

APWA

Principles & Procedures

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ELIGIBILITY TO APPEAL TO MSPB

VETERAN'S PREFERENCE ACT OF 1944

Employees Eligible to
Appeal to the Merit
Systems Protection Board:

Employees of Postal and/or Federal Agencies classified as "preference eligibles" are governed by the Veterans' Preference Act of 1944 which provides as follows:

Preference eligibles are certain classes of veterans and the survivors of veterans who have completed one (1) year of continuous service in the same or similar position.

1. Ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a **service-connected disability**, or who are **receiving compensation, disability retirement benefits, or pension** by reason of **public laws administered.***
2. The wives or husbands of such service connected disabled veterans as have themselves been unable to qualify for any civil-service appointment.
3. The **unmarried widows or widowers** of **deceased** veterans who served on active duty in any branch of the armed forces of the United States during any **war**, or in any **campaign**, or expedition (for which a **campaign badge** has been authorized), and who were separated therefrom under honorable conditions.¹
4. Ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States during any war, or in any campaign, or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.¹
5. Mothers of deceased ex-servicemen or ex-servicewomen who lost their lives, under honorable conditions while on active duty during any war, or in any campaign or expedition (for which a campaign badge has been authorized) or of service connected permanently and totally disabled ex-servicemen or ex-servicewomen who were separated from such armed forces under honorable conditions if,

*NOTE: A retired member of the armed forces holding the rank of Major or above at time of retirement is not considered a preference eligible under the Act.

¹ Widows or widowers should notify USPS of Veteran's Preference Status

¹ A veteran that has served 20 or more years of service is not accorded preference eligible status under the Act.

- (2) "suspension" means the placing of an employee for disciplinary reasons, in a temporary status without duties and pay.
- (3) "grade" means a level of classification under a position classification system.
- (4) "pay" means the rate of basic pay fixed by law, contract or administrative action for the position held by an employee.
- (5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or other non-disciplinary reasons.

NOTICE REQUIREMENTS

An employee against whom adverse action is proposed is entitled to an advance written notice of the proposed action at least thirty (30) days prior to its effective date.

The notice must state

- 1. specific reasons for the proposed action;
- 2. the right of the employee to review the material relied upon to support the proposed action;
- 3. the right of the employee to file a grievance under the National Agreement.




The employee must be provided a reasonable time, but not less than seven (7) days, to answer the notice orally and/or in writing. In computing **any time period** the day of receipt of the employer's notice or decision shall not be included. The last day of the designated period shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day.

The employee must be provided an opportunity to

1. respond in writing and/or in person to the designated postal official who must be a higher level official than the official who proposed the adverse action;
2. be represented by a person of the employee's choice, (i.e. union official or attorney).

Such representative may assist the employee in preparing a response and may represent the employee in a meeting scheduled to accept oral response.

The employee must be provided reasonable time, on the clock, to review relevant material and prepare and furnish or solicit



**Minimum of
7 days to
reply to notice**



relevant affidavits in support of their response. (Time spent in these activities must be on official time if performed when the employee would otherwise be in an active duty status.)

The Postal Service must designate an official* to hear the employee's oral answer and/or receive a written response who has the authority to make or recommend a final decision.

*Cannot be the person that issued the proposed action.

CRIME EXCEPTION

The required advance notice of at least thirty (30) days may be reduced when the Postal Service has cause to reasonably believe the employee has committed a crime for which a sentence of imprisonment can be imposed.

In such situations the advance notice may be shortened to no less than seven (7) days.

— The employee may be placed in a non-duty status immediately, but the employee must be paid for the seven (7) consecutive days (including non-scheduled days).

The notice provisions and the rights of the employee to respond within seven (7) days are applicable to crime situations.

If the employee is continued in a non-duty status, with pay the Postal Service must issue its final decision on the proposed action within ten (10) days.

Note { The emergency procedures of the National Agreement enabling the employer to immediately place an employee in a non-duty status, without pay does not apply to preference eligible employees. The employee may be placed in a non-duty status, but must be paid during the thirty (30) day notice period.

EMPLOYEE'S RIGHT TO DECISION

The Postal Service must issue a decision after the employee has been provided an opportunity to respond to the adverse action orally and/or in writing. The decision **must be** confined to the specific reasons identified in the notice of proposed action, plus the employee's written and/or oral answer if such has been offered.

The decision must

1. be in writing and delivered to the employee prior to the effective date of the action;
2. advise the employee of the right to appeal to the MSPB;
3. inform the employee of the time limits for appeal (20 days from the effective date of the action);
4. include a copy of the MSPB regulations;
5. include the address of the appropriate MSPB regional office for filing an appeal; and
6. include a MSPB appeals form.

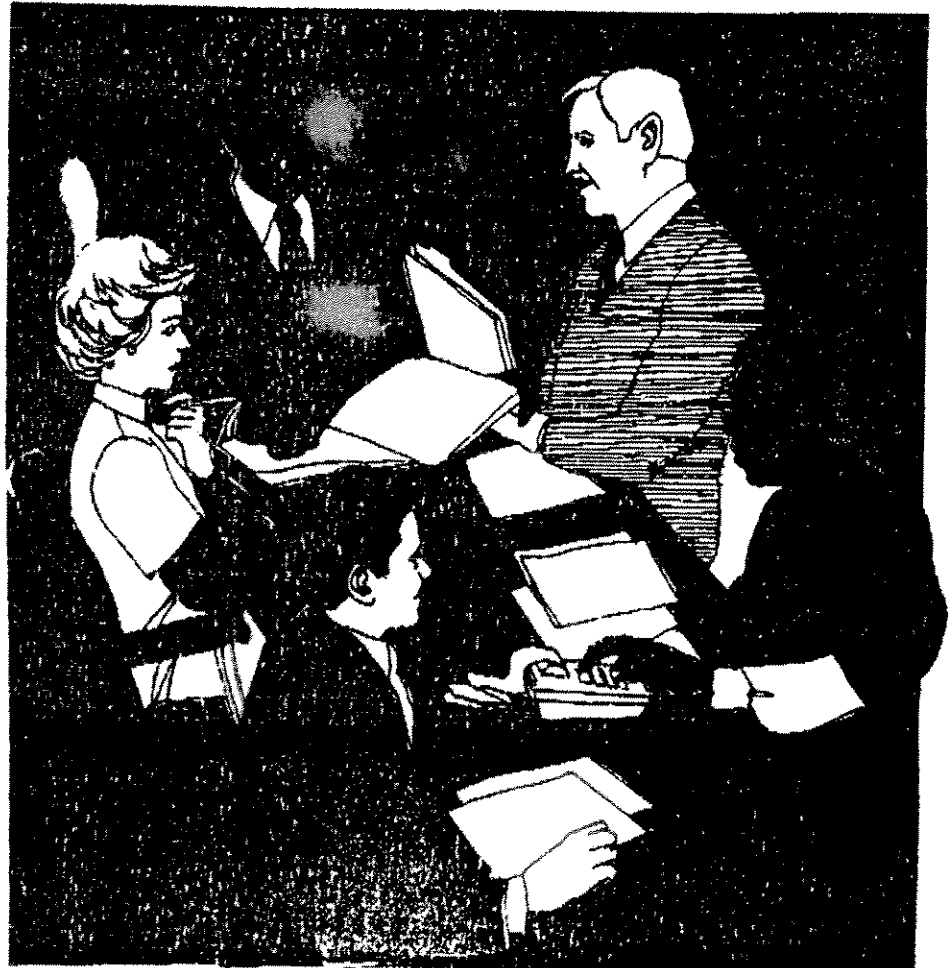
**failure by USPS
to provide
required
information**

Failure by the Postal Service to:

1. advise the employee of the right to appeal to MSPB;
2. to provide necessary forms; or
3. to provide address of appropriate MSPB office does not in itself negate the action taken by the Postal Service. In most cases such failure is sufficient grounds for extending the time period for an MSPB appeal, until the employee knew or may have been expected to have known of all appeal rights.

The employee's representative should note in filing a delayed appeal that failure of USPS to advise the employee was the cause for the delayed filing and compromised the employee's opportunity to prepare a timely defense.

1. An employee or applicant for employment may submit an appeal to the Merit Systems Protection Board concerning any action which is appealable to the Board under any law, rule or regulation.
2. The appellant has the right to a hearing for which a transcript will be kept and to be represented by an attorney or other representative.
3. The Board may hear any case referred to it or it may refer the case to an administrative law judge or other employee of the Board designated to hear such cases. Any case involving a removal from the service must be heard by the Board, an



employee experienced in hearing appeals, or an administrative law judge.

4. After receiving the written representatives of the parties to the appeal and after the opportunity for a hearing, the Board, administrative law judge or other employee will make a decision which shall be furnished to each party to the appeal and to the Office of Personnel Management.
5. The decision of the agency (USPS) will be sustained only if it is supported by a **preponderance of the evidence**.
The decision of the agency (USPS) **shall not be sustained** if the appellant
 - (a) shows harmful error in the application of the agency's procedures in arriving at the decision.
 - (b) shows that the decision was based on any prohibited personnel practice, or
 - (c) shows that the decision was not in accordance with the law.

CONTENT OF APPEAL

**ALL REQUESTED
INFORMATION ON
APPEALS FORM
SHOULD BE
COMPLETED**

Although the information on appeals form is mandatory, omission will generally not cause the appeal to fail. Regulations provide that an appellant's failure to raise a claim or defense may be waived if its later submission does not unduly delay the proceedings or prejudice the rights of the other parties.

NOTE: If the employee lists certain defenses and claims but raises others at the hearings, the presiding official may delay the hearing which will give the Postal Service more time to prepare a case, or the employee's defense claim may be dismissed as inappropriately raised. If the USPS fails to make such argument, you may claim the silence of the Postal Service as a waiver.

All appeals must be filed by **certified mail** or hand delivered to the appropriate MSPB office.

When filing an appeal the employee must include copies of all relevant documents (i.e. notice of suspension, notice of removal).

In filing appeals to MSPB the employee must include one original and three copies.

1. **Class Actions.** One or more employees may file an appeal as representatives of a class of employees. The presiding official has the authority to accept or deny the class action based on whether or not it represents the most efficient and fair way to adjudicate the appeal and protect the interest of all parties. The decision of the presiding official will be made within 30 days.

NOTE: ALL APPELLATE PLEADINGS AND ATTACHMENTS MUST BE SUBMITTED ON 8½ x 11 INCH STANDARD SIZE PAPER.

2. The parties must serve on each other by mail or personal delivery all pleadings filed with the Board other than a petition for appeal or petition for review. The pleading must be accompanied by a certificate of service specifying how and when service was made. Unless the hearing officer specifies otherwise a party has 10 days from date of receipt to respond to a pleading served by the other party.

CONTENT OF AGENCY RESPONSE

request for hearing

A request for a hearing by an employee must be complied with. Presiding officials have broad discretion in granting the Postal Service request for hearing. No established standards exist. However, as a matter of policy, the Board disfavors granting an Employer's request in order to merely permit them to complete an otherwise incomplete record. Request for hearing is not mandatory.

USPS response to request for hearing

The Postal Service is required to make specific responses to each of the employee's allegations, either denying, admitting, or explaining each in whole or in part.

Even in cases where it is obvious that MSPB lacks jurisdiction, the Postal Service is still required to respond. However, the

TIME LIMITS FOR APPEAL

1. USPS issues notice of **Proposed Action**. (Notice must be specific as to alleged violation(s) and/or reason for action and must inform employee of right to review material relied upon and to respond in writing and/or in person.



2. Employee reviews material and responds orally and/or in writing.



2A. Employee files grievance

3. USPS issues written decision



- 3A. Employee files written appeal to MSPB.



4. USPS implements adverse action.



Grievance is denied at Step 3 and is appealed to arbitration.

5. Employee must elect to pursue appeal through arbitration or MSPB.

response may be limited to the minimum of information necessary for the jurisdictional question to be resolved (i.e. that the appellant is not a veteran preference eligible or does not have one year of service).

The Postal Service must provide the employee with a copy of the USPS file that is forwarded to the Board.

**appeal without
a hearing**

NOTE: If the employee appeals without a request for a hearing, the Postal Service is required to clearly set forth all their evidence in their appeal file. The standard of proof remains the same and the Postal Service must present sufficient evidence to sustain its case. A written response by the employee may sufficiently cloud the issues, which would result in the Postal Service's failure to meet the burden of proof.

NEXUS REQUIREMENT

CRIMINAL CONVICTIONS AND THE EFFICIENCY OF THE SERVICE

Nexus means that a direct link exists between the alleged or proven criminal act which limits the continuing performance of the employee.

When employees have been convicted for some minor criminal offense such as simple assault, possession or sale of small quantities of drugs, and some types of moral charges, which are not job related and which were committed while in an off-duty status the Postal Service must establish the nexus between the act and the efficiency of the service. When discipline has been imposed on employees because of their

Alleged
or
Proven
**CRIMINAL
ACT**

Efficiency
of the
SERVICE

commission of minor criminal offenses, the crime has not been found to be presumptively connected with the efficiency of the service and has thus required proof of nexus. This holds true even when the employee has been imprisoned for committing the crime.

Some of the factors the courts have considered in determining whether that connection has been established are:

- 1) age and years of service of disciplined employee;
- 2) satisfactory work record;
- 3) contact with the public;
- 4) opinions of supervisors and foremen;
- 5) criminal conviction's effect on quantity and quality of the employee's work;
- 6) extent of publicity;
- 7) seriousness of the offense;
- 8) offense committed in public or private;
- 9) amount of time elapsed since offense;
- 10) psychological or physiological condition at the time of the crime and any subsequent rehabilitation;
- 11) action by the agency once an employee's involvement in criminal activity was made known to agency officials;
- 12) reaction by members of the public and fellow employees once criminal conduct became known to them; and
- 13) severity of the criminal penalty imposed.

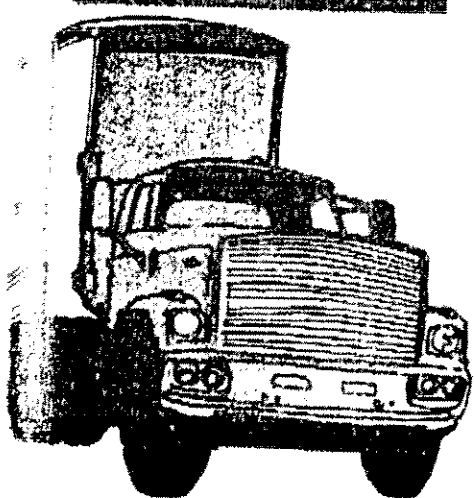
APPROPRIATE- NESS OF PENALTY

The Board, noting court decisions as well as OPM and CSC decisions and regulations, has recognized the following factors as being relevant for consideration in determining the appropriateness of a penalty:

- (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;



U.S. MAIL



- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about conduct in question;
- (10) potential for the employee's rehabilitation;
- (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- (12) the adequacy and effectiveness of alternate sanctions to deter such conduct in the future by the employee or others."

ALLEGATIONS OF DISCRIMINATION



special
caution for
EEO issues

An allegation of discrimination brings into the proceedings all of the civil rights statutes and case laws interpreting these statutes. It is extremely important that an advocate be fully aware of the legal and factual issues involved in the case.

EEO appeal
petitions

The contents of an appellant's appeal petition are the same as an appeal petition of an adverse action, except

- (1) the petition shall state that there was discrimination and provide specific examples of how the appellant was discriminated against; and
- (2) the petition shall state whether the appellant has filed a discrimination complaint or grievance with his/her agency or any other agency, the date of filing such complaint or grievance, and any action taken.

jurisdiction of
EEO issues

MSB will delay taking jurisdiction of an appeal if there has been a formal EEO complaint filed prior to the appellant's filing an appeal with MSPR. MSPB will eventually take



jurisdiction, however, after the employer has issued a final decision on the EEO complaint or 120 days has elapsed since the appellant filed his formal EEO complaint, whichever comes first. The appellant must, however, file with the MSPB within one year after filing a formal EEO complaint.

If an EEO complaint is filed by the appellant after filing an appeal with MSPB, the MSPB appeal will not be held in abeyance but will proceed simultaneously on the merits. Any final outcome on the merits of the EEO complaint, i.e. resolution, withdrawal, final decision, will not prevent MSPB hearing the case on the merits. In other words, the appellant will have "another day in court" over the same issue.

when issue of
discrimination can
be raised

The issue of discrimination can be raised at any time during the MSPB's consideration of the appeal of the agency's adverse action. The discrimination issue will be excluded if it is shown that consideration of the issue would unduly prejudice

and thus delay the proceedings or that the discrimination issue was not directly related to the matter being appealed.

NOTE: A presiding official is mandated to rule on all discrimination issues properly appealed. Even though a case may be reversed on the merits without regard to the discrimination, the presiding official will also rule on the discrimination issue. A ruling sustaining the discrimination issue will result in USPS liability for appellant's reasonable attorney fees, if any were incurred.

GRIEVANCE PROCEDURE VS. MSPB

Jeff Stanley

The right to appeal to MSPB is in addition to the employee's right to file a grievance contesting the proposed notice of adverse action. If the employee files both a grievance and a formal appeal to MSPB and the employee receives a **negative response** at Step 3 of the grievance procedure the employee must elect to pursue the adverse action through either arbitration or the MSPB appeals procedure.

The adverse action may be **appealed** to arbitration while awaiting a MSPB hearing, however the action may not be **arbitrated** or **certified** for arbitration.

DISCIPLINE FOR APPROVED ABSENCE

A preference eligible employee who is suspended for more than fourteen (14) days or discharged for absences from work which were approved should consider appealing to the MSPB.

The Merit System Protection Board (MSPB) has issued a policy directive stating:

"Given an agency's authority to deny leave under any circumstances when it must have the services of an employee, an adverse action based on a record of approved leave is not for such cause as will promote the efficiency of the service."

Numerous cases before the Board have been won by employees based on the above ruling.

Under the National Agreement arbitrators have generally ruled that the "just cause" provision of the National Agreement may be met by the Postal Service even though the absences were approved.

OTHER APPEALS



Retirement

An employee whose application for retirement is denied may request the Office of Personnel Management (OPM) to **reconsider** its decision.

If the request for reconsideration is denied the employee may appeal within twenty (20) days of the effective date of the decision to MSPB.

Injury on Duty

An employee recovering from a compensable injury (IOD) who requests restoration to full or limited duty may appeal:

1. USPS failure or refusal to restore the employee to full or limited duty.
2. Restoration which the employee believes to be unsatisfactory.

The appeal must be filed within twenty (20) days of receipt of USPS written notice or the date USPS may reasonably have been expected to respond.

Reduction in Rank or Pay

No preference eligible employee may be reduced in pay or grade while non-preference employees are retained in the same competing group and the same competitive level.

If a preference eligible employee is reduced in rank or compensation the notice and appeal provisions for adverse action (page . . .) similarly apply.

1. The employee must receive notice in writing at least thirty (30) days in advance.
2. The employee must be given an opportunity to review material, respond and be represented.
3. USPS must issue a decision.
4. The employee must be advised of his/her rights, provided with a copy of the MSPB regulations, as well as the address of the appropriate MSPB regional office and a copy of the MSPB appeals form.

step increases

Hearing officers have denied the right to appeal the withholding of step increases. The issue is under appeal to the full Board for final decision

Furloughs for 30 Days or Less

A preference eligible employee whose performance rating is good or satisfactory is entitled to be retained in preference to other non-preference employees.

Preference eligible employees whose performance ratings are below good or satisfactory are entitled to be retained in preference to non-preference employees who have equal or lower performance ratings.

The employer must offer a preference eligible employee any other position for which he is qualified to perform.

Severance Pay

(Governed by Employee &
Labor Relations Manual,
Chapter 435)

435 Severance Pay

435.1 Eligibility

Any career USPS employee who is involuntarily separated and who has been employed continuously by the USPS and/or federal agency for at least 12 consecutive months (without a break in service of three or more consecutive days) immediately prior to the separation is eligible for severance pay, except in the following circumstances:

- a. The employee is entitled to an immediate retirement annuity.
- b. At the time of separation the employee is offered and declines to accept a position in the USPS or in any other federal agency of like seniority, tenure, and pay within the same commuting area.
- c. The employee is separated because of entry in the military service.

d. The employee is separated for cause on charges of misconduct, delinquency or inefficiency.

e. The employee at the time of separation is receiving compensation as a beneficiary of the Federal Employees Compensation Act, except when receiving this compensation concurrently with postal pay.

435.2 Computing Severance Fund

.21 Limitation. In no case shall the severance pay fund exceed fifty-two weeks basic compensation.

.22 Creditable Service. Creditable service means all service as a paid federal civilian or postal employee and all military service which interrupted a period of paid federal civilian or postal service—excluding any period of federal or postal service for which severance pay has previously been paid.

.23 Paid Allowance. The employee is credited with one week's basic compensation (the weekly basic rate of pay, excluding COLA, in effect at the time of separation) for each year of creditable service up to ten years; and with two weeks' basic compensation for each year of creditable service in excess of ten years. Each 3-month period of service that exceeds one or more full years of service is computed as 25% of a full year.

a. **Employee in Non-Pay Status.** In this case, the basic compensation is the basic compensation the employee would have received had he been in a pay status at the time of separation.

b. **Part-time Regular Employee.** In this case, determine the basic weekly compensation by multiplying the number of hours in the employee's regular schedule by the employee's hourly rate of compensation.

c. **Part-Time Flexible Employee.** In this case (1) divide by 52 the total number of hours—excluding overtime hours but including paid leave hours—that the employee had to his credit during the previous 52 weeks to find the average hours worked per week and (2) multiply the average hours worked per week by the employee's hourly rate of compensation to determine the basic weekly compensation.

.24 Allowance for Age Over 40. The employee's basic allowance is increased by 10% for each full year and by 2½% for each three full months in excess of a full year that the employee's age exceeds 40 years at the time of separation. For example, if the employee's age at the time of separation is 42 years and 7 months, the basic allowance computed in 435.23 above is increased by 25% (10% for each of the two years in excess of 40, and 2½% for each of the two full three month periods in excess of the two full years).

REPRESENTATION

conflict of interest
of position

A qualified union representative is fully capable of adequately representing employees, however, union representatives are not obligated under the law to process appeals before the Board.

Only in the most exceptional case will a representative's position or interest disqualify him/her from representing the appellant's interests.

Witnesses Right to Representation

witnesses

Any witness whose appearance at a hearing is authorized may have a representative present. The witness' representative is not compensated by the employer.

NOTE: Witnesses may be challenged as to the relevance of their testimony to the case or to the excessively repetitive nature of their testimony. Objection can be made in writing before the hearing or orally at the hearing.

UNION'S RIGHT TO INTERVENE



rights
and
privileges

Within the scope of their interests, intervenors have the same privileges and rights at a hearing that other parties have under the regulations. They may not request a hearing, but they may appeal a decision that adversely affects them. They are also entitled to file interlocutory appeals if their right to intervene has been successfully challenged at the hearing. Likewise, other parties to the proceedings, can file an interlocutory appeal if a party's right to intervene has been sustained at the hearing. The case on the merits may be held in abeyance until the interlocutory appeal is resolved.

The scope of intervenors' participation in the proceedings is limited to issues directly affecting them.

permissive
intervenors

A person may be a permissive intervenor if the proceedings will "directly affect" such a person and intervention is not in violation of some other law. An "agency" i.e. the Postal Service has been included under the term of "person."

Whether or not a union, employee, organization, special interest groups, or EEO personnel within an agency etc., are considered "persons" who may "participate" as intervenors at this time is unclear. In any event, such organizations or individuals must still meet the rather restrictive criterion of being "directly affected" and being able to intervene without violating any law.

mandatory
intervention

A non-appellant whose rights will be disposed of in the hearing has the mandatory right to intervene.

CONSOLIDATION OR JOINDER

The official designated to hear a case may

- (a) consolidate appeals filed by two or more appellants, or
- (b) join two or more appeals filed by the same appellant and hear them concurrently

if they are of the opinion that this would result in the appeals being processed more expeditiously and would not adversely affect any party.

joinder

The employee can request a consolidation or joinder of appeals. Joinder of appeals would be most commonly used where an emergency suspension and removal actions were issued regarding the same offense.

consolidation

Consolidation may be requested where two employees were discharged as a result of the same incident. For instance, consolidation would be appropriate where two employees are charged with conspiring to sabotage an LSM.

NOTE: An advocate must be prepared to show that a consolidation or joinder will

- 1) expedite the proceedings and
- 2) not adversely affect the interest of any party involved.

FEES

witness fees

As of this writing the policy of the Board is that attorneys' fees do not apply to union representatives.

- (1) Federal employees: Employees of a Federal agency testifying in any proceeding before the Board or making a statement for the record shall be in official duty status and shall not receive witness fees. Payment of travel and per diem expenses shall be governed by applicable law and regulations.

employees as
witnesses for

- (2) Other witnesses. Witnesses who are not covered by subsection (1) of this section are entitled to the same fees as other witnesses.



(3) Payment of witness fees. Witness fees shall be paid by the party requesting the presence of the witness and shall be tendered to the witness at the time the subpoena is served, or, when the witness appears voluntarily at the time of appearance.

**employees called
as appellant's
witnesses**

If bargaining unit employees are called as management witnesses they must be paid at the straight time rate provided they are testifying during their normal tour of duty. In other cases, where bargaining unit employees are called as management witnesses, either out-of-schedule or on non-scheduled days, the appropriate pay provisions will apply.

The appellant must bear the expense of calling non-employees as witnesses.