



**cyberFEDS® Chatter -- Employee relations**

## **MSPB could remain without a quorum into 2019, creating uncertainty for feds**

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SEPTEMBER 24 -- Agencies could be waiting well into 2019 before they see a quorum once again at the Merit Systems Protection Board unless Congress confirms the current board nominees before the end of this congressional term, according to attorney John Mahoney.

This summer, the Senate Committee on Homeland Security and Governmental Affairs held hearings on the current nominees, Dennis Kirk, Julia Clark, and Andrew Maunz. But the current committee agenda shows no plans to vote on any of the board nominees. A committee staffer told **cyberFEDS®** only one non-MSPB nominee "is ready for consideration" at this week's scheduled business meeting.

Another Senate staffer told **cyberFEDS®** that one reason for the delay is that there is more opposition to Kirk and Maunz than is often reported.

"It's no secret unions don't like them," he said, citing a [letter](#) signed by 11 groups against the nominations, including the American Federation of Government Employees, International Federation of Professional and Technical Engineers, National Association of Government Employees, and National Federation of Federal Employees.

There is also a "log-jam" in the Senate's consideration of numerous nominations, he said, from the Supreme Court to subagency heads, which means even getting a committee vote on the nominees may not be possible.

The staffer said there have been situations where instead of waiting for a regular markup, the committee meets on an ad hoc basis to quickly work on items, and that has included nominations. However, this is usually only the case when the issue or nomination is not controversial or has been delayed earlier in the day by debate, neither of which is the case with the MSPB nominations.

As for the lame-duck session, what happens "will depend on the mid-term elections." The staffer said that if the Senate numbers remain roughly the same, it's likely nothing will happen before the end of the 115th Congress. But if a number of Republican Senate candidates "who really don't like federal workers" get elected, "I can see Democrats figuring they will only get someone worse" if they don't approve Kirk and Maunz.

Mahoney said the delay will create a "continued state of limbo for more appellants and agencies with actions pending before the MSPB," which will continue to grow from the current estimate of about 1,600 appeals "with no end in sight."

Peter Noone, of Avery Dooley & Noone LLP, said "languishing cases" offer no finality to either side and create a persistent sense of uncertainty in costs and operations.

Even though agencies win most cases at the MSPB, "if the employee presents legitimate arguments on appeal, agencies have to be concerned about the potential disruption" of possibly having to rehire someone who was out of the office for years and "deal with the uncertainty of what will happen should they lose and have to pay significant unanticipated back pay and damages awards," he added.

Even though the MSPB changed its [policy](#) on withdrawing petitions for review from the MSPB and electing to pursue the case at the Federal Circuit, agencies are unlikely to see a "flood" of withdrawals from the MSPB process because pursuing Federal Circuit appeals is expensive and often necessitates an attorney representative, while the MSPB is set up to allow employees to defend themselves, Noone said.

"In rare circumstances, those who can afford it go to Federal Circuit and incur the costs," he added.

Currently, individuals can withdraw their MSPB petitions for review if all parties agree and no one is raising a timeliness issue, which "is an option that didn't exist previously," he explained. Under the prior policy, the MSPB clerk granted withdrawal requests only when the request was made early in the process before the "record on petition for review" closed. Otherwise, the full MSPB had to review requests to withdraw.

Another issue is that current member Mark Robbins must step down on March 1, 2019, which could potentially leave the MSPB without any members.

Mahoney said that the president could direct a non-MSPB political appointee or a GS-15 or higher MSPB employee to take over the functions of the member seat for 210 days or until the Senate confirms a nominee under the Federal Vacancies Reform Act.