Shift to Republican majority at MSPB could impact case law

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Key points:

- **Republican majority may be more likely to uphold penalty actions**
- **Disparate penalty analysis may look at narrower pool of comparators**
- **Findings of due process violations could decrease**

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IN FOCUS: The Merit Systems Protection Board has been without a quorum for more than a year, and it's still unclear when the Trump administration will select nominees, who must then go through the Senate confirmation process. Once that happens, experts predict a new Republican majority will likely have a pro-agency and management tilt.

By statute, the three-member board can only have two members of the same political party. That means if and when President Trump restores the quorum, it will shift to a Republican majority from the Democratic majority under President Obama.

"A Republican majority MSPB could greatly affect current Board case law in any area not governed by Supreme Court or Federal Circuit binding precedent," federal employment law expert John Mahoney told ***cyber*FEDS®**.

Plus, even in areas with binding precedent, a Trump MSPB still has the power to interpret and apply those cases narrowly or broadly depending on the particular case up for review and the political climate, he explained.

Mahoney expressed concern "that a Trump MSPB could become a rubber stamp of agency adverse actions to the point that the Board's mission could be undermined entirely."

However, Cheri Cannon, a managing partner at Tully Rinckey PLLC, told ***cyber*FEDS®** that even though people are "extraordinarily concerned" about where the MSPB is going, she has not seen evidence that Republican majority boards are pro-agency or that Democratic majority boards are pro-employee.

Plus, most appeals often go no further than the administrative judge level regardless of who is in charge at the board level. In 2008 during the Bush administration, 12 percent of agency actions were overturned by AJs, 34 percent were upheld or left undisturbed, while 54 percent opted to settle. In 2016 during the Obama administration, 5 percent of agency actions -- not including furlough appeals -- were overturned by AJs, 39 percent were upheld or unchanged, and 54 percent opted to settle.

At the petition for review level, the MSPB only tracks data with respect to whether the board upheld, denied, or decided the petition, without tracking whether the board upheld or overturned the agency action, according to MSPB Chief Information Officer William Spencer.

This data seems to support Cannon's view that "agencies win most cases regardless of the political composition" of the MSPB.

However, there can be different judicial philosophies, based on the administration, which can lead to different interpretations of case precedent, Cannon said.

Due process and penalty analysis

One area that could see a shift surrounds due process violations involving, for example, inappropriately considering *ex parte* communications without notifying the employee. Even though current precedent in this area is set by the Federal Circuit, the MSPB could take a narrower approach in interpreting the *Stone/Ward* factors as outlined in *Ward v. U.S. Postal Service*, 111 LRP 11915 (Fed. Cir. 2011), and *Stone v. Federal Deposit Insurance Corporation,* 99 FMSR 7010, 179 F.3d 1368 (Fed. Cir. 1999), employment lawyer Robert Erbe said.

Under these factors, the MSPB will determine whether the *ex parte* communications introduced new and material information -- and therefore constitute a due process violation -- by evaluating whether:

- The communication introduced new information or merely cumulative information.
- The employee knew the agency failed to provide notice and had a chance to respond.
- The communications were likely to place undue pressure on the deciding official to rule in a certain way.

Penalty mitigation

Joe Kaplan, founding principal of Passman & Kaplan PC, said that "a Republican majority could make it harder to prevail when arguing for a mitigation in the penalty based on disparate treatment in penalties."

In *Boucher v. U.S. Postal Service*, 112 LRP 56207 (MSPB 2012), then-member and current Vice Chair Mark Robbins, a Republican, dissented and disagreed with the majority's decision to mitigate a removal to a 90-day suspension because the agency failed to explain why the employee was treated more harshly than a comparator employee.

Robbins advocated reconsidering the 2010 shift in the law, which, he said, "relaxed the test for impermissible disparity in penalties." Based on case precedent, "broad similarity in misconduct" is sufficient to shift the burden to the agency to explain the difference in treatment. *See Villada v. U.S. Postal Service*, 110 LRP 70123 (MSPB 2010); *Woebcke*

v. Department of Homeland Security, 110 LRP 26911 (MSPB 2010); *Lewis v. Department of Veterans Affairs*, 110 LRP 31478 (MSPB 2010).

But under "the *Villada-Woebcke-Lewis* trilogy" test, "the universe for potential comparators is worldwide," Robbins noted.

In addition, the Federal Circuit previously explained that the overall goal is to ensure agencies do not "knowingly" treat similarly situated employees differently, he added. In *Boucher*, the deciding officials were different, and whether the deciding official knew about the comparator employee's case was unclear, Robbins said, adding that "[t]his alone justifies a difference in treatment, as long as the penalty in this case is otherwise reasonable under *Douglas*."

Kaplan said that when Robbins becomes a member of the majority, "the Board could revisit this issue if it comes up again, and overrule the *Boucher* decision."

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