

**NAVIGATING THE MAZE --  
Understanding the Confusing Principles  
of Mixed Cases**

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# MIXED BLESSING

- The employment rights of federal employees present a mixed blessing. On the one hand, federal employees are protected from many forms of arbitrary and treatment. Without a doubt, compared to most private sector counterparts, federal employees have a great deal of "job security." On the other hand, these job security protections stem from a host of laws and regulations that are often confusing, written in "legalese," and are subject to varying, and changing, interpretations by courts, administrative agencies, and other decision-making authorities.

# MIXED BLESSING

- To further complicate matters, the elections of remedies available differ for employees covered by collective bargaining agreements (union contracts) and those who are not.

# STATUTORY AUTHORITY

- There are three primary statutory sources for the "elections of remedies" many federal employees face.
  - **5 U.S.C. § 7702;**
  - **5 U.S.C. § 7121;** and
  - **5 U.S.C. § 7116.**

# 5 U.S.C. § 7702

- 5 U.S.C. § 7702 establishes the election for mixed cases between the EEO statutory process and the MSPB appeal route for adverse actions.

# 5 U.S.C. § 7702

## ■ §7702(a).

- If employee files EEO mixed case complaint, the agency must resolve within 120 days. The agency decision is judicially reviewable unless the employee appeals to the MSPB.
- If employee files mixed case complaint directly with MSPB, the MSPB must issue a decision within 120 days.

# 5 U.S.C. § 7702

## ■ §7702(e)(1).

- If there is no decision within 120 days of a mixed case complaint filed with the agency, or
- if there is no decision within 120 days of an MSPB appeal

the employee shall be entitled to file a civil action.

## ■ 7702(e)(2).

- If there is no decision decision within 120 days of mixed case complaint filed with the agency, the employee may appeal to the MSPB

# 5 U.S.C. § 7702

- Only the MSPB has the authority to hold a hearing; the hearing is not before the EEOC.
- Exception: constructive adverse actions as a result of a pattern of discrimination may stay at EEOC if “firmly enmeshed” or “inextricably intertwined” in EEO process.

# Firmly Enmeshed / Inextricably Intertwined

Example 1: Complainant alleged that he was forced to apply for disability retirement because the agency failed to provide reasonable accommodation. The EEOC held that the involuntary retirement claim is *firmly enmeshed* in the EEO process and that it would unduly delay justice and create unnecessary procedural complications to remand it to the MSPB.

*Morris v. DoL*, EEOC Appeal No. 0120110481  
(11/28/12)

# Firmly Enmeshed / Inextricably Intertwined (cont'd)

Example 2: Complainant alleged agency failed to change her tour of duty due to race and that she was ultimately compelled to resign. Constructive termination alleged. EEOC held that “this claim is so *firmly enmeshed* in the EEO forum that it would better serve the interests of administrative economy to address it here.”

*Hose v. Dept. of Veterans Affairs*, Appeal No. 0120093173, (3/25/11)

# Firmly Enmeshed / Inextricably Intertwined (cont'd)

Note: The EEOC has sometimes used the term “*inextricably intertwined*” in what appears a description of the “firmly enmeshed” doctrine.

# Firmly Enmeshed / Inextricably Intertwined (cont'd)

Example 3: Complainant was placed on AWOL although in the leave transfer program, reprimanded for leave abuse, suffered a HWE, and failure to accommodate. Complainant ultimately was forced to apply for disability retirement. EEOC held the constructive discharge claim is inextricably intertwined in the EEO process, and that it was appropriate for the AJ to retain jurisdiction over this matter rather than remanding it to the MSPB.

*Blount v. DHS*, EEOC Appeal No. 0720070010  
(10/21/09)

# Firmly Enmeshed / Inextricably Intertwined (cont'd)

**What does the Supreme Court think of the firmly enmeshed doctrine?**

In *Kloeckner v. Solis*, 133 S. Ct. 596, 568 US \_\_ (2012).

in footnote 2, the Court said: “Neither the CSRA nor any regulation explicitly authorizes an EEOC judge to consider the legality of a removal or other serious personnel action before the Board has done so. Nonetheless, the EEOC has approved that approach when the issues the personnel action raises are “firmly enmeshed” in an ongoing EEOC proceeding in order to avoid “delay[ing] justice and creat[ing] unnecessary procedural complications.” (citations omitted).

***We express no view on the propriety of this practice.”***

# 5 U.S.C. § 7121

- **5 U.S.C. § 7121(d)** establishes the election for cases of discrimination between the negotiated grievance procedure and the statutory EEO process.

# 5 U.S.C. § 7121

- **5 U.S.C. § 7121(e)** establishes the election for adverse actions between the negotiated grievance procedure and the MSPB appeal route.

# 5 U.S.C. § 7121

- **5 U.S.C. § 7121(g)** establishes the election for prohibited personnel practices (other than discrimination) between the negotiated grievance procedure, the Office of Special Counsel and the MSPB appeal route.

# 5 U.S.C. § 7116

- **5 U.S.C. § 7116(d)** establishes the election of remedies between the FLRA's ULP procedures, other statutory appeals, and the negotiated grievance procedure.

# EEOC'S REGULATIONS

- 29 CFR §1614.301 – Relationship to Negotiated Grievance Procedure
- 29 CFR § 1614.302 – Mixed Case Complaints
- These regulations discuss such important issues as at what point does the “election” take place

# Relationship to Grievance Procedure

§ 1614.301

- “An election to proceed under this part is indicated only by the filing of a written complaint; *use of the pre-complaint process . . . does not constitute an election . . . .*”
- “An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely *written* grievance.”

# Mixed Case Complaints

## § 1614.302 (b) *Election.*

- Aggrieved person may file complaint under part 1614 or an appeal to the MSPB, but not both.
- If MSPB dismisses **direct appeal** for lack of jurisdiction, the case goes back to agency for counseling.
- If MSPB dismisses appeal **from agency processing of mixed case** for lack of jurisdiction, the Agency shall issue notice of right election between EEOC hearing and Final Agency decision.

# **“ELECTION OF REMEDIES” FOR EMPLOYEES COVERED BY UNION NEGOTIATED GRIEVANCE PROCEDURES**

## IF GRIEVABLE

- Failure to be promoted
- Failure to be promoted  
Discrimination alleged
- Disciplinary Action  
(Suspension 14 days or less)
- Disciplinary Action  
(Suspension 14 days or less)  
Discrimination alleged

## APPEAL ROUTE

- Negotiated Grievance Procedure
- Negotiated Grievance Procedure; **OR**  
EEO Process, **but not both**
- Negotiated Grievance Procedure
- Negotiated Grievance Procedure; **OR**  
EEO Process, **but not both**

# **“ELECTION OF REMEDIES” FOR EMPLOYEES COVERED BY UNION NEGOTIATED GRIEVANCE PROCEDURES**

## **IF GRIEVABLE**

- Adverse Action (Removal, demotion, suspension of more than 14 days)
- Adverse Action (Removal, demotion, suspension of more than 14 days)  
Discrimination alleged
- Reduction in Force

## **APPEAL ROUTE**

Negotiated Grievance Procedure; **OR**  
MSPB, **but not both**

Negotiated Grievance Procedure; **OR**  
MSPB (either directly or through  
EEO process, **but not both**)

Negotiated Grievance Procedure  
(MSPB appeal available only if a  
RIF is not grievable under the  
negotiated grievance procedure)

# “ELECTION OF REMEDIES” FOR EMPLOYEES COVERED BY UNION NEGOTIATED GRIEVANCE PROCEDURES

## IF GRIEVABLE

- Denial of Within-grade (step) increase
- Reprisal for Whistleblowing where MSPB has jurisdiction (*e.g.*, adverse actions)

## APPEAL ROUTE

Negotiated Grievance Procedure  
(MSPB appeal available only if a WIGI is not grievable under the negotiated grievance procedure)

MSPB; **OR** Complaint to the Office of Special Counsel (OSC) [then appeal to the MSPB]; **OR** Negotiated grievance procedure **but only one**

# **“ELECTION OF REMEDIES” FOR EMPLOYEES COVERED BY UNION NEGOTIATED GRIEVANCE PROCEDURES**

## IF GRIEVABLE

- Reprisal for Whistleblowing where MSPB does not already have jurisdiction (e.g. minor suspension)

## APPEAL ROUTE

Negotiated grievance procedure;  
**OR** Complaint to the Office of Special Counsel (OSC) [then appeal to the MSPB]; **but not both**

# SOME PRACTICAL CONSIDERATIONS

- LENGTH OF TIME TO RESOLUTION
- DISCOVERY AVAILABLE
- COSTS OF LITIGATION
- SETTLEMENT OPPORTUNITIES
- REMEDIES

# LENGTH OF TIME TO RESOLUTION

- **MSPB initial decisions** – goal is 120 days
- **EEOC process** – Counseling (30 days)  
ADR (90 days); 180 days for investigation;  
hearing – goal is 180 days, but rarely met
- **Arbitration** – parties have most flexibility and control; depends on how busy the arbitrator is
- **OSC** – must have at least 120 days to investigate before filing IRA

# DISCOVERY AVAILABLE

✓ MSPB

✓ EEOC

X ARBITRATION

(5 U.S.C. § 7114(b)(4)(B) information request is available)

# COSTS OF LITIGATION

## ■ “FREE FORUM”

- MSPB
- EEOC
- OSC
- FLRA

## ■ “PAID FORUM”

- **ARBITRATION** (typical per diem rates range from \$1200-\$1500). Allow for hearing days, “study” days, and decision writing

# COSTS OF LITIGATION

- Because of **DISCOVERY** costs, MSPB and EEOC hearings can be more costly than arbitrations.
- In “mixed cases” where the hearing is ultimately at the MSPB, proceeding through the EEO process *first* may provide “free discovery” due to the agency’s obligation to conduct an investigation.

# SETTLEMENT OPPORTUNITIES

- **EEOC PROCESS** – settlement opportunities at counseling stage through ADR; administrative judges stress settlement at pre-hearing stages
- **MSPB** – Acknowledgment Order requires settlement discussion; administrative judges stress settlement at pre-hearing stages; MAP
- **ARBITRATION** – varies greatly with the individual arbitrators; Relies more on initiative of the parties

# REMEDIES

Generally, all appeal fora provide for similar remedies. The EEOC has more experience with compensatory damages and is more apt to find discrimination. Arbitrators may be less comfortable with such award, but should be getting more used to it. (Arbitrators must be educated on the law by the parties; do not expect independent research).

# JUDICIAL REVIEW

Judicial review of MSPB decisions in mixed cases is in the United States District Courts.

*Kloeckner v. Solis*, 133 S. Ct. 596, 568 US \_\_ (2012).

# ATTACHMENTS

- 5 U.S.C. § 7702
- 5 U.S.C. § 7121 (excerpts)
- 5 U.S.C. § 7116
- EEOC's regulations on mixed cases, 29 CFR §§ 1614.301 – 303
- MSPB's regulations on mixed cases, 5 C.F.R. § 1201.154

# THE END

## MIXED CASES & ELECTION OF REMEDIES IN FEDERAL-SECTOR CASES

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