



**Key points:**

- Reasonableness of penalty may be determined outside of *Douglas* factors
- Limited review may apply even in mixed cases involving discrimination
- Affected employees could challenge constitutionality of process

**Attorneys raise concerns about new VA appeals process (8/20/14)**

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**IN FOCUS:** The newly enacted Veterans' Access to Care through Choice, Accountability, and Transparency Act of 2014 and accompanying regulations do not adequately protect the rights of executives at the VA and could be challenged for violating their constitutional right to due process, according to federal employment law experts.

Although the Merit Systems Protection Board accomplished the statute's mandate to release regulations outlining the procedures that will be used for the expedited appeals process for VA executives who are removed or demoted for poor performance or misconduct, the [interim final rule](#) is "problematic" and creates additional issues, said federal employment law attorney John Mahoney.

Under the 21-day appeal timeframe, the initial hearing conference would take place within a week or so with the hearing to be held by day 18, but the interim rule does not allow for depositions, he added.

Since "depositions are vital to proving an appellant's case and given the short timeframe, agencies should be required to make individuals available for deposition," he said. Even though individuals who still work at the VA would be obligated to testify at the hearing, Mahoney said, it is unclear whether the interim rule would allow the appellant to subpoena individuals who have retired or otherwise left the agency.

So if the secretary delegated his authority to take the action to someone else, and that person retires, "that could be a problem," he said.

**Reasonableness of penalty**

Mahoney is also concerned about the penalty review provisions. Under 5 CFR 1210(d), the MSPB administrative judge must presume the removal or demotion action was warranted if the agency proves the charge, but the executive may rebut this presumption by showing that the action was unreasonable under the circumstances. However, this standard "muddies the water" when determining the reasonableness of the penalty because, although the *Douglas* factors typically apply, these regulations leave the discretion solely up to the AJ to determine whether the action was reasonable, Mahoney explained. By leaving the AJ the sole discretion to determine reasonableness in general terms, various AJs across the country could potentially apply their own standards, resulting in disparate decisions, especially because the MSPB does not have the authority to review these decisions, Mahoney said.

In addition "if the AJ believes that the penalty is unreasonable under the circumstances, he cannot mitigate the penalty and must simply reverse the action."

So "ultimately these provisions could create more problems for the VA than the statute was meant to solve," he added

Mahoney also said there could be problems for mixed cases involving removals or demotions that also involve alleged discrimination. Normally, if federal employees believe their termination or demotion was the result of discrimination and the MSPB disagrees, the employee can appeal to the Equal Employment Opportunity Commission and ultimately to the US district court. For normal board appeals not involving discrimination, the employee can appeal the MSPB decision to the Federal Circuit. However, under the new statute and the Board's regulation, the employee is not allowed any further appeal beyond the AJ's decision, Mahoney said.

### **Collateral attacks**

Cheri Cannon, a partner at Tully Rinckey, PLLC, said that even though executives do not have a right to appeal to the full MSPB or Federal Circuit, appellants could potentially attack the constitutionality of the statute and interim rule at the federal U.S. district court level. In the introduction to the interim rule, she said, the MSPB seems to be openly inviting individuals to challenge the statute with the board's unusual comment on the limited appeals process, which states that "the MSPB questions the constitutionality of any provision of law that prohibits presidentially-appointed, Senate-confirmed Officers of the United States Government from carrying out the mission of the agency to which they were appointed and confirmed to lead." To minimize those challenges, Cannon said it might be wise for the VA to choose not to use the statute since employees can still be removed using normal Title 5 procedures.