conference

The Hearing

Initial Decision

Post Hearing

Other Processing Procedures

3. Mixed Case And Whistleblower Reprisal Case Processing

Mixed Case Processing

Whistleblower Appeals

D. MSPB: The Common Types Of Cases

1. Introduction

- A Brief Summary Of MSPB Jurisdiction
- The Several Burdens Of Proof
- Summary Of Employee Defenses

2. Adverse Actions

a. The Charges

- Attendance Related Offenses
- Falsification
- Threatening Conduct
- Theft
- Sex Harassment
- Insubordination
- Physical Inability To Perform A Job
- Indefinite Suspensions

b. The Nexus

c. The Penalty

1. The Douglas Factors

- The Nature And Seriousness Of The Offense And Its Relation To The Employee's Duties, Position, And Responsibilities, Including Whether The Offense Was Intentional Or Technical Or Inadvertent, Or Was Committed Maliciously Or For Gain, Or Was Frequently Repeated;

- The Employee's Job Level And Type Of Employment, Including Supervisory Or Fiduciary Role, Contacts With The Public And Prominence Of The Position;

- The Employee's Past Disciplinary Record;
- The Employee's Past Work Record, Including Length Of Service, Performance On The Job, Ability To Get Along With Fellow Workers, And Dependability;
- The Effect Of The Offense Upon The Employee's Ability To Perform At A Satisfactory Level And Its Effect Upon Supervisors' Confidence In The Employee's Ability To Perform Assigned Duties;
- Consistency Of The Penalty With Those Imposed Upon Other Employees For The Same Or Similar Offenses;
- Consistency Of The Penalty With Any Applicable Table Of Penalties;
- The Notoriety Of The Offense Or Its Impact On The Reputation Of The Agency;
- The Clarity With Which The Employee Was On Notice Of Any Rules That Were Violated In Committing The Offense, Or Had Been Warned About The Conduct In Question;
- Potential For The Employee's Rehabilitation;
- Mitigating Circumstances Surrounding The Offense Such As Unusual Job Tensions, Personality Problems, Mental Impairment, Harassment, Or Bad Faith, Malice Or Provocation On The Part Of Others Involved In The Matter; And,

- The Adequacy And Effectiveness Of Alternative Sanctions To Deter Such Conduct In The Future By The Employee Or Others.

3. Performance Removals And Reductions In Grade Under Chapter 43

4. Reduction-In-Force Actions

5. Probationer Terminations

E. MSPB: The Statutory Defenses

- I. Introduction

2. Harmful Procedural Error

3. Prohibited Personnel Practices

- a. Prohibited Discrimination

- b. Reprisal

- Whistleblower Reprisal

- Appeal Right Reprisal

4. The Action Was Not In Accordance With Law

F. Discovery

1. Introduction

2. Types Of Discovery

Requests For Production Of Documents

Interrogatories

Depositions

3. Objections And Responses To Discovery

4. Motions To Compel

G. - Prehearing Conferences

1. Introduction

2. Matters Discussed

Settlement

Summary Of Positions

Witnesses

Exhibits

Other Matters

H. Settlement

1. Introduction

2. Pros And Cons

a. The Settlement Advantages

b. The Settlement Disadvantages (Or Cases That Perhaps Should Not Settle)

3. Legal Principles
4. Options When You Feel Pressured To Settle
5. Techniques
6. Specific Settlement Provisions
7. Enforcing Or Setting Aside The Agreement

I. Evidence

1. Introduction
2. Forms Or Types Of Evidence
3. Rules Of Evidence

Relevant Evidence

Hearsay Evidence

Impeachment Evidence

Rules Concerning The Use Of Writings And Prior Statements

Hearing Control Rules

Opinion And Expert Testimony Evidence

Expert Testimony Evidence

Authentication Evidence

Official Notice

Presumptions

Conclusory Evidence

Deference

4. The Evidence Received In A Case

J. Witnesses

1. Selection, Preparation And Examination

a. Witness Selection

b. Witness Preparation

c. Witness Examination

i. Direct Examination

ii. Cross-Examination

2. Credibility

3. Objections

4. Motions To Strike

5. Offers Of Proof

6. Special Considerations
 - a. Expert Testimony
 - b. Opinion Testimony
 - c. Privileged Communications

- K. The Hearing
 - I. Introduction
 2. Opening Statements
 3. The Testimony
 4. Closing Statement

- L. Post-Hearing

- M. Mock Hearing