

# Trump could address MSPB backlog with acting appointments

02/06/18

## Key points:

- **Accrued back pay and attorneys' fees could lead to large payouts**
- **Federal Circuit review is an option for employees willing to pay high cost**
- **Issuing simple denials could resolve backlog quickly**

## Trump could address MSPB backlog with acting appointments

By Anjali Patel, Esq., **cyberFEDS®** Legal Editor Washington Bureau

**IN FOCUS:** With the Merit Systems Protection Board's backlog rising every day, President Trump could use the Federal Vacancies Reform Act to appoint two acting board members from within the MSPB until permanent members are confirmed, **federal employment law expert John Mahoney** told **cyberFEDS®**.

The MSPB has been without a quorum for more than a year, and the current sole member, Mark Robbins, said at the end of last year that about 750 cases were awaiting review.

The White House has not announced any potential nominees, so without interim appointees the backlog will continue to grow for some time, which will have "a major impact" on the outcome of cases awaiting board review, **Mahoney said**.

The "government could be on the hook for some hefty back pay awards if the MSPB eventually reinstates a terminated employee on petition for review, once it has a quorum," **he said**. Consequently, the employing agency "would have to budget for and pay any such retroactive back pay and benefits awards with interest."

## Back pay

Attorney Robert Erbe agreed that large back pay awards could have some effect on operations as agencies try to function under reduced budgets.

The cases where the agency wins at the administrative judge level but loses in front of the board could result in huge awards because back pay and interest would accrue from the original termination through the MSPB reversal decision -- a time period that will be much longer than normal due to the ongoing lack of a quorum, he added.

Nonetheless, under the Back Pay Act, 5 USC 5596, the MSPB can only order back pay for the previous six years, said Cheri Cannon, a managing partner at Tully Rinckey PLLC.

But the "real cost" for agencies is often the attorneys' fees, which may double the amount of the total award, Cannon said.

Consequently, agencies may run into budget issues if they have not allocated sufficient funds at the time the MSPB awards damages, she noted. Initially, the damages award comes out of the Judgment Fund, but must ultimately be reimbursed by the agency.

That means agencies could be forced to find enough money to pay for damages by reorganizing their civilian personnel, salaries, and current year appropriations budget, she said.

However, Erbe pointed out that in certain cases, agencies without sufficient funds in the year back pay is awarded may be able to tap into "prior year money" that was not used for certain budget allocations, such as salaries.

"Prior year money could be available in certain circumstances" even though eligibility for such funds would require a fact-specific analysis, he said.

Some of the impact may be mitigated in cases where the AJ ordered the employee's reinstatement as well as interim relief, which means the agency would pay the employee's salary at least until the time the board rules, but would hold off on the back pay and attorney's fees until the board decision, Erbe explained. That means the agency would have already paid for a portion of the accrued back pay even if the board affirms the AJ decision to reinstate the employee.

### **Impact on Federal Circuit**

The lack of a quorum at the MSPB could also be influencing cases at the U.S. Court of Appeals, Federal Circuit, Mahoney said.

Generally, when appealing an AJ decision, the losing party must choose between filing a petition for review with the MSPB or pursuing an appeal at the Federal Circuit. However, once Federal Circuit review is selected, "an appellant cannot later opt out of that Federal Circuit appeal and return back to the MSPB once it has a quorum," Mahoney said.

But Erbe said that only employees who are willing to pay much higher fees will pursue Federal Circuit review, and agencies cannot pursue a Federal Circuit review without obtaining a finding from the Office of Personnel Management that the case is likely to have a substantial impact on civil service law.

So generally, agencies that lose at the AJ level are stuck waiting for an MSPB quorum before they can have their cases reviewed, he added.

### **Simple denials versus nonprecedential decisions**

Erbe said it's possible that once confirmed, new board members could choose to address the backlog by not issuing nonprecedential decisions, which former Chair Susan Tsui Grundmann's board introduced in 2011 to "give parties greater insight into the MSPB's reasoning in a particular case" without having to issue a precedential decision. 76 FR 60706 (2011).

The MSPB then could return to the practice of issuing simple denials in cases that do not meet the criteria for a petition for review -- which was the board's practice before nonprecedential decisions were introduced, he explained.

In cases that merit further explanation, the board still could issue nonprecedential decisions, which were sometimes issued for certain agency reversals that do not add significantly to the body of MSPB case law, he said.

Hopefully, writing nonprecedential decisions will not overly burden the new members because Robbins has already written his analysis on pending cases, which would provide a good starting point, Erbe said.

**February 6, 2018**

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