# Feds Rarely Win Before MSPB. Board Says That’s Not a Problem.

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Federal employees who challenge adverse actions against them rarely win when facing a decision from the quasi judicial board that hears those appeals.

According to that board, that reality is perfectly acceptable.

Federal employees won relief from administrative judges in just 3% of cases over the last three years, the agency said in a recent report. The Merit Systems Protection Board noted in a recent newsletter that this has led to criticisms from employee advocates, and prompted support from those who believe feds are not held sufficiently accountable. Neither side is right, MSPB said.

For example, the relief rate jumped to 18% for the 5,000 cases that actually were decided on the merits (the remaining cases were either dismissed for not being filed on time, ruled to be outside of MSPB’s jurisdiction or settled). MSPB cautioned against drawing conclusions from the employee win rate at all, noting critics have no basis for suggesting what a proper win rate would look like.

“Rather than citing win rates as if they mean something in a vacuum, we should instead be able to point to specific decisions and explain how they were based on a misinterpretation of the law, an incorrect weighing of the evidence, or some other error,” MSPB wrote. “It is unconvincing to suggest that some decisions in favor of agencies must be wrong simply because there are a lot of them.”

More than one in five cases brought before MSPB are settled before receiving a ruling from an administrative judge. The agency said this has driven down the employee win rate, as agencies often decide to settle cases they believe they are likely to lose. Employees would also win favorable decisions more often, MSPB said, if their agencies took more capricious actions.

“It hardly seems an improvement, however, to have more litigation and fewer negotiated resolutions,” the agency wrote.

MSPB further argued its administrative judges nearly always make the correct decision. The federal court that hears appeals following a board decision has affirmed MSPB’s decisions 92% to 96% of the time.

“This is a good indication that MSPB is getting it right pretty consistently,” the agency wrote.

Federal employees are temporarily without the option for a mid-level appeal, however. The three-member, presidentially appointed and Senate-confirmed central board at MSPB is currently without any members. It has been without a quorum for more than two years. President Trump has [nominated individuals](https://www.govexec.com/pay-benefits/2019/05/federal-employee-appeals-board-poised-finally-have-members/156685/) to serve in all three slots, meaning the board may soon once again have the capacity to hear appeals after administrative judges issue initial rulings. Once confirmed, those members will be facing an existing backlog of more than 2,000 cases.

Employees can bypass the central board and take their appeals straight to federal court, though the process is costly and time consuming.