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# Restored Federal Worker Board to Become Center of Layoff Fights

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Ian Kullgren

A restored quorum at the Merit Systems Protection Board could alter the terrain for legal challenges to President Donald Trump's federal workforce cuts, including the layoffs launched during the government shutdown.

The Oct. 7 confirmation of Republican nominee James Woodruff is set to bolster a key argument by Trump's attorneys aimed at keeping federal worker disputes at MSPB—and out of court.

The new quorum should reinforce the board's status as the primary venue for those cases under the law, said Ariel Solomon, a federal employment attorney specializing in MSPB cases.

"At bottom, if the MSPB has jurisdiction, it should be able to weigh in on the arguments that are brought in front of it," Solomon said.

In defending legal challenges from federal unions over Trump's employee firings and widespread layoff plans, the US Department of Justice has argued that the disputes should first be routed through the employment boards that hear worker complaints. The strategy has had some success: a Massachusetts district judge recently dismissed a union lawsuit over Trump's deferred resignation offer, saying it belonged in front of MSPB and not the courts.

Any changes at the MSPB are unlikely to be felt until the government shutdown lifts. While board members are Senate-confirmed and not subject to furloughs, virtually all other employees of the board are suspended, according to the agency's shutdown plan.

## Backlog

The MSPB faces a backlog having operated with only one member for several months while experiencing an increase in cases brought before it.

The board told Congress it had received 11,166 appeals as of late May—twice the typical workload in an entire fiscal year. Over the past year, the board has received 20,335 cases, according to agency records.

While administrative judges are the first to handle cases, decisions on appeals require two of the three seats to be filled. Now, Woodruff and the sitting chairman, Henry Kerner, also a Republican appointee, will be

able to decide some appeals where they agree, though a third member is required to break a tie.

Woodruff's addition will be an improvement for federal workers whose claims have been languishing for months or years, attorneys say. It may also discourage agencies from firing workers without justification—as the Office of Management and Budget called on agencies to do at the start of the shutdown.

"Before the quorum, no one could get a final decision on anything, so the administration could do what it wanted to do," Eric Pines, a Houston-based federal employment attorney, said. "It's going to help resolve all these issues, so no party can willy-nilly exercise their will."

Some courts have rejected the Trump administration's argument to kick federal workforce litigation to the MSPB, saying the administration eroded it and other oversight boards by firing their leadership.

In a union case challenging probationary worker firings, the US Court of Appeals for the Fourth Circuit **ordered** a lower court to weigh whether the MSPB's authorizing statute "has been so undermined that the jurisdiction stripping scheme no longer controls."

Judge William Alsup of the US District Court for the Northern District of California **wrote** last month that MSPB officials "have stopped doing any work at all."

## Independence

The restored quorum will also test the MSPB's independence from a White House that has sought more control over quasi-judicial agencies previously considered free from political influence.

"That's going to be interesting to see with the new quorum, how they review cases that may go against the administration's legal or political interpretation," Raymond Limon, a Biden appointee who left the board earlier this year. "What happens? Will they be removed?"

The three-member board was created in the wake of the Watergate scandal to protect the civil service from partisan influence. By law, federal worker complaints must go through the MSPB or a handful of other agencies before proceeding to federal court.

Trump **fired** Biden-appointed MSPB member Cathy Harris less than a month into his second term, along with several other leaders of independent agencies that had previously been considered protected from political interference by law.

They include **former Special Counsel** Hampton Dellinger, who had found that the president's mass firings of probationary workers were likely illegal. He later nominated Paul Ingrassia, **a supporter who has said** federal workers are trying to thwart Trump's agenda.

Harris sued the administration over her removal, and her case remains pending at the US Court of Appeals for the District of Columbia Circuit.

Some federal judges may still feel they're in a better position to answer certain constitutional questions enmeshed in federal workforce cases—such as Trump circumventing Congress to change the structure of the government— rather than leaving them to a statutory board, Limon said.

“If the government is so confident in its constitutional arguments, then why are they wasting their time with the board?” he said.

The DOJ is also seeking to widen the scope of the agency’s initial review of complaints, instructing administrative judges—career civil servants who make initial decisions—to weigh whether government agencies have a **constitutional** basis to fire federal workers who say they were wrongfully terminated.

“You have asked whether MSPB administrative judges are empowered and obligated to consider constitutional issues raised by the agencies during these proceedings,” Assistant Attorney General T. Elliot Gaiser wrote in an advisory memo. “We concluded that they are and that they must therefore resolve Agencies’ constitutional arguments.”