

EEOC MD-110

CHAP 4

RELATED PROCESSES

INTRODUCTION

As noted in Chapter 2, Section IV.B and Appendix C of this Management Directive, different procedures apply to certain related processes. The relationship between 29 C.F.R. Part 1614 EEO complaints, Merit Systems Protection Board (MSPB) actions, grievances filed pursuant to negotiated grievance procedures, notices of intent to sue in Age Discrimination in Employment Act (ADEA) complaints and the alternative available in Equal Pay Act (EPA) complaints are set out more specifically here. All time frames in this Chapter are expressed in calendar days.

I. MIXED CASE COMPLAINTS AND APPEALS - 29 C.F.R. § 1614.302

A. Definitions

A "mixed case complaint" is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or reprisal related to or stemming from an action that may be appealed to the MSPB. The complaint may contain only a claim of employment discrimination or it may contain additional non-discrimination claims that the MSPB has jurisdiction to address. A "mixed case appeal" is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or reprisal. There is no right to a hearing before an EEOC Administrative Judge on a mixed-case complaint.

B. Procedures

EEOC regulations provide for processing discrimination complaints on claims that are otherwise appealable to the MSPB. Two determinations must be made to decide if the mixed case regulations apply. First, the employee must have standing to file such an appeal with the MSPB. Second, the claim that forms the basis of the discrimination complaint must be appealable to the MSPB.

1. Standing

- a. The following employees generally have a right to appeal to the MSPB and, therefore, to initiate a mixed case complaint or appeal: ⁽¹⁾

(1) competitive service employees not serving a probationary or trial period under an initial appointment;

(2) career appointees to the Senior Executive Service;

(3) non-competitive service veterans preference eligible employees with one or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and

(4) non-preference eligible excepted service employees who have completed their probationary period or with two or more years of current continuous service (e.g., attorneys).

b. The following employees generally do not have a right to appeal to the MSPB:

(1) probationary employees (but see 5 C.F.R. § 315.806, allowing appeals alleging discrimination based on party affiliation, marital status, procedural deficiencies);

(2) certain non-appropriated fund activity employees; ⁽²⁾

(3) employees serving under a temporary appointment limited to one year or less; and

(4) employees of the Central Intelligence Agency, the General Accounting Office, the United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority, and the Federal Bureau of Investigation.

2. Appealable Actions

a. Most appealable actions fall into the following six categories:

(1) reduction in grade or removal for unacceptable performance;

(2) removal, reduction in grade or pay, suspension for more than fourteen (14) days, or furlough for thirty (30) days or less for cause that will promote the efficiency of the service;

(3) separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of a reduction-in-force;

(4) reduction-in-force action affecting a career appointee in the Senior Executive Service;

(5) reconsideration decision sustaining a negative determination of competence for a general schedule employee; and

(6) disqualification of an employee or applicant because of a suitability determination.

- b. See Appendix I for a more complete listing of appealable actions.

3. Election to Proceed is Required

- a. The regulations provide that a covered individual may raise claims of discrimination in a mixed case either as a direct appeal to the MSPB or as a mixed-case EEO complaint with the agency, but not both. 29 C.F.R. § 1614.302(b).
- b. Whatever action the individual files first is considered an election to proceed in that forum. § 1614.302(b). Filing a formal EEO complaint constitutes an election to proceed in the EEO forum. Contacting an EEO Counselor or receiving EEO counseling does **not** constitute an election.
- c. Where an aggrieved person files an MSPB appeal and timely seeks counseling, counseling may continue pursuant to § 1614.105, at the option of the parties. In any case, counseling must be terminated with notice of rights pursuant to § 1614.105(d), (e), or (f).

4. Procedures for Handling Dual Filing

- a. Where the agency does not dispute MSPB jurisdiction

(1) If an individual files a mixed case appeal with the MSPB before filing a mixed case complaint with the agency, and the agency does not dispute MSPB jurisdiction, the agency must thereafter dismiss any complaint on the same claim, regardless of whether the claims of discrimination are raised in the appeal to the MSPB.⁽³⁾

(2) The agency or the EEOC Administrative Judge must advise the complainant that s/he must bring the claims of discrimination contained in the dismissed complaint to the attention of the MSPB, pursuant to 5 C.F.R. § 1201.151, et seq.

(3) Where an agency has not accepted a complaint for processing, i.e., has disposed of the complaint on procedural grounds, the resulting final agency decision is appealable to the Commission. § 1614.302(d)(1); Abegglen v. Department of Energy, EEOC Appeal No. 01966055 (October 9, 1998).

- b. Where the agency or the MSPB Administrative Judge questions MSPB jurisdiction

The agency shall hold the mixed case complaint in abeyance until the MSPB Administrative Judge rules on the

jurisdictional issue, notify the complainant that it is doing so, and instruct him/her to bring the discrimination claim to the attention of MSPB. During this period, all time limitations for processing or filing the complaint will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB Administrative Judge finds that MSPB has jurisdiction over the claim, the agency shall dismiss the mixed case complaint and advise the complainant of the right to petition EEOC to review MSPB's final decision on the discrimination issue. If the MSPB administrative judge finds that MSPB does not have jurisdiction over the claim, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

c. Where a complainant files with the agency first

If an employee first files a mixed case complaint at the agency and then files a mixed case appeal with the MSPB, the agency should advise MSPB of the prior agency filing and request that the MSPB dismiss the appeal without prejudice.

5. Processing Where MSPB Dismisses a Mixed Case Appeal Because it Finds No Jurisdiction (That Is, the Case Is Not Mixed)

- a. If an individual files a mixed case appeal with MSPB instead of a mixed case complaint, and MSPB subsequently dismisses the appeal as non-jurisdictional, the agency must inform the individual that s/he may contact a Counselor **within forty-five (45) days** to raise the discrimination claim(s) and that the filing date of the mixed case appeal will be deemed to be the date the individual initially contacted the Counselor.
- b. If the individual filed the appeal after the agency issued an agency final decision on the mixed case complaint or after the agency failed to issue a final decision on the mixed case complaint **within 120 days**, the agency must provide the complainant with a thirty (30) day notice of right to a hearing and decision from an EEOC Administrative Judge or an immediate final decision by the agency pursuant to § 1614.108(f) and thereafter proceed as in a non-mixed case.

6. Processing Mixed Case Complaints Filed at the Agency

If an employee elects to file a mixed case complaint, the agency must process the complaint in the same manner as it would any other discrimination complaint, except :

- a. Within **forty-five (45) days** following completion of the investigation, the agency must issue a final decision without a hearing before an EEOC Administrative Judge.

- b. Upon the filing of a complaint, the agency must advise the complainant that if a final decision is not issued within **120 days** of the date of filing the mixed case complaint, the complainant may appeal the claim to the MSPB at any time thereafter, as specified in 5 C.F.R. § 1201.154(a), or may file a civil action as specified in § 1614.310(g), but not both.
- c. Also upon the filing of a complaint, the agency must notify the complainant that if s/he is dissatisfied with the agency's final decision on the mixed case complaint, s/he may appeal the claim to the MSPB (not the EEOC) within **thirty (30) days** of receipt of the agency's final decision.
- d. Upon completion of the investigation, the agency must notify the complainant that a final decision will be issued within forty-five (45) days without a hearing before an EEOC Administrative Judge.
- e. Upon issuance of the agency's final decision on a mixed case complaint, the agency must advise the complainant of the right to appeal the claim to the MSPB (not EEOC) within **30 days** of receipt of the notice and of the right to file a civil action as provided in § 1614.310(a).