

## Employee Rights

### Federal Employment Appeals Board Faces Shutdown, Changes Under Trump

**T**he Merit Systems Protection Board's central function will come to a halt for several months in 2017, and the agency faces possible fundamental changes to its structure and mission under President-elect Donald Trump.

Board Chairman Susan Tsui Grundmann retired Jan. 6, leaving the board with only one sitting member. The MSPB now lacks a quorum and can't issue legally binding decisions until Trump appoints a nominee and gets a confirmation from Congress.

The three-member board can't have more than two members from the same political party and can't issue decisions without at least two members. The remaining board member, Mark Robbins, is a Democrat appointed by President Barack Obama. The other vacancy has lasted almost a year. President Obama nominated Democrat Mark Cohen in June 2015, but the Republican-controlled Congress didn't confirm him before the 2016 election.

Trump now will have a similar opportunity as Obama to make two appointments and shape the board's approach to claims of discrimination, unfair labor practices, whistle-blower retaliation and other issues in federal employment.

Federal employment practitioners told Bloomberg BNA that a fundamental reconsideration of the agency's role, and even its dismantlement, is possible given the hostile rhetoric Republican lawmakers have used toward federal workers in recent years.

MSPB representatives declined opportunities to be interviewed for this article.

**Temporary Shutdown, Backlog at Board Level.** "The board will continue its work—judges will hold hearings, lawyers at the agency will continue to review appeals," federal labor practitioner Peter Broida told Bloomberg BNA. "But an official decision can't be issued without two members, so the board's decisional output will come to a halt for a while."

In other words, cases decided by the MSPB's administrative judges can become final, but a one-member board won't be able to issue legally binding "merits decisions" in the event that a party chooses to appeal an administrative judge's ruling.

The situation seems likely to persist well into the year.

"I doubt that the MSPB is going to be a priority for the new administration considering all the positions a

new president has to fill," federal labor practitioner Joe Kaplan told Bloomberg BNA. Kaplan is a founding principal of Kaplan & Passman P.C. in Washington, D.C. "In the meanwhile, there'll be a growing backlog of cases that a full board will eventually have to deal with."

"The incoming administration will have two positions to fill, one of course will be Republican, but the other has to be a Democrat," Peter Broida, a federal sector practitioner in Arlington, Va., told Bloomberg BNA.

Kaplan speculated that December 2017 is likely the "best case scenario" in terms of when a new member or members will be appointed.

**Decisional Changes Likely.** The MSPB's approach to cases will almost certainly change once the new members join the board. Stakeholders have varying opinions as to the degree and significance of the changes.

"As to decisional law, Mr. Robbins has not often parted ways" with the previous Democratic majority, Broida said. "He's issued a couple dissents here and there, and a few separate concurrences, but few decisions at the MSPB are split."

One major issue where Robbins has dissented from the other two members is a line of cases dealing with when a federal employee can compare his or her discipline to another worker's and how similar the comparator and situation has to be.

Robbins dissented from a 2013 decision that mitigated a worker's firing to a suspension because others weren't terminated for "comparable offenses." He said that the appropriate standard is whether the comparator was charged with "the same or similar offenses," as opposed to something "comparable." In essence, Robbins believed that the worker and misconduct had to be more similar to compare discipline.

Robbins' views are more likely to prevail in 2017.

Broida noted that the MSPB is "led by its reviewing court," the U.S. Court of Appeals for the Federal Circuit, and that the court's composition is not likely to change significantly. "So to some extent, the ability of the board to change the law is circumscribed by that court's prior decisions," he said.

Nonetheless, Broida said he "suspects there'll be some changes" once the board's new Republican majority is confirmed.

**More Fundamental Changes to Agency's Role?** Federal-sector practitioners and other experts seem more concerned about the possibility of very fundamental changes to the MSPB's role within the federal government.

"I anticipate that politically the winds will shift drastically," attorney John Mahoney in Washington, D.C.,

said. Mahoney thinks “the Trump administration will appoint some pretty conservative members to be on the board.” He mentioned the possibility of the “dismantling of the board,” which has been a component of the government for 38 years.

“One of the things that seems pretty clear is that the new administration is trying to loosen some of the current civil service protections” that allow federal workers to bring employment disputes to the board, Donald Kettl, a professor of public policy at the University of Maryland, told Bloomberg BNA.

Kettl noted that public employee unions have been weakened in the last two to three years.

“There are signals that this administration is interested in going even further, and the implications to the MSPB could be very substantial,” the professor said. “All of a sudden, there are a lot of very fundamental questions about the role of the MSPB, and we’re likely to see a more fundamental debate about the agency than we have in a very long time.”

Questions have arisen and will continue to arise about what protections should exist for senior executives who are fired and what kinds of appeal rights they should have, Kettl and Kaplan said. Both noted that efforts have been made in the past two years to shorten the time period for appeal and review of federal worker discipline. They also pointed to efforts to make it easier to hire workers and to terminate workers without cause at the Department of Veterans Affairs. All of these issues will have an impact on the MSPB’s function and operations.

“They’ll likely try to expand these things farther into the government, and there’s lots more that could be done to curtail the due process rights of federal workers,” Kaplan said.

Political signals seem to indicate that the incoming administration wants to restrict or repeal some federal

employment rights, which should mean that the board’s role and mission would be diminished. But the effect those policies may have is a bit more complicated.

Part of the problem is that MSPB “hasn’t had sufficient resources” to manage federal workers’ appeal rights, Kettl said. “So if you say we’re going to fire a guy and MSPB, which already has a small staff, has a smaller window to decide a case,” the question becomes whether the agency can efficiently carry out its mission at all.

“It seems that at the core of this is a dilemma: The smaller the MSPB staff the longer the appeals process will have to be,” Kettl said. “The only way to do that is to have enough people to do it quickly, so there’s a real tradeoff.”

Kettl said if more terminations are anticipated, it’s likely there will be more appeals. “Then MSPB may very well need to be larger,” he said.

“These are very tough questions, and in practice they have tremendous impact on the ability of any administration to go down this road,” Kettl said.

“The real trick here is the people who evaluate how to do civil service reform have to have some idea how the system is structured before they make changes, and there’s critical nuances,” Broida told Bloomberg BNA. “I hope the incoming administration and all the new folks who come in have a sense of this, realize there’s more to this than what they know, and get information from people within the system they might want to restructure.”

By HASSAN A. KANU

To contact the reporter on this story: Hassan A. Kanu in Washington at [hkanu@bna.com](mailto:hkanu@bna.com)

To contact the editors responsible for this story: Peggy Aulino at [maulino@bna.com](mailto:maulino@bna.com); Terence Hyland at [thyland@bna.com](mailto:thyland@bna.com)

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