



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

Office of  
Legal Counsel

December 9, 2013

William D. Spencer  
Clerk of the Board  
Merit Systems Protection Board  
1615 M Street NW  
Washington, DC 20419

Mr. Spencer:

This letter responds to the Merit Systems Protection Board (MSPB or “Board”) request for written comments concerning four separate proposals to amend regulations governing “how jurisdiction is established over Board appeals.” 78 Fed. Reg. 67076 (Nov. 8, 2013). The Equal Employment Opportunity Commission (EEOC) has an interest in these proposals to the extent that federal employees file “mixed” cases falling under the jurisdiction of both the EEOC and MSPB. Such cases allege both prohibited personnel practices under civil service laws enforced by the MSPB and also unlawful employment discrimination under laws enforced primarily by the EEOC, which include the Equal Pay Act of 1963, as amended, title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Rehabilitation Act of 1973, as amended, and the Genetic Information Nondiscrimination Act of 2008.

Whether the MSPB dismisses a claim for jurisdictional reasons, as opposed to issuing a decision on its merits, affects the EEOC’s jurisdiction over the employment discrimination allegations. If the MSPB declines to take jurisdiction, the EEOC also cannot take jurisdiction directly from the MSPB’s dismissal. *See, e.g. Complainant v. Department of Justice*, EEOC Appeal No. 0120113297 (Sept. 26, 2013). Instead, EEOC regulations require the defendant agency either to inform the claimant of her right to contact an EEO Counselor (if the discrimination issue was first raised in a “mixed case appeal” directly with the MSPB), 29 C.F.R. § 302(b), or to resume the administrative EEO process from the point where the claimant sought MSPB jurisdiction (if the discrimination was first alleged in a “mixed case complaint” via the administrative EEO process). 29 C.F.R. § 302(c).

The EEOC has jurisdiction over a “mixed” employment discrimination claim without first returning it to earlier stages of the administrative EEO process only when the MSPB accepted jurisdiction and issued a decision on its merits. *See* 5 C.F.R. § 1201.151 - .175 (MSPB regulations involving employment discrimination appeals); 29 C.F.R. § 1614.302 - .308 (EEOC regulations for “mixed” claims). In these cases, the MSPB decision must give the claimant notice of her right to petition the EEOC for review of the employment discrimination issues in the decision. 5 C.F.R. § 1201.157. Should the EEOC disagree with the MSPB’s ruling on the employment discrimination claims, federal regulations provide a mechanism for resolving these substantive disputes. 29 C.F.R. §§ 1614.305 - .309 (EEOC regulations to share findings with

MSPB and conduct a “Special Panel”); 5 C.F.R. §§ 1201.171-.175 (MSPB regulations for Special Panel).

The EEOC has no comment concerning how the MSPB chooses to define its own jurisdiction under any of the four proposals in its Federal Register notice. Nonetheless, we have anecdotally observed employment discrimination cases become lost or significantly delayed when the defendant agency fails to further process a claim pursuant to its obligations after an MSPB dismissal for lack of jurisdiction. For this reason, we recommend that the Board remind the defendant agencies of their obligation in an order appended to its dismissals for lack of jurisdiction. For example, the MSPB could remand the dismissed claim to the agency, with instructions that it “continue processing the employment discrimination allegations consistent with its obligations under 29 C.F.R. Part 1614.” It would further highlight this concern if such a requirement were enshrined in regulation, or contained in Board policy guidance.

Ensuring that a forum exists for employment discrimination claims also requires that appellants be aware of their obligations to alert the Board of employment discrimination allegations. We note that Proposals C and D both detail, either in proposed regulatory language or a supplemental “Matrix” document, the specific requirements for stating a claim, or establishing MSPB jurisdiction, under a variety of statutes and other authorities enforced by MSPB, except for employment discrimination. If the Board decides to adopt a jurisdictional regulation and/or supplemental materials that contain such detailed information about every other type of claim, we request that it also cross-reference the filing requirements for claims of employment discrimination identified in MSPB Regulation 5 C.F.R. § 1201.153.

Should you have any questions or otherwise wish to discuss our comments, please feel free to contact Assistant Legal Counsel Corbett Anderson at (202) 663-4579, or Senior Attorney Advisor Raymond Peeler at (202) 663-4537.

Sincerely,

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Legal Counsel