REPRESENTING THE AGENCY BEFORE THE MERIT SYSTEMS PROTECTION BOARD: A HANDBOOK ON MSPB PRACTICE AND PROCEDURE[1]

REVIEWED BY RICHARD W. VITARIS[2]

For many years, federal agency labor attorneys learned their business, at least in part, from a concise, blue-covered handbook last published by the Office of Personnel Management (OPM) in 1984 called *Representing the Agency Before the Merit Systems Protection Board*.[3] The book provided a step-by-step explanation of how to represent an agency before the Board and even included sample pleadings. It was a godsend for the novice and overworked administrative law attorney, who lamented its loss when it went out of print.[4]

Since 1984, OPM, like many federal agencies, has downsized, and the quality and quantity of guidance OPM provides to personnel specialists and labor law attorneys has eroded. The *Federal Personnel Manual*, which had provided detailed guidance on processing personnel actions, was abolished by the Clinton administration to cut down on "red tape."[5] It has become more difficult than ever for an agency to get its actions sustained before the Board.[6]

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1. HAROLD J. ASHNER, REPRESENTING THE AGENCY BEFORE THE MERIT SYSTEMS PROTECTION BOARD: A HANDBOOK ON MSPB PRACTICE AND PROCEDURE (Arlington, Virginia: Dewey Publications, Inc. 1998); 600 pages, $95.00 (softcover).

2. LL.M. Labor law, The George Washington University National Law Center; J.D., *with highest honors*, Rutgers University School of Law, Camden; B.A., Georgetown University. The author is an administrative judge with the United States Merit Systems Protection Board, Atlanta Regional Office. Before his appointment as an administrative judge, the author served as both a civilian attorney with the Department of the Army and as an active duty Army judge advocate. The views expressed are solely those of the author and do not purport to reflect the position of the Merit Systems Protection Board.

3. HAROLD J. ASHNER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD (1984).

4. *See* Richard W. Vitaris, *Toward the Simplification of Civil Service Disciplinary Procedures*, 150 MIL. L. REV. 382, 386 (1995) ("Although the handbook would pay for itself if it prevented an agency from losing even a single removal action, OPM did not keep it updated and it is now out of print.").

5. Although the Federal Personnel Manual (FPM) has been abolished, it can continue to provide useful guidance in appropriate circumstances. *Cf.* Maryland v. Office of Personnel Management, 140 F.3d 1031, 1034 (Fed. Cir. 1998) (noting that until OPM publishes another interpretation of the reduction in force (RIF) regulations, the FPM remains a valuable resource for the purpose of construing the RIF regulations).

Representing the Agency before the Merit Systems Protection Board is now back. Mr. Ashner, a co-author of OPM's original publication, has authored a complete rewrite, which is up-to-date and expanded to include new areas of MSPB practice. The book reflects Mr. Ashner's considerable experience in civil service law and procedure. Mr. Ashner served as a hearing officer with the Federal Employee Appeals Authority, a predecessor agency to the MSPB. At the MSPB, he prepared final decisions for the full Board on petitions for review. While at OPM, he coordinated OPM intervention in MSPB cases, and he advised and trained legal and personnel officials from other agencies on employee relations and appeals issues.[7]

The new book provides the equivalent of a weeklong introductory training course on MSPB practice. Mr. Ashner takes the mystery out of adverse action appeals by explaining in plain English concepts such as nexus, the *Douglas* factors,[8] and the performance opportunity period.[9] The book provides far more than an overview, with considerable discussion on the most typical case, a disciplinary action taken against an employee for misconduct under Chapter 75.[10] The book contains a more limited but nonetheless adequate treatment of performance based actions Chapter 43,

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6. The Board's annual reports for the last few years reflect little change in the percentage of agency actions that are affirmed by the Board. However, Board case law has generated more work for the agency representative. For example, in *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R 127, 133-35 (1997), a case in which there was no hearing, the Board held that the agency-imposed penalty was not entitled to deference because the decision letter did not show whether any specific mitigating factors were considered. The Board gave no weight to the decision letter's general reference to consideration of the "*Douglas* factors because that type of general reference does not necessarily show that the deciding official actually considered any specific mitigating factors." *Id.* at 128. Thus, today's labor counselor must devote considerably more time and attention to the decision letter's explanation of the agency's penalty determination.

7. Mr. Ashner served in various capacities with the MSPB, OPM, and other federal agencies. He is currently the Assistant General Counsel for Legislation and Regulations at the Pension Benefit Guaranty Corporation.

8. Douglas v. Veterans Admin., 5 M.S.P.R. 280 (1981). When an employee challenges an adverse action (e.g., discharge) in the ordinary course by initiating MSPB review, the government, to have the action upheld, must establish, one, that the charged conduct occurred, two, that there is a nexus between that conduct and the efficiency of the service, and, three, that the penalty imposed is reasonable. *See* Pope v. United States Postal Serv., 114 F.3d 1144, 1147 (Fed. Cir. 1997).

9. Before initiating an action for unacceptable performance under 5 U.S.C.A. § 4303 (West 1999), an agency must give the employee a reasonable opportunity to demonstrate acceptable performance. *See* Smith v. Department of Health & Human Serv., 35 M.S.P.R. 101, 104 (1987).

even including a discussion of how an agency representative should choose between taking an action under Chapter 75 and under Chapter 43.[11]

It remains, however, an introductory primer and not a treatise on MSPB law and procedure. Treatment of the more exotic types of Board cases such as individual right of action (IRA) appeals under the Whistleblower Protection Act,[12] or the new and ever expanding area of claims under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[13] is insufficient, in that an agency representative is forced to look elsewhere for adequate introductory guidance on these types of cases.

Determining the length and scope of a "Handbook on MSPB Practice and Procedure," as the book is subtitled, is no easy task. Mr. Ashner's 600 page volume strikes a fine balance between the gargantuan treatise by Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice*,[14] which weighs in at a hefty 3544 pages, and one of the superficial 50-100 page guidebooks for supervisors about the MSPB or about adverse actions that are available from a number of publishers.[15]

Mr. Ashner states in his preface that his goal is to prepare a concise summary, in plain English, of everything an agency representative needs to know to be an effective advisor and advocate in MSPB cases.[16] The book is clearly written. It is a useful guidebook not only for its intended audience of agency representatives, but also for agency managers and supervisors who seek to learn more about the disciplinary process; appellant's representatives may also find it useful.

An agency representative need not consult any reference books other than Mr. Ashner's to prepare for a typical adverse action appeal, except for

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10. A federal agency has two avenues to discipline a civilian employee. Chapter 75 allows an agency to take an action against an employee for such cause as will promote efficiency of the service. *See* 5 U.S.C.A. § 7513(a). Chapter 43 allows an agency to reduce in grade or remove an employee for unacceptable performance. *Id.* § 4303.

11. ASHNER, *supra* note 1, at 80-82.

12. Pub. L. No. 101-12, 103 Stat. 16 (1989).

13. Pub. L. No. 103-353, 108 Stat. 3149 (codified beginning at 38 U.S.C. § 4301).

14. PETER BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE (1998) (softcover).

15. For example, FPMI Communications, Inc., offers a series of guidebooks for supervisors in the $19-$29 price range, with such titles as *Federal Manager's Guide to Discipline* and *RIF and the Federal Employee, What you need to Know.*

16. ASHNER, *supra* note 1, at iii.

the individualized research into MSPB case law necessary to address the particular facts and circumstances of the case. The book, however, does not meet the author's goal of telling an agency representative everything he needs to know to be an effective advisor and advocate. This failure is not so much a criticism, as it is a statement that Mr. Ashner's goal was too ambitious given the complexity of current MSPB practice and procedure.

For example, Mr. Ashner's book does little to explain the complexity of charging before the MSPB, except to lay out some bare-boned boilerplate.[17] He does not discuss the pros and cons of whether to charge an employee with a specific label charge, (that is, theft of government property versus using a generic charge such as, conduct unbecoming a federal employee) or even using no label for the charge at all.

An effective agency representative should know that nothing in law or regulation requires that an agency affix a label to a charge of misconduct. If the agency so chooses, it may simply describe actions that constitute misbehavior in a narrative form, and have its discipline sustained if the efficiency of the service suffers because of the misconduct.[18] If, on the other hand, an agency chooses to label an act of misconduct, then it is bound to prove the elements that make up the legal definition of that charge, if there are any. Much of the relevant case law regarding an agency's labeling of its charge discusses the analysis of those elements, and the Board's responsibility regarding that analysis.[19] There is no requirement, though, that the Board imposes on the agency an obligation to label specifically the misconduct, if it chooses not to do so.[20]

Another gap in *Representing the Agency before the Merit Systems Protection Board*, is its inadequate discussion of mixed case procedures.[21] The book does little more than cite the reader to the applicable regulations governing mixed cases. The book's failure to discuss substantive issues of discrimination law is not a source for significant criticism, however. Incorporating a detailed discussion of discrimination law into this book would not have been prudent. An adequate summary of discrimination law would warrant at least 200 pages, expanding the scope of Mr. Ashner's book by one third. Indeed, West Publishing Company's elementary

17. *Id.* at 47.

18. *See, e.g.*, Boykin v. United States Postal Serv., 51 M.S.P.R. 56, 58-59 (1991).

19. *See, e.g.*, Chauvin v. Department of the Navy, 38 F.3d 563, 565-66 (Fed. Cir. 1994); 918 F.2d 170, 171-72 (Fed. Cir. 1990).

20. Otero v. United States Postal Serv., 73 M.S.P.R. 198, 202 (1997).

primer, *Federal Law of Employment Discrimination in a Nutshell*, runs more than 300 pages.[22]

The slight treatment given mixed case procedures is a limitation, however. While Mr. Ashner alerts the reader that in a mixed case the employee can elect to file an appeal, a discrimination complaint, or a grievance,[23] the agency labor counselor also must be familiar with the two different processes to be followed depending upon whether the employee files an Equal Employment Opportunity (EEO) complaint in the mixed case or an appeal to the Board.[24]

For example, to adequately counsel management, the labor counselor needs to know that when an employee files an EEO complaint in a mixed case (as opposed to an appeal to the Board), a final agency decision is issued on the discrimination claim based solely on the agency's investigation. Further, the labor counselor should know that there is no right to a hearing before an EEO Commission (EEOC) administrative judge.[25] The hearing, if any, will be before the MSPB after the employee subsequently files an appeal to the Board following receipt of his final agency decision.[26]

Similarly, an agency labor counselor should know that if the employee initially elects to file an appeal to the MSPB rather than a discrimination complaint with the agency, and the appeal is subsequently dismissed by the MSPB for lack of jurisdiction, the discrimination claims do not simply go away. Rather, the agency is required to promptly notify the individual in writing of the right to contact an EEO counselor within forty-five days of receipt of this notice and to file an EEO complaint.[27]

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21. A "mixed case" appeal is an appeal to the Board from an adverse personnel action, coupled with an allegation that the action was based on prohibited discrimination. *See* 5 U.S.C.A. § 7702 (West 1999); 29 C.F.R. § 1614.302(a)(2) (1999). For example, an appeal involving a removal from service by a career employee in the competitive service who alleges her removal was based upon sex discrimination would be a "mixed case" because the Board would have jurisdiction over the removal action. On the other hand, an appeal of a 14-day suspension, which is alleged to be based on sex discrimination, would not be mixed because the Board does not have jurisdiction over a suspension for 14 days or less. *See* 5 U.S.C.A. § 7512(2); Meglio v. Merit Systems Protection Bd., 758 F.2d 1576, 1578 (Fed. Cir. 1984).

22. MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL (3rd ed. 1992) (softcover). The Nutshell Series is a popular series of short legal guidebooks designed to provide a succinct exposition of the law.

23. ASHNER, *supra* note 1, at 16.

While Mr. Ashner might have had a more expansive treatment of some subjects, the subjects he does discuss–which include virtually everything that an agency representative would need to know concerning the routine non-mixed case adverse action appeal–are exceptionally well presented. Moreover, *Representing the Agency before the Merit Systems Protection Board* provides important, highly practical advice in addition to its

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24. An employee may initiate a mixed case directly with the Board and seek a decision on both the appealable action and the discrimination claim. *See* 5 U.S.C.A. § 7702(a)(1). The review rights that follow the Board's disposition of a mixed case differ from an ordinary personnel case in that the employee may appeal to the EEOC.

After an administrative judge issues an initial decision in a mixed case and the initial decision becomes the final decision of the Board, *see* 5 U.S.C.A. § 7701(e); 5 C.F.R. § 1201.113 (1999), the employee may file a petition for review with the EEOC. *See* 5 U.S.C.A. §§ 7701(e)(1), 7702(b); 5 C.F.R. § 1201.163. If the employee seeks review before the EEOC and the EEOC agrees to consider the decision, the EEOC can concur in the Board's final decision, or it can issue a new final decision. *See* 5 U.S.C.A. § 7702(b). Once the EEOC concurs in a final decision of the Board, the decision becomes judicially reviewable in federal district court. *See id.* § 7702(b)(5)(A). The Board then has no further jurisdiction to review the matter. *See* Williams v. United States Postal Serv., 967 F.2d 577, 579 (Fed. Cir. 1992).

An employee may also initiate a mixed case appeal by filing an EEO complaint with his employing agency. 29 C.F.R. § 1614.302(b). In that event, the EEO complaint is processed normally except that the agency issues a final agency decision on the discrimination complaint after the agency's investigation. There is no hearing before an EEOC AJ. *Id.* § 1614.302(d)(2). If the employee receives an adverse final agency decision, the employee may appeal that decision to the MSPB, not to the EEOC.

Another important difference between a mixed case and normal Board appeal is the employee's appellate rights following an adverse decision. Once the Board issues a final decision in a mixed case–regardless of how the appeal was initiated–the employee may not appeal to the U.S. Court of Appeals for the Federal Circuit which is not empowered to decide discrimination claims in mixed cases. *See* 5 U.S.C.A. § 7703(b). If an individual wishes to appeal to the Federal Circuit from an unfavorable final decision in a mixed case, she must abandon her discrimination claim and proceed before the Federal Circuit solely with respect to the adverse personnel action. *See* Daniels v. United States Postal Serv., 726 F.2d 723, 724 (Fed. Cir. 1984).

25. 29 C.F.R. § 1614.302(d)(2).

26. An employee may file an appeal to the Board within 30 days after he receives the final agency decision on his discrimination claim. 5 C.F.R. § 1201.154(b)(1). Thereafter, the appeal will be adjudicated in accordance with the Board's ordinary procedures, which afford an appellant the right to a hearing. *Id.* § 7701(a)(1) (providing that where an employee "submit[s] an appeal to [the Board] from any action which is appealable to the Board under any law, rule, or regulation," he "shall have the right to a hearing"); *id.* § 7702(a)(1) ("[I]n the case of any employee. . ." who "has been affected by an action which the employee . . .may appeal to [the Board]" and who "alleges that a basis for the action was discrimination[,] . . . the Board shall . . . decide both the issue of discrimination and the appealable action[.]").

27. 29 C.F.R. § 1614.203.

discussion of applicable law and regulation. For example, the book contains seven pages of essential questions for a labor counselor or personnel specialist to ask in preparing a notice of proposed adverse action. Here are just a few:

> *Attendance Violations*:
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> What is the employee's leave pattern (e.g., AWOL, heavy Monday or Friday leave usage, zero leave balance, excessive unscheduled LWOP)?
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> Did agency officials counsel the employee about the leave problem? Does the agency have established procedures for requesting or documenting leave? If so, did the employee follow these procedures?
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> Is the employee currently on leave restriction? If not, should the employee now be placed on leave restriction?
>
> Have agency officials documented all instances of AWOL or other leave abuse?
>
> If the employee has been away from the worksite, what attempts, if any, have been made to contact the employee? Were these attempts documented?
>
> Did the employee abandon the job (i.e., leave the job without resigning and without any apparent intention of returning)?
>
> *Insubordination or Failure to Follow Instructions*:
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> What is the function of the office?
>
> What was the instruction? Was it work-related? Was it clear?
>
> Was the instruction given in writing? If not, were there witnesses when the instruction was given?
>
> Was the instruction mandatory or advisory in nature? Was the employee warned that failure to follow the instruction could lead to disciplinary action?

> What was the employee's response to the instruction?
>
> Did the employee subsequently do the work? When? Was it performed adequately? What impact, if any, did this delay have on the office?
>
> Is there circumstantial or other evidence that the employee's failure to follow the instruction was intentional (in which case a charge of insubordination may be appropriate)?
>
> Is there reason to believe the employee will claim that it was impossible to comply with the instruction?[28]

These questions, which might appear intuitive to an experienced agency representative, are often overlooked by the inexperienced.

Mr. Ashner's questions are very helpful to the agency because the answers to them can easily affect the outcome of the case. For example, it is important in pursuing an attendance-related offense to inquire into whether the employee was under leave restrictions. An employee who has been placed on a leave restriction letter can be charged with AWOL based upon a failure to provide medical documentation in the time frame required by the leave restriction letter,[29] while, in the absence of a leave-restriction letter, an employee can defeat an AWOL charge by presenting administratively acceptable medical evidence for the first time before the MSPB.[30]

As a second example, in considering whether to charge an employee with either insubordination or failure to follow instructions, it is vital for the labor counselor to ascertain if the work was ever actually completed. If an employee given an order or instruction belatedly does the work, the Board may find a charge of failure to follow instructions to be unproved if the employee had not been given a deadline.[31]

In sum, *Representing the Agency before the Merit Systems Protection Board* is an invaluable resource to the new labor counselor and a useful

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28. ASHNER, *supra* note 1, at 29-30.

29. Flory v. Federal Aviation Administration, 17 M.S.P.R. 395, 399 (1983); Morris v. Department of the Air Force, 30 M.S.P.R. 343, 345-46 (1986).

30. Cantu v. Department of the Navy, 24 M.S.P.R. 601, 603 (1984); Morgan v. United States Postal Serv., 48 M.S.P.R. 607, 610-11 (1991).

31. Hamilton v. United States Postal Serv., 71 M.S.P.R. 547, 557 (1996).

primer for the experienced representative. For typical cases, carefully following the guidance contained in this book will eliminate many of the most common mistakes made by agency representatives. This strength is perhaps also the greatest limitation of the book because a great many cases are not typical, and an effective labor attorney must be able to recognize them. Therefore, Mr. Ashner's book must be used with care. It should only be the starting point for research, but never the end point.

If I had one major disappointment with this book, it is that it is written solely for agency representatives and from an agency perspective. This is not to say that an appellant's representative would be wasting his time to read this work, but the appellant's bar as well as the union officers who represent appellants could also benefit greatly from a handbook of this type tailored to their needs.

Either Mr. Ashner should expand his book to include guidance for appellant's representatives in his next edition, or, in the alternative, write a companion volume to assist appellants and their counsel. There is a need for such a book since, except for the small segment of the private bar that specializes in MSPB practice, most attorneys have little or no familiarity with the Board, and most union officers who represent appellants have far fewer training opportunities in MSPB practice than their agency representative counterparts.