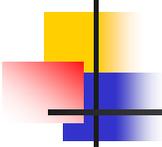


# MIXED CASES

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What's What in  
Mixed Case  
Processing?

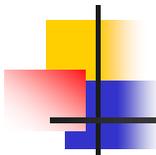


## **EEO Procedures and the MSPB**

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Mixed Case procedures may be found at:

- 29 C.F.R. §§ 1614.302 through 1614.310
- Management Directive 110, Chapter 4.

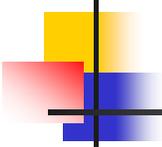


## What is a Mixed Case?

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An Agency action within the *Jurisdiction* of the MSPB where an employee raises *Discrimination* under one of the governing EEOC statutes. It can result in either a . . .

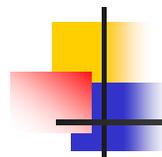
- Mixed Case *Complaint* or
- Mixed Case *Appeal*



## What is a Mixed Case Complaint?

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- (1) A Discrimination Complaint that is
- (2) based on an Agency Action/Decision that is appealable to the MSPB and
- (3) the Final MSPB decision (as to discrimination only) is reviewable by EEOC if the employee files a petition with EEOC



# Mixed Case *Complaint* Process

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Adverse Action



Mixed Case Complaint Filed with Agency



Agency Investigation (120 days)



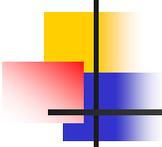
Final Agency Decision



Appeal to MSPB (not EEOC)



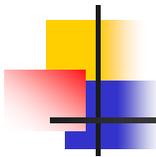
Petition to EEOC\* (not typical for mixed complaint)



## What is a Mixed Case Appeal?

---

- (1) An Appeal filed from an agency action to the MSPB that
- (2) Contains allegations of employment discrimination and
- (3) A Final MSPB decision (*as to discrimination only*) may be reviewed by EEOC if the employee files a petition with EEOC



# Mixed Case *Appeal* Process

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Adverse Action



MSPB Appeal



MSPB AJ - may hold Hearing



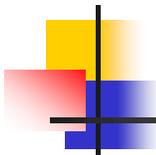
MSPB Initial Decision



Petition for Review with Full Board



Petition with EEOC\* (not typical for mixed complaint)



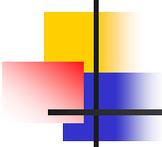
## The Mixed Case Criteria

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A matter is "*appealable*"  
to the MSPB when:

- (1) The employee has *Standing*
- AND
- (2) The MSPB has *Jurisdiction* over  
adverse action alleged in the matter.

\*Remember, BOTH *Standing* and *Jurisdiction* must be present.

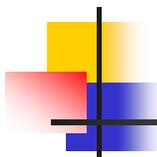


## Standing (Employment Status Required to Appeal to MSPB)

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Common Examples that EEOC receives include:

- Competitive service employees (non-probationary)
- Employees in the Excepted service (other than USPS) who have at least 2 years continuous service
- USPS employees who are preference-eligible with 1+ years continuous service

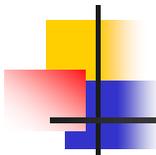


## **Standing *continued***

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*Exceptions include:*

- Political Appointees
- For certain actions, employees of Intelligence Agencies, *e.g.*, CIA, FBI, GAO

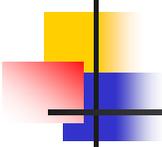


## Scenario One

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After an exam, Donna was selected above many applicants for a Program Analyst position. She was terminated after six months and now alleges race discrimination.

- Is Donna's claim a "mixed matter?"
  - Why or Why not?

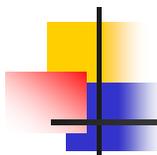


## MSPB “Appealable” Actions

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Typical *Appellate Jurisdiction actions EEOC sees:*

- Removals or Reductions-in-grade,
- 14+ days Suspensions,
- Furloughs for 30 or less days,
- Demotions,
- Furloughs for 30+ days, or
- Negative suitability determination.

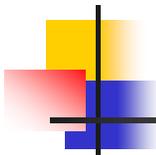


## Scenario Two

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Rita applied for a security position, but was found unsuitable for employment due to illegal use of narcotics. She admits to using cocaine in the distant past, but says that she has been “clean” for 10 years after rehabilitation. She alleges  
Disability discrimination.

- Is this a mixed matter?
- Does she have standing?
- Is this an Appealable Action?



## Mixed Case Elections

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An employee must ELECT to file either a:

- Mixed Case Appeal with the MSPB
- OR
- Mixed Case (EEO) Complaint with his/her agency.\*

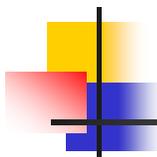
\*EEO Counseling is not considered an election to proceed with a mixed case complaint.

## Mixed Case Elections

### *continued*

- Whichever action (*appeal or complaint*) is *FILED FIRST* will be considered an election to file in that forum (*MSPB or EEO*).
- How a claim proceeds depends on the election made.

*Filing in both forums results in “dual filings,” but what can that mean? Let’s see . . .*

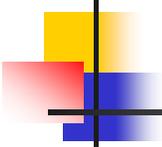


## Mixed Case Dual Filings

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Employee elects MSPB forum (*files an MSPB appeal FIRST*) and there is no dispute of MSPB jurisdiction. *The agency must inform employee:*

- of the need to inform the MSPB of the discrimination claim(s),
- of procedural dismissal of EEO complaint, and
- of ability to appeal MSPB final decision to EEOC.

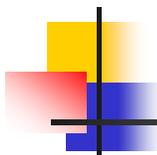


## Mixed Case Dual Filings *continued*

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Employee elects EEO forum (*files a formal EEO complaint FIRST*), the agency should:

- inform MSPB of the existence of the mixed case complaint, and
- ask the MSPB to “dismiss without prejudice” the mixed case appeal on the same matter.

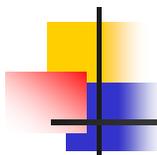


## MSPB Jurisdiction

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If an MSPB Judge decides that the MSPB HAS jurisdiction of an appeal, the agency **MUST**:

- dismiss the mixed case complaint that has been held in abeyance, AND
- advise employee of the right to appeal the MSPB final decision on discrimination aspect only to the EEOC.

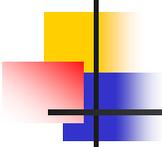


## MSPB Jurisdiction

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If the MSPB Administrative Judge decides that *MSPB LACKS jurisdiction* of a mixed case appeal, the agency **MUST**:

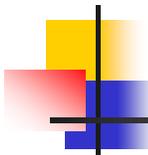
- Treat the matter as “non-mixed,” AND
- inform the employee that s/he may contact an EEO Counselor and file a formal complaint.



## Mixed Case – No Dual Filing

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If an employee files an MSPB appeal but does NOT file a mixed case complaint, *and* the MSPB finds that it lacks jurisdiction over the matter, the agency **MUST** inform the employee of the right to contact an EEO Counselor.

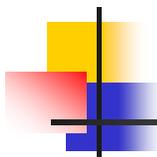


## Scenario Three

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Ronald, a long-time competitive service employee, contacts an EEO Counselor alleging the agency discriminated against him based on national origin when he was terminated. Ronald decides not to file a formal complaint and files a mixed case appeal with the MSPB instead. The agency asks the MSPB to dismiss the appeal without prejudice, stating that Ronald elected the EEO process by initiating EEO contact.

- What do you think about the agency's MSPB contact and the possibility of dismissal?

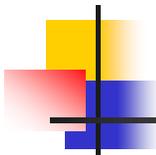


## Scenario Four

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Thomas, a competitive service employee, quit his administrative position after 8 years. He stated that his job became unbearable because his supervisor never spoke to anyone and communicated by e-mail only. He now alleges “constructive discharge” based on sex.

- Is this a mixed matter?
- What do you think about jurisdiction?

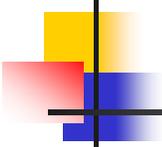


## Scenario Five

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Three months after Florence files a mixed case complaint with her agency, she becomes frustrated with the investigative process. The agency has yet to issue a final decision on her complaint so she wants to file an appeal with the MSPB on the same matter.

- May Florence file an appeal with the MSPB?



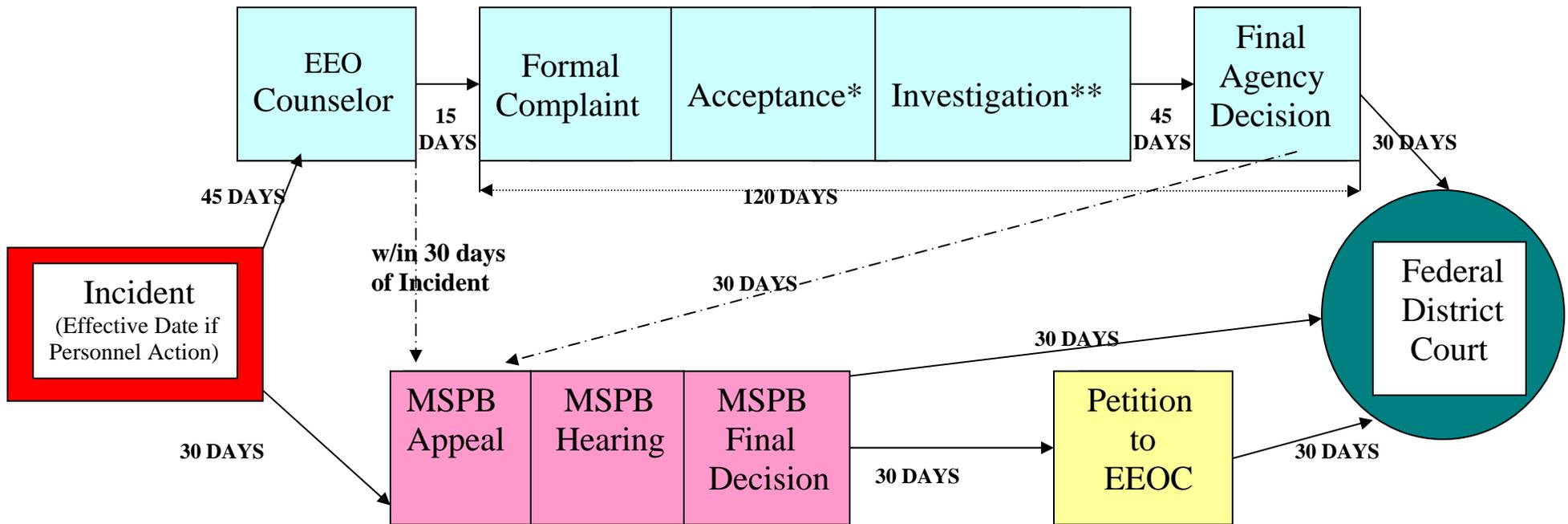
## Special Issues in Mixed Cases

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- Constructive Discharge
- Special Panel
- Subsumed (“Inextricably Intertwined”)

# FEDERAL SECTOR MIXED CASE PROCESS

## Mixed Case Complaints



## Mixed Case Appeals

\* Complainant must be provided a notice that if a final decision is not issued within 120 days of filing a formal mixed case complaint, the complainant may appeal to the MSPB or may file a civil action in a Federal district court.

\*\* Complainant must be advised, following completion of the investigation, that a final decision will be issued within 45 days without a hearing.