

Processing Mixed Cases During COVID-19 National Emergency

Background

Under 29 CFR 1614.302(d)(1), agencies are supposed to advise complainants, who have filed mixed case complaints, that they may either appeal their mixed case complaints to MSPB or file civil actions if their agencies do not issue final decisions on mixed case complaints within 120 days of the date of filing.

Additionally, under 29 CFR 1614.302(d)(2), agencies are to advise complainants that final decisions will be issued within 45 days following completion of an investigation.

During our April 14, 2020 meeting with federal EEO Directors, questions about these requirements were raised; we committed to reaching out to the U.S. Merit Systems Protection Board. The following summarizes the questions and the information provided by the MSPB.

EEO Directors' Questions

- Some agencies have asked whether they are expected to be held to the general deadline of issuing decisions within 45 days following completion of an investigation and what should they advise complainants in terms of their rights?
- Should they encourage complainants to simply elect to electronically file mixed case appeals directly with MSPB if agencies are incapable of processing mixed case complaints or issuing final decisions on such complaints?
- What about the 120-day time period after which a complainant can appeal to MSPB? Is that tolled for now, or does the clock continue to run during the national emergency?
- What should agencies advise complainants who are thinking about filing a civil action if the courts are closed?

MSPB's Responses

MSPB and each of its offices, although physically closed to the public, have remained virtually "open for business" while all of its employees are on 100% telework. MSPB's goal has been to advance its mission and continue its work on the appeals filed with it as normally as possible throughout the pandemic.

MSPB is fortunate to have a well-established, easy to use electronic appeal system, e-Appeal, through which we can receive appeals and pleadings and issue orders, notices, and decisions with no delay in receipt by the Board or the

parties. In addition, we have quickly modified policies to the extent necessary to assure that our adjudication process can continue to be available to all parties, even those who communicate with us by Postal mail.

Toward that end, we have allowed our Administrative Judges to waive our rule disallowing the use of email to transmit pleadings to us under certain circumstances, and have made limited arrangements for sending and receiving Postal mail for those with whom we cannot communicate any other way, although some delays may result from that form of service. We have, though, made every effort to urge parties to take advantage of e-Appeal in order to minimize any disruption to the adjudication of their appeals.

Appeals of mixed and non-mixed cases alike will continue to be processed by MSPB's Administrative Judges, including cases in which a hearing has been requested. As far as MSPB operations are concerned, there is no reason to delay issuance of mixed case decisions appealable to MSPB. We have always applied a good cause standard in judging the reasons for late appeals and pleadings and continue to do so during the present national emergency. Moreover, we have continued to issue decisions in both mixed and non-mixed cases and have received no indication that the courts to which they are appealable, even if closed for most purposes, are not accepting appeals filed with them.

In short, we believe that there is no reason to delay issuing decisions that are appealable to MSPB.

If agencies have further procedural concerns about processing mixed cases, they can contact Michael Bogdanow, the Acting Director of Regional Operations at the MSP. If they have questions about individual cases, they should contact the relevant MSPB regional office.

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