

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**¹ 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.

¹ All references to days are calendar days unless specified otherwise.