Examining the Inefficiencies of the Federal Workplace

Recommendations for Reform

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INTRODUCTION

This paper illustrates the inherent redundancies, inefficiencies and inequities in the current system for Federal employees contesting workplace issues and proposes a solution.[1] Employees and management may find themselves entangled in a burdensome and complicated process which may take years to resolve. Employees can either consecutively or simultaneously have claims which are based primarily on the same set of facts adjudicated by the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor (DOL) and the Merit Systems Protection Board (MSPB). Under the current system, Federal government management is often reluctant to take necessary disciplinary action to contest dubious claims filed by employees. The result is a bureaucracy that accommodates employees who cannot or will not perform their jobs because, at times, management is unable to meaningfully and efficiently deal with the problem and the ensuing burden of litigation.

The complexities of the current system are best illustrated by using a hypothetical scenario of an employee who pursues a dubious claim through each and every available forum. Charts delineating the complexities of the system and a proposal for reform are attached as Appendices.[2] The solution outlined herein is not intended to be a panacea, but to encourage discussion to resolve the problems in the current system.

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[1] In addition to the forums discussed in this paper, employees who are members of a union may bring matters of dissatisfaction before an arbitrator rather than before the Equal Employment Opportunity Commission or Merit Systems Protection Board. 29 CFR 1614.301(a).

[2] This paper is intended for dissemination to all interested parties in the private and public sectors. This paper is provided for educational purposes only and is not to be construed as legal advice. Any person faced with the issues discussed herein should consult with appropriate legal counsel. This paper has no policy or regulatory effect and confers no rights or remedies.

Hypothetical Scenario

In this hypothetical, we will assume an employee with a dubious claim who exhausts every forum and avenue of appeal legally available. The process begins with a secretary who complains to her supervisor at a Federal agency (Agency) that she suffers from wrist pain. This employee tells her supervisor that her doctor advised her that she suffers from carpel tunnel syndrome in both wrists. The employee asks her supervisor to remove the typing responsibilities of her job as a reasonable accommodation under the Rehabilitation Act. Pursuant to the Rehabilitation Act, agencies are required to offer accommodations to qualified individuals with a disability.[3]

The supervisor asks the employee to provide medical documentation concerning the expected length of time and severity of the condition. Despite multiple requests, however, the employee fails to provide such documentation. In an effort to determine a reasonable accommodation, the supervisor conducts an ergonomic review of the employee's work station which concludes that the work station conditions are satisfactory. The supervisor then denies the employee's request because the request is unsupported. The employee subsequently claims an inability to perform an essential function of her job.

The employee blames her wrist injury on her job at the Agency and files a claim for compensation with the DOL Office of Worker's Compensation. The Agency questions this claim because, although the employee has not reported to work, she admits that she is able to engage in other activities involving her wrist, such as bowling, playing the piano and tennis. The employee also files a complaint with her Agency's Office of Equal Opportunity (OEO) asserting that the Agency violated the Rehabilitation Act by failing to accommodate her disability. The employee receives several suspensions pursuant to the Agency's policy of progressive discipline and is removed from her position because she fails to report to

[3] This act is similar to the American with Disabilities Act that covers non-federal employees.

work. The employee files an appeal of her removal with the MSPB and files additional charges with her Agency's OEO alleging that her discipline was in retaliation for her complaint with the agency's office of equal opportunity. The specifics about each of the employee's claims are brought before the EEOC, DOL and MSPB discussed below.

Equal Employment Opportunity Commission Complaint- Legal Authority and Claim Procedure

The EEOC was established by Title VII of the Civil Rights Act of 1964 and enforces, among other things, claims of discrimination, non-compliance with the Rehabilitation Act, and retaliation for filing an action with the agency's OEO.[4] According to the hypothetical, the employee claims the Agency did not fulfill its duties under the Rehabilitation Act because it failed to accommodate her carpel tunnel disability. The employee also claims that any subsequent discipline was in retaliation for her complaints to the Agency's OEO.

The EEOC process commences with the employee contacting her Agency's OEO office within 45 days of the alleged discriminatory action.[5] The Agency OEO office offers either counseling or Alternative Dispute Resolution, and the employee chooses counseling.[6] Because counseling does not resolve the employee's complaint, the Agency conducts a final interview and notifies the employee of her right to file a formal complaint with the Agency. The employee files a formal complaint with the Agency and the Agency acknowledges her complaint in writing. The Agency does not exercise its authority to dismiss the employee's complaint, but if it had, she could have appealed that decision to

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[4] 42 U.S.C. Section 2000e-16 et seq. (Employment by Federal Government), 29 U.S.C. Section 791 et seq. (Rehabilitation Act).

[5] 29 CFR 1614.105(a)(1).

[6] 29 CFR Sections 1614.102(b)(2), 1614.105(b)(2). Counseling must be completed within 30 days and ADR within 90 days. 29 CFR Sections 1614.105(d) and (f).

the EEOC Office of Federal Operations.[7] The Agency must therefore conduct an investigation of the employee's complaint within 180 days of when her complaint was filed.[8]

After the investigation is completed, the Agency issues a notice to the employee and provides her with a copy of the investigative file. The employee is then allowed to either request an immediate final decision on her complaint from the Agency, or request a hearing before an EEOC administrative judge.[9] If the employee requests an immediate final decision from the Agency, the Agency issues a final decision consisting of findings on the merits of each issue in the complaint and notifies the employee of her right to either appeal the final action to the EEOC Office of Federal Operations (OFO) or file a civil action in federal district court.[10] If the employee requests a hearing, the employee and Agency are allowed to serve requests for documents, interrogatories and notices of depositions. At the hearing, both the employee and the Agency may call witnesses to testify. An administrative judge presides over the hearing and must issue a decision within 180 days of the hearing.[11]

If the administrative judge had found discrimination, he or she would have ordered appropriate relief and the Agency would have been required to issue a final order fixing the problem within 40 days or the administrative judge's decision would become the final Agency decision.[12] If the Agency issues an order notifying the employee that the Agency will not fully implement the administrative judge's decision, the Agency must also

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[7] 29 CFR 1614.107.

[8] 29 CFR 1614.108(e).

[9] 29 CFR 1614.108.

[10] 29 CFR 1614.110(b).

[11] 29 CFR 1614.109 (I).

[12] 29 CFR 1614.109 (I).

simultaneously file an appeal with the EEOC OFO.[13]

Assuming that the administrative judge issues a decision finding no discrimination, the employee is dissatisfied with the decision and files an appeal with the OFO within 30 days of receiving the decision.[14] The OFO accepts the case and both parties have an opportunity to submit briefs.[15] The OFO issues a decision affirming the administrative judge's decision and the employee files a request for reconsideration of this decision with the OFO.[16] The EEOC denies the employee's request for reconsideration, and she files a complaint in Federal Court within the 90 day limit. The employee also could have filed a complaint in Federal Court if a decision was not rendered within 180 days of filing the formal complaint with the Agency.

Unfortunately at this point, the process starts over because the Federal Court review consists of a trial *de novo* which means that the prior administrative decision is suspended. The employee and the Agency again serve each other with requests for documents, interrogatories and notices of depositions. Pre-trial motions are filed and witnesses are called to testify at a trial before a jury (except in the case where only an age discrimination complaint has been filed or where the parties agree to a bench trial). After a finding in favor of the Agency by the jury, the employee appeals this decision to the United States Court of Appeals. Following an unfavorable decision by the Federal Appeals court, the employee files an appeal before the U.S. Supreme Court which rejects her case. Because the employee requested a hearing before the EEOC and later filed a complaint in Federal Court, the process took several years to complete.

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[13] 29 CFR 1614.110(a).

[14] 29 CFR 1614.402.

[15] The employee has 30 days from the date of filing of the appeal to submit a brief. The Agency's brief is due within 30 days from the due date for the employee's brief or 60 days from the date of her appeal if she chooses to not file a brief. 29 CFR 1614.403.

[16] 29 CFR 1614.405(b).

Department of Labor - Legal Authority and Claim Procedure

The employee filed an occupational injury claim with the DOL Office of Worker's Compensation Programs claiming her carpel tunnel syndrome was caused by her job. The employee was required to file a claim with the DOL rather than in the state or Federal court system because sovereign immunity insulates the United States government from any common law tort liability for the work-related injuries of its employees. Federal employees, however, can receive compensation for injuries sustained on the job through the Federal Employees' Compensation Act (FECA) which provides for a limited waiver of sovereign immunity.[17] The FECA is operated by the DOL and is administered by the Division of Federal Employees' Compensation. The employee can receive payment from DOL pursuant to FECA and the DOL seeks reimbursement from the agencies for these payments.[18]

The employee files her claim for compensation with the DOL within the 30 day deadline.[19] The employee's supervisor completes a report in connection with the DOL claims. He questions her claim because, while the employee claims her wrist pain rendered her unable to perform her job, she admits she plays piano, tennis and attends her bowling league each week. He consults with a medical doctor who advises him that the employee should have been likewise unable to engage in other activities that could aggravate her condition. Also, the medical doctor questions whether the Agency job was

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[17] The FECA was enacted in 1916 and provides compensation for wage loss and for certain permanent bodily impairments incurred by civilian Federal employees as a result of injury, illness or death sustained during the performance of their duties. 5 U.S.C. Section 8101 et seq.

[18] 5 U.S.C. Section 8147(b).

[19] 20 CFR 10.100. A traumatic injury claim must be caused by a specific event or incident or series of events or incidents within a single day or work shift. Conditions produced in the work environment over a period longer than a single workday or shift constitute an occupational disease or illness claim. 20 CFR 10.5(q). The thirty day deadline is found at 20 CFR 10.101(b).

the cause of the employee's problem because she also engaged in other activities that could have caused her medical condition. The employee fails to submit any medical documentation to support her injury claim, therefore, the DOL denies her claim.

The employee has several options when contesting the DOL's denial of her claim. She could request a hearing within 30 days, request reconsideration within one year, or appeal to the DOL Employees' Compensation Appeal Board within 90 days. Assuming the employee requests a hearing from DOL, a hearings representative from DOL presides over the hearing, questions the employee and allows the employee to add any additional information before the conclusion of the hearing. While the Agency is allowed to send a representative to a hearing, the representative attends primarily in the role of an observer without the right to question the employee or make any argument. The Agency representative, upon request of the employee, or the employee's representative, may be asked by the DOL hearing representative to give oral testimony at the hearing. The employing Agency is not a party to the hearing, but it has an interest in the outcome because it will ultimately reimburse the DOL for any medical and compensation claims. The Agency, therefore, is entitled to a copy of the hearing transcript and allowed 20 calendar days to submit comments or additional material for inclusion in the record.[20]

Following the DOL hearing officer's decision affirming the rejection of the employee's claim, she again has several appeal rights. She either has one year to submit additional information to support her request for reconsideration or she has 90 days to appeal the decision to the DOL Employees' Compensation Appeal Board (ECAB). The employee chooses to request reconsideration.

Following the denial of her request for reconsideration, the employee exercises her right to appeal the decision to the ECAB. Because she chose to have a hearing, request reconsideration and appeal to the ECAB, the DOL appeals process lasted over two years before a final resolution was reached.

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[20] 20 CFR 10.617(e).

Merit Systems Protection Board - Legal Authority and Procedure

The MSPB is an independent Agency in the Executive branch. The MSPB was established by the Civil Service Reform Act of 1978, which replaced the Civil Service Commission with three new independent agencies: the Office of Personnel Management, the Federal Labor Relations Authority and the MSPB.

After a lengthy procedure which led to the employee's removal, she elected to file an action contesting her removal before the MSPB, in addition to all of her previously discussed claims. Because her Agency's personnel handbook contained a table of penalties that required progressive discipline, the employee was subject to discipline prior to any removal action.[21] The Civil Service Reform Act requires written notice and an opportunity to respond both orally and in writing to proposed discipline. For each of the employee's suspensions for 14 days or less, she was entitled to advance written notice stating the specific reasons for the proposed action and a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the response, representation by an attorney or other representative and a written decision.[22] When the employee was removed, the Agency was required to serve her with 30 days advance written notice.[23] Prior to removing the employee from her position, her Agency was required to allow her at least seven days to answer orally and in writing and to offer evidence in support of her response.[24] The employee was allowed to be represented by an attorney or other representative.[25] Following this procedure, the Agency issued a

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[21] See Douglas v. VA, 5 MSPR 280, 5 MSPB 313 (1981).

[22] 5 U.S.C. Section 7503.

[23] 5 U.S.C. Section 7513(b)(1). The thirty day notice also applies to employees subject to suspension of more than 14 days, reduction of grade or pay, and/or furlough of 30 days or less. 5 U.S.C. Section 7512.

[24] 5 U.S.C. Section 7513(b)(2).

[25] 5 U.S.C. Section 7513(b)(3).

written decision that included specific reasons for the removal action.[26]

The employee appeals her removal to the MSPB within 20 days of receiving the removal decision.[27] Because the employee claimed the removal involved discrimination, the MSPB is authorized to decide the discrimination issue, while the employee appeals the remaining discrimination allegations to the EEOC.[28] Upon receipt of the appeal, the MSPB assigns the case to an administrative judge who issues a scheduling order and the Agency response file is due within 20 days of the date of the order.[29] Within 15 days of the date of the scheduling order, any pre-trial motions or discovery are generally due.[30] The Agency is generally required to initiate settlement negotiations within 35 days of the scheduling order.

At the employee's request, the MSPB administrative judge holds a hearing and issues an initial decision in favor of the Agency which becomes final if neither party files a petition for review with the three member MSPB panel within 35 days.[31] In cases involving discrimination, the MSPB is required to issue a decision within 120 days.[32] There is no

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[26] 5 U.S.C. Section 7513(b)(4).

[27] 5 U.S.C. Section 7513(d). Other Agency personnel actions that Federal employees may appeal to the Board include, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less, performance based removals or reductions in grade, denials of within-grade increases, certain reduction-in-force actions, denials of restoration to duty or reemployment rights, and removals from the Senior Executive Service for failure to be recertified. Determinations by OPM in employment suitability and retirement matters are also appealable through the MSPB. 5 CFR Section 1201.22 (appeal must be filed by the later of effective date or date received)

[28] 5 U.S.C. Section 7702(a).

[29] 5 CFR Section 1201.25.

[30] 5 CFR Section 1201.73(d).

[31] The Agency has no statutory right to a hearing. 5 C.F.R. Section 1201.24(d). The AJ decision becomes final on the later of 35 days after the date of the decision or within 30 days after the date received unless appealed with the 3 member board.

[32] 5 U.S.C. 7702(a)(1).

penalty or sanction against the MSPB for its failure to comply with that time limit.[33] During fiscal year 1999, the average time to process an appeal by an administrative judge was 100 days.[34]

The employee files her appeal with the three member MSPB panel. The average processing time for appeals to the three member MSPB panel during fiscal year 1999 totaled 222 days.[35] Following an adverse ruling by the MSPB panel, the employee appeals the decision to the Court of Appeals for the Federal Circuit within 60 days.[36] The case can remain pending before the Court of Appeals for the Federal Circuit for several months. The Court of Appeals for the Federal Circuit affirms the MSPB decision and the employee appeals this decision to the U.S. Supreme Court which rejects her case.

Disadvantages with Current Process

I. Delay

The agencies processing claims are bound by few statutory or regulatory time frames in which to complete their work. Generally, the administrative process is lengthy and duplicative. It may take several years for the complaint to be adjudicated if either the employee or Agency elects to appeal the claim through all available routes and waits until the deadline to file each appeal. For example, the employee may wait up until one year to request reconsideration of a DOL decision. EEOC claims will take even longer because

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[33] Moye v. VA, 10 MSPR 448 (1982); The MSPB generally runs the fastest process, often meeting the 120 day limit from the date the case is filed, to issuing a decision.

[34] 21st Annual Report of the MSPB.

[35] 21st Annual Report of the MSPB.

[36] 5 U.S.C. Section 7703. Exceptions include appeals of MSPB decisions in mixed cases in which the discrimination issue is appealed. Such cases may be appealed to an appropriate U.S. district court. Also, Hatch Act cases involving State or local Government employees may be appealed to the U.S. District courts.

the process can involve an investigation, depositions, interrogatories, document requests, a hearing and a duplication of this entire process if the claim is filed in Federal court.

This delay is problematic because, in tight fiscal situations, managers may be unable to commit resources to replace the removed employee until a final decision is reached. The delay creates disillusion for the remaining workforce and allows employees to abuse the system and use the delays as a bargaining tool to effect a settlement. This subverts the purpose of protecting honest and hardworking members of the Federal workforce. The delay also supports the public perception that it is impossible to take action against a Federal employee.

Delay is also detrimental for employees with legitimate claims. Employees are required to wait an unreasonable time for justice. Employees with legitimate claims may be subject to the perception that their claim is spurious.

II. Use of Progressive Discipline May Not Be Used in Cases With Multiple Administrative Proceedings

A recent case issued by the U.S. Court of Appeals for the Federal Circuit may decrease the use of progressive discipline. When determining appropriate discipline, supervisors are required to consider various factors known as the "Douglas factors."[37] The Douglas factors were identified in a case before the MSPB in which the board discussed its authority to mitigate penalties. These factors include the employee's past disciplinary record. When determining the appropriate discipline for an offense, the Federal Circuit held that supervisors may not consider disciplinary actions that are subject to ongoing challenges.[38] Although the court did not identify the types of challenges covered by its rule, the Court was dealing with a case with prior actions that were still in

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[37] See Douglas v. VA, 5 MSPR 280, 5 MSPB 313 (1981).

[38] Gregory v. United States Postal Service, 212 F.3d 1296 (Fed. Cir. 2000), cert granted, 121 S.Ct. 1076, 148 L.Ed2d. 954 (2001).

the administrative grievance process. Therefore, this rule would apply to prior actions on appeal to the MSPB, Federal Circuit Court of Appeals, U.S. Supreme Court, or those in the negotiated grievance/arbitration process. Courts may possibly apply this rule to matters pending before the EEOC and DOL.[39] Because appeals may take years to work its way through the administrative process, supervisors will not be able to rely upon prior discipline under appeal when determining the appropriate penalty for a current offense. Accordingly, the supervisor may not be able to take progressive discipline.

III. Duplication of Effort - Fragmented Jurisdiction

Because several different agencies can adjudicate claims for different remedies involving substantially the same set of facts, both the employee and the Agency are often required to submit the same information to several different government agencies. Each government Agency has promulgated its own regulations with different formats for the information submitted. The resulting duplication of effort taxes the resources of the Agency. The employee and his or her Agency are continually burdened with submitting information to the various forums to comply with competing deadlines.

In addition, the employee, management and witnesses can be required to testify more than one time in the different forums about the same set of facts. For example, in an EEOC case, employees are required to provide a sworn statement to an investigator, testify at a hearing held before the EEOC and testify again at a trial if the employee files an action in Federal court. The trial before the Federal Court is essentially the same proceeding which occurred before the administrative tribunal. In addition to repetitive testimony, both parties are burdened with duplicate pre-trial obligations. Prior to the hearing and trial, the parties are involved in depositions, interrogatories, and document

[39] The Federal Court of Appeals has declined to extend this rule to actions challenged before EEOC as discriminatory reasoning that it is a collateral attack on the validity of the disciplinary action itself. Blank v. Dep't Army, 247 F.3d 1225 (CAFed. 2001).

production. Allowing a new trial in Federal court also undermines the usefulness of the administrative EEOC process.

IV. No Recourse for Claims Without Merit

There is no recourse for the Agency in the event an employee files a claim without merit with an administrative Agency. There is also no prohibition against an employee for forum shopping or filing claims with the EEOC, DOL and MSPB based on the same set of facts. The employee is not obliged to pay any costs or fees relating to these administrative processes. While false statements on government forms may be prosecuted in a criminal proceeding, claims without merit may not rise to this level and thus go unpunished. Dubious and duplicate claims congest the system and delay justice for meritorious claims.

Furthermore, meritless claims are costly to the government because it is often more economical for the government employer to offer a cash settlement to the complaining employee rather than expend resources and defend the claim. Employees do not pay a filing fee for filing a claim with EEOC, DOL and MSPB. The Agency is responsible for providing for an investigation in EEOC matters which is often performed by contract investigators. Following a hearing before the EEOC the Agency must pay for transcripts and provide a free copy for the employee. In addition the Agency must absorb costs of Agency management and lawyers.

SOLUTION

The myriad of forums available for different legal remedies for complaints based on the same set of facts pose problems for both Agency management and the complaining employee. Employers and employees would be better served with a consolidation of employment law forums for Federal sector employees, simplification of procedures and imposition of time limits for processing cases. Economy and efficiency would be

increased with a consolidation of forums. Duplication of effort would be eliminated. Processing time will decrease because the parties are not burdened with waiting for the resolution of several appeals that may be pending in the various forums currently available. A timely resolution to these issues would benefit both the employer and employees.[40] These proposed changes are discussed more fully below. A chart outlining the procedures and time limits is attached as Appendix B.

I. Consolidation of Forums

It is proposed that all Federal employee administrative proceeding complaints be adjudicated by one administrative Agency. Currently, several different agencies adjudicate claims. Proceedings involving work injuries are currently adjudicated by the DOL, appealable personnel actions are adjudicated by the MSPB, and discrimination claims are processed by the employee's Agency, the EEOC and Federal Courts. Employees would be required to raise all claims that occurred prior to the filing date, whether they constitute alleged discrimination, disputed personnel action or injury. All claims arising out of the same set of facts should be adjudicated during the same proceeding. To avoid creating another new Federal Agency, these types of claims could be transferred to an existing Agency. The Office of Personnel Management (OPM), which adjudicates other employee benefit issues, could administer these additional employment issues. The structure of OPM would have to be changed to accommodate the additional responsibilities. Employees currently involved in the adjudication process of MSPB, OWCP, and Federal sector EEOC claims could transfer to OPM.

The consolidation of forums, in part, resembles the Civil Service Commission

[40] Through its 1999 regulatory revisions, the EEOC has recognized that the process was inefficient with too may layers of review. The EEOC's revised regulations include alternative dispute resolution, mandatory counselor training, and additional bases for the dismissal of complaints including control of fragmented claims. Early indications show that the changes have only produced limited benefits.

(CSC) which prior to the 1978 Civil Service Reform Act, was responsible for Federal sector equal employment opportunity programs, policies and complaints and various other personnel functions. Certain functions of the CSC were disbursed to other agencies because there was a belief that the CSC's responsibilities as the personnel policy arm of the executive branch undermined its credibility as an impartial arbitrator of employment disputes. However, the 1978 Civil Service Reform Act and subsequent transfers of Federal sector equal employment opportunity programs, policies and complaints did not alleviate this concern because the transfer entailed both policy development and complaint processing. The EEOC currently reviews Agencys' OEO programs and adjudicates claims against the Agency. Additionally, as explained below, employees would still maintain their rights to appeal any decision in Federal court, which should rectify any alleged credibility concerns.

One benefit of a consolidation of forums is economies of scale that would result in eliminating duplicate management and support staff. Also, employees would benefit from a single forum because there is less chance for confusion if the employee has only one place to file a claim. Both employees and management will benefit from presenting information once instead of in several different formats to multiple agencies and complying with differing deadlines. A consolidation of forums will also improve efficiency of the government as it will eliminate the ability of employees to forum shop.

II. One Claim Adjudicator

All claims related to the government employee's employment would be adjudicated by an Administrative Law Judge (ALJ). ALJs serve as independent, impartial triers of fact in formal hearings similar to trial judges who conduct civil trials without a jury. ALJs decisions are afforded statutory protection from undue Agency influence. One claims adjudicator will enhance the consistency of decisions. Currently, administrative judges adjudicate claims brought before the EEOC and the MSPB. Claims before the DOL are adjudicated by claims examiners and hearings officers. Other Federal agencies, such as

the Social Security Administration, use an ALJ to adjudicate claims.

An ALJ would be well suited to adjudicate the breadth of issues resulting from a consolidation of forums. An ALJ must meet rigorous qualification standards. Applicants must be attorneys and have a minimum of seven years of administrative law and/or trial experience involving formal administrative proceedings before local, State, or Federal administrative agencies, courts or other administrative bodies. In addition, applicants must demonstrate that they have had two years of qualifying experience at a level of difficulty and responsibility characteristic of a Federal government attorney actively involved in administrative law and/or litigation work at the level of at least senior level GS-13, or one year characteristic of at least GS-14 or GS-15.

III. Simplified Procedures

Pre-complaint administrative proceedings by the employing Agency would be transferred to OPM. Currently, after an employee files an EEOC complaint, the employing Agency assigns a co-worker as a counselor to meet with the complainant and management independently to resolve the complaint. Although efforts are made to ensure that the co-worker who serves as a counselor is impartial, both the employee and management may not perceive another co-worker to be unbiased. Because the counselor works in the same Agency, it is likely that the counselor will have some knowledge about the individuals involved. As a result, the counselor may enter the assignment with a bias which undermines his or her effectiveness. Also, most counselors are assigned counseling duties as collateral duties and following their efforts will resume working in the same Agency. Such a situation does not lend itself to an effective resolution. A more effective resolution would likely be obtained if the counselor had no potential for bias and was not employed by the Agency in which the complaint arises.

Currently, in an EEOC proceeding, if counseling does not resolve the problem, the Agency investigates the complaint. Administrative proceedings such as Agency investigations would no longer be necessary because an Administrative Law Judge would

preside over the process and oversee any investigation. Investigations would be conducted through discovery procedures in which the Federal Rules of Civil Procedures control. Parties would be required to complete any discovery and pretrial motions within 90 days of the filing of the complaint. An Administrative Law Judge would preside over the hearing and would be required to issue a decision within 60 days. An Administrative Law Judge would likely be perceived more favorably by both the complaining party and the Agency. Currently, agencies usually hire contract investigators. The complaining employees may perceive an Agency hired investigator to favor management. The Agency management, however, is not usually involved in the investigator hiring process. Rather, the Agency's OEO office typically hires the contract investigators. Therefore, Agency management may perceive the contractor as having a bias in favor of the employee.

IV. One Appeal Right

Following the decision by the ALJ, both parties should be allowed an opportunity to appeal the decision through the Federal court system without expanding legal rights. For instance, there is no right of appeal through the Federal court system for DOL cases. A new right of appeal would not be created. For proceedings that already may be appealed through the Federal court system, such as MSPB and EEOC, there would be changes to the appeal process. Similar to MSPB appeals, the appeal should be based on the record developed before the ALJ rather than a new trial. Because the parties would have an opportunity for a hearing before the ALJ, parties to EEOC proceedings would not be allowed a new trial in Federal court. This would align the EEOC process with private party proceedings. Currently, parties to Federal employee EEOC proceedings are allowed to present their case to an investigator who makes findings, before an EEOC administrative judge and again in Federal Circuit court. There is no reason to allow Federal parties three different opportunities to develop a factual record. Federal employees who file an EEOC claim, therefore, are afforded more rights than private sector employees. In private sector

EEOC cases, the EEOC is not the adjudicator of complaints. Instead, the EEOC investigates and sues on behalf of the employee or issues a right to sue letter to the employee.

Similarly, MSPB procedures would be streamlined. Employees in an action appealable to the MSPB are given several different opportunities to develop facts. In response to an appealable action, employees are afforded an opportunity to reply both in writing and orally.[41] In addition, Agencies may also provide a hearing for the employee. Current statutes also allow employees a right to a hearing before a MSPB administrative judge, even if there is no issue of fact.[42]

Multiple opportunities to create a factual record are unnecessary and create undue delay. The parties should be given one opportunity to fully develop the facts and be required to appeal that record. This change would allow the process to more closely resemble other legal proceedings.

The parties should be allowed 30 days to appeal any ALJ decision to the Court of Appeals for the Federal Circuit. Any decision rendered by the Court of Appeals for the Federal Circuit could be appealed to the United States Supreme Court.

V. Required Statutory and Regulatory Changes

A consolidation of forums would require substantial statutory and regulatory change. Numerous statutes and regulations govern the EEOC, DOL and MSPB process for Federal employees. The EEOC process involves 10 sections of statutes and 45 sections of regulations.[43] Parties to DOL proceedings are bound by over 50 sections of statutes and

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[41] 5 U.S.C. 7513(c), 5 CFR 752.404(g).

[42] 5 U.S.C. 7701(a)(1).

[43] See 42 U.S.C. Section 2000e, 29 U.S.C. Sections 791, 794, 794a, 794d, 29 CFR Part 1614.101-1614.607

over 200 sections of regulations.[44] MSPB statutes consist of almost 20 sections and over 100 sections of regulations.[45] Current EEOC, DOL and MSPB regulations would need to be rescinded and one consolidated set of regulations that address Federal employee complaints would need to be issued. Because the Federal Rules of Civil Procedure would bind the parties, statutory and regulatory changes would not have to restate the process for the commencement of an action, service of process, pleadings, motions, depositions, discovery and trials.

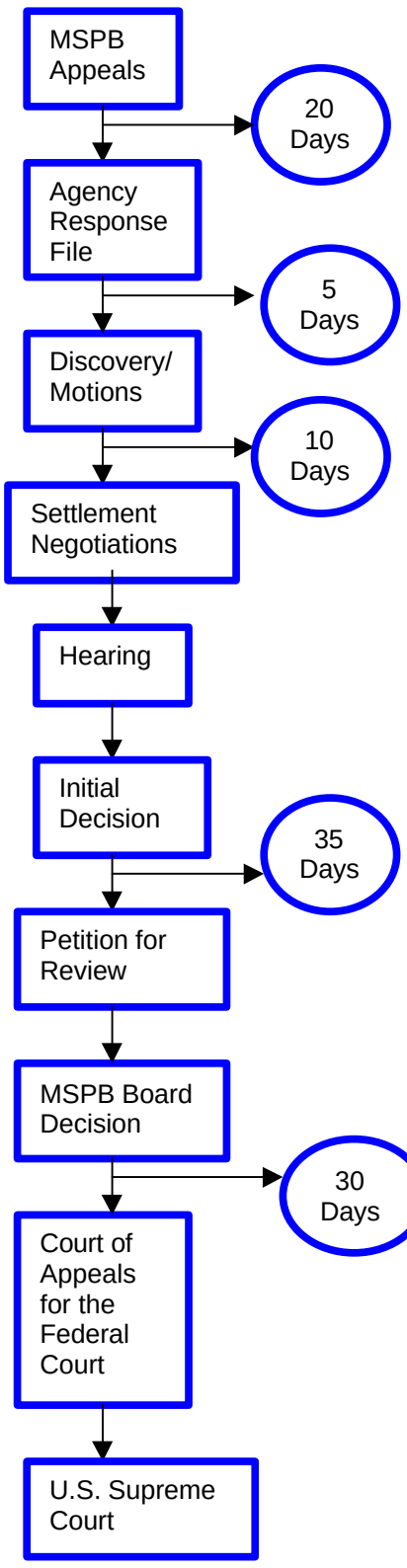
CONCLUSION

The current process for resolving Federal sector employee complaints is replete with duplication of effort and delay. As a result, the employee and the Agency are needlessly burdened and meritorious claims are not resolved in a timely manner. Also, the current process carries few consequences for an employee with a dubious claim who seeks relief in every available forum hoping for a mistake in the process to exploit. To such an employee, the process is like the lottery in that the more tickets he or she buys (or cases filed or appealed), the greater are his or her odds of success. This is contrary to the typical notions of justice which gives injured parties one change to prove their case. A consolidation of the administrative forums and claims would benefit both employees and the Agency, albeit changing all these forums would require a herculean effort necessitating numerous legislative changes. As a result of reorganizing the current process, duplication will be minimized and claims will be processed more timely and efficiently. There are many possible ways to reorganize the current system. While the solution proposed herein represents the view of the authors, there may be other feasible alternatives available. This paper is meant to generate a meaningful discussion to resolve the issues which are of great importance to both government management and employees.

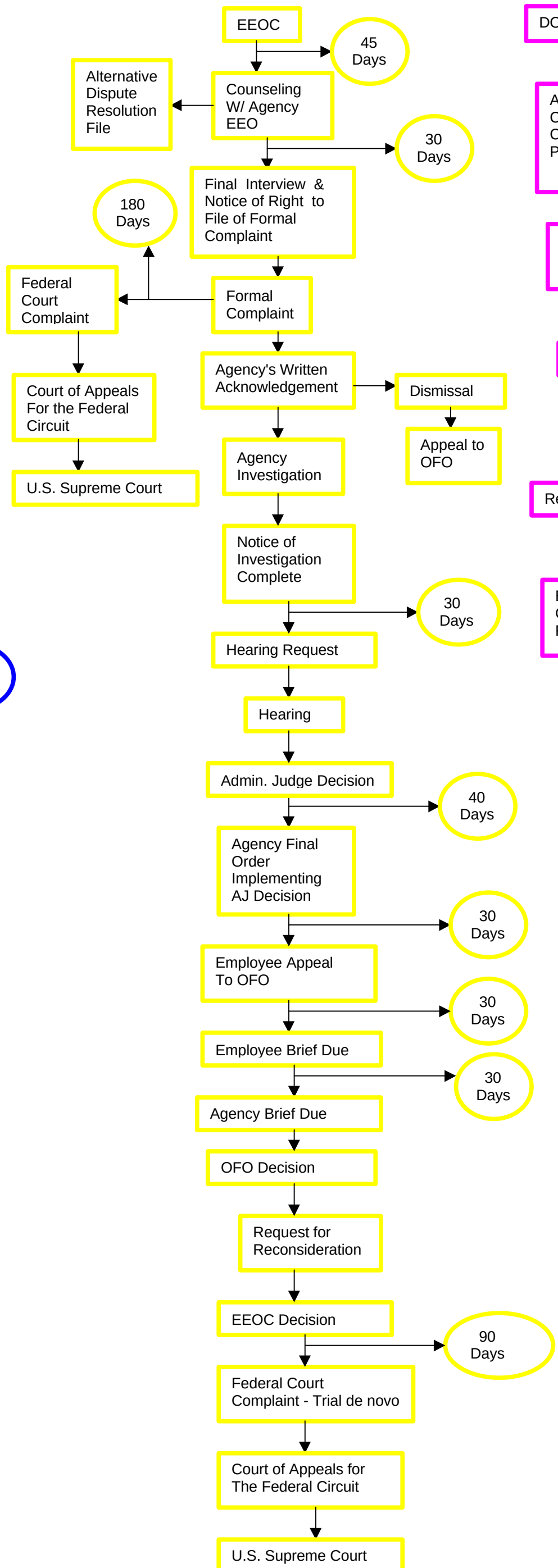
[44]See 5 U.S.C. Sections 8101-8151, 20 CFR Part 1.1-10.826

[45]See 5 U.S.C. Sections 7501-7543, 5 CFR Part 1200.1-1201.205

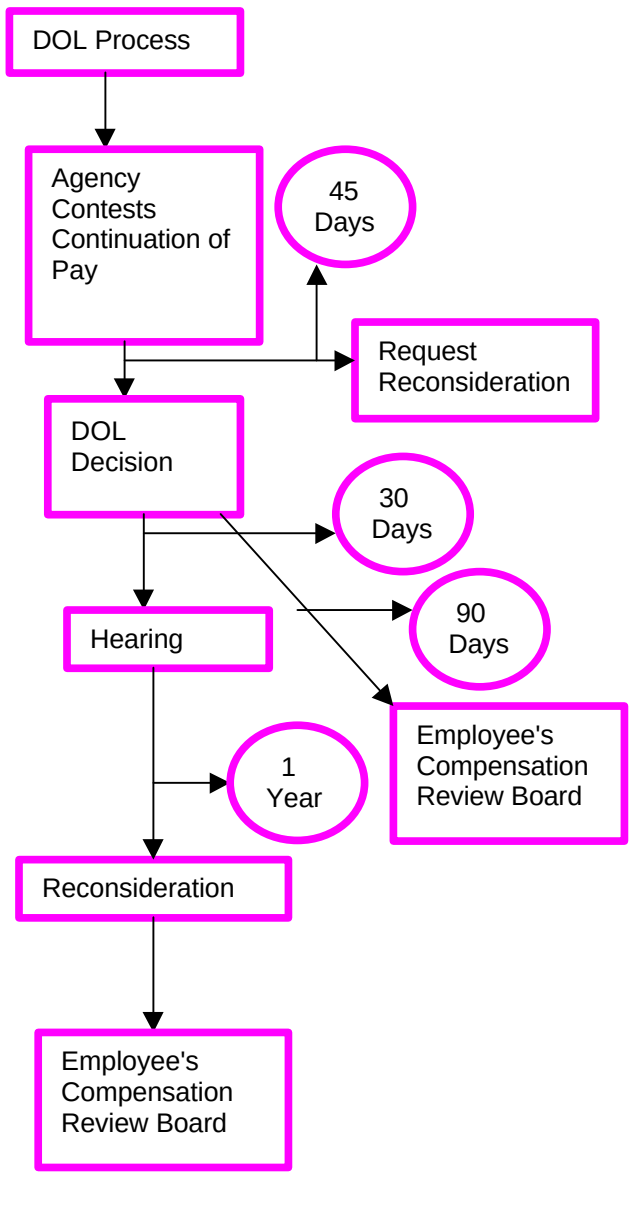
MERIT SYSTEMS PROTECTION BOARD - Appeal of Removal from Job



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION - Claims of Discrimination, Reprisal and Violation of the RehabilitationAct



DEPARTMENT OF LABOR Appeal of Denial of Occupational Injury Claim



PROPOSED PROCESS

Appendix B