

Technician Personnel Regulation 752

MERIT SYSTEMS PROTECTION BOARD (MSPB)

LTC Lloyd Phelps II
HING SJA
672-1010
lloyd.c.phelps4.mil@mail.mil

Historical Background

- 1916 – National Defense Act:
 - Established “caretakers,” full-time employees that cared for “material, animals, and equipment” allocated to the National Guard
 - Provided federal funding for caretaker salaries
 - Provided that Service Secretaries would designate the person to employ caretakers
- 1965 – Maryland v. United States (Sup. Ct.) reversed the lower courts and held National Guard technicians were state employees for all purposes, including FTCA.
 - Decedents were passengers on an airliner which collided in May 1958 with a jet trainer assigned to the Maryland Air National Guard. The only survivor was the jet trainer pilot, whose negligence is not disputed. The pilot held a commission from the Governor of Maryland as an officer in the Maryland Air National Guard where he was a civilian Aircraft Maintenance Chief under 32 U.S.C. 709, a so-called "caretaker" of Guard property.

NGTA 1969-2016

- **1969 National Guard Technician Act (NGTA)**
 - TAG final appeal authority for Adverse Actions (Suspensions, Terminations, RIF, Demotions)
 - Requires 30-day termination notice for non-temps, in a trial/probationary period
 - Scheduling of work belongs solely with the TAG
 - **Overtime pay** not allowed, but compensatory time is

- **RIP**

2017 NDAA, Section 512

- **Overtakes prohibition on appeals beyond the TAG**
 - Previously:
 - NG techs could not appeal to the MSPB;
 - Case law severely limited EEOC and FLRA authority
- Allows technicians to appeal **adverse actions** that:
 - do not concern activity occurring while the member is **in a military pay status**, or
 - that does not concern **fitness for duty in the reserve components**.

2017 NDAA, Section 512 (Cont.)

- Applies to ALL technicians as of 23 DEC 2016
- TAGs subject to MSPB and EEOC authority???
 - **EEOC** asserts jurisdiction over almost all personnel actions
(more expansive)
 - **MSPB**
 - Termination/Removal
 - Suspension for more than 14 Days
 - Reduction in Grade/Pay
 - Furlough of 30 Days or more
 - **Both** Can Order
 - Reinstatement
 - Mitigation
 - Award damages (back pay and attorney fees)
 - **WHO PAYS???**

Why Care???

2017 NDAA, Section 932

- (3) Administrative actions
 - (A) The **adjutant general** of the jurisdiction concerned **shall be considered the head of the agency** and the National Guard of the jurisdiction concerned **shall be considered the employing agency of the individual and the sole defendant** or respondent **in any administrative action.**
 - (B) The National Guard of the jurisdiction concerned **shall defend any administrative complaint, grievance, claim, or action, and shall promptly implement all aspects** of any final administrative order, judgment, or decision.

Why Care???

2017 NDAA, Section 932 (Cont.)

- **(3) Administrative actions (Continued)**
 - (C) In any civil action or proceeding brought in any court arising from an action under this section, the **United States shall be the sole defendant or respondent.**
 - (D) The **Attorney General of the United States shall defend** the United States in actions arising under this section described in subparagraph (C).
 - (E) **Any settlement, judgment, or costs** arising from an action described in subparagraph (A) or (C) **shall be paid from appropriated funds allocated to the National Guard of the jurisdiction concerned.**

MSPB Jurisdiction

MSPB Appealable Actions – 5 U.S.C. § 7512

- Removal
- Suspension for more than 14 days
- A reduction in grade
- A reduction in pay; and
- A furlough of 30 days or more



Adverse Actions Pitfalls

- Proposing (Charging) Official:
 - Don't over investigate (**Time is the enemy, Collateral Attacks, Worker's Comp,...**)
 - Don't overcharge (**KISS**)
 - Nexus?
 - Don't Wait for a Criminal Conviction
 - Preponderance v. Reasonable Doubt
- Deciding Official Fails to Apply Douglas Factors

Douglas Factors

- **The nature and seriousness of the offense**, the relation of the offense to the employee's duties, whether the offense was intentional or inadvertent, or whether or not the offense was committed for gain, with malice, or repeatedly.
- The **employee's job level and type of employment** – supervisory or fiduciary, contact with the public, prominence of the position;
- The employee's **past disciplinary record**
- **The employee's past work record**: length of service, quality of performance, and dependability
- **The effect of the offense upon the employee's ability to continuing performing at a satisfactory level**, and the effect on the supervisor's confidence in the employee after the misconduct;
- **The consistency of the penalty with those imposed upon other employees for the same or similar offenses.**
- **Consistency of the penalty with the Agency's Table of Penalties** (if any)
- **The notoriety of the offense** and the impact on the reputation of the Agency;
- **The clarity with which the employee was one notice of the rules violated in committing the offense**, including warnings about the conduct;
- **The potential for the employee's rehabilitation**
- **Mitigating circumstances** surrounding the commission of the offense (unusual job tensions, personality conflicts, bad faith issues, mental impairment, harassment, etc.) **The adequacy and effectiveness of alternative sanctions to deter such conduct**
- in the future by this employee or others.

Douglas Factors

- **All 12 Douglas Factors must be considered**
- **If any factor does not apply to offense charged simply notate “Not Applicable to the Charge.”**

CNGBN (Draft) v. TPR 752

NG TECHNICIAN ADVERSE ACTIONS AND APPEALS

- CNGBN (Draft) updates TPR 752 and 752.1:
 - TAG will issue the **final decision** ... on an appealable action **w/10 days** of receiving a request for administrative review ... or the report of a hearing examiner....
 - **Miltechs, after having exhausted the (administrative) procedures ... (and received TAG final decision), may file an appeal ...**
 - Miltechs must file ...with the **MSPB** ... **w/30 days** of receiving TAG's final decision..., or the effective date of the adverse action, whichever is later.
 - Miltechs may file (an)...**EO complaint** with the State on the basis of **race, color, national origin, religion or sex** **w/45 days** of receiving TAG's final decision, or the effective date of the adverse action, whichever is later.

Timeliness (cont.)

- **5 C.F.R. § 1201.22(c): If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown**
 - **Good cause = the exercise of due diligence or ordinary prudence under the circumstances of the case**
 - **Board will consider the length of the delay; the reasonableness of the excuse; and whether he has presented evidence of the existence of circumstances beyond his control, unavoidable casualty, or misfortune**
 - **See *Rocio v. OPM*, 80 M.S.P.R. 518, ¶ 5 (1999)**
- **The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.**
- **The appellant bears the burden of proving the timeliness of the appeal by preponderant evidence**
 - **See 5 C.F.R. § 1201.56(b)(2)(i)(B)**

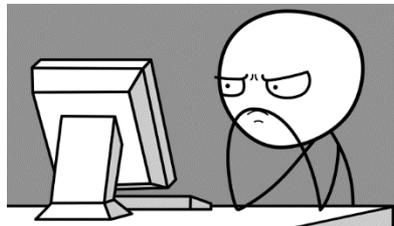
Timeliness, cont.

Failure to provide notice of appeal rights in a decision letter

- An agency is responsible for providing an appellant notice of his right to file an appeal with the Board
- Failure to apprise an appellant of a right of appeal may constitute grounds for finding an untimely appeal timely filed for good cause
 - See *Ford v. U.S. Postal Service*, 82 M.S.P.R. 327, ¶ 9 (1999)
- In these circumstances, the Board will consider whether the appellant was diligent in filing an appeal after he learned of his right to do so

e-Appeal System

- <https://e-appeal.mspb.gov/>
- Contains online repository of pleadings and orders filed in appeals
- System generated email when pleadings filed and orders issued
- Contains the electronic appeal file, which is the primary source of information the administrative judge will cite to in orders and in the initial decision



Discovery

- **5 C.F.R. § 1201.71 – Purpose**
 - **Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case.**
 - **The regulations are intended to provide a simple method of discovery.**
 - **The regulations will be interpreted and applied to avoid delay and facilitate adjudication.**
 - **The parties are expected to complete discovery with a minimum of Board intervention.**
 - **Discovery requests and responses should NOT be filed with the administrative judge unless part of a motion to compel**

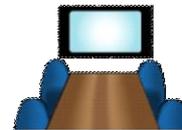


Prehearing Conference and Hearings

- **Prehearing Conference**
 - Usually set about 1 week prior to hearing
 - Parties must submit any agreed upon facts in advance, as well as requests to call witnesses and introduce exhibits not already in the record (i.e., not in the agency file)
 - **Date for prehearing submissions set by administrative judge; usually due 2-3 days before prehearing conference**
 - Administrative judge will approve witnesses; may rule on admissibility of exhibits at this time, or may address at the hearing
 - Final settlement efforts

Hearing

- **Hearing**
 - If issues of credibility are involved, will hold hearing in-person or via videoconference
 - Telephonic hearings are disfavored
 - *See McGrath v. Department of Defense*, 64 M.S.P.R. 112, 115 (1994) (an appellant has a right to an in-person hearing and administrative judge may not order telephonic hearing over appellant's objection)
 - Video-teleconference is commonly used and may be ordered over an appellant's objection
 - *See Koehler v. Department of the Air Force*, 99 M.S.P.R. 82, ¶¶ 11, 13-14 (2005) (use of videoconference hearing subject to abuse of discretion)
 - Agency is typically responsible for arranging videoconference hearing location



The Hearing

- Agency presents its case first because it bears the burden of proving the charge, nexus, and penalty (see 5 C.F.R. § 1201.58)
 - Administrative judge can order testimony out of order (5 C.F.R. § 1201.58(c))
- Typically joint witnesses (i.e. those called by both sides) will only testify once
- Witnesses subject to direct and cross examination; possible questioning by the administrative judge during the examination or when the parties have completed their examination
- Documents introduced
- Typically no opening statements; usually oral closing arguments, but administrative judge may allow for written closing arguments
- Court reporter present taking down testimony in audio recording, which is made part of the record
 - The parties may purchase a written transcript of the proceedings from the court reporter
- Record typically closes at the conclusion of the hearing, i.e., no further evidence taken or admitted
 - See 5 C.F.R. § 1201.59(a)



The Initial Decision

- **Contains findings of fact and conclusions of law**
- **Will address the agency's charge and specifications (if any); nexus; and penalty determination**
- **Must include credibility findings and resolve factual disputes**
- **Will resolve any affirmative defenses**
- **If agency action is mitigated or overturned, may include an award of interim relief pending the initial decision becoming final following a Petition for Review filed with full Board**
- **Will include a date (35 days from date of issuance) when Petition for Review must be filed; otherwise, Initial Decision becomes Board's final decision, and appellant may file an appeal in U.S. Court of Appeals or U.S. District Court**
 - **See 5 C.F.R. 1201.114(e)**



Beyond the Initial Decision

- Both the appellant and the agency have the right to file a Petition for Review with the full Board – see 5 C.F.R. § 1201.114-120
- Full Board may affirm, modify, or vacate and remand the appeal to the administrative judge
- If Board either affirms or modifies the initial decision, the appellant has option of seeking judicial review in U.S. Court of Appeals for the Federal Circuit; in U.S. District Court (for appeals involving claims of discrimination); or in any U.S. Court of Appeals of competent jurisdiction if the appeal involves an allegation of whistleblower reprisal
- The agency, however, has no right to seek judicial review in the federal courts without the Office of Personnel Management's (OPM) approval
 - **With OPM approval, an agency can appeal a final Board decision to the U.S. Court of Appeals for the Federal Circuit on important issues of civil service law impacting the entire Federal workforce**



Settlement

- Settlement is highly encouraged and can be reached either while the initial appeal is with the administrative judge or while the case is with the full Board on Petition for Review



- A settlement is a contract between the parties
 - ***See Young v. U.S. Postal Service*, 113 M.S.P.R. 609, ¶ 10 (2010)**

4 Methods for Settlement

- **Party-driven settlement**
 - After the initial appeal is filed, the parties reach a settlement on their own terms
- **Administrative judge facilitates settlement**
 - Administrative judges will proactively raise the issue of settlement
 - Regulations permit the parties, on consent, to have ex parte (i.e. one-sided) conversations with the assigned administrative judge in furtherance of settlement
 - **See 5 C.F.R. § 1201.41(c)(1)**
 - Administrative judge serves as mediator
- **Informal referral of the appeal to another administrative judge for settlement only**
- **Mediation Appeals Program (MAP) mediator from HQ**

Initial Decisions Based on Settlement

- Upon agreeing to settle the appeal, the parties should submit the agreement to the administrative judge along with a request to dismiss the appeal with prejudice
 - 5 C.F.R. § 1201.41(c)(2)
- Before dismissing an appeal as settled, the Board ensures:
 - The parties actually entered into a signed settlement
 - They understand its terms
 - They specified whether they want the agreement entered into the record for purposes of enforcement



See Jimenez v. HHS, 70 M.S.P.R. 24, 26 (1996)



Enforcement of Settlement Agreements

- The parties have the option of entering the agreement into the record for purposes of enforcement, *i.e.*, in the event either party believes the other is not complying with the terms of the settlement, the party alleging noncompliance can file an appeal with the Board alleging noncompliance, *i.e.*, a Petition for Enforcement (PFE)
 - See 5 C.F.R. § 1201.181-183
- The Board will only entertain a PFE if the parties enter the agreement into the record for purposes of enforcement
 - See 5 C.F.R. § 1201.41(c)(2)(i)
 - Previously, the Board had required administrative judges to make findings that the underlying appeal was within the Board’s jurisdiction in order for a settlement to be entered into the record for enforcement purposes
 - The Board changed this approach in *Delorme v. Department of the Interior*, 124 M.S.P.R. 123, ¶ 14 (2017), provided the underlying appeal is a “colorable” Board appeal

QUESTIONS?



"We only have a few rules around here, but we really enforce them."