

	<i>Part</i>
CHAPTER LXV—Department of Housing and Urban Development .....	7501
CHAPTER LXVI—National Archives and Records Administration .....	7601
CHAPTER LXVII—Institute of Museum and Library Services ..	7701
CHAPTER LXIX—Tennessee Valley Authority .....	7901
CHAPTER LXXI—Consumer Product Safety Commission .....	8101
CHAPTER LXXIII—Supplemental Standards of Ethical Conduct for Employees of the Department of Agriculture .....	8301
CHAPTER LXXIV—Federal Mine Safety and Health Review Commission .....	8401
CHAPTER LXXVI—Federal Retirement Thrift Investment Board .....	8601
CHAPTER LXXVII—Office of Management and Budget .....	8701
CHAPTER XCVII—Department of Homeland Security Human Resources Management System (Department of Homeland Security—Office of Personnel Management) .....	9701
CHAPTER XCIX—Department of Defense Human Resources Management and Labor Relations Systems (Department of Defense—Office of Personnel Management) .....	9901



## CHAPTER II—MERIT SYSTEMS PROTECTION BOARD

---

### SUBCHAPTER A—ORGANIZATION AND PROCEDURES

<i>Part</i>		<i>Page</i>
1200	Board organization .....	7
1201	Practices and procedures .....	9
1202	Statutory Review Board .....	57
1203	Procedures for review of rules and regulations of the Office of Personnel Management .....	57
1204	Availability of official information .....	61
1205	Privacy Act regulations .....	68
1206	Open meetings .....	71
1207	Enforcement of nondiscrimination on the basis of disability in programs or activities conducted by the Merit Systems Protection Board .....	74
1208	Practices and procedures for appeals under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act .....	81
1209	Practices and procedures for appeals and stay requests of personnel actions allegedly based on whistleblowing .....	85
1210	Department of Homeland Security human resources management system .....	90
1211–1214	[Reserved]	
1215	Debt management .....	97
1216	Testimony by MSPB employees relating to official information and production of official records in legal proceedings .....	104



## **SUBCHAPTER A—ORGANIZATION AND PROCEDURES**

### **PART 1200—BOARD ORGANIZATION**

#### **Subpart A—General**

Sec.

- 1200.1 Statement of purpose.
- 1200.2 Board members and duties.
- 1200.3 How the Board members make decisions.

#### **Subpart B—Offices of the Board**

- 1200.10 Staff organization and functions.

SOURCE: 56 FR 41747, Aug. 23, 1991, unless otherwise noted.

#### **Subpart A—General**

AUTHORITY: 5 U.S.C. 1201 *et seq.*

#### **§ 1200.1 Statement of purpose.**

The Merit Systems Protection Board (the Board) is an independent Government agency that operates like a court. The Board was created to ensure that all Federal government agencies follow Federal merit systems practices. The Board does this by adjudicating Federal employee appeals of agency personnel actions, and by conducting special reviews and studies of Federal merit systems.

[56 FR 41747, Aug. 23, 1991, as amended at 59 FR 65233, Dec. 19, 1994]

#### **§ 1200.2 Board members and duties.**

(a) The Board has three members whom the President appoints and the Senate confirms. Members of the Board serve seven-year terms.

(b) The President appoints, with the Senate's consent, one member of the Board to serve as Chairman and chief executive officer of the Board. The President also appoints one member of the Board to serve as Vice Chairman. If the office of the Chairman is vacant or the Chairman cannot perform his or her duties, then the Vice Chairman performs the Chairman's duties. If both the Chairman and the Vice Chairman cannot perform their duties, then the

remaining Board Member performs the Chairman's duties.

[56 FR 41747, Aug. 23, 1991, as amended at 59 FR 65233, Dec. 19, 1994]

#### **§ 1200.3 How the Board members make decisions.**

(a) The three Board members make decisions in all cases by majority vote except in circumstances described in paragraphs (b) and (c) of this section or as otherwise provided by law.

(b) When due to a vacancy, recusal or other reasons, the Board members are unable to decide any case by majority vote, the decision, recommendation or order under review shall be deemed the final decision or order of the Board. The Chairman of the Board may direct the issuance of an order consistent with this paragraph.

(c) When due to a vacancy, recusal or other reasons, the Board members are unable to decide a matter in a case which does not involve a decision, recommendation or order, the Chairman may direct referral of the matter to an administrative judge or other official for final disposition.

(d) Decisions and orders issued pursuant to paragraphs (b) and (c) of this section shall not be precedential.

(e) This section applies only when at least two Board members are in office.

[59 FR 39937, Aug. 5, 1994]

#### **Subpart B—Offices of the Board**

AUTHORITY: 5 U.S.C. 1204 (h) and (j).

#### **§ 1200.10 Staff organization and functions.**

(a) The Board's headquarters staff is organized into the following offices and divisions:

- (1) Office of Regional Operations.
- (2) Office of the Administrative Law Judge.
- (3) Office of Appeals Counsel.
- (4) Office of the Clerk of the Board.
- (5) Office of the General Counsel.
- (6) Office of Policy and Evaluation.
- (7) Office of Equal Employment Opportunity.

## § 1200.10

## 5 CFR Ch. II (1-1-08 Edition)

(8) Office of Financial and Administrative Management.

(9) Office of Information Resources Management.

(b) The principal functions of the Board's headquarters offices are as follows:

(1) *Office of Regional Operations.* The Director, Office of Regional Operations, manages the adjudicatory and administrative functions of the MSPB regional and field offices.

(2) *Office of the Administrative Law Judge.* The Administrative Law Judge hears Hatch Act cases, disciplinary action complaints brought by the Special Counsel, actions against administrative law judges, appeals of actions taken against MSPB employees, and other cases that the Board assigns.

(3) *Office of Appeals Counsel.* The Director, Office of Appeals Counsel, prepares proposed decisions that recommend appropriate action by the Board in petition for review cases, original jurisdiction cases, and other cases assigned by the Board.

(4) *Office of the Clerk of the Board.* The Clerk of the Board enters petitions for review and other headquarters cases onto the Board's docket and monitors their processing. The Clerk of the Board also does the following:

(i) Serves as the Board's public information center, including providing information on the status of cases, distributing copies of Board decisions and publications, and operating the Board's Library and on-line information services;

(ii) Manages the Board's records, reports, legal research, and correspondence control programs; and

(iii) Answers requests under the Freedom of Information and Privacy Acts at the Board's headquarters, and answers other requests for information except those for which the Office of the General Counsel or the Office of Policy and Evaluation is responsible.

(5) *Office of the General Counsel.* The General Counsel provides legal advice to the Board and its headquarters and regional offices; represents the Board in court proceedings; prepares proposed decisions for the Board in cases that the Board assigns; coordinates legislative policy and performs legislative liaison; responds to requests for non-case

related information from the White House, Congress, and the media; and plans and directs audits and investigations.

(6) *Office of Policy and Evaluation.* The Director, Policy and Evaluation, carries out the Board's statutory responsibility to conduct special reviews and studies of the civil service and other merit systems in the Executive Branch, as well as oversight reviews of the significant actions of the Office of Personnel Management. The office prepares the Board's reports of these reviews and studies, submits them to the President and the Congress, and makes them available to other interested individuals and organizations. The office is responsible for distributing the Board's reports and for responding to requests for information or briefings concerning them.

(7) *Office of Equal Employment Opportunity.* The Director, Office of Equal Employment Opportunity, manages the Board's equal employment programs.

(8) *Office of Financial and Administrative Management.* The Office of Financial and Administrative Management administers the budget, accounting, procurement, property management, physical security, and general services functions of the Board. It also develops and coordinates internal management programs and projects, including review of internal controls agencywide. It performs certain personnel functions, including policy, training, drug testing, and the Employee Assistance Program. It also administers the agency's cross-servicing arrangements with the U.S. Department of Treasury's Bureau of Public Debt for accounting services and with the U.S. Department of Agriculture's National Finance Center for payroll and personnel action processing services and with the U.S. Department of Agriculture's APHIS Business Services for most human resources management services.

(9) *Office of Information Resources Management.* The Office of Information Resources Management develops, implements, and maintains the Board's automated information systems.

(c) *Regional and Field Offices.* The Board has regional and field offices located throughout the country (See Appendix II to 5 CFR part 1201 for a list of

## Merit Systems Protection Board

Pt. 1201

the regional and field offices). Judges in the regional and field offices hear and decide initial appeals and other assigned cases as provided for in the Board's regulations.

[62 FR 49589, Sept. 23, 1997, as amended at 64 FR 15916, Apr. 2, 1999; 70 FR 30608, May 27, 2005]

### PART 1201—PRACTICES AND PROCEDURES

#### Subpart A—Jurisdiction and Definitions

Sec.

- 1201.1 General.
- 1201.2 Original jurisdiction.
- 1201.3 Appellate jurisdiction.
- 1201.4 General definitions.

#### Subpart B—Procedures for Appellate Cases

##### GENERAL

- 1201.11 Scope and policy.
- 1201.12 Revocation, amendment, or waiver of rules.
- 1201.13 Appeals by Board employees.
- 1201.14 Electronic filing procedures.

##### APPEAL OF AGENCY ACTION; PLEADINGS

- 1201.21 Notice of appeal rights.
- 1201.22 Filing an appeal and responses to appeals.
- 1201.23 Computation of time.
- 1201.24 Content of an appeal; right to hearing.
- 1201.25 Content of agency response.
- 1201.26 Number of pleadings, service, and response.
- 1201.27 Class appeals.
- 1201.28 Case suspension procedures.

##### PARTIES, REPRESENTATIVES, AND WITNESSES

- 1201.31 Representatives.
- 1201.32 Witnesses; right to representation.
- 1201.33 Federal witnesses.
- 1201.34 Intervenors and amicus curiae.
- 1201.35 Substituting parties.
- 1201.36 Consolidating and joining appeals.
- 1201.37 Witness fees.

##### JUDGES

- 1201.41 Judges.
- 1201.42 Disqualifying a judge.
- 1201.43 Sanctions.

##### HEARINGS

- 1201.51 Scheduling the hearing.
- 1201.52 Public hearings.
- 1201.53 Record of proceedings.
- 1201.55 Motions.
- 1201.56 Burden and degree of proof; affirmative defenses.

- 1201.57 Order of hearing.
- 1201.58 Closing the record.

##### EVIDENCE

- 1201.61 Exclusion of evidence and testimony.
- 1201.62 Producing prior statements.
- 1201.63 Stipulations.
- 1201.64 Official notice.

##### DISCOVERY

- 1201.71 Purpose of discovery.
- 1201.72 Explanation and scope of discovery.
- 1201.73 Discovery procedures.
- 1201.74 Orders for discovery.
- 1201.75 Taking depositions.

##### SUBPOENAS

- 1201.81 Requests for subpoenas.
- 1201.82 Motions to quash subpoenas.
- 1201.83 Serving subpoenas.
- 1201.84 Proof of service.
- 1201.85 Enforcing subpoenas.

##### INTERLOCUTORY APPEALS

- 1201.91 Explanation.
- 1201.92 Criteria for certifying interlocutory appeals.
- 1201.93 Procedures.

##### EX PARTE COMMUNICATIONS

- 1201.101 Explanation and definitions.
- 1201.102 Prohibition on ex parte communications.
- 1201.103 Placing communications in the record; sanctions.

##### FINAL DECISIONS

- 1201.111 Initial decision by judge.
- 1201.112 Jurisdiction of judge.
- 1201.113 Finality of decision.

#### Subpart C—Petitions for Review of Initial Decisions

- 1201.114 Filing petition and cross petition for review.
- 1201.115 Contents of petition for review.
- 1201.116 Appellant requests for enforcement of interim relief.
- 1201.117 Procedures for review or reopening.
- 1201.118 Board reopening of case and reconsideration of initial decision.
- 1201.119 OPM petition for reconsideration.
- 1201.120 Judicial review.

#### Subpart D—Procedures for Original Jurisdiction Cases

##### GENERAL

- 1201.121 Scope of jurisdiction; application of subparts B, F, and H.

## § 1201.1

### SPECIAL COUNSEL DISCIPLINARY ACTIONS

- 1201.122 Filing complaint; serving documents on parties.
- 1201.123 Contents of complaint.
- 1201.124 Rights; answer to complaint.
- 1201.125 Administrative law judge.
- 1201.126 Final decisions.
- 1201.127 Judicial review.

### SPECIAL COUNSEL CORRECTIVE ACTIONS

- 1201.128 Filing complaint; serving documents on parties.
- 1201.129 Contents of complaint.
- 1201.130 Rights; answer to complaint.
- 1201.131 Judge.
- 1201.132 Final decisions.
- 1201.133 Judicial review.

### SPECIAL COUNSEL REQUESTS FOR STAYS

- 1201.134 Deciding official; filing stay request; serving documents on parties.
- 1201.135 Contents of stay request.
- 1201.136 Action on stay request.

### ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES

- 1201.137 Covered actions; filing complaint; serving documents on parties.
- 1201.138 Contents of complaint.
- 1201.139 Rights; answer to complaint.
- 1201.140 Judge; requirement for finding of good cause.
- 1201.141 Judicial review.
- 1201.142 Actions filed by administrative law judges.

### REMOVAL FROM THE SENIOR EXECUTIVE SERVICE

- 1201.143 Right to hearing; filing complaint; serving documents on parties.
- 1201.144 Hearing procedures; referring the record.
- 1201.145 No appeal.

### REQUESTS FOR PROTECTIVE ORDERS

- 1201.146 Requests for protective orders by the Special Counsel.
- 1201.147 Requests for protective orders by persons other than the Special Counsel.
- 1201.148 Enforcement of protective orders.

### Subpart E—Procedures for Cases Involving Allegations of Discrimination

- 1201.151 Scope and policy.
- 1201.152 Compliance with subpart B procedures.
- 1201.153 Contents of appeal.
- 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.
- 1201.155 Remand of allegations of discrimination.
- 1201.156 Time for processing appeals involving allegations of discrimination.

## 5 CFR Ch. II (1-1-08 Edition)

- 1201.157 Notice of right to judicial review.

### REVIEW OF BOARD DECISION

- 1201.161 Action by the Equal Employment Opportunity Commission; judicial review.
- 1201.162 Board action on the Commission decision; judicial review.

### SPECIAL PANEL

- 1201.171 Referral of case to Special Panel.
- 1201.172 Organization of Special Panel; designation of members.
- 1201.173 Practices and procedures of Special Panel.
- 1201.174 Enforcing the Special Panel decision.
- 1201.175 Judicial review of cases decided under 5 U.S.C. 7702.

### Subpart F—Enforcement of Final Decisions and Orders

- 1201.181 Authority and explanation.
- 1201.182 Petition for enforcement.
- 1201.183 Procedures for processing petitions for enforcement.

### Subpart G—Savings Provisions

- 1201.191 Savings provisions.

### Subpart H—Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages

- 1201.201 Statement of purpose.
- 1201.202 Authority for awards.
- 1201.203 Proceedings for attorney fees.
- 1201.204 Proceedings for consequential damages and compensatory damages.
- 1201.205 Judicial review.

APPENDIX I TO PART 1201 [RESERVED]  
APPENDIX II TO PART 1201—APPROPRIATE REGIONAL OR FIELD OFFICE FOR FILING APPEALS

APPENDIX III TO PART 1201—APPROVED HEARING LOCATIONS BY REGIONAL OFFICE  
APPENDIX IV TO PART 1201—SAMPLE DECLARATION UNDER 28 U.S.C. 1746

AUTHORITY: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

SOURCE: 54 FR 53504, Dec. 29, 1989, unless otherwise noted.

### Subpart A—Jurisdiction and Definitions

#### § 1201.1 General.

The Board has two types of jurisdiction, original and appellate.

## Merit Systems Protection Board

### § 1201.2 Original jurisdiction.

The Board's original jurisdiction includes the following cases:

- (a) Actions brought by the Special Counsel under 5 U.S.C. 1214, 1215, and 1216;
- (b) Requests, by persons removed from the Senior Executive Service for performance deficiencies, for informal hearings; and
- (c) Actions taken against administrative law judges under 5 U.S.C. 7521.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 66814, Dec. 22, 1997]

### § 1201.3 Appellate jurisdiction.

(a) *Generally.* The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions:

(1) Reduction in grade or removal for unacceptable performance (5 CFR part 432; 5 U.S.C. 4303(e));

(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 CFR part 752, subparts C and D; 5 U.S.C. 7511-7514);

(3) Removal, or suspension for more than 14 days, of a career appointee in the Senior Executive Service (5 CFR part 752, subparts E and F; 5 U.S.C. 7541-7543);

(4) Reduction-in-force action affecting a career appointee in the Senior Executive Service (5 U.S.C. 3595);

(5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 CFR 531.410; 5 U.S.C. 5335(c));

(6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employees' Retirement System (5 CFR parts 831, 839, 842, 844, and 846; 5 U.S.C. 8347(d)(1)-(2) and 8461 (e)(1); and 5 U.S.C. 8331 note, Federal Erroneous Retirement Coverage Corrections Act)

(7) Disqualification of an employee or applicant because of a suitability determination (5 CFR 731.501);

(8) Termination of employment during probation or the first year of a veterans readjustment appointment when:

### § 1201.3

(i) The employee alleges discrimination because of partisan political reasons or marital status; or

(ii) The termination was based on conditions arising before appointment and the employee alleges that the action is procedurally improper (5 CFR 315.806, 38 U.S.C. 4214(b)(1)(E));

(9) Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status (5 CFR 315.908(b));

(10) Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901);

(11) Furlough of a career appointee in the Senior Executive Service (5 CFR 359.805);

(12) Failure to restore, improper restoration of, or failure to return following a leave of absence an employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) following partial or full recovery from a compensable injury (5 CFR 353.304);

(13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury (5 CFR 302.501, 5 CFR 330.209);

(14) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 CFR 352.508);

(15) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209);

(16) Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313);

(17) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 CFR 352.707);

(18) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 CFR 352.807);

(19) Employment practices administered by the Office of Personnel Management to examine and evaluate the

### § 1201.3

### 5 CFR Ch. II (1-1-08 Edition)

qualifications of applicants for appointment in the competitive service (5 CFR 300.104);

(20) Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011); and

(21) Actions taken by the Department of Homeland Security under subpart F of 5 CFR part 9701, except for those matters excluded under 5 CFR 1210.2(c) and (d). Actions covered include suspensions of 15 days or more, demotions, reductions in pay, removals, or furloughs of 30 days or less, subject to the limitations set forth in 5 CFR 9701.704.

(b)(1) *Appeals under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act.* Appeals filed under the Uniformed Services Employment and Reemployment Rights Act (Public Law 103-353), as amended, and the Veterans Employment Opportunities Act (Public Law 105-339) are governed by part 1208 of this title. The provisions of subparts A, B, C, and F of part 1201 apply to appeals governed by part 1208 unless other specific provisions are made in that part. The provisions of subpart H of this part regarding awards of attorney fees apply to appeals governed by part 1208 of this title.

(2) *Appeals involving an allegation that the action was based on appellant's "whistleblowing."* Appeals of actions appealable to the Board under any law, rule, or regulation, in which the appellant alleges that the action was taken because of the appellant's "whistleblowing" [a violation of the prohibited personnel practice described in 5 U.S.C. 2302(b)(8)], are governed by part 1209 of this title. The provisions of subparts B, C, E, F, and G of part 1201 apply to appeals and stay requests governed by part 1209 unless other specific provisions are made in that part. The provisions of subpart H of this part regarding awards of attorney fees and consequential damages under 5 U.S.C. 1221(g) apply to appeals governed by part 1209 of this chapter.

(3) *Appeals of certain actions taken by the Department of Homeland Security.* Appeals of actions taken by the Department of Homeland Security under subpart F of 5 CFR part 9701, except for those matters excluded under 5 CFR

1210.2 (c) and (d), are governed by part 1210 of this title. Parts 1201, 1208 and 1209 of this title apply to Board appellate proceedings conducted under 5 CFR part 1210, except as otherwise provided therein.

(c) *Limitations on appellate jurisdiction, collective bargaining agreements, and election of procedures:*

(1) For an employee covered by a collective bargaining agreement under 5 U.S.C. 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(i) An appealable action involving discrimination under 5 U.S.C. 2302(b)(1), reduction in grade or removal under 5 U.S.C. 4303, or adverse action under 5 U.S.C. 7512, may be raised under the Board's appellate procedures, or under the negotiated grievance procedures, but not under both;

(ii) An appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) may be raised under not more than one of the following procedures:

(A) The Board's appellate procedures;

(B) The negotiated grievance procedures; or

(C) The procedures for seeking corrective action from the Special Counsel under subchapters II and III of chapter 12 of title 5 of the United States Code.

(iii) Except for actions involving discrimination under 5 U.S.C. 2302(b)(1) or any other prohibited personnel practice, any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

(2) *Choice of procedure.* When an employee has an option of pursuing an action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between those procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first. When an employee has the choice of pursuing an appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) in

## Merit Systems Protection Board

## § 1201.4

accordance with paragraph (c)(1)(ii) of this section, the Board considers the choice among those procedures to have been made when the employee timely files an appeal with the Board, timely files a written grievance under the negotiated grievance procedure, or seeks corrective action from the Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1), whichever event occurs first.

(3) *Review of discrimination grievances.* If an employee chooses the negotiated grievance procedure under paragraph (c)(2) of this section and alleges discrimination as described at 5 U.S.C. 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with § 1201.154.

[54 FR 53504, Dec. 29, 1989, as amended at 56 FR 41748, Aug. 23, 1991; 59 FR 65235, Dec. 19, 1994; 61 FR 1, Jan. 2, 1996; 62 FR 17044, 17045, Apr. 9, 1997; 62 FR 66814, Dec. 22, 1997; 65 FR 5409, Feb. 4, 2000; 66 FR 30635, June 7, 2001; 70 FR 30608, May 27, 2005; 72 FR 56884, Oct. 5, 2007]

### § 1201.4 General definitions.

(a) *Judge.* Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including an attorney-examiner, an administrative judge, an administrative law judge, the Board, or any member of the Board.

(b) *Pleading.* Written submission setting out claims, allegations, arguments, or evidence. Pleadings include briefs, motions, petitions, attachments, and responses.

(c) *Motion.* A request that a judge take a particular action.

(d) *Appropriate regional or field office.* The regional or field office of the Board that has jurisdiction over the area where the appellant's duty station was located when the agency took the action. Appeals of Office of Personnel Management reconsideration decisions concerning retirement benefits, and appeals of adverse suitability determinations under 5 CFR part 731, must be filed with the regional or field office that has jurisdiction over the area where the appellant lives. Appendix II

of these regulations lists the geographic areas over which each of the Board's regional and field offices has jurisdiction. Appeals, however, may be transferred from one regional or field office to another.

(e) *Party.* A person, an agency, or an intervenor, who is participating in a Board proceeding. This term applies to the Office of Personnel Management and to the Office of Special Counsel when those organizations are participating in a Board proceeding.

(f) *Appeal.* A request for review of an agency action.

(g) *Petition for review.* A request for review of an initial decision of a judge.

(h) *Day.* Calendar day.

(i) *Service.* The process of furnishing a copy of any pleading to Board officials, other parties, or both, by mail, by facsimile, by commercial or personal delivery, or by electronic filing (e-filing) in accordance with § 1201.14.

(j) *Date of service.* The date on which documents are served on other parties.

(k) *Certificate of service.* A document certifying that a party has served copies of pleadings on the other parties or, in the case of paper documents associated with electronic filings under paragraph (g) of § 1201.14, on the Board.

(l) *Date of filing.* A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the Board is closed for business) before its receipt. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. The date of filing by e-filing is the date of electronic submission.

(m) *Electronic filing (e-filing).* Filing and receiving documents in electronic form in proceedings within the Board's appellate or original jurisdiction in accordance with § 1201.14.

## § 1201.11

(n) *E-filer.* A party or representative who has registered to engage in e-filing under paragraph (e) of § 1201.14.

[54 FR 53504, Dec. 29, 1989, as amended at 58 FR 36345, July 7, 1993; 59 FR 65235, Dec. 19, 1994; 68 FR 59860, Oct. 20, 2003; 69 FR 57628, Sept. 27, 2004]

### Subpart B—Procedures for Appellate Cases

#### GENERAL

##### § 1201.11 Scope and policy.

The regulations in this subpart apply to Board appellate proceedings except as otherwise provided in § 1201.13. The regulations in this subpart apply also to appellate proceedings and stay requests covered by part 1209 unless other specific provisions are made in that part. These regulations also apply to original jurisdiction proceedings of the Board except as otherwise provided in subpart D. The regulations in this subpart apply also to appellate proceedings covered by part 1210 unless other specific provisions are made in that part. It is the Board's policy that these rules will be applied in a manner that expedites the processing of each case.

[72 FR 56884, Oct. 5, 2007]

##### § 1201.12 Revocation, amendment, or waiver of rules.

The Board may revoke, amend, or waive any of these regulations. A judge may, for good cause shown, waive a Board regulation unless a statute requires application of the regulation. The judge must give notice of the waiver to all parties, but is not required to give the parties an opportunity to respond.

##### § 1201.13 Appeals by Board employees.

Appeals by Board employees will be filed with the Clerk of the Board and will be assigned to an administrative law judge for adjudication under this subchapter. The Board's policy is to insulate the adjudication of its own employees' appeals from agency involvement as much as possible. Accordingly, the Board will not disturb initial decisions in those cases unless the party shows that there has been harmful pro-

## 5 CFR Ch. II (1-1-08 Edition)

cedural irregularity in the proceedings before the administrative law judge or a clear error of law. In addition, the Board, as a matter of policy, will not rule on any interlocutory appeals or motions to disqualify the administrative law judge assigned to those cases until the initial decision has been issued.

##### § 1201.14 Electronic filing procedures.

(a) *General.* This section prescribes the rules and procedures by which parties and representatives to proceedings within the Board's appellate and original jurisdiction may file and receive documents in electronic form.

(b) *Matters subject to electronic filing.* Subject to the registration requirement of paragraph (e) of this section, parties and representatives may use electronic filing (e-filing) to do any of the following:

(1) File any pleading, including a new appeal, in any matter within the Board's appellate jurisdiction (§ 1201.3);

(2) File any pleading, other than the original complaint or request, in any matter within the Board's original jurisdiction (§ 1201.2);

(3) File a petition for enforcement of a final Board decision (§ 1201.182);

(4) File a motion for attorney fees as a prevailing party (§ 1201.203);

(5) File a motion for compensatory or consequential damages (§ 1201.204);

(6) Designate a representative, revoke such a designation, or change such a designation (§ 1201.31); or

(7) Notify the Board of a change in contact information such as address (geographic or electronic mail) or telephone number.

(c) *Matters excluded from electronic filing.* Electronic filing may not be used to:

(1) File the original complaint or request in a matter within the Board's original jurisdiction, which includes: a complaint filed by the Special Counsel seeking corrective or disciplinary action (§§ 1201.122, 1201.128); a request by the Special Counsel for the stay of certain personnel actions (§ 1201.134); a proposal to take action against an administrative law judge under 5 U.S.C. 7521 (§ 1201.137); or a request for a hearing on a proposed removal of a career appointee from the Senior Executive

**Merit Systems Protection Board****§ 1201.14**

Service for performance reasons (§ 1201.143);

(2) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27);

(3) Serve a subpoena (§ 1201.83); or

(4) File a pleading with the Special Panel (§ 1201.137).

(d) *Internet is sole venue for electronic filing.* Following the instructions at the Board's e-Appeal site (<https://e-appeal.mspb.gov>) is the only method allowed for filing electronic pleadings with the Board. The Board will not accept pleadings filed by electronic mail.

(e) *Registration as an e-filer.* (1) Except when filing a new appeal within the Board's appellate jurisdiction (§ 1201.3), no party or representative may file an electronic pleading with the Board unless he or she has registered with the Board as an e-filer. Registration as an e-filer constitutes consent to accept electronic service of pleadings filed by other registered e-filers and documents issued by the Board.

(2) The exclusive means for a party or representative to register as an e-filer during a Board proceeding is to follow the instructions at the Board's e-Appeal site (<https://e-appeal.mspb.gov>).

(3) When a party who is an individual is represented, the party and the representative can make separate determinations whether to register as an e-filer. For example, an appellant may file and receive pleadings and Board documents by non-electronic means, even though his or her representative has registered as an e-filer. Similarly, when a party has more than one representative, each representative has the choice of registering as an e-filer or filing and receiving pleadings and Board documents by non-electronic means.

(4) A party or representative who has registered as an e-filer may file any pleading, or portion of a pleading as described in paragraph (g) of this section, by non-electronic means.

(5) A party or representative may withdraw his or her registration as an e-filer. Such withdrawal means that, effective upon the Board's receipt of this withdrawal, pleadings and Board documents will no longer be served on that person in electronic form. A withdrawal of registration as an e-filer may

be filed at the Board's e-Appeal site, in which case service is governed by paragraph (h) of this section, or by non-electronic means, in which case service is governed by section 1201.26(b) of this part.

(f) *Form of electronic pleadings—(1) Options for e-filing.* An appellant or representative using e-Appeal to file a new appeal within the Board's appellate jurisdiction (§ 1201.3) must complete the structured interview at the Board's e-Appeal site (<https://e-appeal.mspb.gov>). For all other pleadings, the e-filer has the option of uploading an electronic file or entering the text of the pleading online. Regardless of the means of filing a particular pleading, the e-filer will be allowed to submit supporting documentation as attachments, in both electronic and paper form, as described in paragraphs (f)(2) and (f)(3) of this section.

(2) *Electronic formats allowed.* The Board will accept numerous electronic formats, including word-processing and spreadsheet formats, Portable Document Format (PDF), and image files (files created by scanning). A list of formats allowed can be found at the Board's e-Appeal site. All electronic documents must be formatted so that they will print on standard 8½ inch by 11 inch paper.

(3) *Limitation on number of electronic attachments.* E-filers may upload up to three electronic files as supporting documentation, in addition to the document that constitutes the primary pleading. There is no limit on the number of non-electronic documents that may be submitted as attachments under paragraph (g) of this section.

(g) *Hybrid pleadings that include both electronic and paper documents.* An e-filer may file a hybrid pleading in which part of the pleading is submitted electronically, and part of the pleading consists of one or more paper documents filed by non-electronic means. If one or more parts of a hybrid pleading are untimely filed, the judge or the Clerk may reject the untimely part or parts while accepting timely filed parts of the same pleading.

(h) *Service of electronic pleadings.* The Board will serve electronic pleadings on other parties and representatives who have registered as e-filers. The

## § 1201.21

Board's e-Appeal application will notify the e-filer of all documents that must be served by non-electronic means. The e-filer must certify that he or she will serve all such documents no later than the first business day after the electronic submission.

(i) *Documents requiring a signature.* An electronic document filed by a party who has registered as an e-filer pursuant to this section shall be deemed to be signed for purposes of any regulation in part 1201, 1203, 1208, 1209, or 1210 of this title that requires a signature.

(j) *Affidavits and declarations made under penalty of perjury.* Registered e-filers may submit electronic pleadings in the form of declarations made under penalty of perjury under 28 U.S.C. 1746, as described in Appendix IV of this part. If the declarant is someone other than the e-filer, a physically signed affidavit or declaration should be uploaded as an image file, or submitted separately as a non-electronic document under paragraph (g) of this section.

(k) *Issuance of Board documents to e-filers.* The Board's notices, orders, and decisions will be served on e-filers as PDF files attached to electronic mail messages, which will be sent to the electronic mail address supplied by the e-filer.

(l) *Date electronic documents are received.* Pleadings and Board documents served electronically on registered e-filers are deemed received on the date of electronic submission or, if submitted on a weekend or federal holiday, on the first business day after the electronic submission.

(m) *Authority of a judge or the Clerk to regulate e-filing.* (1) In the event that the Board or any party encounters repeated or unexplained difficulties filing, serving, or receiving electronic documents, the judge or the Clerk of the Board may order one or more parties to cease filing pleadings by e-filing, cease serving documents in electronic form, or take both these actions. In such instances, filing and service shall be undertaken in accordance with § 1201.26. The authority to order the cessation of the use of electronic filing may be for a particular submission, for a particular time frame, or for the duration of the pendency of a case.

## 5 CFR Ch. II (1-1-08 Edition)

(2) A judge or the Clerk of the Board may require that any document filed electronically be submitted in non-electronic form and bear the written signature of the submitter. A party receiving such an order from a judge or the Clerk of the Board shall, within 5 calendar days, serve on the judge or Clerk of the Board by regular mail, by facsimile, or by commercial or personal delivery a signed, non-electronic copy of the document.

[69 FR 57628, Sept. 27, 2004, as amended at 72 FR 56884, Oct. 5, 2007]

### APPEAL OF AGENCY ACTION; PLEADINGS

#### § 1201.21 Notice of appeal rights.

(a) When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with the following:

(1) Notice of the time limits for appealing to the Board, the requirements of § 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(2) A copy, or access to a copy, of the Board's regulations;

(3) A copy of the MSPB appeal form available at the Board's Web site (<http://www.mspb.gov>), and

(4) Notice of any right the employee has to file a grievance, including:

(i) Whether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board;

(ii) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board; and

(iii) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.154(d).

(b) When the Department of Homeland Security (or component thereof) issues a decision notice to an employee on a matter that is appealable to the Board, except as provided under 5 CFR 9701.707, the Department must comply

## Merit Systems Protection Board

## § 1201.24

with the notice provisions set forth in 5 CFR 1210.10.

[72 FR 56884, Oct. 5, 2007]

### § 1201.22 Filing an appeal and responses to appeals.

(a) *Place of filing.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See § 1201.4(d) of this part.

(b) *Time of filing.* (1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days—for a total of 60 days. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order. The time for filing a submission under this section is computed in accordance with § 1201.23 of this part.

(2) The time limit prescribed by paragraph (b)(1) of this section for filing an appeal does not apply where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Pub. L. 103-353), as amended; see part 1208 of this title. See part 1208 of this title for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Pub. L. 105-339). See part 1209 of this title for the statutory filing time limits applicable to whistleblower appeals and stay requests. See part 1210 of this title for time limits applicable to appeals by employees of the Department of Homeland Security.

(c) *Timeliness of appeals.* If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show

why the appeal should not be dismissed as untimely.

(d) *Method of filing an appeal.* Filing of an appeal must be made with the appropriate Board office by commercial or personal delivery, by facsimile, by mail, or by electronic filing under § 1201.14.

(e) *Filing a response.* Filing of a response must be made with the appropriate Board office by commercial or personal delivery, by facsimile, by mail, or by electronic filing under § 1201.14.

[54 FR 53504, Dec. 29, 1989, as amended at 58 FR 36345, July 7, 1993; 59 FR 31109, June 17, 1994; 59 FR 65235, Dec. 19, 1994; 62 FR 59992, Nov. 6, 1997; 62 FR 66814, Dec. 22, 1997; 64 FR 27899, May 24, 1999; 64 FR 54508, Oct. 7, 1999; 65 FR 5409, Feb. 4, 2000; 68 FR 59862, Oct. 20, 2003; 69 FR 57629, Sept. 27, 2004; 72 FR 56885, Oct. 5, 2007]

### § 1201.23 Computation of time.

In computing the number of days allowed for filing a submission, the first day counted is the day after the event from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date.

*Example:* If an employee receives a decision notice that is effective on July 1, the 30-day period for filing an appeal starts to run on July 2. The filing ordinarily would be timely only if it is made by July 31. If July 31 is a Saturday, however, the last day for filing would be Monday, August 2.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994]

### § 1201.24 Content of an appeal; right to hearing.

(a) *Content.* Only an appellant, his or her designated representative, or a party properly substituted under § 1201.35 may file an appeal. Appeals may be in any format, including letter form. An appeal may be filed in electronic form provided that the requirements of § 1201.14 have been satisfied. All appeals must contain the following:

(1) The name, address, and telephone number of the appellant, and the name and address of the agency that took the action;

## § 1201.25

(2) A description of the action the agency took and its effective date;

(3) A request for hearing if the appellant wants one;

(4) A statement of the reasons why the appellant believes the agency action is wrong;

(5) A statement of the action the appellant would like the judge to order;

(6) The name, address, and telephone number of the appellant's representative, if the appellant has a representative;

(7) The notice of the decision to take the action being appealed, along with any relevant documents;

(8) A statement telling whether the appellant or anyone acting on his or her behalf has filed a grievance or a formal discrimination complaint with any agency regarding this matter; and

(9) The signature of the appellant or, if the appellant has a representative, of the representative. If the appeal is electronically filed, compliance with § 1201.14 and the directions at the Board's e-Appeal site (<https://e-appeal.mspb.gov>) satisfy the signature requirement.

(b) An appellant may raise a claim or defense not included in the appeal at any time before the end of the conference(s) held to define the issues in the case. An appellant may not raise a new claim or defense after that time, except for good cause shown. However, a claim or defense not included in the appeal may be excluded if a party shows that including it would result in undue prejudice.

(c) *Use of Board form or electronic filing.* An appellant may comply with paragraph (a) of this section, and with § 1201.31, by completing MSPB Form 185, or by completing all requests for information marked as required at the e-Appeal site (<https://e-appeal.mspb.gov>). MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>).

(d) *Right to hearing.* Under 5 U.S.C. 7701, an appellant has a right to a hearing.

(e) *Timely request.* The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely

## 5 CFR Ch. II (1-1-08 Edition)

request for a hearing, the right to a hearing is waived.

[54 FR 53504, Dec. 29, 1989, as amended at 68 FR 59862, Oct. 20, 2003; 69 FR 57629, Sept. 27, 2004]

### § 1201.25 Content of agency response.

The agency response to an appeal must contain the following:

(a) The name of the appellant and of the agency whose action the appellant is appealing;

(b) A statement identifying the agency action taken against the appellant and stating the reasons for taking the action;

(c) All documents contained in the agency record of the action;

(d) Designation of and signature by the authorized agency representative; and

(e) Any other documents or responses requested by the Board.

### § 1201.26 Number of pleadings, service, and response.

(a) *Number.* The appellant must file two copies of both the appeal and all attachments with the appropriate Board office, unless the appellant files an appeal in electronic form under § 1201.14.

(b) *Service—(1) Service by the Board.* The appropriate office of the Board will mail a copy of the appeal to each party to the proceeding other than the appellant. It will attach to each copy a service list, consisting of a list of the names and addresses of the parties to the proceeding or their designated representatives.

(2) *Service by the parties.* The parties must serve on each other one copy of each pleading, as defined by § 1201.4(b), and all documents submitted with it, except for the appeal. They may do so by mail, by facsimile, by commercial or personal delivery, or by electronic filing in accordance with § 1201.14. Documents and pleadings must be served upon each party and each representative. A certificate of service stating how and when service was made must accompany each pleading. The parties must notify the appropriate Board office and one another, in writing, of any changes in the names, or addresses on the service list.

## Merit Systems Protection Board

## § 1201.31

(c) *Paper size.* Pleadings and attachments must be filed on 8½ by 11-inch paper, except for good cause shown. This requirement enables the Board to comply with standards established for U.S. courts. All electronic documents must be formatted so that they will print on 8½ by 11-inch paper.

[54 FR 53504, Dec. 29, 1989; 55 FR 548, Jan. 5, 1990, as amended at 58 FR 36345, July 7, 1993; 68 FR 59862, Oct. 20, 2003; 69 FR 57629, Sept. 27, 2004]

### § 1201.27 Class appeals.

(a) *Appeal.* One or more employees may file an appeal as representatives of a class of employees. The judge will hear the case as a class appeal if he or she finds that a class appeal is the fairest and most efficient way to adjudicate the appeal and that the representative of the parties will adequately protect the interests of all parties. When a class appeal is filed, the time from the filing date until the judge issues his or her decision under paragraph (b) of this section is not counted in computing the time limit for individual members of the potential class to file individual appeals.

(b) *Procedure.* The judge will consider the appellant's request and any opposition to that request, and will issue an order within 30 days after the appeal is filed stating whether the appeal is to be heard as a class appeal. If the judge denies the request, the appellants affected by the decision may file individual appeals within 30 days after the date of receipt of the decision denying the request to be heard as a class appeal. Each individual appellant is responsible for either filing an individual appeal within the original time limit, or keeping informed of the status of a class appeal and, if the class appeal is denied, filing an individual appeal within the additional 35-day period.

(c) *Standards.* In determining whether it is appropriate to treat an appeal as a class action, the judge will be guided but not controlled by the applicable provisions of the Federal Rules of Civil Procedure.

(d) *Electronic filing.* A request to hear a case as a class appeal and any opposition thereto may not be filed in electronic form. Subsequent pleadings may be filed and served in electronic form,

provided that the requirements of § 1201.14 are satisfied.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994; 62 FR 59992, Nov. 6, 1997; 68 FR 59862, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

### § 1201.28 Case suspension procedures.

(a) *Joint requests.* The parties may submit a joint request for additional time to pursue discovery or settlement. Upon receipt of such request, an order suspending processing of the case for a period up to 30 days may be issued at the discretion of the judge.

(b) *Unilateral requests.* In lieu of participating in a joint request, either party may submit a unilateral request for additional time to pursue discovery as provided in this subpart. Unilateral requests for additional time of up to 30 days may be granted for good cause shown at the discretion of the judge.

(c) *Time for filing requests.* The parties must file a joint request that the adjudication of the appeal be suspended within 45 days of the date of the acknowledgment order (or within 7 days of the appellant's receipt of the agency file, whichever date is later).

(d) *Untimely requests.* The judge may consider requests for suspensions that are filed after the time limit set forth in paragraph (c) of this section. Such requests may be granted at the discretion of the judge.

(e) *Early termination of suspension period.* The suspension period may be terminated prior to the end of the agreed upon period if the parties request the judge's assistance relative to discovery or settlement during the suspension period and the judge's involvement pursuant to that request is likely to be extensive.

(f) *Limitation on suspension period.* No case may be suspended for more than a total of 30 days under the provisions of this section.

[68 FR 54651, Sept. 18, 2003]

### PARTIES, REPRESENTATIVES, AND WITNESSES

### § 1201.31 Representatives.

(a) *Procedure.* A party to an appeal may be represented in any matter related to the appeal. Parties may designate a representative, revoke such a

**§ 1201.32****5 CFR Ch. II (1-1-08 Edition)**

designation, and change such a designation in a signed submission, submitted as a pleading.

(b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one.

(c) The judge, on his or her own motion, may disqualify a party's representative on the grounds described in paragraph (b) of this section.

(d)(1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice.

(2) When a judge determines that a person should be excluded from participation in a proceeding, the judge shall inform the person of this determination through issuance of an order to show cause why he or she should not be excluded. The show cause order shall be delivered to the person by the most expeditious means of delivery available, including issuance of an oral order on the record where the determination to exclude the person is made during a hearing. The person must respond to the judge's show cause order within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the order, unless the judge provides a different time limit, or forfeit the right to seek certification of a subsequent exclusion order as an interlocutory appeal to the Board under paragraph (d)(3) of this section.

(3) When, after consideration of the person's response to the show cause

order, or in the absence of a response to the show cause order, the judge determines that the person should be excluded from participation in the proceeding, the judge shall issue an order that documents the reasons for the exclusion. The person may obtain review of the judge's ruling by filing, within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the ruling, a motion that the ruling be certified to the Board as an interlocutory appeal. The judge shall certify an interlocutory appeal to the Board within one day (excluding Saturdays, Sundays, and Federal holidays) of receipt of such a motion. Only the provisions of this paragraph apply to interlocutory appeals of rulings excluding a person from a proceeding; the provisions of §§ 1201.91 through 1201.93 of this part shall not apply.

(4) A proceeding will not be delayed because the judge excludes a person from the proceeding, except that:

(i) Where the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative; and

(ii) Where the judge certifies an interlocutory appeal of an exclusion ruling to the Board, the judge or the Board may stay the proceeding *sua sponte* or on the motion of a party for a stay of the proceeding.

(5) The Board, when considering a petition for review of a judge's initial decision under subpart C of this part, will not be bound by any decision of the judge to exclude a person from the proceeding below.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 62689, Nov. 25, 1997; 62 FR 66815, Dec. 22, 1997; 63 FR 35500, June 30, 1998; 65 FR 5409, Feb. 4, 2000; 68 FR 59862, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

**§ 1201.32 Witnesses; right to representation.**

Witnesses have the right to be represented when testifying. The representative of a nonparty witness has no right to examine the witness at the hearing or otherwise participate in the development of testimony.

## Merit Systems Protection Board

## § 1201.35

### § 1201.33 Federal witnesses.

(a) Every Federal agency or corporation must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the judge to do so. When providing those statements or appearing at the hearing, Federal employee witnesses will be in official duty status (*i.e.*, entitled to pay and benefits including travel and per diem, where appropriate).

(b) A Federal employee who is denied the official time required by paragraph (a) of this section may file a written request that the judge order the employing agency to provide such official time. The judge will act on such a request promptly and, where warranted, will order the agency to comply with the requirements of paragraph (a) of this section.

(c) An order obtained under paragraph (b) of this section may be enforced as provided under subpart F of this part.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 48935, Sept. 18, 1997]

### § 1201.34 Intervenors and amicus curiae.

(a) *Explanation of Intervention.* Intervenors are organizations or persons who want to participate in a proceeding because they believe the proceeding, or its outcome, may affect their rights or duties. Intervenors as a "matter of right" are those parties who have a statutory right to participate. "Permissive" intervenors are those parties who may be permitted to participate if the proceeding will affect them directly and if intervention is otherwise appropriate under law. A request to intervene may be made by motion filed with the judge.

(b) *Intervenors as a matter of right.* (1) The Director of the Office of Personnel Management may intervene as a matter of right under 5 U.S.C. 7701(d)(1). The motion to intervene must be filed at the earliest practicable time.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the Special Counsel may intervene as a matter of right under 5 U.S.C. 1212(c). The motion to intervene must be filed at the earliest practicable time.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(c) *Permissive intervenors.* (1) Any person, organization or agency may, by motion, ask the judge for permission to intervene. The motion must explain the reason why the person, organization or agency should be permitted to intervene.

(2) A motion for permission to intervene will be granted where the requester will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may request permission to intervene. A judge's denial of a motion for permissive intervention may be appealed to the Board under § 1201.91 of this part.

(d) *Role of intervenors.* Intervenors have the same rights and duties as parties, with the following two exceptions:

(1) Intervenors do not have an independent right to a hearing; and

(2) Permissive intervenors may participate only on the issues affecting them. The judge is responsible for determining the issues on which permissive intervenors may participate.

(e) *Amicus curiae.* An amicus curiae is a person or organization that, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may, in the discretion of the judge, be granted permission to file an amicus curiae brief.

### § 1201.35 Substituting parties.

(a) If an appellant dies or is otherwise unable to pursue the appeal, the processing of the appeal will only be completed upon substitution of a proper party. Substitution will not be permitted where the interests of the appellant have terminated because of the appellant's death or other disability.

## § 1201.36

(b) The representative or proper party must file a motion for substitution within 90 days after the death or other disabling event, except for good cause shown.

(c) In the absence of a timely substitution of a party, the processing of the appeal may continue if the interests of the proper party will not be prejudiced.

### § 1201.36 Consolidating and joining appeals.

(a) *Explanation.* (1) Consolidation occurs when the appeals of two or more parties are united for consideration because they contain identical or similar issues. For example, individual appeals rising from a single reduction in force might be consolidated.

(2) Joinder occurs when one person has filed two or more appeals and they are united for consideration. For example, a judge might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent dismissal if the same appellant filed both appeals.

(b) *Action by judge.* A judge may consolidate or join cases on his or her own motion or on the motion of a party if doing so would:

- (1) Expedite processing of the cases; and
- (2) Not adversely affect the interests of the parties.

(c) Any objection to a motion for consolidation or joinder must be filed within 10 days of the date of service of the motion.

### § 1201.37 Witness fees.

(a) *Federal employees.* Employees of a Federal agency or corporation testifying in any Board proceeding or making a statement for the record will be in official duty status and will not receive witness fees.

(b) *Other witnesses.* Other witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) *Payment of witness fees and travel costs.* The party requesting the presence of a witness must pay that witness' fees. Those fees must be paid or offered to the witness at the time the subpoena is served, or, if the witness

## 5 CFR Ch. II (1-1-08 Edition)

appears voluntarily, at the time of appearance. A Federal agency or corporation is not required to pay or offer witness fees in advance.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994; 59 FR 65235, Dec. 19, 1994; 62 FR 17045, Apr. 9, 1997]

### JUDGES

### § 1201.41 Judges.

(a) *Exercise of authority.* Judges may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate.

(b) *Authority.* Judges will conduct fair and impartial hearings and will take all necessary action to avoid delay in all proceedings. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges' powers include, but are not limited to, the authority to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas under § 1201.81 of this part;

(3) Rule on offers of proof and receive relevant evidence;

(4) Rule on discovery motions under § 1201.73 of this part;

(5) After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary:

(i) To resolve an important issue of credibility;

(ii) To ensure that the record on significant issues is fully developed; or

(iii) To otherwise ensure a fair and just adjudication of the case;

(6) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum, and exclude any disruptive persons from the hearing;

(7) Exclude any person from all or any part of the proceeding before him or her as provided under § 1201.31(d) of this part;

(8) Rule on all motions, witness and exhibit lists, and proposed findings;

(9) Require the parties to file memoranda of law and to present oral argument with respect to any question of law;

(10) Order the production of evidence and the appearance of witnesses whose

## Merit Systems Protection Board

## § 1201.51

testimony would be relevant, material, and nonrepetitious;

(11) Impose sanctions as provided under § 1201.43 of this part;

(12) Hold prehearing conferences for the settlement and simplification of issues;

(13) Require that all persons who can be identified from the record as being clearly and directly affected by a pending retirement-related case be notified of the appeal and of their right to request intervention so that their interests can be considered in the adjudication;

(14) Issue any order that may be necessary to protect a witness or other individual from harassment and provide for enforcement of such order in accordance with subpart F;

(15) Issue initial decisions; and

(16) Determine, in decisions in which the appellant is the prevailing party, whether the granting of interim relief is appropriate.

(c) *Settlement*—(1) *Settlement discussion*. The judge may initiate attempts to settle the appeal informally at any time. The parties may agree to waive the prohibitions against *ex parte* communications during settlement discussions, and they may agree to any limits on the waiver.

(2) *Agreement*. If the parties agree to settle their dispute, the settlement agreement is the final and binding resolution of the appeal, and the judge will dismiss the appeal with prejudice.

(i) If the parties offer the agreement for inclusion in the record, and if the judge approves the agreement, it will be made a part of the record, and the Board will retain jurisdiction to ensure compliance with the agreement.

(ii) If the agreement is not entered into the record, the Board will not retain jurisdiction to ensure compliance.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 62689, Nov. 25, 1997; 63 FR 35500, June 30, 1998]

### § 1201.42 Disqualifying a judge.

(a) If a judge considers himself or herself disqualified, he or she will withdraw from the case, state on the record the reasons for doing so, and immediately notify the Board of the withdrawal.

(b) A party may file a motion asking the judge to withdraw on the basis of personal bias or other disqualification. This motion must be filed as soon as the party has reason to believe there is a basis for disqualification. The reasons for the request must be set out in an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.)

(c) If the judge denies the motion, the party requesting withdrawal may request certification of the issue to the Board as an interlocutory appeal under § 1201.91 of this part. Failure to request certification is considered a waiver of the request for withdrawal.

### § 1201.43 Sanctions.

The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), and (c) of this section.

(a) *Failure to comply with an order*. When a party fails to comply with an order, the judge may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;

(3) Permit the requesting party to introduce secondary evidence concerning the information sought; and

(4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

(b) *Failure to prosecute or defend appeal*. If a party fails to prosecute or defend an appeal, the judge may dismiss the appeal with prejudice or rule in favor of the appellant.

(c) *Failure to make timely filing*. The judge may refuse to consider any motion or other pleading that is not filed in a timely fashion in compliance with this subpart.

## HEARINGS

### § 1201.51 Scheduling the hearing.

(a) The hearing will be scheduled not earlier than 15 days after the date of the hearing notice unless the parties

## § 1201.52

## 5 CFR Ch. II (1-1-08 Edition)

agree to an earlier date. The agency, upon request of the judge, must provide appropriate hearing space.

(b) The judge may change the time, date, or place of the hearing, or suspend, adjourn, or continue the hearing. The change will not require the 15-day notice provided in paragraph (a) of this section.

(c) Either party may file a motion for postponement of the hearing. The motion must be made in writing and must either be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV.) The affidavit or sworn statement must describe the reasons for the request. The judge will grant the request for postponement only upon a showing of good cause.

(d) The Board has established certain approved hearing locations, which are published as a Notice in the FEDERAL REGISTER. See appendix III. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board.

### § 1201.52 Public hearings.

Hearings are open to the public. The judge may order a hearing or any part of a hearing closed, however, when doing so would be in the best interests of the appellant, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record.

### § 1201.53 Record of proceedings.

(a) *Preparation.* A word-for-word record of the hearing is made under the judge's guidance. It is kept in the Board's copy of the appeal file and it is the official record of the hearing. Only hearing tape recordings or written transcripts prepared by the official hearing reporter will be accepted by the Board as the official record of the hearing. When the judge assigned to the case tape records a hearing (for example, a telephonic hearing in a retirement appeal), the judge is the "official hearing reporter" under this section.

(b) *Copies.* When requested and when costs are paid, a copy of the official

record of the hearing will be provided to a party. A party must send a request for a copy of a hearing tape recording or written transcript to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. A request for a copy of a hearing tape recording or written transcript sent by a non-party is controlled by the Board's rules at 5 CFR part 1204 (Freedom of Information Act). Requests for hearing tape recordings or written transcripts under the Freedom of Information Act must be sent to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC.

(c) *Exceptions to payment of costs.* A party may not have to pay for a hearing tape recording or written transcript if he has a good reason to support a request for an exception. If a party believes he has a good reason and the request is made before the judge issues an initial decision, the party must send the request for an exception to the judge. If the request is made after the judge issues an initial decision, the request must be sent to the Clerk of the Board, who shall have authority to grant or deny such requests. The party must clearly state the reason for the request in an affidavit or sworn statement.

(d) *Corrections to written transcript.* Corrections to the official written transcript may be made on motion by a party or on the judge's own motion. Motions for corrections must be filed within 10 days after the receipt of a written transcript. Corrections of the official written transcript will be made only when substantive errors are found and only with the judge's approval.

(e) *Official record.* Exhibits, the official hearing record, if a hearing is held, all papers filed, and all orders and decisions of the judge and the Board, make up the official record of the case.

[65 FR 19293, Apr. 11, 2000, as amended at 70 FR 30608, May 27, 2005]

### § 1201.55 Motions.

(a) *Form.* All motions, except those made during a prehearing conference or a hearing, must be in writing. All motions must include a statement of

## Merit Systems Protection Board

## § 1201.56

the reasons supporting them. Written motions must be filed with the judge or the Board, as appropriate, and must be served upon all other parties in accordance with § 1201.26(b)(2) of this part. A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the other party to determine whether there is any objection to the motion, and must state in the motion whether the other party has an objection.

(b) *Objection.* Unless the judge provides otherwise, any objection to a written motion must be filed within 10 days from the date of service of the motion. Judges, in their discretion, may grant or deny motions for extensions of time to file pleadings without providing any opportunity to respond to the motions.

(c) *Motions for extension of time.* Motions for extension of time will be granted only on a showing of good cause.

(d) *Motions for protective orders.* A motion for an order under 5 U.S.C. 1204(e)(1)(B) to protect a witness or other individual from harassment must be filed as early in the proceeding as practicable. The party seeking a protective order must include a concise statement of reasons justifying the motion, together with any relevant documentary evidence. An agency, other than the Office of Special Counsel, may not request such an order with respect to an investigation by the Special Counsel during the Special Counsel's investigation. An order issued under this paragraph may be enforced in the same manner as provided under subpart F for Board final decisions and orders.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 17045, Apr. 9, 1997]

### § 1201.56 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof—(1) Agency:* Under 5 U.S.C. 7701(c)(1), and subject to the exceptions stated in paragraph (b) of this section, the agency action must be sustained if:

(i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

- (i) Issues of jurisdiction;
- (ii) The timeliness of the appeal; and
- (iii) Affirmative defenses.

In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits. An appellant who has received an overpayment from the Civil Service Retirement and Disability Fund has the burden of proving, by substantial evidence, eligibility for waiver or adjustment.

(b) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at its decision;

(2) Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) *Definitions.* The following definitions apply to this part:

(1) *Substantial evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(2) *Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

(3) *Harmful error.* Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the

**§ 1201.57****5 CFR Ch. II (1-1-08 Edition)**

absence or cure of the error. The burden is upon the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

[54 FR 53504, Dec. 29, 1989, as amended at 56 FR 41748, Aug. 23, 1991; 70 FR 30608, May 27, 2005]

**§ 1201.57 Order of hearing.**

(a) In cases in which the agency has taken an action against an employee, the agency will present its case first.

(b) The appellant will proceed first at hearings convened on the issues of:

- (1) Jurisdiction;
- (2) Timeliness; or

(3) Office of Personnel Management disallowance of retirement benefits, when the appellant applied for those benefits.

(c) The judge may vary the normal order of presenting evidence.

**§ 1201.58 Closing the record.**

(a) When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When the judge allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence, however, the record will remain open for as much time as the judge grants for that purpose.

(b) If the appellant waives the right to a hearing, the record will close on the date the judge sets as the final date for the receipt or filing of submissions of the parties.

(c) Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed. The judge will include in the record, however, any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.

**EVIDENCE****§ 1201.61 Exclusion of evidence and testimony.**

Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.

**§ 1201.62 Producing prior statements.**

After an individual has given evidence in a proceeding, any party may request a copy of any prior signed statement made by that individual that is relevant to the evidence given. If the party refuses to furnish the statement, the judge may exclude the evidence given.

**§ 1201.63 Stipulations.**

The parties may stipulate to any matter of fact. The stipulation will satisfy a party's burden of proving the fact alleged.

**§ 1201.64 Official notice.**

Official notice is the Board's or judge's recognition of certain facts without requiring evidence to be introduced establishing those facts. The judge, on his or her own motion or on the motion of a party, may take official notice of matters of common knowledge or matters that can be verified. The parties may be given an opportunity to object to the taking of official notice. The taking of official notice of any fact satisfies a party's burden of proving that fact.

**DISCOVERY****§ 1201.71 Purpose of discovery.**

Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected to start and complete discovery with a minimum of Board intervention.

**§ 1201.72 Explanation and scope of discovery.**

(a) *Explanation.* Discovery is the process, apart from the hearing, by which a party may obtain relevant information, including the identification of potential witnesses, from another person or a party, that the other person or party has not otherwise provided. Relevant information includes information that appears reasonably

**Merit Systems Protection Board****§ 1201.73**

calculated to lead to the discovery of admissible evidence. This information is obtained to assist the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. Those rules, however, are instructive rather than controlling.

(b) *Scope.* Discovery covers any nonprivileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.

(c) *Methods.* Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission.

(d) *Limitations.* The judge may limit the frequency or extent of use of the discovery methods permitted by these regulations. Such limitations may be imposed if the judge finds that the discovery sought is:

(1) Cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had sufficient opportunity by discovery in the action to obtain the information sought; or

(3) The burden or expense of the proposed discovery outweighs its likely benefit.

[68 FR 54651, Sept. 18, 2003]

**§ 1201.73 Discovery procedures.**

(a) *Discovery from a party.* A party seeking discovery from another party must start the process by serving a request for discovery on the representative of the other party or the party if there is no representative. The request for discovery must state the time limit for responding, as prescribed in

§ 1201.73(d), and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to an officer or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency.

(b) *Discovery from a nonparty, including a nonparty Federal agency.* Parties should try to obtain voluntary discovery from nonparties whenever possible. A party seeking discovery from a nonparty Federal agency or employee must start the process by serving a request for discovery on the nonparty Federal agency or employee. A party may begin discovery from other nonparties by serving a request for discovery on the nonparty directly. If the party seeking the information does not make that request, or if it does so but fails to obtain voluntary cooperation, it may obtain discovery from a nonparty by filing a written motion with the judge, showing the relevance, scope, and materiality of the particular information sought. If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the Board will issue a ruling on the motion, and will serve the ruling on the moving party. That official also will provide that party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any Board-approved discovery request and subpoena on the individual or entity, or for arranging for their service.

(c) *Responses to discovery requests.* (1) A party, or a Federal agency that is not a party, must answer a discovery request within the time provided under paragraph (d)(2) of this section, either by furnishing to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable

## § 1201.74

time, or by stating an objection to the particular request and the reasons for the objection. Non-parties may respond to discovery requests by electronic mail if authorized by the requesting party.

(2) If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond in full to a Board-approved discovery order, the requesting party may file a motion to compel discovery. The requesting party must file the motion with the judge, and must serve a copy of the motion on the other party and on any nonparty entity or person from whom the discovery was sought. The motion must be accompanied by:

(i) A copy of the original request and a statement showing that the information sought is relevant and material; and

(ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement. (See appendix IV to part 1201.)

(3) The other party and any other entity or person from whom discovery was sought may respond to the motion to compel discovery within the time limits stated in paragraph (d)(4) of this section.

(d) *Time limits.* (1) Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response.

(2) A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 7 days of the date of service of the prior response, unless the parties are otherwise directed. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place.

(3) Any motion to depose a nonparty (along with a request for a subpoena)

## 5 CFR Ch. II (1-1-08 Edition)

must be submitted to the judge within the time limits stated in paragraph (d)(1) of this section or as the judge otherwise directs.

(4) Any motion for an order to compel discovery must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with the judge within 10 days of the date of service of the motion.

(5) Discovery must be completed within the time the judge designates.

(e) *Limits on the number of discovery requests.* (1) Absent prior approval by the judge, interrogatories served by parties upon another party or a nonparty may not exceed 25 in number, including all discrete subparts.

(2) Absent prior approval by the judge, parties may not take more than 10 depositions.

(3) Requests to exceed the limitations set forth in paragraphs (a) and (b) of this section may be granted at the discretion of the judge. In considering such requests, the judge shall consider the factors identified in § 1201.72(d) of this part.

[68 FR 54651, Sept. 18, 2003]

## § 1201.74 Orders for discovery.

(a) *Motion for an order compelling discovery.* Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the judge in accordance with § 1201.73(c)(2) and (d)(4).

(b) *Content of order.* Any order issued will include, where appropriate:

(1) A provision that the person to be deposed must be notified of the time and place of the deposition;

(2) Any conditions or limits concerning the conduct or scope of the proceedings or the subject matter that may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment, or oppression;

(3) Limits on the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(4) Other restrictions upon the discovery process that the judge sets.

## Merit Systems Protection Board

## § 1201.85

(c) *Noncompliance.* The judge may impose sanctions under § 1201.43 of this part for failure to comply with an order compelling discovery.

### § 1201.75 Taking depositions.

Depositions may be taken by any method agreed upon by the parties. The person providing information is subject to penalties for intentional false statements.

#### SUBPOENAS

### § 1201.81 Requests for subpoenas.

(a) *Request.* Parties who wish to obtain subpoenas that would require the attendance and testimony of witnesses, or subpoenas that would require the production of documents or other evidence under 5 U.S.C. 1204(b)(2)(A), should file their motions for those subpoenas with the judge. The Board has authority under 5 U.S.C. 1204(b)(2)(A) to issue a subpoena requiring the attendance and testimony of any individual regardless of location and for the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico or the District of Columbia. Subpoenas are not ordinarily required to obtain the attendance of Federal employees as witnesses.

(b) *Form.* Parties requesting subpoenas must file their requests, in writing, with the judge. Each request must identify specifically the books, papers, or testimony desired.

(c) *Relevance.* The request must be supported by a showing that the evidence sought is relevant and that the scope of the request is reasonable.

(d) *Rulings.* Any judge who does not have the authority to issue subpoenas will refer the request to an official with authority to rule on the request, with a recommendation for decision. The official to whom the request is referred will rule on the request promptly. Judges who have the authority to rule on these requests themselves will do so directly.

[54 FR 53504, Dec. 29, 1989, as amended at 70 FR 30608, May 27, 2005]

### § 1201.82 Motions to quash subpoenas.

Any person to whom a subpoena is directed, or any party, may file a motion to quash or limit the subpoena. The motion must be filed with the judge, and it must include the reasons why compliance with the subpoena should not be required or the reasons why the subpoena's scope should be limited.

### § 1201.83 Serving subpoenas.

(a) Any person who is at least 18 years of age and who is not a party to the appeal may serve a subpoena. The means prescribed by applicable state law are sufficient. The party who requested the subpoena, and to whom the subpoena has been issued, is responsible for serving the subpoena.

(b) A subpoena directed to an individual outside the territorial jurisdiction of any court of the United States may be served in the manner described by the Federal Rules of Civil Procedure for service of a subpoena in a foreign country.

### § 1201.84 Proof of service.

The person who has served the subpoena must certify that he or she did so:

- (a) By delivering it to the witness in person,
- (b) By registered or certified mail, or
- (c) By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended.

The document in which the party makes this certification also must include a statement that the prescribed fees have been paid or offered.

### § 1201.85 Enforcing subpoenas.

(a) If a person who has been served with a Board subpoena fails or refuses to comply with its terms, the party seeking compliance may file a written motion for enforcement with the judge or make an oral motion for enforcement while on the record at a hearing. That party must present the document certifying that the subpoena was served and, except where the witness was required to appear before the judge, must submit an affidavit or

## § 1201.91

sworn statement under 28 U.S.C. 1746 (see appendix IV) describing the failure or refusal to obey the subpoena. The Board, in accordance with 5 U.S.C. 1204(c), may then ask the appropriate United States district court to enforce the subpoena. If the person who has failed or refused to comply with a Board subpoena is located in a foreign country, the U.S. District Court for the District of Columbia will have jurisdiction to enforce compliance, to the extent that a U.S. court can assert jurisdiction over an individual in the foreign country.

(b) Upon application by the Special Counsel, the Board may seek court enforcement of a subpoena issued by the Special Counsel in the same manner in which it seeks enforcement of Board subpoenas, in accordance with 5 U.S.C. 1212(b)(3).

### INTERLOCUTORY APPEALS

#### § 1201.91 Explanation.

An interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding. The judge may permit the appeal if he or she determines that the issue presented in it is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal. In addition, the judge, on his or her own motion, may certify an interlocutory appeal to the Board. If the appeal is certified, the Board will decide the issue and the judge will act in accordance with the Board's decision.

#### § 1201.92 Criteria for certifying interlocutory appeals.

The judge will certify a ruling for review only if the record shows that:

(a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and

(b) An immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.

## 5 CFR Ch. II (1-1-08 Edition)

#### § 1201.93 Procedures.

(a) *Motion for certification.* A party seeking the certification of an interlocutory appeal must file a motion for certification within 10 days of the date of the ruling to be appealed. The motion must be filed with the judge, and must state why certification is appropriate and what the Board should do and why. The opposing party may file objections within 10 days of the date of service of the motion, or within any other time period that the judge may designate.

(b) *Certification and review.* The judge will grant or deny a motion for certification within five days after receiving all pleadings or, if no response is filed, within 10 days after receiving the motion. If the judge grants the motion for certification, he or she will refer the record to the Board. If the judge denies the motion, the party that sought certification may raise the matter at issue in a petition for review filed after the initial decision is issued, in accordance with §§ 1201.113 and 1201.114 of this part.

(c) *Stay of hearing.* The judge has the authority to proceed with or to stay the hearing while an interlocutory appeal is pending with the Board. Despite this authority, however, the Board may stay a hearing on its own motion while an interlocutory appeal is pending with it.

### EX PARTE COMMUNICATIONS

#### § 1201.101 Explanation and definitions.

(a) *Explanation.* An ex parte communication is an oral or written communication between a decision-making official of the Board and an interested party to a proceeding, when that communication is made without providing the other parties to the appeal with a chance to participate. Not all ex parte communications are prohibited. Those that involve the merits of the case, or those that violate rules requiring submissions to be in writing, are prohibited. Accordingly, interested parties may ask about such matters as the status of a case, when it will be heard, and methods of submitting evidence to the Board. Parties may not ask about matters such as what defense they should

## Merit Systems Protection Board

## § 1201.111

### FINAL DECISIONS

#### § 1201.111 Initial decision by judge.

(a) The judge will prepare an initial decision after the record closes, and will serve that decision on the Clerk of the Board, on the Director of the Office of Personnel Management, and on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right.

(b) Each initial decision will contain:

(1) Findings of fact and conclusions of law upon all the material issues of fact and law presented on the record;

(2) The reasons or bases for those findings and conclusions;

(3) An order making final disposition of the case, including appropriate relief;

(4) A statement, if the appellant is the prevailing party, as to whether interim relief is provided effective upon the date of the decision, pending the outcome of any petition for review filed by another party under subpart C of this part;

(5) The date upon which the decision will become final (a date that, for purposes of this section, is 35 days after issuance); and

(6) A statement of any further process available, including, as appropriate, a petition for review under § 1201.114 of this part, a petition for enforcement under § 1201.182, a motion for attorney fees under § 1201.203, a motion to initiate an addendum proceeding for consequential damages or compensatory damages under § 1201.204, and a petition for judicial review.

(c) *Interim relief.* (1) Under 5 U.S.C. 7701(b)(2), if the appellant is the prevailing party, the initial decision will provide appropriate interim relief to the appellant effective upon the date of the initial decision and remaining in effect until the date of the final order of the Board on any petition for review, unless the judge determines that the granting of interim relief is not appropriate. The agency may decline to return the appellant to his or her place of employment if it determines that the return or presence of the appellant will be unduly disruptive to the work environment. However, pay and benefits must be provided.

use or whether their evidence is adequate, and they may not make a submission orally if that submission is required to be made in writing.

(b) *Definitions for purposes of this section*—(1) *Interested party* includes:

(i) Any party or representative of a party involved in a proceeding before the Board; and

(ii) Any other person who might be affected by the outcome of a proceeding before the Board.

(2) *Decision-making official* means any judge, officer or other employee of the Board designated to hear and decide cases.

#### § 1201.102 Prohibition on ex parte communications.

Except as otherwise provided in § 1201.41(c)(1) of this part, ex parte communications that concern the merits of any matter before the Board for adjudication, or that otherwise violate rules requiring written submissions, are prohibited from the time the persons involved know that the Board may consider the matter until the time the Board has issued a final decision on the matter.

#### § 1201.103 Placing communications in the record; sanctions.

(a) Any communication made in violation of § 1201.102 of this part will be made a part of the record. If the communication was oral, a memorandum stating the substance of the discussion will be placed in the record.

(b) If there has been a violation of § 1201.102 of this part, the judge or the Clerk of the Board, as appropriate, will notify the parties in writing that the regulation has been violated, and will give the parties 10 days to file a response.

(c) The following sanctions are available:

(1) *Parties.* The offending party may be required to show why, in the interest of justice, the claim or motion should not be dismissed, denied, or otherwise adversely affected.

(2) *Other persons.* The Board may invoke appropriate sanctions against other offending parties.

[54 FR 53504, Dec. 29, 1989, as amended at 70 FR 30609, May 27, 2005]

## § 1201.112

(2) An initial decision that orders interim relief shall include a section which will provide the appellant specific notice that the relief ordered in the decision must be provided by the agency effective as of the date of the decision if a party files a petition for review. If the relief ordered in the initial decision requires the agency to effect an appointment, the notice required by this section will so state, will specify the title and grade of the appointment, and will specifically advise the appellant of his right to receive pay and benefits while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace would be unduly disruptive.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 17045, Apr. 9, 1997; 63 FR 41179, Aug. 3, 1998; 64 FR 27900, May 24, 1999]

### § 1201.112 Jurisdiction of judge.

(a) After issuing the initial decision, the judge will retain jurisdiction over a case only to the extent necessary to:

(1) Correct the transcript; when one is obtained;

(2) Rule on a request by the appellant for attorney fees, consequential damages, or compensatory damages under subpart H of this part;

(3) Process any petition for enforcement filed under subpart F of this part;

(4) Vacate an initial decision before that decision becomes final under § 1201.113 in order to accept a settlement agreement into the record.

(b) Nothing in this section affects the time limits prescribed in § 1201.113 regarding the finality of an initial decision or the time allowed for filing a petition for review.

[59 FR 22125, Apr. 29, 1994, as amended at 62 FR 17045, Apr. 9, 1997; 70 FR 30609, May 27, 2005]

### § 1201.113 Finality of decision.

The initial decision of the judge will become final 35 days after issuance. Initial decisions are not precedential.

(a) *Exceptions.* The initial decision will not become final if any party files a petition for review within the time limit for filing specified in § 1201.114 of this part, or if the Board reopens the case on its own motion.

## 5 CFR Ch. II (1-1-08 Edition)

(b) *Petition for review denied.* If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review.

(c) *Petition for review granted or case reopened.* If the Board grants a petition for review or a cross petition for review, or reopens or dismisses a case, the decision of the Board is final if it disposes of the entire action.

(d) *Extensions.* The Board may extend the time limit for filing a petition for good cause shown as specified in § 1201.114 of this part.

(e) *Exhaustion.* Administrative remedies are exhausted when a decision becomes final in accordance with this section.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 59992, Nov. 6, 1997]

### Subpart C—Petitions for Review of Initial Decisions

#### § 1201.114 Filing petition and cross petition for review.

(a) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel may file a petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative.

(b) *Cross petition for review.* If a party, the Director of OPM, or the Special Counsel files a timely petition for review, any other party, the Director of OPM, or the Special Counsel may file a timely cross petition for review. The Board normally will consider only issues raised in a timely filed petition for review or in a timely filed cross petition for review.

(c) *Place for filing.* A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by commercial or personal delivery, by facsimile, by

## Merit Systems Protection Board

## § 1201.114

mail, or by electronic filing in accordance with § 1201.14.

(d) *Time for filing.* Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross petition.

(e) *Extension of time to file.* The Board will grant a motion for extension of time to file a petition for review, a cross petition, or a response only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV to part 1201.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted.

(f) *Late filings.* Any petition for review, cross petition for review, or response that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (e) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See appendix IV to part 1201.) The affidavit or sworn statement must include:

(1) The reasons for failing to request an extension before the deadline for the submission; and

(2) A specific and detailed description of the circumstances causing the late

filings, accompanied by supporting documentation or other evidence.

Any response to the motion may be included in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (d) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

(g) *Intervention—(1) By Director of OPM.* The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.

(2) *By Special Counsel.* (i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (g)(2)(ii) of this section. The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel

## § 1201.115

must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(3) *Permissive intervenors.* Any person, organization or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.

(h) *Service.* A party submitting a pleading must serve a copy of it on each party and on each representative, as required by paragraph (b)(2) of § 1201.26.

(i) *Closing the record.* The record closes on expiration of the period for filing the response to the petition for review, or to the cross petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

[54 FR 53504, Dec. 29, 1989, as amended at 58 FR 36345, July 7, 1993; 62 FR 59992, Nov. 6, 1997; 68 FR 59863, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

### § 1201.115 Contents of petition for review.

(a) The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.

(b)(1) If the appellant was the prevailing party in the initial decision, and the decision granted the appellant interim relief, any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

## 5 CFR Ch. II (1-1-08 Edition)

(2) If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission.

(3) If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(4) Failure by an agency to provide the certification required by paragraph (b)(1) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraph (b)(2) or (b)(3) of this section, may result in the dismissal of the agency's petition or cross petition for review.

(c) Nothing in paragraph (b) of this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final.

(d) The Board, after providing the other parties with an opportunity to respond, may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record closed; or

(2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 30863, June 16, 1994; 62 FR 43631, Aug. 15, 1997; 64 FR 27900, May 24, 1999]

### § 1201.116 Appellant requests for enforcement of interim relief.

(a) *Before a final decision is issued.* If the agency files a petition for review or a cross petition for review and has not provided required interim relief, the appellant may request dismissal of the agency's petition. Any such request

## Merit Systems Protection Board

## § 1201.120

must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit.

(b) *After a final decision is issued.* If the appellant is not the prevailing party in the final Board order, and if the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under § 1201.182. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under § 1201.183.

[59 FR 30864, June 16, 1994]

### § 1201.117 Procedures for review or reopening.

(a) In any case that is reopened or reviewed, the Board may:

(1) Issue a single decision that denies or grants a petition for review, reopens the appeal, and decides the case;

(2) Hear oral arguments;

(3) Require that briefs be filed;

(4) Remand the appeal so that the judge may take further testimony or evidence or make further findings or conclusions; or

(5) Take any other action necessary for final disposition of the case.

(b) The Board may affirm, reverse, modify, or vacate the decision of the judge, in whole or in part. Where appropriate, the Board will issue a final decision and order a date for compliance with that decision.

[54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994]

### § 1201.118 Board reopening of case and reconsideration of initial decision.

The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part.

[54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994]

### § 1201.119 OPM petition for reconsideration.

(a) *Criteria.* Under 5 U.S.C. 7703(d), the Director of the Office of Personnel Management may file a petition for reconsideration of a Board final order if he or she determines:

(1) That the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management, and

(2) That the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(b) *Time limit.* The Director must file the petition for reconsideration within 35 days after the date of service of the Board's final order.

(c) *Briefs.* After the petition is filed, the Board will make the official record relating to the petition for reconsideration available to the Director for review. The Director's brief in support of the petition for reconsideration must be filed within 20 days after the Board makes the record available for review. Any party's opposition to the petition for reconsideration must be filed within 25 days from the date of service of the Director's brief.

(d) *Stays.* If the Director of OPM files a petition for reconsideration, he or she also may ask the Board to stay its final order. An application for a stay, with a supporting memorandum, must be filed at the same time as the petition for reconsideration.

[54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994]

### § 1201.120 Judicial review.

Any employee or applicant for employment who is adversely affected by a final order or decision of the Board under the provisions of 5 U.S.C. 7703 may obtain judicial review in the United States Court of Appeals for the Federal Circuit. As § 1201.175 of this

## § 1201.121

part provides, an appropriate United States district court has jurisdiction over a request for judicial review of cases involving the kinds of discrimination issues described in 5 U.S.C. 7702.

[54 FR 53504, Dec. 29, 1989. Redesignated at 59 FR 30864, June 16, 1994]

### Subpart D—Procedures for Original Jurisdiction Cases

SOURCE: 62 FR 48451, Sept. 16, 1997, unless otherwise noted.

#### GENERAL

##### § 1201.121 Scope of jurisdiction; application of subparts B, F, and H.

(a) *Scope.* The Board has original jurisdiction over complaints filed by the Special Counsel seeking corrective or disciplinary action (including complaints alleging a violation of the Hatch Political Activities Act), requests by the Special Counsel for stays of certain personnel actions, proposed agency actions against administrative law judges, and removals of career appointees from the Senior Executive Service for performance reasons.

(b) *Application of subparts B, F, and H.* (1) Except as otherwise expressly provided by this subpart, the regulations in subpart B of this part applicable to appellate case processing also apply to original jurisdiction cases processed under this subpart.

(2) Subpart F of this part applies to enforcement proceedings in connection with Special Counsel complaints and stay requests, and agency actions against administrative law judges, decided under this subpart.

(3) Subpart H of this part applies to requests for attorney fees or compensatory damages in connection with Special Counsel corrective and disciplinary action complaints, and agency actions against administrative law judges, decided under this subpart. Subpart H of this part also applies to requests for consequential damages in connection with Special Counsel corrective action complaints decided under this subpart.

(c) The provisions of this subpart do not apply to appeals alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code

## 5 CFR Ch. II (1-1-08 Edition)

relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services, in which the Special Counsel appears as the designated representative of the appellant. Such appeals are governed by part 1208 of this title.

[62 FR 48451, Sept. 16, 1997, as amended at 62 FR 66815, Dec. 22, 1997; 65 FR 5409, Feb. 4, 2000]

#### SPECIAL COUNSEL DISCIPLINARY ACTIONS

##### § 1201.122 Filing complaint; serving documents on parties.

(a) *Place of filing.* A Special Counsel complaint seeking disciplinary action under 5 U.S.C. 1215(a)(1) (including a complaint alleging a violation of the Hatch Political Activities Act) must be filed with the Clerk of the Board.

(b) *Initial filing and service.* The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The Special Counsel must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form.

(c) *Subsequent filings and service.* Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by § 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(d) *Method of filing and service.* Filing may be by mail, by facsimile, or by personal or commercial delivery to the Clerk of the Board. Service may be by mail, by facsimile, or by personal or commercial delivery to each party or the party's representative, as shown on the certificate of service.

## Merit Systems Protection Board

## § 1201.125

(e) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

[62 FR 48451, Sept. 16, 1997, as amended at 68 FR 59863, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

### § 1201.123 Contents of complaint.

(a) If the Special Counsel determines that the Board should take any of the actions listed below, he or she must file a written complaint in accordance with § 1201.122 of this part, stating with particularity any alleged violations of law or regulation, along with the supporting facts.

(1) Action to discipline an employee alleged to have committed a prohibited personnel practice, 5 U.S.C. 1215(a)(1)(A);

(2) Action to discipline an employee alleged to have violated any law, rule, or regulation, or to have engaged in prohibited conduct, within the jurisdiction of the Special Counsel under 5 U.S.C. 1216 (including an alleged violation by a Federal or District of Columbia government employee involving political activity prohibited under 5 U.S.C. 7324), 5 U.S.C. 1215(a)(1)(B), 1216(a), and 1216(c);

(3) Action to discipline a State or local government employee for an alleged violation involving prohibited political activity, 5 U.S.C. 1505; or

(4) Action to discipline an employee for an alleged knowing and willful refusal or failure to comply with an order of the Board, 5 U.S.C. 1215(a)(1)(C).

(b) The administrative law judge to whom the complaint is assigned may order the Special Counsel and the responding party to file briefs, memoranda, or both in any disciplinary action complaint the Special Counsel brings before the Board.

### § 1201.124 Rights; answer to complaint.

(a) *Responsibilities of Clerk of the Board.* The Clerk of the Board shall furnish a copy of the applicable Board regulations to each party that is not a Federal, State, or local government agency and shall inform such a party of the party's rights under paragraph (b) of this section and the requirements re-

garding the timeliness and content of an answer to the Special Counsel's complaint under paragraphs (c) and (d), respectively, of this section.

(b) *Rights.* When the Special Counsel files a complaint proposing a disciplinary action against an employee under 5 U.S.C. 1215(a)(1), the employee has the right:

(1) To file an answer, supported by affidavits and documentary evidence;

(2) To be represented;

(3) To a hearing on the record before an administrative law judge;

(4) To a written decision, issued at the earliest practicable date, in which the administrative law judge states the reasons for his or her decision; and

(5) To a copy of the administrative law judge's decision and subsequent final decision by the Board, if any.

(c) *Filing and default.* A party named in a Special Counsel disciplinary action complaint may file an answer with the Clerk of the Board within 35 days of the date of service of the complaint. If a party fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the administrative law judge's decision.

(d) *Content.* An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent has no knowledge of a fact, he or she must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

### § 1201.125 Administrative law judge.

(a) An administrative law judge will hear a disciplinary action complaint brought by the Special Counsel.

(b) Except as provided in paragraph (c)(1) of this section, the administrative law judge will issue an initial decision on the complaint pursuant to 5 U.S.C. 557. The applicable provisions of §§ 1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the

## § 1201.126

## 5 CFR Ch. II (1-1-08 Edition)

procedures for a petition for review by the Board under subpart C of this part.

(c)(1) In a Special Counsel complaint seeking disciplinary action against a Federal or District of Columbia government employee for a violation of 5 U.S.C. 7323 or 7324, where the administrative law judge finds that the violation does not warrant removal, the administrative law judge will issue a recommended decision to the Board in accordance with 5 U.S.C. 557.

(2) The parties may file with the Clerk of the Board any exceptions they may have to the recommended decision of the administrative law judge. Those exceptions must be filed within 35 days after the date of service of the recommended decision or, if the filing party shows that the recommended decision was received more than 5 days after the date of service, within 30 days after the date the filing party received the recommended decision.

(3) The parties may file replies to exceptions within 25 days after the date of service of the exceptions, as that date is determined by the certificate of service.

(4) No additional evidence will be accepted with a party's exceptions or with a reply to exceptions unless the party submitting it shows that the evidence was not readily available before the administrative law judge closed the record.

(5) The Board will consider the recommended decision of the administrative law judge, together with any exceptions and replies to exceptions filed by the parties, and will issue a final written decision.

[62 FR 48451, Sept. 16, 1997, as amended at 63 FR 42686, Aug. 11, 1998; 70 FR 30609, May 27, 2005]

### § 1201.126 Final decisions.

(a) In any action to discipline an employee, except as provided in paragraphs (b) or (c) of this section, the administrative law judge, or the Board on petition for review, may order a removal, a reduction in grade, a debarment (not to exceed five years), a suspension, a reprimand, or an assessment of civil penalty not to exceed \$1,100. 5 U.S.C. 1215(a)(3).

(b) In any action in which the administrative law judge, or the Board on pe-

tion for review, finds under 5 U.S.C. 1505 that a State or local government employee has violated the Hatch Political Activities Act and that the employee's removal is warranted, the administrative law judge, or the Board on petition for review, will issue a written decision notifying the employing agency and the employee that the employee must be removed and not reappointed within 18 months of the date of the decision. If the agency fails to remove the employee, or if it reappoints the employee within 18 months, the administrative law judge, or the Board on petition for review, may order the Federal entity administering loans or grants to the agency to withhold funds from the agency as provided under 5 U.S.C. 1506.

(c) In any Hatch Act action in which the administrative law judge, or the Board on petition for review, finds that a Federal or District of Columbia government employee has violated 5 U.S.C. 7323 or 7324 and that the violation warrants removal, the administrative law judge, or the Board on petition for review, will issue a written decision ordering the employee's removal. If the administrative law judge finds a violation of 5 U.S.C. 7323 or 7324 and determines that removal is not warranted, the judge will issue a recommended decision under § 1201.125(c)(1) of this part. If the Board finds a violation of 5 U.S.C. 7323 or 7324 and determines by unanimous vote that the violation does not warrant removal, it will impose instead a penalty of not less than 30 days suspension without pay. If the Board finds by majority vote that the violation warrants removal, it will order the employee's removal.

[62 FR 48451, Sept. 16, 1997, as amended at 70 FR 30609, May 27, 2005]

### § 1201.127 Judicial review.

(a) An employee subject to a final Board decision imposing disciplinary action under 5 U.S.C. 1215 may obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit, except as provided under paragraph (b) of this section. 5 U.S.C. 1215(a)(4).

(b) A party aggrieved by a determination or order of the Board under 5

## Merit Systems Protection Board

U.S.C. 1505 (governing alleged violations of the Hatch Political Activities Act by State or local government employees) may obtain judicial review in an appropriate United States district court. 5 U.S.C. 1508.

### SPECIAL COUNSEL CORRECTIVE ACTIONS

#### **§ 1201.128 Filing complaint; serving documents on parties.**

(a) *Place of filing.* A Special Counsel complaint seeking corrective action under 5 U.S.C. 1214 must be filed with the Clerk of the Board. After the complaint has been assigned to a judge, subsequent pleadings must be filed with the Board office where the judge is located.

(b) *Initial filing and service.* The Special Counsel must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative, and each person on whose behalf the corrective action is brought. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative, and each person on whose behalf the corrective action is brought. The Special Counsel must serve a copy of the complaint on the agency or its representative, and each person on whose behalf the corrective action is brought, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form.

(c) *Subsequent filings and service.* Each party must serve on every other party, or the party's representative one copy of each of its pleadings, as defined by § 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(d) *Method of filing and service.* A filing may be by mail, by facsimile, or by personal or commercial delivery to the office determined under paragraph (a) of this section. Service may be by mail, by facsimile, or by personal or com-

#### **§ 1201.130**

mercial delivery to each party or the party's representative, as shown on the certificate of service.

(e) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

[62 FR 48451, Sept. 16, 1997, as amended at 68 FR 59863, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

#### **§ 1201.129 Contents of complaint.**

(a) If the Special Counsel determines that the Board should take action to require an agency to correct a prohibited personnel practice (or a pattern of prohibited personnel practices) under 5 U.S.C. 1214(b)(4), he or she must file a written complaint in accordance with § 1201.128 of this part, stating with particularity any alleged violations of law or regulation, along with the supporting facts.

(b) If the Special Counsel files a corrective action with the Board on behalf of an employee, former employee, or applicant for employment who has sought corrective action from the Board directly under 5 U.S.C. 1214(a)(3), the Special Counsel must provide evidence that the employee, former employee, or applicant has consented to the Special Counsel's seeking corrective action. 5 U.S.C. 1214(a)(4).

(c) The judge to whom the complaint is assigned may order the Special Counsel and the respondent agency to file briefs, memoranda, or both in any corrective action complaint the Special Counsel brings before the Board.

#### **§ 1201.130 Rights; answer to complaint.**

(a) *Rights.* (1) A person on whose behalf the Special Counsel brings a corrective action has a right to request intervention in the proceeding in accordance with the regulations in § 1201.34 of this part. The Clerk of the Board shall notify each such person of this right.

(2) When the Special Counsel files a complaint seeking corrective action, the judge to whom the complaint is assigned shall provide an opportunity for oral or written comments by the Special Counsel, the agency involved, and

## § 1201.131

the Office of Personnel Management. 5 U.S.C. 1214(b)(3)(A).

(3) The judge to whom the complaint is assigned shall provide a person alleged to have been the subject of any prohibited personnel practice alleged in the complaint the opportunity to make written comments, regardless of whether that person has requested and been granted intervenor status. 5 U.S.C. 1214(b)(3)(B).

(b) *Filing and default.* An agency named as respondent in a Special Counsel corrective action complaint may file an answer with the judge to whom the complaint is assigned within 35 days of the date of service of the complaint. If the agency fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the judge's decision.

(c) *Content.* An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent agency has no knowledge of a fact, it must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

### § 1201.131 Judge.

(a) The Board will assign a corrective action complaint brought by the Special Counsel under this subpart to a judge, as defined at § 1201.4(a) of this part, for hearing.

(b) The judge will issue an initial decision on the complaint pursuant to 5 U.S.C. 557. The applicable provisions of §§ 1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the procedures for a petition for review by the Board under subpart C of this part.

[62 FR 48451, Sept. 16, 1997, as amended at 62 FR 66815, Dec. 22, 1997]

### § 1201.132 Final decisions.

(a) In any Special Counsel complaint seeking corrective action based on an allegation that a prohibited personnel practice has been committed, the

## 5 CFR Ch. II (1-1-08 Edition)

judge, or the Board on petition for review, may order appropriate corrective action. 5 U.S.C. 1214(b)(4)(A).

(b) (1) Subject to the provisions of paragraph (b)(2) of this section, in any case involving an alleged prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the judge, or the Board on petition for review, will order appropriate corrective action if the Special Counsel demonstrates that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was taken or will be taken against the individual.

(2) Corrective action under paragraph (b)(1) of this section may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C. 1214(b)(4)(B).

### § 1201.133 Judicial review.

An employee, former employee, or applicant for employment who is adversely affected by a final Board decision on a corrective action complaint brought by the Special Counsel may obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1214(c).

### SPECIAL COUNSEL REQUESTS FOR STAYS

### § 1201.134 Deciding official; filing stay request; serving documents on parties.

(a) *Request to stay personnel action.* Under 5 U.S.C. 1214(b)(1), the Special Counsel may seek to stay a personnel action if the Special Counsel determines that there are reasonable grounds to believe that the action was taken or will be taken as a result of a prohibited personnel practice.

(b) *Deciding official.* Any member of the Board may delegate to an administrative law judge the authority to decide a Special Counsel request for an initial stay. The Board may delegate to a member of the Board the authority to rule on any matter related to a stay that has been granted to the Special Counsel, including a motion for extension or termination of the stay.

(c) *Place of filing.* A Special Counsel stay request must be filed with the Clerk of the Board.

## Merit Systems Protection Board

## § 1201.136

(d) *Initial filing and service.* The Special Counsel must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The Special Counsel must serve a copy of the request on the agency or its representative, as shown on the certificate of service. The initial filing in a request for a stay may not be submitted in electronic form.

(e) *Subsequent filings and service.* Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by § 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(f) *Method of filing and service.* A filing may be by mail, by facsimile, or by personal or commercial delivery to the Clerk of the Board. Service may be by mail, by facsimile, or by personal or commercial delivery to each party or the party's representative, as shown on the certificate of service.

(g) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

[62 FR 48451, Sept. 16, 1997, as amended at 63 FR 42686, Aug. 11, 1998; 68 FR 59863, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

### § 1201.135 Contents of stay request.

The Special Counsel, or that official's representative, must sign each stay request, and must include the following information in the request:

- (a) The names of the parties;
- (b) The agency and officials involved;
- (c) The nature of the action to be stayed;
- (d) A concise statement of facts justifying the charge that the personnel ac-

tion was or will be the result of a prohibited personnel practice; and

(e) The laws or regulations that were violated, or that will be violated if the stay is not issued.

### § 1201.136 Action on stay request.

(a) *Initial stay.* A Special Counsel request for an initial stay of 45 days will be granted within three working days after the filing of the request, unless, under the facts and circumstances, the requested stay would not be appropriate. Unless the stay is denied within the 3-day period, it is considered granted by operation of law.

(b) *Extension of stay.* Upon the Special Counsel's request, a stay granted under 5 U.S.C. 1214(b)(1)(A) may be extended for an appropriate period of time, but only after providing the agency with an opportunity to comment on the request. Any request for an extension of a stay under 5 U.S.C. 1214(b)(1)(B) must be received by the Board and the agency no later than 15 days before the expiration date of the stay. A brief describing the facts and any relevant legal authority that should be considered must accompany the request for extension. Any response by the agency must be received by the Board no later than 8 days before the expiration date of the stay.

(c) *Evidence of compliance with a stay.* Within five working days from the date of a stay order or an order extending a stay, the agency ordered to stay a personnel action must file evidence setting forth facts and circumstances demonstrating compliance with the order.

(d) *Termination of stay.* A stay may be terminated at any time, except that a stay may not be terminated:

(1) On the motion of an agency, or on the deciding official's own motion, without first providing notice and opportunity for oral or written comments to the Special Counsel and the individual on whose behalf the stay was ordered; or

(2) On the motion of the Special Counsel without first providing notice and opportunity for oral or written comments to the individual on whose behalf the stay was ordered. 5 U.S.C. 1214(b)(1)(D).

## § 1201.137

(e) *Additional information.* At any time, where appropriate, the Special Counsel, the agency, or both may be required to appear and present further information or explanation regarding a request for a stay, to file supplemental briefs or memoranda, or to supply factual information needed to make a decision regarding a stay.

[62 FR 48451, Sept. 16, 1997, as amended at 63 FR 42686, Aug. 11, 1998]

### ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES

#### § 1201.137 Covered actions; filing complaint; serving documents on parties.

(a) *Covered actions.* The jurisdiction of the Board under 5 U.S.C. 7521 and this subpart with respect to actions against administrative law judges is limited to proposals by an agency to take any of the following actions against an administrative law judge:

- (1) Removal;
- (2) Suspension;
- (3) Reduction in grade;
- (4) Reduction in pay; and
- (5) Furlough of 30 days or less.

(b) *Place of filing.* To initiate an action against an administrative law judge under this subpart, an agency must file a complaint with the Clerk of the Board.

(c) *Initial filing and service.* The agency must file two copies of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The agency must serve a copy of the complaint on each party or the party's representative, as shown on the certificate of service. The initial filing in a complaint may not be submitted in electronic form.

(d) *Subsequent filings and service.* Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by § 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying

#### 5 CFR Ch. II (1-1-08 Edition)

the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(e) *Method of filing and service.* A filing may be by mail, by facsimile, or by personal or commercial delivery to the Clerk of the Board. Service may be by mail, by facsimile, or by commercial or personal delivery to each party or the party's representative, as shown on the certificate of service.

(f) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

[62 FR 48451, Sept. 16, 1997, as amended at 68 FR 59863, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

#### § 1201.138 Contents of complaint.

A complaint filed under this section must describe with particularity the facts that support the proposed agency action.

#### § 1201.139 Rights; answer to complaint.

(a) *Responsibilities of Clerk of the Board.* The Clerk of the Board shall furnish a copy of the applicable Board regulations to each administrative law judge named as a respondent in the complaint and shall inform each respondent of his or her rights under paragraph (b) of this section and the requirements regarding the timeliness and content of an answer to the agency's complaint under paragraphs (c) and (d), respectively, of this section.

(b) *Rights.* When an agency files a complaint proposing an action against an administrative law judge under 5 U.S.C. 7521 and this subpart, the administrative law judge has the right:

- (1) To file an answer, supported by affidavits and documentary evidence;
- (2) To be represented;
- (3) To a hearing on the record before an administrative law judge;
- (4) To a written decision, issued at the earliest practicable date, in which the administrative law judge states the reasons for his or her decision; and
- (5) To a copy of the administrative law judge's decision and subsequent final decision by the Board, if any.

## Merit Systems Protection Board

## § 1201.143

(c) *Filing and default.* A respondent named in an agency complaint may file an answer with the Clerk of the Board within 35 days of the date of service of the complaint. If a respondent fails to answer, the failure may constitute waiver of the right to contest the allegations in the complaint. Unanswered allegations may be considered admitted and may form the basis of the administrative law judge's decision.

(d) *Content.* An answer must contain a specific denial, admission, or explanation of each fact alleged in the complaint. If the respondent has no knowledge of a fact, he or she must say so. The respondent may include statements of fact and appropriate documentation to support each denial or defense. Allegations that are unanswered or admitted in the answer may be considered true.

### § 1201.140 Judge; requirement for finding of good cause.

(a) *Judge.* (1) An administrative law judge will hear an action brought by an employing agency under this subpart against a respondent administrative law judge.

(2) The judge will issue an initial decision pursuant to 5 U.S.C. 557. The applicable provisions of §§ 1201.111, 1201.112, and 1201.113 of this part govern the issuance of initial decisions, the jurisdiction of the judge, and the finality of initial decisions. The initial decision will be subject to the procedures for a petition for review by the Board under subpart C of this part.

(b) *Requirement for finding of good cause.* A decision on a proposed agency action under this subpart against an administrative law judge will authorize the agency to take a disciplinary action, and will specify the penalty to be imposed, only after a finding of good cause as required by 5 U.S.C. 7521 has been made.

### § 1201.141 Judicial review.

An administrative law judge subject to a final Board decision authorizing a proposed agency action under 5 U.S.C. 7521 may obtain judicial review of the decision in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703.

### § 1201.142 Actions filed by administrative law judges.

An administrative law judge who alleges a constructive removal or other action by an agency in violation of 5 U.S.C. 7521 may file a complaint with the Board under this subpart. The filing and serving requirements of 5 CFR 1201.37 apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.

[71 FR 34232, June 14, 2006]

## REMOVAL FROM THE SENIOR EXECUTIVE SERVICE

### § 1201.143 Right to hearing; filing complaint; serving documents on parties.

(a) *Right to hearing.* If an agency proposes to remove a career appointee from the Senior Executive Service under 5 U.S.C. 3592(a) (2) and 5 CFR 359.502, and to place that employee in another civil service position, the appointee may request an informal hearing before an official designated by the Board. Under 5 CFR 359.502, the agency proposing the removal must provide the appointee 30 days advance notice and must advise the appointee of the right to request a hearing. If the appointee files the request at least 15 days before the effective date of the proposed removal, the request will be granted.

(b) *Place of filing.* A request for an informal hearing under paragraph (a) of this section must be filed with the Clerk of the Board. After the request has been assigned to a judge, subsequent pleadings must be filed with the Board office where the judge is located.

(c) *Initial filing and service.* The appointee must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the agency proposing the appointee's removal or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The appointee must serve a copy of the request on the agency or its representative, as shown on the certificate of service. The initial filing may not be submitted in electronic form.

**§ 1201.144****5 CFR Ch. II (1-1-08 Edition)**

(d) *Subsequent filings and service.* Each party must serve on every other party or the party's representative one copy of each of its pleadings, as defined by § 1201.4(b). A certificate of service describing how and when service was made must accompany each pleading. Each party is responsible for notifying the Board and the other parties in writing of any change in name, address, telephone number, or facsimile number of the party or the party's representative.

(e) *Method of filing and service.* A filing may be by mail, by facsimile, or by personal or commercial delivery, to the office determined under paragraph (b) of this section. Service may be by mail, by facsimile, or by personal or commercial delivery to each party or the party's representative, as shown on the certificate of service.

(f) *Electronic filing.* All pleadings, other than the complaint, may be filed and served in electronic form at the Board's e-Appeal site (<https://e-appeal.mspb.gov>), provided the requirements of § 1201.14 are satisfied.

[62 FR 48451, Sept. 16, 1997, as amended at 68 FR 59864, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

**§ 1201.144 Hearing procedures; referring the record.**

(a) The official designated to hold an informal hearing requested by a career appointee whose removal from the Senior Executive Service has been proposed under 5 U.S.C. 3592(a)(2) and 5 CFR 359.502 will be a judge, as defined at § 1201.4(a) of this part.

(b) The appointee, the appointee's representative, or both may appear and present arguments in an informal hearing before the judge. A verbatim record of the proceeding will be made. The appointee has no other procedural rights before the judge or the Board.

(c) The judge will refer a copy of the record to the Special Counsel, the Office of Personnel Management, and the employing agency for whatever action may be appropriate.

**§ 1201.145 No appeal.**

There is no right under 5 U.S.C. 7703 to appeal the agency's action or any action by the judge or the Board in cases arising under § 1201.143(a) of this

part. The removal action will not be delayed as a result of the hearing.

**REQUESTS FOR PROTECTIVE ORDERS****§ 1201.146 Requests for protective orders by the Special Counsel.**

(a) Under 5 U.S.C. 1204(e)(1)(B), the Board may issue any order that may be necessary to protect a witness or other individual from harassment during an investigation by the Special Counsel or during the pendency of any proceeding before the Board, except that an agency, other than the Office of the Special Counsel, may not request a protective order with respect to an investigation by the Special Counsel during such investigation.

(b) Any motion by the Special Counsel requesting a protective order must include a concise statement of reasons justifying the motion, together with any relevant documentary evidence. Where the request is made in connection with a pending Special Counsel proceeding, the motion must be filed as early in the proceeding as practicable.

(c) Where there is a pending Special Counsel proceeding, a Special Counsel motion requesting a protective order must be filed with the judge conducting the proceeding, and the judge will rule on the motion. Where there is no pending Special Counsel proceeding, a Special Counsel motion requesting a protective order must be filed with the Clerk of the Board, and the Board will designate a judge, as defined at § 1201.4(a) of this part, to rule on the motion.

**§ 1201.147 Requests for protective orders by persons other than the Special Counsel.**

Requests for protective orders by persons other than the Special Counsel in connection with pending original jurisdiction proceedings are governed by § 1201.55(d) of this part.

**§ 1201.148 Enforcement of protective orders.**

A protective order issued by a judge or the Board under this subpart may be enforced in the same manner as provided under subpart F of this part for Board final decisions and orders.

## Merit Systems Protection Board

### Subpart E—Procedures for Cases Involving Allegations of Discrimination

#### § 1201.151 Scope and policy.

(a) *Scope.* (1) The rules in this subpart implement 5 U.S.C. 7702. They apply to any case in which an employee or applicant for employment alleges that a personnel action appealable to the Board was based, in whole or in part, on prohibited discrimination.

(2) “Prohibited discrimination,” as that term is used in this subpart, means discrimination prohibited by:

(i) Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(a));

(ii) Section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d));

(iii) Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791);

(iv) Sections 12 and 15 of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 631, 633a); or

(v) Any rule, regulation, or policy directive prescribed under any provision of law described in paragraphs (a)(2) (i) through (iv) of this section.

(b) *Policy.* The Board’s policy is to adjudicate impartially, thoroughly, and fairly all issues raised under this subpart.

#### § 1201.152 Compliance with subpart B procedures.

Unless this subpart expressly provides otherwise, all actions involving allegations of prohibited discrimination must comply with the regulations that are included in subpart B of this part.

#### § 1201.153 Contents of appeal.

(a) *Contents.* An appeal raising issues of prohibited discrimination must comply with § 1201.24 of this part, with the following exceptions:

(1) The appeal must state that there was discrimination in connection with the matter appealed, and it must state specifically how the agency discriminated against the appellant; and

(2) The appeal must state whether the appellant has filed a formal discrimination complaint or a grievance with any agency. If he or she has done so, the appeal must state the date on

#### § 1201.154

which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance.

(b) *Use of Board form or Internet filing option.* An appellant may comply with paragraph (a) of this section by completing MSPB Form 185, or by completing all requests for information marked as required at the e-Appeal site (<https://e-appeal.mspb.gov>). MSPB Form 185 can be accessed at the Board’s Web site (<http://www.mspb.gov>).

[54 FR 53504, Dec. 29, 1989, as amended at 68 FR 59864, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

#### § 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.

Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

(a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency’s decision on the appealable action, whichever is later.

(b) If the appellant has filed a timely formal complaint of discrimination with the agency:

(1) An appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue; or

(2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under § 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

(d) This paragraph does not apply to employees of the Postal Service or to

**§ 1201.155**

other employees excluded from the coverage of the federal labor-management relations laws at chapter 71 of title 5, United States Code. If the appellant has filed a grievance with the agency under a negotiated grievance procedure, he may ask the Board to review the final decision on the grievance if he alleges before the Board that he is the victim of prohibited discrimination. Usually, the final decision on a grievance is the decision of an arbitrator. A full description of an individual's right to pursue a grievance and to request Board review of a final decision on the grievance is found at 5 U.S.C. 7121 and 7702. The appellant's request for Board review must be filed within 35 days after the date of issuance of the decision or, if the appellant shows that the decision was received more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

- (1) A statement of the grounds on which review is requested;
- (2) References to evidence of record or rulings related to the issues before the Board;
- (3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and
- (4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing.
- (e) The record will close upon expiration of the period for filing the response to the petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994; 62 FR 59992, Nov. 6, 1997; 65 FR 25624, May 3, 2000]

**5 CFR Ch. II (1-1-08 Edition)****§ 1201.155 Remand of allegations of discrimination.**

If the parties file a written agreement that the discrimination issue should be remanded to the agency for consideration, and if the judge determines that action would be in the interest of justice, the judge may take that action. The remand order will specify a time period within which the agency action must be completed. In no instance will that time period exceed 120 days. While the issue is pending with the agency, the judge will retain jurisdiction over the appeal.

**§ 1201.156 Time for processing appeals involving allegations of discrimination.**

(a) *Issue raised in appeal.* When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after the appeal is filed.

(b) *Issue not raised in appeal.* When an appellant has not alleged prohibited discrimination in the appeal, but has raised the issue later in the proceeding, the judge will decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

(c) *Discrimination issue remanded to agency.* When the judge remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the agency completes its action and returns the case to the Board.

**§ 1201.157 Notice of right to judicial review.**

Any final decision of the Board under 5 U.S.C. 7702 will notify the appellant of his or her right, within 30 days after receiving the Board's final decision, to petition the Equal Employment Opportunity Commission to consider the Board's decision, or to file a civil action in an appropriate United States district court. If an appellant elects to waive the discrimination issue, an appeal may be filed with the United States Court of Appeals for the Federal Circuit as stated in § 1201.120 of this part.

[54 FR 53504, Dec. 29, 1989, as amended at 63 FR 41179, Aug. 3, 1998]

## Merit Systems Protection Board

### REVIEW OF BOARD DECISION

#### **§ 1201.161 Action by the Equal Employment Opportunity Commission; judicial review.**

(a) *Time limit for determination.* In cases in which an appellant petitions the Equal Employment Opportunity Commission (Commission) for consideration of the Board's decision under 5 U.S.C. 7702(b)(2), the Commission will determine, within 30 days after the date of the petition, whether it will consider the decision.

(b) *Judicial review.* The Board's decision will become judicially reviewable on:

(1) The date on which the decision is issued, if the appellant does not file a petition with the Commission under 5 U.S.C. 7702(b)(1); or

(2) The date of the Commission's decision that it will not consider the petition filed under 5 U.S.C. 7702(b)(2).

(c) *Commission processing and time limits.* If the Commission decides to consider the decision of the Board, within 60 days after making its decision it will complete its consideration and either:

(1) Concur in the decision of the Board; or

(2) Issue in writing and forward to the Board for its action under § 1201.162 of this subpart another decision, which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law:

(i) The decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive related to prohibited discrimination; or

(ii) The evidence in the record as a whole does not support the decision involving that provision.

(d) *Transmittal of record.* The Board will transmit a copy of its record to the Commission upon request.

(e) *Development of additional evidence.* When asked by the Commission to do so, the Board or a judge will develop additional evidence necessary to supplement the record. This action will be completed within a period that will permit the Commission to make its decision within the statutory 60-day time limit referred to in paragraph (c) of this section. The Board or the judge may schedule additional proceedings if

#### **§ 1201.171**

necessary in order to comply with the Commission's request.

(f) *Commission concurrence in Board decision.* If the Commission concurs in the decision of the Board under 5 U.S.C. 7702(b)(3)(A), the appellant may file suit in an appropriate United States district court.

#### **§ 1201.162 Board action on the Commission decision; judicial review.**

(a) *Board decision.* Within 30 days after receipt of a decision of the Commission issued under 1201.161(c)(2), the Board shall consider the decision and:

(1) Concur and adopt in whole the decision of the Commission; or

(2) To the extent that the Board finds that, as a matter of law:

(i) The Commission decision is based on an incorrect interpretation of any provision of any civil service law, rule, regulation, or policy directive, or

(ii) The evidence in the record as a whole does not support the Commission decision involving that provision, it may reaffirm the decision of the Board. In doing so, it may make revisions in the decision that it determines are appropriate.

(b) *Judicial review.* If the Board concurs in or adopts the decision of the Commission under paragraph (a)(1) of this section, the decision of the Board is a judicially reviewable action.

### SPECIAL PANEL

#### **§ 1201.171 Referral of case to Special Panel.**

If the Board reaffirms its decision under § 1201.162(a)(2) of this part with or without modification, it will certify the matter immediately to a Special Panel established under 5 U.S.C. 7702(d). Upon certification, the Board, within 5 days (excluding Saturdays, Sundays, and Federal holidays), will transmit the administrative record in the proceeding to the Chairman of the Special Panel and to the Commission. That record will include the following:

(a) The factual record compiled under this section, which will include a transcript of any hearing;

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

## § 1201.172

(c) A transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

### § 1201.172 Organization of Special Panel; designation of members.

(a) A Special Panel is composed of:

(1) A Chairman, appointed by the President with the advice and consent of the Senate, whose term is six (6) years;

(2) One member of the Board, designated by the Chairman of the Board each time a Panel is convened;

(3) One member of the Commission, designated by the Chairman of the Commission each time a Panel is convened.

(b) *Designation of Special Panel members*—(1) *Time of designation*. Within 5 days of certification of a case to a Special Panel, the Chairman of Board and the Chairman of the Commission each will designate one member from his or her agency to serve on the Special Panel.

(2) *Manner of designation*. Letters designating the Panel members will be served on the Chairman of the Panel and on the parties to the appeal.

### § 1201.173 Practices and procedures of Special Panel.

(a) *Scope*. The rules in this subpart apply to proceedings before a Special Panel.

(b) *Suspension of rules*. Unless a rule is required by statute, the Chairman of a Special Panel may suspend the rule, in the interest of expediting a decision or for other good cause shown, and may conduct the proceedings in a manner he or she directs. The Chairman may take this action at the request of a party, or on his or her own motion.

(c) *Time limit for proceedings*. In accordance with 5 U.S.C. 7702(d)(2)(A), the Special Panel will issue a decision within 45 days after a matter has been certified to it.

(d) *Administrative assistance to the Special Panel*. (1) The Board and the Commission will provide the Panel with the administrative resources that the Chairman of the Special Panel determines are reasonable and necessary.

(2) Assistance will include, but is not limited to, processing vouchers for pay and travel expenses.

## 5 CFR Ch. II (1-1-08 Edition)

(3) The Board and the Commission are responsible for all administrative costs the Special Panel incurs, and, to the extent practicable, they will divide equally the costs of providing administrative assistance. If the Board and the Commission disagree on the manner in which costs are to be divided, the Chairman of the Special Panel will resolve the disagreement.

(e) *Maintaining the official record*. The Board will maintain the official record of the appeal. It will transmit two copies of each submission that is filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings*. (1) The parties must file the original and six copies of each submission with the Clerk, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419. The Office of the Clerk will serve one copy of each submission on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be made by mail or by personal delivery during the Board's normal business hours (8:30 a.m. to 5:00 p.m.). Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail, provided by the U.S. Postal Service, if they file their submissions by mail.

(4) A submission filed by Express Mail is considered to have been filed on the date of the Express Mail Order. A submission that is delivered personally is considered to have been filed on the date the Office of the Clerk of the Board receives it.

(g) *Briefs and responsive pleadings*. If the parties wish to submit written argument, they may file briefs with the Special Panel within 15 days after the date of the Board's certification order. Because of the short statutory time limit for processing these cases, the Special Panel ordinarily will not permit responsive pleadings.

(h) *Oral argument*. The parties have the right to present oral argument. Parties wishing to exercise this right must indicate this desire when they file their briefs or, if no briefs are filed, within 15 days after the date of the

## Merit Systems Protection Board

## § 1201.182

### Subpart F—Enforcement of Final Decisions and Orders

#### § 1201.181 Authority and explanation.

(a) Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction, and the authority to enforce compliance with its orders and decisions. The parties are expected to cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. The Board's decisions and orders will contain a notice of the Board's enforcement authority.

(b) In order to avoid unnecessary petitions under this subpart, the agency must inform the appellant promptly of the actions it takes to comply, and it must tell the appellant when it believes it has completed its compliance. The appellant must provide all necessary information that the agency requests in order to comply, and, if not otherwise notified, he or she should, from time to time, ask the agency about its progress.

#### § 1201.182 Petition for enforcement.

(a) *Appellate jurisdiction.* Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction. The petition must be filed promptly with the regional or field office that issued the initial decision; a copy of it must be served on the other party or that party's representative; and it must describe specifically the reasons the petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition.

(b) *Original jurisdiction.* Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction must file a petition for

Board's certification order. Upon receiving a request for argument, the Chairman of the Special Panel will determine the time and place for argument and the amount of time to be allowed each side, and he or she will provide this information to the parties.

(i) *Postargument submission.* Because of the short statutory time limit for processing these cases, the parties may not file postargument submissions unless the Chairman of the Special Panel permits those submissions.

(j) *Procedural matters.* Any procedural matters not addressed in these regulations will be resolved by written order of the Chairman of the Special Panel.

(k) *Electronic filing.* Pleadings in matters before the Special Panel may not be filed or served in electronic form.

[54 FR 53504, Dec. 29, 1989, as amended at 65 FR 48885, Aug. 10, 2000; 68 FR 59864, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

### § 1201.174 Enforcing the Special Panel decision.

The Board, upon receipt of the decision of the Special Panel, will order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board apply to this matter. These regulations are set out in subpart F of this part.

### § 1201.175 Judicial review of cases decided under 5 U.S.C. 7702.

(a) *Place and type of review.* The appropriate United States district court is authorized to conduct all judicial review of cases decided under 5 U.S.C. 7702. Those cases include appeals from actions taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a(c)); and section 15(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)).

(b) *Time for filing request.* Regardless of any other provision of law, requests for judicial review of all cases decided under 5 U.S.C. 7702 must be filed within 30 days after the appellant received notice of the judicially reviewable action.

**§ 1201.183**

enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance.

(c) *Petition by an employee other than a party.* (1) Under 5 U.S.C. 1204(e)(2)(B), any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board for enforcement. Except for a petition filed under paragraph (c)(2) or (c)(3) of this section, the Board will entertain a petition for enforcement from an aggrieved employee who is not a party only if the employee seeks and is granted party status as a permissive intervenor under § 1201.34(c) of this part. The employee must file a motion to intervene at the time of filing the petition for enforcement. The petition for enforcement must describe specifically why the petitioner believes there is noncompliance and in what way the petitioner is aggrieved by the noncompliance. The motion to intervene will be considered in accordance with § 1201.34(c) of this part.

(2) Under § 1201.33(c) of this part, a nonparty witness who has obtained an order from a judge that his or her employing agency provide the witness with official time may petition the Board for enforcement of the order.

(3) Under § 1201.55(d) of this part, a nonparty witness or other individual who has obtained a protective order from a judge during the course of a Board proceeding for protection from harassment may petition the Board for enforcement of the order.

(4) A petition for enforcement under paragraph (c)(1), (c)(2), or (c)(3) of this section must be filed promptly with the regional or field office that issued the order or, if the order was issued by the Board, with the Clerk of the Board. The petitioner must serve a copy of the petition on each party or the party's representative. If the petition is filed under paragraph (c)(1) of this section, the motion to intervene must be filed and served with the petition.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 65235, Dec. 19, 1994; 62 FR 48935, Sept. 18, 1997]

**5 CFR Ch. II (1-1-08 Edition)****§ 1201.183 Procedures for processing petitions for enforcement.**

(a) *Initial Processing.* (1) When a party has filed a petition for enforcement of a final decision, the alleged noncomplying party must file one of the following within 15 days of the date of service of the petition:

(i) Evidence of compliance, including a narrative explanation of the calculation of back pay and other benefits, and supporting documents;

(ii) Evidence as described in paragraph (a)(1)(i) of this section of the compliance actions that the party has completed, and a statement of the actions that are in process and the actions that remain to be taken, along with a reasonable schedule for full compliance; or

(iii) A statement showing good cause for the failure to comply completely with the decision of the Board.

The party that filed the petition may respond to that submission within 10 days after the date of service of the submission. The parties must serve copies of their pleadings on each other as required under § 1201.26(b)(2) of this part.

(2) If the agency is the alleged noncomplying party, it shall submit the name and address of the agency official charged with complying with the Board's order, even if the agency asserts it has fully complied. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance.

(3) The judge may convene a hearing if one is necessary to resolve matters at issue.

(4) If the judge finds that there has been compliance or a good faith effort to take all actions required to be in compliance with the final decision, he or she will state those findings in a decision. That decision will be subject to the procedures for petitions for review by the Board under subpart C of this part, and subject to judicial review under § 1201.120 of this part.

(5) If the judge finds that:

(i) The alleged noncomplying party has not taken, or has not made a good

## Merit Systems Protection Board

## § 1201.191

faith effort to take, any action required to be in compliance with the final decision, or

(ii) The party has taken or made a good faith effort to take one or more, but not all, actions required to be in compliance with the final decision; he or she will issue a recommendation containing his or her findings, a statement of the actions required by the party to be in compliance with the final decision, and a recommendation that the Board enforce the final decision.

(6) If a recommendation described under paragraph (a)(5) of this section is issued, the alleged noncomplying party must do one of the following:

(i) If it decides to take the actions required by the recommendation, it must submit to the Clerk of the Board, within 15 days after the issuance of the recommendation, evidence that it has taken those actions.

(ii) If it decides not to take any of the actions required by the recommendation, it must file a brief supporting its nonconcurrence in the recommendation. The brief must be filed with the Clerk of the Board within 30 days after the recommendation is issued and, if it is filed by the agency, it must identify by name, title, and grade the agency official responsible for the failure to take the actions required by the recommendation for compliance.

(iii) If the party decides to take one or more, but not all, actions required by the recommendation, it must submit both evidence of the actions it has taken and, with respect to the actions that it has not taken, a brief supporting its disagreement with the recommendation. The evidence and brief must be filed with the Clerk of the Board within 30 days after issuance of the recommendation and, if it is filed by the agency, it must contain the identifying information required by paragraph (a)(6)(ii) of this section.

(7) The petitioner may file a brief that responds to the submission described in paragraph (a)(6) of this section, and that asks the Board to review any finding in the recommendation, made under paragraph (a)(5)(ii) of this section, that the other party is in partial compliance with the final decision.

The petitioner must file this brief with the Clerk of the Board within 20 days of the date of service of the submission described in paragraph (a)(6) of this section.

(b) *Consideration by the Board.* (1) The Board will consider the recommendation, along with the submissions of the parties, promptly. When appropriate, the Board may require the alleged noncomplying party, or that party's representative, to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A). The Board also may require the party or its representative to make this showing in writing, or to make it both personally and in writing.

(2) The Board may hold a hearing on an order to show cause, or it may issue a decision without a hearing.

(3) The Board's final decision on the issues of compliance is subject to judicial review under § 1201.120 of this part.

(c) *Certification to the Comptroller General.* When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee. This order may apply to any Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in noncompliance with the Board's order.

(d) *Effect of Special Counsel's action or failure to act.* Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.

[54 FR 53504, Dec. 29, 1989, as amended at 63 FR 41179, Aug. 3, 1998]

## Subpart G—Savings Provisions

### § 1201.191 Savings provisions.

(a) *Civil Service Reform Act of 1978 (Pub.L. 95-454).* (1) *Scope.* All executive orders, rules and regulations relating to the Federal service that were in effect prior to the effective date of the Civil Service Reform Act shall continue in effect and be applied by the

## § 1201.201

Board in its adjudications until modified, terminated, superseded, or repealed by the President, Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority, as appropriate.

(2) *Administrative proceedings and appeals therefrom.* No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

(3) *Explanation.* Mr. X was advised of agency's intention to remove him for abandonment of position, effective December 29, 1978. Twenty days later Mr. X appealed the agency action to the Merit Systems Protection Board. The Merit Systems Protection Board docketed Mr. X's appeal as an "old system case," *i.e.*, one to which the savings clause applied. The appropriate regional office processed the case, applying the substantive laws, rules and regulations in existence prior to the enactment of the Act. The decision, dated February 28, 1979, informed Mr. X that he is entitled to judicial review if he files a timely notice of appeal in the appropriate United States district court or the United States Court of Claims under the statute of limitations applicable when the adverse action was taken.

(b) *Whistleblower Protection Act of 1989 (Pub. L. 101-12)—(1) Scope.* All orders, rules, and regulations issued by the Board and the Special Counsel before the effective date of the Whistleblower Protection Act of 1989 shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed by the Board or the Special Counsel, as appropriate.

(2) *Administrative proceedings and appeals therefrom.* No provision of the Whistleblower Protection Act of 1989

## 5 CFR Ch. II (1-1-08 Edition)

shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, including personnel actions that were proposed, threatened, or taken before July 9, 1989, the effective date of the Whistleblower Protection Act of 1989, and appeals before the Board or its predecessor agencies that were subject to judicial review on that date. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

### **Subpart H—Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages**

SOURCE: 63 FR 41179, Aug. 3, 1998, unless otherwise noted.

#### **§ 1201.201 Statement of purpose.**

(a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, and compensatory damages.

(b) There are seven statutory provisions covering attorney fee awards. Because most MSPB cases are appeals under 5 U.S.C. 7701, most requests for attorney fees will be governed by § 1201.202(a)(1). There are, however, other attorney fee provisions that apply only to specific kinds of cases. For example, § 1201.202(a)(4) applies only to certain whistleblower appeals. Sections 1201.202(a)(5) and (a)(6) apply only to corrective and disciplinary action cases brought by the Special Counsel. Section 1201.202(a)(7) applies only to appeals brought under the Uniformed Services Employment and Reemployment Rights Act.

(c) An award of consequential damages is authorized in only two situations: Where the Board orders corrective action in a whistleblower appeal under 5 U.S.C. 1221, and where the Board orders corrective action in a Special Counsel complaint under 5

## Merit Systems Protection Board

## § 1201.202

U.S.C. 1214. Consequential damages include such items as medical costs and travel expenses, and other costs as determined by the Board through case law.

(d) The Civil Rights Act of 1991 (42 U.S.C. 1981a) authorizes an award of compensatory damages to a prevailing party who is found to have been intentionally discriminated against based on race, color, religion, sex, national origin, or disability. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

### § 1201.202 Authority for awards.

(a) *Awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable).* The Board is authorized by various statutes to order payment of attorney fees and, where applicable, costs, expert witness fees, and litigation expenses. These statutory authorities include, but are not limited to, the following authorities to order payment of:

(1) Attorney fees, as authorized by 5 U.S.C. 7701(g)(1), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701 or an agency action against an administrative law judge under 5 U.S.C. 7521, and an award is warranted in the interest of justice;

(2) Attorney fees, as authorized by 5 U.S.C. 7701(g)(2), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701, a request to review an arbitration decision under 5 U.S.C. 7121(d), or an agency action against an administrative law judge under 5 U.S.C. 7521, and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1);

(3) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(2), where the appellant is the prevailing party in an appeal under 5 U.S.C. 7701 and the Board's decision is based on a finding of a prohibited personnel practice;

(4) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(1)(B), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies;

(5) Attorney fees, as authorized by 5 U.S.C. 1214(g)(2) or 5 U.S.C. 7701(g)(1), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214;

(6) Attorney fees, as authorized by 5 U.S.C. 1204(m), where the respondent is the prevailing party in a Special Counsel complaint for disciplinary action under 5 U.S.C. 1215;

(7) Attorney fees, expert witness fees, and litigation expenses, as authorized by the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324(c)(4); and

(8) Attorney fees, expert witness fees, and other litigation expenses, as authorized by the Veterans Employment Opportunities Act; 5 U.S.C. 3330c(b).

(b) *Awards of consequential damages.* The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages:

(1) As authorized by 5 U.S.C. 1221(g)(1)(A)(ii), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies; and

(2) As authorized by 5 U.S.C. 1214(g)(2), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214.

(c) *Awards of compensatory damages.* The Board may order payment of compensatory damages, as authorized by section 102 of the Civil Rights Act of 1991 (42 U.S.C. 1981a), based on a finding of unlawful intentional discrimination but not on an employment practice that is unlawful because of its disparate impact under the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

(d) *Definitions.* For purposes of this subpart:

(1) A *proceeding on the merits* is a proceeding to decide an appeal of an agency action under 5 U.S.C. 1221 or 7701, an appeal under 38 U.S.C. 4324, an appeal under 5 U.S.C. 3330a, a request to review an arbitration decision under 5

## § 1201.203

U.S.C. 7121(d), a Special Counsel complaint under 5 U.S.C. 1214 or 1215, or an agency action against an administrative law judge under 5 U.S.C. 7521.

(2) An *addendum proceeding* is a proceeding conducted after issuance of a final decision in a proceeding on the merits, including a decision accepting the parties' settlement of the case. The final decision in the proceeding on the merits may be an initial decision of a judge that has become final under § 1201.113 of this part or a final decision of the Board.

[63 FR 41179, Aug. 3, 1998, as amended at 65 FR 5409, Feb. 4, 2000]

### § 1201.203 Proceedings for attorney fees.

(a) *Form and content of request.* A request for attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. Evidence supporting a motion for attorney fees must include at a minimum:

(1) Accurate and current time records;

(2) A copy of the terms of the fee agreement (if any);

(3) A statement of the attorney's customary billing rate for similar work, with evidence that that rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices; and

(4) An established attorney-client relationship.

(b) *Addendum proceeding.* A request for attorney fees will be decided in an addendum proceeding.

(c) *Place of filing.* Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, a motion for attorney fees must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, a motion for attorney fees must be filed with the Clerk of the Board.

## 5 CFR Ch. II (1-1-08 Edition)

(d) *Time of filing.* A motion for attorney fees must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final.

(e) *Service.* A copy of a motion for attorney fees must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) *Hearing; applicability of subpart B.* The judge may hold a hearing on a motion for attorney fees and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) *Initial decision; review by the Board.* The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

[63 FR 41179, Aug. 3, 1998, as amended at 65 FR 24381, Apr. 26, 2000]

### § 1201.204 Proceedings for consequential damages and compensatory damages.

(a) *Time for making request.* (1) A request for consequential damages or compensatory damages must be made during the proceeding on the merits, no later than the end of the conference(s) held to define the issues in the case.

(2) The judge or the Board, as applicable, may waive the time limit for making a request for consequential damages or compensatory damages for good cause shown. The time limit will not be waived if a party shows that such waiver would result in undue prejudice.

(b) *Form and content of request.* A request for consequential damages or compensatory damages must be made in writing and must state the amount of damages sought and the reasons why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard.

(c) *Service.* A copy of a request for consequential damages or compensatory damages must be served on the other parties or their representatives when the request is made.

A party may file a pleading responding to the request within the time

## Merit Systems Protection Board

## Pt. 1201, App. II

limit established by the judge or the Board, as applicable.

(d) *Addendum proceeding.* (1) A request for consequential damages or compensatory damages will be decided in an addendum proceeding.

(2) A judge may waive the requirement of paragraph (d)(1), either on his or her own motion or on the motion of a party, and consider a request for damages in a proceeding on the merits where the judge determines that such action is in the interest of the parties and will promote efficiency and economy in adjudication.

(e) *Initiation of addendum proceeding.* (1) A motion for initiation of an addendum proceeding to decide a request for consequential damages or compensatory damages must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. Where the initial decision in the proceeding on the merits was issued by a judge in a MSPB regional or field office, the motion must be filed with the regional or field office that issued the initial decision. Where the decision in the proceeding on the merits was an initial decision issued by a judge at the Board's headquarters or where the only decision was a final decision issued by the Board, the motion must be filed with the Clerk of the Board.

(2) A copy of a motion for initiation of an addendum proceeding to decide a request for consequential damages or compensatory damages must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(f) *Hearing; applicability of subpart B.* The judge may hold a hearing on a request for consequential damages or compensatory damages and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) *Initial decision; review by the Board.* The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

(h) *Request for damages first made in proceeding before the Board.* Where a request for consequential damages or

compensatory damages is first made on petition for review of a judge's initial decision on the merits and the Board waives the time limit for making the request in accordance with paragraph (a)(2) of this section, or where the request is made in a case where the only MSPB proceeding is before the 3-member Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may:

(1) Consider both the merits and the request for damages and issue a final decision;

(2) Remand the case to the judge for a new initial decision, either on the request for damages only or on both the merits and the request for damages; or

(3) Where there has been no prior proceeding before a judge, forward the request for damages to a judge for hearing and a recommendation to the Board, after which the Board will issue a final decision on both the merits and the request for damages.

(i) *EEOC review of decision on compensatory damages.* A final decision of the Board on a request for compensatory damages pursuant to the Civil Rights Act of 1991 shall be subject to review by the Equal Employment Opportunity Commission as provided under subpart E of this part.

### § 1201.205 Judicial review.

A final Board decision under this subpart is subject to judicial review as provided under 5 U.S.C. 7703.

### APPENDIX I TO PART 1201 [RESERVED]

### APPENDIX II TO PART 1201—APPROPRIATE REGIONAL OR FIELD OFFICE FOR FILING APPEALS

All submissions shall be addressed to the Regional Director, if submitted to a regional office, or the Chief Administrative Judge, if submitted to a field office, Merit Systems Protection Board, at the addresses listed below, according to geographic region of the employing agency or as required by § 1201.4(d) of this part. The facsimile numbers listed below are TDD-capable; however, calls will be answered by voice before being connected to the TDD. Address of Appropriate Regional or Field Office and Area Served:

1. Atlanta Regional Office, 401 West Peachtree Street, NW., 10th floor, Atlanta, Georgia

**Pt. 1201, App. III****5 CFR Ch. II (1-1-08 Edition)**

30308-3519, Facsimile No.: (404) 730-2767, (Alabama; Florida; Georgia; Mississippi; South Carolina; and Tennessee).

2. Central Regional Office, 230 South Dearborn Street, 31st floor, Chicago, Illinois 60604-1669, Facsimile No.: (312) 886-4231, (Illinois; Indiana; Iowa; Kansas City, Kansas; Kentucky; Michigan; Minnesota; Missouri; Ohio; and Wisconsin).

3. Northeastern Regional Office, U.S. Customhouse, Room 501, Second and Chestnut Streets, Philadelphia, Pennsylvania 19106-2987, Facsimile No.: (215) 597-3456, (Connecticut; Delaware; Maine; Maryland—except the counties of Montgomery and Prince George's; Massachusetts; New Hampshire; New Jersey—except the counties of Bergen, Essex, Hudson, and Union; Pennsylvania; Rhode Island; Vermont; and West Virginia).

3a. New York Field Office, 26 Federal Plaza, Room 3137-A, New York, New York 10278-0022, Facsimile No.: (212) 264-1417, (New Jersey—counties of Bergen, Essex, Hudson, and Union; New York; Puerto Rico; and Virgin Islands).

4. Washington Regional Office, 1800 Diagonal Road, Alexandria, Virginia 22314, Facsimile No.: (703) 756-7112, (Maryland—counties of Montgomery and Prince George's; North Carolina; Virginia; Washington, DC; and all overseas areas not otherwise covered).

5. Western Regional Office, 201 Mission Street, Suite 2310, San Francisco, California 94105-1831 Facsimile No.: (415) 904-0580, (Alaska; California; Hawaii; Idaho; Nevada; Oregon; Washington; and Pacific overseas areas).

5a. Denver Field Office, 165 South Union Blvd., Suite 318, Lakewood, Colorado 80228-2211, Facsimile No.: (303) 969-5109, (Arizona; Colorado; Kansas—except Kansas City; Montana; Nebraska; New Mexico; North Dakota; South Dakota; Utah; and Wyoming).

6. Dallas Regional Office, 1100 Commerce Street, Room 620, Dallas, Texas 75242-9979, Facsimile No.: (214) 767-0102, (Arkansas; Louisiana; Oklahoma; and Texas).

[69 FR 11503, Mar. 11, 2004, as amended at 69 FR 61991, Oct. 22, 2004; 72 FR 40215, July 24, 2007]

**APPENDIX III TO PART 1201—APPROVED HEARING LOCATIONS BY REGIONAL OFFICE***Atlanta Regional Office*

Birmingham, Alabama  
Huntsville, Alabama  
Mobile, Alabama  
Montgomery, Alabama  
Jacksonville, Florida  
Miami, Florida  
Orlando, Florida  
Pensacola, Florida  
Tallahassee, Florida

Tampa/St. Petersburg, Florida  
Atlanta, Georgia  
Augusta, Georgia  
Macon, Georgia  
Savannah, Georgia  
Jackson, Mississippi  
Charleston, South Carolina  
Columbia, South Carolina  
Chattanooga, Tennessee  
Knoxville, Tennessee  
Memphis, Tennessee  
Nashville, Tennessee

*Central Regional Office*

Chicago, Illinois  
Indianapolis, Indiana  
Davenport, Iowa/Rock Island, Illinois  
Des Moines, Iowa  
Lexington, Kentucky  
Louisville, Kentucky  
Detroit, Michigan  
Minneapolis/St. Paul, Minnesota  
Kansas City, Missouri  
Springfield, Missouri  
St. Louis, Missouri  
Cleveland, Ohio  
Cincinnati, Ohio  
Columbus, Ohio  
Dayton, Ohio  
Milwaukee, Wisconsin

*Dallas Regional Office*

Little Rock, Arkansas  
Alexandria, Louisiana  
New Orleans, Louisiana  
Oklahoma City, Oklahoma  
Tulsa, Oklahoma  
Corpus Christi, Texas  
Dallas, Texas  
El Paso, Texas  
Houston, Texas  
San Antonio, Texas  
Temple, Texas  
Texarkana, Texas

*Northeastern Regional Office*

Hartford, Connecticut  
New Haven, Connecticut  
Dover, Delaware  
Bangor, Maine  
Portland, Maine  
Baltimore, Maryland  
Boston, Massachusetts  
Manchester, New Hampshire  
Portsmouth, New Hampshire  
Trenton, New Jersey  
Harrisburg, Pennsylvania  
Philadelphia, Pennsylvania  
Pittsburgh, Pennsylvania  
Wilkes-Barre, Pennsylvania  
Providence, Rhode Island  
Burlington, Vermont  
Charleston, West Virginia  
Morgantown, West Virginia

**Merit Systems Protection Board****Pt. 1203***New York Field Office*

Newark, New Jersey  
Albany, New York  
Buffalo, New York  
New York, New York  
Syracuse, New York  
San Juan, Puerto Rico

*Washington Regional Office*

Washington, DC  
Asheville, North Carolina  
Charlotte, North Carolina  
Raleigh, North Carolina  
Jacksonville, North Carolina  
Alexandria, Virginia  
Norfolk, Virginia  
Richmond, Virginia  
Roanoke, Virginia

*Western Regional Office*

Anchorage, Alaska  
Fresno, California  
Los Angeles, California  
Monterey, California  
Sacramento, California  
San Bernardino, California  
San Diego, California  
San Francisco, California  
Santa Ana, California  
Santa Barbara, California  
Honolulu, Hawaii  
Boise, Idaho  
Pocatello, Idaho  
Las Vegas, Nevada  
Reno, Nevada  
Medford, Oregon  
Portland, Oregon  
Seattle, Washington  
Spokane, Washington  
Richland, Kennewick, and Pasco, Washington

*Denver Field Office*

Phoenix, Arizona  
Tucson, Arizona  
Grand Junction, Colorado  
Lakewood, Colorado  
Pueblo, Colorado  
Wichita, Kansas  
Billings, Montana  
Great Falls, Montana  
Missoula, Montana  
Omaha, Nebraska  
Albuquerque, New Mexico  
Bismarck, North Dakota  
Fargo, North Dakota  
Rapid City, South Dakota  
Sioux Falls, South Dakota  
Salt Lake City, Utah  
Casper, Wyoming

[69 FR 11503, Mar. 11, 2004, as amended at 69 FR 61991, Oct. 22, 2004]

**APPENDIX IV TO PART 1201—SAMPLE DECLARATION UNDER 28 U.S.C.1746****Declaration**

I, \_\_\_\_\_, do hereby declare:  
I declare under penalty of perjury under  
the laws of the United States of America  
that the foregoing is true and correct.  
Executed on \_\_\_\_\_

Date \_\_\_\_\_

Signature \_\_\_\_\_

**PART 1202—STATUTORY REVIEW BOARD**

AUTHORITY: 5 U.S.C. 1204.

**§ 1202.1 Designating Chairman of Statutory Review Board.**

At the written request of the Department of Transportation, the Chairman of the Board will designate a presiding official of the Board to serve as the Chairman of any Board of Review established by the Secretary of Transportation under 5 U.S.C. 3383(b) to review certain actions to remove air traffic controllers.

[54 FR 28658, July 6, 1989]

**PART 1203—PROCEDURES FOR REVIEW OF RULES AND REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT****GENERAL****Sec.**

1203.1 Scope; application of part 1201, subpart B.  
1203.2 Definitions.

**PROCEDURES FOR REVIEW**

1203.11 Request for regulation review.  
1203.12 Granting or denying the request for regulation review.  
1203.13 Filing pleadings.  
1203.14 Serving documents.  
1203.15 Review of regulations on the Board's own motion.  
1203.16 Proceedings.

**ORDER OF THE BOARD**

1203.21 Final order of the Board.  
1203.22 Enforcement of order.

AUTHORITY: 5 U.S.C. 1204(a), 1204(f), and 1204(h).

## § 1203.1

SOURCE: 54 FR 23632, June 2, 1989, unless otherwise noted.

### GENERAL

#### § 1203.1 Scope; application of part 1201, subpart B.

(a) *General.* This part applies to the Board's review, under 5 U.S.C. 1204(a)(4) and 1204(f), of any rules or regulations ("regulations") issued by the Office of Personnel Management (OPM). It applies to the Board's review of the way in which an agency implements regulations, as well as to its review of the validity of the regulations on their face.

(b) *Application of 5 CFR part 1201, subparts B and C.* (1) Where appropriate, and unless the Board's regulations provide otherwise, the Board may apply the provisions of 5 CFR part 1201, subpart B to proceedings conducted under this part. It may do so on its own motion or on the motion of a party to these proceedings.

(2) The following provisions of 5 CFR part 1201, subparts B and C do not apply to proceedings conducted under this part:

(i) Sections 1201.21 through 1201.27 which concern petitions for appeal of agency actions, and the pleadings that are filed in connection with those petitions; and

(ii) Sections 1201.111 through 1201.119 which concern final decisions of presiding officials, and petitions for Board review of those decisions.

[54 FR 23632, June 2, 1989, as amended at 54 FR 28658, July 6, 1989]

#### § 1203.2 Definitions.

(a) *Invalid regulation* means a regulation that has been issued by OPM, and that, on its face, would require an employee to commit a prohibited personnel practice if any agency implemented the regulation.

(b) *Invalidly implemented regulation* means a regulation, issued by OPM, whose implementation by an agency has required an employee to commit a prohibited personnel practice. A valid regulation may be invalidly implemented.

(c) *Merit system principles* are the principles stated in 5 U.S.C. 2301(b)(1) through 2301(b)(9).

## 5 CFR Ch. II (1-1-08 Edition)

(d) *Pleadings* are written submissions containing claims, allegations, arguments, or evidence. They include briefs, motions, requests for regulation review, responses, replies, and attachments that are submitted in connection with proceedings under this part.

(e) *Prohibited personnel practices* are the impermissible actions described in 5 U.S.C. 2302(b)(1) through 2302(b)(11).

(f) *Regulation review* means the procedure under which the Board, under 5 U.S.C. 1204(f), reviews regulations issued by OPM on their face, or reviews those regulations as they have been implemented, or both, in order to determine whether the regulations require any employee to commit a prohibited personnel practice.

(g) *Request for regulation review* means a request that the Board review a regulation issued by OPM.

[54 FR 23632, June 2, 1989, as amended at 54 FR 28658, July 6, 1989]

### PROCEDURES FOR REVIEW

#### § 1203.11 Request for regulation review.

(a) An interested person or the Special Counsel may submit a request for regulation review.

(b) Contents of request. (1) Each request for regulation review must include the following information:

(i) The name, address, and signature of the requester's representative or, if the requester has no representative, of the requester;

(ii) A citation identifying the regulation being challenged;

(iii) A statement (along with any relevant documents) describing in detail the reasons why the regulation would require an employee to commit a prohibited personnel practice; or the reasons why the implementation of the regulation requires an employee to commit a prohibited personnel practice;

(iv) Specific identification of the prohibited personnel practice at issue; and

(v) A description of the action the requester would like the Board to take.

(2) If the prohibited personnel practice at issue is one prohibited by 5 U.S.C. 2302(b)(12), the request must include the following additional information:

## Merit Systems Protection Board

## § 1203.13

(i) Identification of the law or regulation that allegedly would be or has been violated, and how it would be or has been violated; and

(ii) Identification of the merit system principles at issue and an explanation of the way in which the law or regulation at issue implements or directly concerns those principles.

[54 FR 23632, June 2, 1989, as amended at 65 FR 57939, Sept. 27, 2000]

### § 1203.12 Granting or denying the request for regulation review.

(a) The Board, in its sole discretion, may grant or deny an interested person's request for regulation review. It will grant a request for regulation review that the Special Counsel submits. It will not, however, review a regulation before its effective date.

(b) After considering the request for regulation review, the Board will issue an order granting or denying the request in whole or in part. Orders in which the Board grants the request, in whole or in part, will identify the agency or agencies involved, if any. They also will include the following:

- (1) A citation identifying the regulation being challenged;
- (2) A description of the issues to be addressed;
- (3) The docket number assigned to the proceedings; and
- (4) Instructions covering the review proceedings, including information regarding the time limits for filing submissions related to the request.

[54 FR 23632, June 2, 1989, as amended at 56 FR 41749, Aug. 23, 1991]

### § 1203.13 Filing pleadings.

(a) *Place to file and number of copies.* One original and three copies of each pleading must be filed with the Office of the Clerk, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419. In addition, parties to a proceeding under this part must serve their pleadings on each other in accordance with § 1203.14 of this part. The Office of the Clerk will make all pleadings available for review by the public.

(b) *Time limits.* (1) A request for regulation review may be filed any time

after the effective date of the regulation.

(2) A response to a request for regulation review, whether the response supports or opposes the request, must be filed within the time period provided in the Board order granting the request for review.

(3) A reply to a response may be filed within 10 days after the response is filed. The reply may address only those matters raised in the response that were not addressed in the request for regulation review.

(4) Motions may be filed at any time during the regulation review. The filing of a motion will not delay the acting of the Board unless the Board orders a postponement. The Board may rule immediately on a motion for an extension of time or a continuance if circumstances make consideration of others' views regarding the motion impracticable.

(5) Submissions opposing motions must be filed within five days after the opposing party receives the motion.

(c) *Additional pleadings.* The Board will consider pleadings in addition to those mentioned above only if the Board requests them, or if it grants a request that it consider them.

(d) *Method and date of filing.* An initial filing in a request for review of a regulation may be filed with the Office of the Clerk by mail, by commercial or personal delivery, or by facsimile. Pleadings, other than an initial request for a regulation review under this part, may be filed with the Office of the Clerk by mail, by commercial or personal delivery, by facsimile, or by e-filing in accordance with § 1201.14 of this chapter. If the document was submitted by certified mail, it is considered to have been filed on the mailing date. If it was submitted by regular mail, it is presumed to have been filed five days before the Office of the Clerk receives it, in the absence of evidence contradicting that presumption. If it was delivered personally, it is considered to have been filed on the date the Office of the Clerk receives it. If it was submitted by facsimile, the date of the facsimile is considered to be the filing date. If it was submitted by commercial delivery, the date of filing is the

## § 1203.14

date it was delivered to the commercial delivery service. If it was submitted by e-filing, it is considered to have been filed on the date of electronic submission.

(e) *Extensions of time.* The Board will grant a request for extension of time only when good cause is shown.

[54 FR 23632, June 21, 1989, as amended at 59 FR 65242, Dec. 19, 1994; 65 FR 48885, Aug. 10, 2000; 68 FR 59864, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

### § 1203.14 Serving documents.

(a) *Parties.* In every case, the person requesting regulation review must serve a copy of the request on the Director of OPM. In addition, when the implementation of a regulation is being challenged, the requester must also serve a copy of the request on the head of the implementing agency. A copy of all other pleadings must be served, by the person submitting the pleading, on each other party to the proceeding.

(b) *Method of serving documents.* Pleadings may be served on parties by mail, by personal delivery, by facsimile, or by commercial delivery. Service by mail is accomplished by mailing the pleading to each party or representative, at the party's or representative's last known address. Service by facsimile is accomplished by transmitting the pleading by facsimile to each party or representative. Service by personal delivery or by commercial delivery is accomplished by delivering the pleading to the business office or home of each party or representative and leaving it with the party or representative, or with a responsible person at that address. Regardless of the method of service, the party serving the document must submit to the Board, along with the pleading, a certificate of service as proof that the document was served on the other parties or their representatives. The certificate of service must list the names and addresses of the persons on whom the pleading was served, must state the date on which the pleading was served, must state the method (*i.e.*, mail, personal delivery, facsimile, or commercial delivery) by which service was accomplished, and must be signed by the

## 5 CFR Ch. II (1-1-08 Edition)

person responsible for accomplishing service.

(c) *Electronic filing.* Other than the initial request for a regulation review, pleadings in a regulation review proceeding may be filed with the Board and served upon other parties by electronic filing, provided the requirements of § 1201.14 of this chapter are satisfied.

[54 FR 23632, June 21, 1989, as amended at 59 FR 65242, Dec. 19, 1994; 68 FR 59864, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

### § 1203.15 Review of regulations on the Board's own motion.

The Board may, from time to time, review a regulation on its own motion under 5 U.S.C. 1204(f)(1)(A). When it does so, it will publish notice of the review in the *FEDERAL REGISTER*.

[54 FR 28658, July 6, 1989]

### § 1203.16 Proceedings.

The Board has substantial discretion in conducting a regulation review under this part. It may conduct a review on the basis of the pleadings alone, or on the basis of the pleadings along with any or all of the following:

- (a) Additional written comments;
- (b) Oral argument;
- (c) Evidence presented at a hearing; and/or
- (d) Evidence gathered through any other appropriate procedures that are conducted in accordance with law.

### ORDER OF THE BOARD

#### § 1203.21 Final order of the Board.

(a) *Invalid regulation.* If the Board determines that a regulation is invalid on its face, in whole or in part, it will require any agency affected by the order to stop complying with the regulation, in whole or in part. In addition, it may order other remedial action that it finds necessary.

(b) *Invalidly implemented regulation.* If the Board determines that a regulation has been implemented invalidly, in whole or in part, it will require affected agencies to terminate the invalid implementation.

(c) *Corrective action.* The Board may order corrective action necessary to ensure compliance with its order. The

## Merit Systems Protection Board

## § 1204.2

action it may order includes, but is not limited to, the following:

- (1) Cancellation of any personnel action related to the prohibited personnel practice;
- (2) Rescission of any action related to the cancelled personnel action;
- (3) Removal of any reference, record, or document within an employee's official personnel folder that is related to the prohibited personnel practice;
- (4) Award of back pay and benefits;
- (5) Award of attorney fees;
- (6) Other remedial measures to reverse the effects of a prohibited personnel practice; and
- (7) The agency's submission of a verified report of its compliance with the Board's order.

### § 1203.22 Enforcement of order.

(a) Any party may ask the Board to enforce a final order it has issued under this part. The request may be made by filing a petition for enforcement with the Office of the Clerk of the Board and by serving a copy of the petition on each party to the regulation review. The request may be filed in electronic form, provided the requirements of § 1201.14 are satisfied. The petition must include specific reasons why the petitioning party believes that there has been a failure to comply with the Board's order.

(b) The Board will take all action necessary to determine whether there has been compliance with its final order. If it determines that there has been a failure to comply with the order, it will take actions necessary to obtain compliance.

(c) Where appropriate, the Board may initiate the enforcement procedures described in 5 CFR 1201.183(c).

[54 FR 23632, June 2, 1989, as amended at 68 FR 59864, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

## PART 1204—AVAILABILITY OF OFFICIAL INFORMATION

### Subpart A—Purpose and Scope

Sec.

1204.1 Purpose.

1204.2 Scope.

### Subpart B—Procedures for Obtaining Records Under the Freedom of Information Act

- 1204.11 Requests for access to Board records.
- 1204.12 Fees.
- 1204.13 Denials.
- 1204.14 Requests for access to confidential commercial information.
- 1204.15 Records of other agencies.

### Subpart C—Appeals

1204.21 Submission.

1204.22 Decision on appeal.

AUTHORITY: 5 U.S.C. 552 and 1204, Pub. L. 99-570, Pub. L. 104-231, and E.O. 12600.

SOURCE: 64 FR 51039, Sept. 21, 1999, unless otherwise noted.

### Subpart A—Purpose and Scope

#### § 1204.1 Purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, by stating the procedures to follow when requesting information from the Board, and by stating the fees that will be charged for that information.

#### § 1204.2 Scope.

(a) For the purpose of this part, the term *record* and any other term used in reference to information includes any information that would be a Board record subject to the requirements of 5 U.S.C. 552 when maintained by the Board in any format including an electronic format. All written requests for information that are not processed under part 1205 of this chapter will be processed under this part. The Board may continue, without complying with this part, to furnish the public with the information it has furnished in the regular course of performing its official duties, unless furnishing the information would violate the Privacy Act of 1974, 5 U.S.C. 552a, or another law.

(b) When the subject of the record, or the subject's representative, requests a record from a Privacy Act system of records, as that term is defined by 5 U.S.C. 552a(a)(5), and the Board retrieves the record by the subject's name or other personal identifier, the Board will handle the request under

## § 1204.11

## 5 CFR Ch. II (1-1-08 Edition)

the procedures and fees shown in part 1205 of this chapter. When a third party requests access to those records, without the written consent of the subject of the record, the Board will handle the request under this part.

(c) When a party to an appeal requests a copy of a tape recording, video tape, or transcript (if one has been prepared) of a hearing that the Board or a judge held under part 1201 or part 1209 of this chapter, the Board will handle the request under § 1201.53 of this chapter. When someone other than a party to the appeal makes this request, the Board will handle the request under this part.

(d) In accordance with 5 U.S.C. 552(a)(2), the Board's final opinions and orders (including concurring and dissenting opinions), those statements of policy and interpretations adopted by the Board and that are not published in the *FEDERAL REGISTER*, administrative staff manuals and instructions to staff that affect a member of the public, and agency records processed and disclosed in response to a FOIA request that the Board determines have been or are likely to become the subject of additional requests for basically the same records and a general index of those records, are available for public review and copying in the Board's Headquarters' Library, 1615 M Street, NW., Washington, DC 20419-0001, and on the Board's World Wide Web site at <http://www.mspb.gov>.

[64 FR 51039, Sept. 21, 1999, as amended at 65 FR 48885, Aug. 10, 2000]

### Subpart B—Procedures for Obtaining Records Under the Freedom of Information Act

#### § 1204.11 Request for access to Board records.

(a) *Sending a request.* A person may request a Board record under this part by writing to the office that has the record. If the requester believes that the records are located in a regional or field office, the request must be sent to that office. A list of the addresses of the Board's regional and field offices are in appendix II of part 1201 of this chapter and on the Board's World Wide Web site at <http://www.mspb.gov>. Other

requests must be sent to the Clerk of the Board, 1615 M Street, NW., Washington, DC 20419-0001. Requests sent under this part must be clearly marked "Freedom of Information Act Request" on both the envelope and the request.

(b) *Description.* A request must describe the records wanted in enough detail for Board employees to locate the records with no more than a reasonable effort. Wherever possible, a request must include specific information about each record, such as the date, title or name, author, recipient, and subject matter of the record. In addition, if the request asks for records on cases decided by the Board, it must show the title of the case, the MSPB docket number, and the date of the decision.

(c) *Time limits and decisions.* If a request is not properly labeled or is sent to the wrong office, the time for processing the request will begin when the proper office receives it. Requests to the Board's headquarters will be decided by the Clerk of the Board. Requests to one of the regional or field offices will be decided by the Regional Director or Chief Administrative Judge. The Board will decide a request within 20 workdays after the appropriate office receives it, except under the conditions that follow.

(1) *Extension of time.* If "unusual circumstances" exist, the Board may extend the time for deciding the request by no more than 10 additional workdays. An example of unusual circumstances could be the need to find and retrieve records from regional or field offices or from federal records centers or the need to search, collect and or examine a large number of records which are demanded in a single request, or the need to talk to another agency with a substantial interest in the determination of the request. When the Board extends the time to decide the request, it will inform the requester in writing and describe the "unusual circumstances", and it will state a date on which a decision on the request will be made. If the "unusual circumstances" are such that the Board cannot comply with the request within the time limit, the Board will offer the requester an opportunity:

## Merit Systems Protection Board

## § 1204.12

(i) To limit the request so that it may be processed within the time limit, or

(ii) To arrange with the Board a different time frame for processing the request or a changed request.

(2) *Expedited processing.* Where a requester shows a "compelling need" and in other cases determined by the Board, a decision whether to provide expedited processing of a request and notification of that decision to the requester will be made within 10 workdays of the date of the request. An example of a compelling need could be that a failure to obtain the records expeditiously could reasonably be expected to be a threat to the life or physical safety of a person or that there is urgency to inform the public about actual or alleged Federal Government activity by a person primarily engaged in distributing information. Where the Board approves expedited processing, the Board will process the request within 5 workdays from the date of the decision to grant the expedited processing. If, in order to fully satisfy the request, the Board requires the standard or additional processing time, or if it decides that good cause for expedited processing has not been made, it will provide written notice of its decision to the requester and will inform the requester of the right to administrative and court review of the decision. A showing of a compelling need must be made by a statement certified to be true to the best of the requester's knowledge and belief.

[64 FR 51039, Sept. 21, 1999, as amended at 65 FR 48886, Aug. 10, 2000]

### § 1204.12 Fees.

(a) *General.* The Board will charge the requester fees for services provided in processing requests for information. Those fees will be charged according to the schedule in paragraph (d) of this section, and will recover the full allowable direct costs that the Board incurs. Fees may be charged for time spent searching for information, even if the Board fails to locate responsive records, and even if it determines that the information is exempt from disclosure.

(b) *Definitions.* (1) The term *direct costs* means the costs to an agency for

searching for and copying (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of each employee performing work at the rate of \$5 per quarter hour. Overhead expenses, such as costs of space and of heating or lighting the facility in which the records are stored, are not included in direct costs.

(2) The term *search*, as defined by 5 U.S.C. 552(a)(3)(D), means either manual or automated review of Board records to locate those records asked for, and includes all time spent looking for material in response to a request, including page-by-page or line-by-line identification of material within documents. Searches will be done in the most efficient and least expensive way to limit costs for both the Board and the requester. Searches may be done manually or by computer using existing programming. The Board will make a reasonable effort to search for the records in electronic form or format, except when such effort would interfere to a large extent with the operation of the Board's automated information system.

(3) The term *duplication* means the process of copying a document or electronically maintained information in response to a FOIA request. Copies can take the form of paper, microfilm, audio-visual materials, or machine-readable documentation (e.g., magnetic tape or disk), among others. The copy provided will be in a form or format requested if the record is readily reproducible by the Board in that form or format. The Board will make a reasonable effort to maintain its records in forms or formats that are reproducible.

(4) The term *review* includes the process of examining documents to determine whether any portion of them may be exempt from disclosure under the FOIA, when the documents have been located in response to a request that is for a commercial use. The term also includes processing any documents for disclosure, e.g., doing all that is necessary to edit them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues.

## § 1204.12

## 5 CFR Ch. II (1-1-08 Edition)

(5) The term *commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In deciding whether a requester properly belongs in this category, the Board will decide the use the requester will make of the documents requested. Also, where the Board has reasonable cause to doubt the use a requester will make of the records requested, or where that use is not clear from the request, the Board will seek additional clarification before assigning the request to a specific category.

(6) The term *educational institution* means a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education that operates a program or programs of scholarly research.

(7) The term *noncommercial scientific institution* means an institution that is not operated on a "commercial" basis as that term is used above, and that is operated solely for the purpose of conducting scientific research whose results are not intended to promote any particular product or industry.

(8) The term *representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that concerns current events or that would be of current interest to the public.

(c) *Categories of requesters.* There are four categories of FOIA requesters: Commercial use requesters; educational and noncommercial scientific institutions; representatives of the news media; and all other requesters. To be included in the category of educational and noncommercial scientific institutions, requesters must show that the request is authorized by a qualifying institution and that they are seeking the records not for a commercial use, but to further scholarly or scientific research. To be included in the news media category, a requester must meet the definition in paragraph (b)(8)

of this section and the request must not be made for a commercial use. To avoid commercial use charges, requesters must show that they should be included in a category or categories other than that of commercial use requesters. The Board will decide the categories to place requesters for fee purposes. It will make these determinations based on information given by the requesters and information otherwise known to the Board.

(d) The Board will not charge a requester if the fee for any request is less than \$100 (the cost to the Board of processing and collecting the fee).

(1) When the Board receives a request:

(i) From a commercial use requester, it will charge fees that recover the full direct costs for searching for the information requested, reviewing it for release at the initial request stage, reviewing it after an appeal to determine whether other exemptions not considered before the appeal apply to it, and copying it.

(ii) From an educational and noncommercial scientific institution or, to the extent copying exceeds 100 pages, from a representative of the news media, it will charge fees only for the cost of copying the requested information.

(iii) From all other requesters, to the extent copying exceeds 100 pages and search time exceeds 2 hours, it will charge fees for the full direct cost of searching for and copying requested records.

(2) When the Board reasonably believes that a requester or group of requesters is attempting to divide a request into more than one request to avoid payment of fees, the Board will combine the requests and charge fees accordingly. The Board will not combine multiple requests on unrelated subjects from one requester.

(3) When the Board decides that charges for a request are likely to exceed \$250, the Board will require the requester to pay the entire fee in advance before continuing to process the request.

(4) When a requester has an outstanding fee charge or has not paid a fee on time, the Board will require the requester to pay the full amount of the

## Merit Systems Protection Board

## § 1204.13

estimated fee in advance before the Board begins to process a new or pending request from that requester, and before it applies administrative time limits for making a decision on the new or pending request.

(e) *Fee schedule.* (1) Fees for document searches for records will be charged at a rate of \$5 per quarter hour spent by each Board employee performing the search.

(2) Fees for computer searches for records will be \$5 per quarter hour spent by each employee operating the computer equipment and/or developing a new inquiry or report.

(3) Fees for review at the initial administrative level to determine whether records or portions of records are exempt from disclosure, and for review after an appeal to determine whether the records are exempt on other legal grounds, will be charged, for commercial use requests, at a rate of \$5 per quarter hour spent by each reviewing employee.

(4) Fees for photocopying records is 20 cents a page, the fee for copying audio tapes is the direct cost up to \$15 per cassette tape; the fee for copying video tapes is the direct cost up to \$20 per tape; and the fee for computer printouts is 10 cents a page. The fee for duplication of electronically maintained information in the requester's preferred format will be \$21 for copying computer tapes and \$4 for copying records on computer diskettes, if it is feasible for the Board to reproduce records in the format requested. Fees for certified copies of the Board's records will include a \$4 per page charge for each page displaying the Board's seal and certification. When the Board estimates that copying costs will exceed \$100, it will notify the requester of the estimated amount unless the requester has indicated in advance a willingness to pay an equal or higher amount.

(f) *Fee waivers.* (1) Upon request, the Clerk of the Board, Regional Director, or Chief Administrative Judge, as appropriate, will furnish information without charge or at reduced rates if it is established that disclosure "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activi-

ties of the government." This decision will be based on:

(i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(ii) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(iii) Whether disclosure of the requested information is likely to contribute to public understanding of the subject of the disclosure; and

(iv) The significance of the contribution the disclosure would make to public understanding of government operations or activities.

(2) If information is to be furnished without charge or at reduced rates, the requester must also establish that disclosure of the information is not primarily in the commercial interest of the requester. This decision will be based on:

(i) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so,

(ii) Whether the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(3) The requester must establish eligibility for a waiver of fees or for reduced fees. The denial of a request for waiver of fees may be appealed under subpart C of this part.

### § 1204.13 Denials

(a) The Board may deny: A request for reduced fees or waiver of fees; a request for a record, either in whole or in part; a request for expeditious processing based on the requester's compelling need; or a request that records be released in a specific electronic format. The denial will be in writing, will state the reasons, and will notify the requester of the right to appeal.

(b) If the Board applies one or more of the exemptions provided under the FOIA to deny access to some or all of

## § 1204.14

## 5 CFR Ch. II (1-1-08 Edition)

the information requested, it will respond in writing, identifying for the requester the specific exemption(s), providing an explanation as to why the exemption(s) to withhold the requested information must be applied, and providing an estimate of the amount of material that has been denied to the requester, unless providing such an estimate would harm an interest protected by the exemptions.

(c) The amount of information deleted will be indicated on the released portion of the record at the place in the record where the deletion is made, if technically feasible and unless the indication would harm an interest protected by the exemption under which the deletion is made.

### § 1204.14 Requests for access to confidential commercial information.

(a) *General.* Confidential commercial information provided to the Board by a business submitter will not be disclosed in response to a FOIA request except as required by this section.

(b) *Definitions.* (1) The term *confidential commercial information* means records provided to the government by a submitter that are believed to contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) The term *submitter* means any person or organization that provides confidential commercial information to the government. The term *submitter* includes, but is not limited to, corporations, state governments, and foreign governments.

(c) *Notice to business submitters.* The Board will provide a business submitter with prompt written notice of a request for its confidential commercial information whenever such written notice is required under paragraph (d) of this section. Exceptions to such written notice are at paragraph (h) of this section. This written notice will either describe the exact nature of the confidential information requested or provide copies of the records or parts of records containing the commercial information.

(d) *When initial notice is required.* (1) With respect to confidential commercial information received by the Board before January 1, 1988, the Board will give the business submitter notice of a request whenever:

(i) The information is less than 10 years old; or

(ii) The Board has reason to believe that releasing the information could reasonably be expected to cause substantial competitive harm.

(2) With respect to confidential commercial information received by the Board on or after January 1, 1988, the Board will give notice to the business submitter whenever:

(i) The business submitter has designated the information in good faith as commercially or financially sensitive information; or

(ii) The Board has reason to believe that releasing the information could reasonably be expected to cause substantial competitive harm.

(3) Notice of a request for commercially confidential information that was received by January 1, 1988, is required for a period of not more than 10 years after the date on which the information is submitted unless the business submitter requests, and provides justification for, a longer specific notice period. Whenever possible, the submitter's claim of confidentiality must be supported by a statement or certification, by an officer or authorized representative of the company, that the information in question is confidential commercial information and has not been disclosed to the public.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, the Board will give a business submitter a reasonable period to provide a detailed statement of any objection to disclosure. The statement must specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act. In addition, in the case of Exemption 4, the statement must state why the information is considered to be a trade secret, or to be commercial or financial information that is privileged or confidential. Information a business submitter provides

## Merit Systems Protection Board

## § 1204.21

under this paragraph may itself be subject to disclosure under the Freedom of Information Act.

(f) *Notice of intent to release information.* The Board will consider carefully a business submitter's objections and specific grounds for claiming that the information should not be released before determining whether to release confidential commercial information. Whenever the Board decides to release confidential commercial information over the objection of a business submitter, it will forward to the business submitter a written notice that includes:

(1) A statement of the reasons for which the business submitter's objections to the release were not sufficient;

(2) A description of the confidential commercial information to be released; and

(3) A *specified release date.* The Board will forward the notice of intent to release the information a reasonable number of days, as circumstances permit, before the specified date upon which release is expected. It will forward a copy of the release notice to the requester at the same time.

(g) *Notice of Freedom of Information Act lawsuit.* Whenever a requester files a lawsuit seeking to require release of business information covered by paragraph (d) of this section, the Board will notify the business submitter promptly.

(h) *Exceptions to notice requirements.* The notice requirements of this section do not apply when:

(1) The Board decides that the information should not be released;

(2) The information lawfully has been published or otherwise made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The disclosure is required by an agency rule that:

(i) Was adopted after notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the FOIA; or

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is sub-

mitted or a reasonable time thereafter, that release of the information could reasonably be expected to cause substantial competitive harm.

(5) The information requested is not designated by the submitter as exempt from release according to agency regulations issued under this section, when the submitter has an opportunity to do so at the time of sending the information or a reasonable time thereafter, unless the agency has good reason to believe that disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter according to Board regulations appears obviously frivolous; except that, in such case, the Board must provide the submitter with written notice of any final administrative release decision within a reasonable period before the stated release date.

### § 1204.15 Records of other agencies.

Requests for Board records that were created by another agency may, in appropriate circumstances, be referred to that agency for discussion or processing. In these instances, the Board will notify the requester.

## Subpart C—Appeals

### § 1204.21 Submission.

(a) A person may appeal the following actions, or failure to act by the Clerk of the Board, a Regional Director, or Chief Administrative Judge:

(1) A denial of access to agency records;

(2) A denial of a request for a waiver or reduced fees;

(3) A decision that it is technically not possible to reproduce electronically maintained information in the requester's preferred format;

(4) A denial of a request for expedited processing of information under this part; or

(5) A failure to decide a request for expedited processing within 10 workdays from the date of the request.

(b) Appeals must be filed with the Chairman, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419-0001 within 10 workdays from the date of the denial. Any appeal must include a copy of the initial request, a

## § 1204.22

copy of the letter denying the request, and a statement of the reasons why the requester believes the denying employee erred.

[64 FR 51039, Sept. 21, 1999, as amended at 65 FR 48886, Aug. 10, 2000]

### § 1204.22 Decision on appeal.

A decision on an appeal will be made within 20 workdays after the appeal is received. A decision not to provide expeditious processing of a request will be made within 15 workdays after the appeal is received. The decision will be in writing and will contain the reasons for the decision and information about the appellant's right to seek court review of the denial.

## PART 1205—PRIVACY ACT REGULATIONS

### Subpart A—General Provisions

Sec.

- 1205.1 Purpose.
- 1205.2 Policy and scope.
- 1205.3 Definitions.
- 1205.4 Disclosure of Privacy Act records.

### Subpart B—Procedures for Obtaining Records

- 1205.11 Access to Board records.
- 1205.12 Time limits and determinations.
- 1205.13 Identification.
- 1205.14 Granting access.
- 1205.15 Denying access.
- 1205.16 Fees.

### Subpart C—Amendment of Records

- 1205.21 Request for amendment.
- 1205.22 Action on request.
- 1205.23 Time limits.

### Subpart D—Appeals

- 1205.31 Submitting appeal.
- 1205.32 Decision on appeal.

AUTHORITY: 5 U.S.C. 552a and 1204.

SOURCE: 64 FR 51043, Sept. 21, 1999, unless otherwise noted.

### Subpart A—General Provisions

#### § 1205.1 Purpose.

This subpart implements the Privacy Act of 1974, 5 U.S.C. 552a, ("the Act") by stating the procedures by which individuals may determine the existence

## 5 CFR Ch. II (1-1-08 Edition)

of, seek access to, and request amendment of Board records concerning themselves, and by stating the requirements that apply to Board employees' use and disclosure of those records.

#### § 1205.2 Policy and scope.

The Board's policy is to apply these regulations to all records that can be retrieved from a system of records under the Board's control by using an individual's name or by using a number, symbol, or other way to identify the individual. These regulations, however, do not govern the rights of the parties in adversary proceedings before the Board to obtain discovery from adverse parties; those rights are governed by part 1201 and part 1209 of this chapter. These regulations also are not meant to allow the alteration, either before or after the Board has issued a decision on an appeal, of evidence presented during the Board's adjudication of the appeal.

#### § 1205.3 Definitions.

The definitions of 5 U.S.C. 552a apply to this part. In addition, as used in this part:

(a) *Inquiry* means a request by an individual regarding whether the Board has a record that refers to that individual.

(b) *Request for access* means a request by an individual to look at or copy a record.

(c) *Request for amendment* means a request by an individual to change the substance of a particular record by addition, deletion, or other correction.

(d) *Requester* means the individual requesting access to or amendment of a record. The individual may be either the person to whom the requested record refers, a legal guardian acting on behalf of the individual, or a representative designated by that individual.

#### § 1205.4 Disclosure of Privacy Act records.

(a) Except as provided in 5 U.S.C. 552a(b), the Board will not disclose any personal record information from systems of records it maintains to any individual other than the individual to whom the record refers, or to any other agency, without the express written

## Merit Systems Protection Board

## § 1205.12

consent of the individual to whom the record refers, or his or her representative or attorney.

(b) The Board's staff will take necessary steps, in accordance with the law and these regulations, to protect the security and integrity of the records and the personal privacy interests of the subjects of the records.

### Subpart B—Procedures for Obtaining Records

#### § 1205.11 Access to Board records.

(a) *Submission of request.* Inquiries or requests for access to records must be submitted to the appropriate regional or field office of the Board, or to the Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419-0001. If the requester has reason to believe that the records are located in a regional or field office, the request must be submitted to that office. Requests submitted to the regional or field office must be addressed to the Regional Director or Chief Administrative Judge at the appropriate regional or field office listed in appendix II of 5 CFR part 1201.

(b) *Form.* Each submission must contain the following information:

(1) The name, address, and telephone number of the individual to whom the record refers;

(2) The name, address, and telephone number of the individual making the request if the requester is someone other than the person to whom the record refers, such as a legal guardian or an attorney, along with evidence of the relationship. Evidence of the relationship may consist of an authenticated copy of:

(i) The birth certificate of the minor child, and

(ii) The court document appointing the individual legal guardian, or

(iii) An agreement for representation signed by the individual to whom the record refers;

(3) Any additional information that may assist the Board in responding to the request, such as the name of the agency that may have taken an action against an individual, or the docket number of the individual's case;

(4) The date of the inquiry or request;

(5) The inquirer's or requester's signature; and

(6) A conspicuous indication, both on the envelope and the letter, that the inquiry is a "PRIVACY ACT REQUEST".

(c) *Identification.* Each submission must follow the identification requirements stated in § 1205.13 of this part.

(d) *Payment.* Records usually will not be released until fees have been received.

[64 FR 51043, Sept. 21, 1999, as amended at 65 FR 48886, Aug. 10, 2000]

#### § 1205.12 Time limits and determinations.

(a) *Board determinations.* The Board will acknowledge the request for access to records and make a determination on whether to grant it within 20 workdays after it receives the request, except under the unusual circumstances described below:

(1) When the Board needs to obtain the records from other Board offices or a Federal Records Center;

(2) When it needs to obtain and examine a large number of records;

(3) When it needs to consult with another agency that has a substantial interest in the records requested; or

(4) When other extenuating circumstances prevent the Board from processing the request within the 20-day period.

(b) *Time extensions.* When unusual circumstances exist, the Board may extend the time for making a determination on the request for no more than 10 additional workdays. If it does so, it will notify the requester of the extension.

(c) *Improper request.* If a request or an appeal is not properly labeled, does not contain the necessary identifying information, or is submitted to the wrong office, the time period for processing the request will begin when the correct official receives the properly labeled request and the necessary information.

(d) *Determining officials.* The Clerk of the Board, a Regional Director, or a Chief Administrative Judge will make determinations on requests.

[64 FR 51043, Sept. 21, 1999; 64 FR 71267, Dec. 21, 1999]

## § 1205.13

### § 1205.13 Identification.

(a) *In person.* Each requester must present satisfactory proof of identity. The following items, which are listed in order of the Board's preference, are acceptable proof of the requester's identity when the request is made in person:

- (1) A document showing the requester's photograph;
- (2) A document showing the requester's signature; or
- (3) If the items described in paragraphs (a)(1) and (2) of the section are not available, a signed statement in which the requester asserts his or her identity and acknowledges understanding that misrepresentation of identity in order to obtain a record is a misdemeanor and subject to a fine of up to \$5,000 under 5 U.S.C. 552a(i)(3).

(b) *By mail.* The identification of a requester making a request by mail must be certified by a notary public or equivalent official or contain other information to identify the requester. Information could be the date of birth of the requester and some item of information in the record that only the requester would be likely to know.

(c) *Parents of minors, legal guardians, and representatives.* Parents of minors, legal guardians, and representatives must submit identification under paragraph (a) or (b) of this section. Additionally, they must present an authenticated copy of:

- (1) The minor's birth certificate, and
- (2) The court order of guardianship, or
- (3) The agreement of representation, where appropriate.

### § 1205.14 Granting access.

(a) The Board may allow a requester to inspect records through either of the following methods:

- (1) It may permit the requester to inspect the records personally during normal business hours at a Board office or other suitable Federal facility closer to the requester; or
- (2) It may mail copies of the records to the requester.

(b) A requester seeking personal access to records may be accompanied by another individual of the requester's choice. Under those circumstances, however, the requester must sign a

## 5 CFR Ch. II (1-1-08 Edition)

statement authorizing the discussion and presentation of the record in the accompanying individuals presence.

### § 1205.15 Denying access.

(a) *Basis.* In accordance with 5 U.S.C. 552a(k)(2), the Board may deny access to records that are of an investigatory nature and that are compiled for law enforcement purposes. Those requests will be denied only where access to them would otherwise be unavailable under Exemption (b)(7) of the Freedom of Information Act.

(b) *Form.* All denials of access under this section will be made in writing and will notify the requester of the right to judicial review.

### § 1205.16 Fees.

(a) No fees will be charged except for making copies of records.

(b) Photocopies of records duplicated by the Board will be subject to a charge of 20 cents a page.

(c) If the fee to be assessed for any request is less than \$100 (the cost to the Board of processing and collecting the fee), no charge will be made to the requester.

(d) Fees for copying audio tapes and computer records will be charged at a rate representing the actual costs to the Board, as shown in paragraphs (d)(1) through (d)(3) of this section.

(1) Audio tapes will be provided at a charge not to exceed \$15 for each cassette tape.

(2) Computer printouts will be provided at a charge of 10 cents a page.

(3) Records reproduced on computer tapes, computer diskettes, or other electronic media, will be provided at the actual cost to the Board.

(e) The Board will provide one copy of the amended parts of any record it amends free of charge as evidence of the amendment.

## Subpart C—Amendment of Records

### § 1205.21 Request for amendment.

A request for amendment of a record must be submitted to the Regional Director or Chief Administrative Judge of the appropriate regional or field office, or to the Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M

## Merit Systems Protection Board

Pt. 1206

Street, NW., Washington, DC 20419-0001, depending on which office has custody of the record. The request must be in writing, must be identified conspicuously on the outside of the envelope and the letter as a "PRIVACY ACT REQUEST," and must include the following information:

- (a) An identification of the record to be amended;
- (b) A description of the amendment requested; and
- (c) A statement of the basis for the amendment, along with supporting documentation, if any.

[64 FR 51043, Sept. 21, 1999, as amended at 65 FR 48886, Aug. 10, 2000]

### § 1205.22 Action on request.

(a) *Amendment granted.* If the Board grants the request for amendment, it will notify the requester and provide him or her with a copy of the amendment.

(b) *Amendment denied.* If the Board denies the request for amendment in whole or in part, it will provide the requester with a written notice that includes the following information:

- (1) The basis for the denial; and
- (2) The procedures for appealing the denial.

### § 1205.23 Time limits.

The Clerk of the Board, Regional Director, or Chief Administrative Judge will acknowledge a request for amendment within 10 workdays of receipt of the request in the appropriate office except under the unusual circumstances described in paragraphs (a)(1) through (a)(4) of § 1205.12 of this part.

## Subpart D—Appeals

### § 1205.31 Submitting appeal.

(a) A partial or complete denial, by the Clerk of the Board, by the Regional Director, or by the Chief Administrative Judge, of a request for amendment may be appealed to the Chairman, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419-0001 within 10 workdays from the date of the denial.

(b) Any appeal must be in writing, must be clearly and conspicuously

identified as a Privacy Act appeal on both the envelope and letter, and must include:

- (1) A copy of the original request for amendment of the record;
- (2) A copy of the denial; and
- (3) A statement of the reasons why the original denial should be overruled.

[64 FR 51043, Sept. 21, 1999, as amended at 65 FR 48886, Aug. 10, 2000]

### § 1205.32 Decision on appeal.

(a) The Chairman will decide the appeal within 30 workdays unless the Chairman determines that there is good cause for extension of that deadline. If an appeal is improperly labeled, does not contain the necessary information, or is submitted to an inappropriate official, the time period for processing that appeal will begin when the Chairman receives the appeal and the necessary information.

(b) If the request for amendment of a record is granted on appeal, the Chairman will direct that the amendment be made. A copy of the amended record will be provided to the requester.

(c) If the request for amendment of a record is denied, the Chairman will notify the requester of the denial and will inform the requester of:

- (1) The basis for the denial;
- (2) The right to judicial review of the decision under 5 U.S.C. 552a(g)(1)(A); and

(3) The right to file a concise statement with the Board stating the reasons why the requester disagrees with the denial. This statement will become a part of the requester's record.

## PART 1206—OPEN MEETINGS

### Subpart A—Purpose and Policy

Sec.

- 1206.1 Purpose.
- 1206.2 Policy.
- 1206.3 Definitions.

### Subpart B—Procedures

- 1206.4 Notice of meeting.
- 1206.5 Change in meeting plans after notice.
- 1206.6 Decision to close meeting.
- 1206.7 Record of meetings.
- 1206.8 Providing information to the public.
- 1206.9 Procedures for expedited closing of meetings.

## § 1206.1

### Subpart C—Conduct of Meetings

1206.11 Meeting place.

1206.12 Role of observers.

AUTHORITY: 5 U.S.C. 552b.

SOURCE: 54 FR 20367, May 11, 1989, unless otherwise noted.

### Subpart A—Purpose and Policy

#### § 1206.1 Purpose.

The purpose of this part is to prescribe the procedures by which the Board will conduct open meetings in accordance with the Government in the Sunshine Act (5 U.S.C. 552b) ("the Act").

#### § 1206.2 Policy.

The Board will provide the public with the fullest practicable information regarding its decision-making processes, while protecting individuals' rights and the Board's ability to carry out its responsibilities. Meetings at which the Board members jointly conduct or dispose of official business are presumptively open to the public. The Board will close those meetings in whole or in part only in accordance with the exemptions provided under 5 U.S.C. 552b(c), and only when doing so is in the public interest.

#### § 1206.3 Definitions.

The following definitions apply to this part:

(a) *Meeting* means deliberations of at least two Board members that determine or result in the joint conduct of official Board business.

(b) *Member* means one of the members of the Merit Systems Protection Board.

### Subpart B—Procedures

#### § 1206.4 Notice of meeting.

(a) Notice of a Board meeting will be published in the FEDERAL REGISTER at least one week before the meeting. Each notice will include the following information:

- (1) The time of the meeting;
- (2) The place where the meeting will be held;
- (3) The subject and agenda of the meeting;

## 5 CFR Ch. II (1-1-08 Edition)

(4) Whether the meeting is to be open to the public or closed; and

(5) The name and telephone number of a Board official responsible for receiving inquiries regarding the meeting.

(b) The Board, by majority vote, may provide less than one week's notice. When it does so, however, it will provide notice of the meeting at the earliest practicable time.

#### § 1206.5 Change in meeting plans after notice.

(a) After notice of a meeting has been published, the Board may change the time or place of the meeting only if it announces the change publicly at the earliest practicable time.

(b) After notice of a meeting has been published, the Board may not change either the subject matter of the meeting or the decision that the meeting will be open to the public or closed unless both of the following conditions are met:

(1) By majority, recorded vote, the Board members determine that Board business requires the change and that no earlier announcement of the change was possible; and

(2) Notice of the change, and of the individual Board members' vote, is published in the FEDERAL REGISTER at the earliest practicable time.

#### § 1206.6 Decision to close meeting.

(a) *Basis.* The Board, by majority vote, may decide to close a meeting in accordance with the provisions of 5 U.S.C. 552b(c)(1) to 552b(c)(10) when closing the meeting is in the public interest.

(b) *General Counsel certification.* For every meeting that is closed to the public in whole or in part, the General Counsel will certify that closing the meeting is proper, and will state the basis for that opinion.

(c) *Vote.* Within one day after voting to close a meeting, the Board will make publicly available a record reflecting the vote of each member. In addition, within one day after any vote to close a portion or portions of a meeting to the public, the Board will make publicly available a full written explanation of its decision to close the meeting, together with a list naming

## Merit Systems Protection Board

## § 1206.9

all persons expected to attend the meeting and identifying their affiliation, unless that disclosure would reveal the information that the meeting was closed to protect.

### § 1206.7 Record of meetings.

(a) *Closed Meeting.* When the Board has decided to close a meeting in whole or in part, it will maintain the following record:

- (1) A transcript or recording of the proceeding;
- (2) A copy of the General Counsel's certification under § 1206.6(b) of this part;
- (3) A statement from the presiding official specifying the time and place of the meeting and naming the persons present; and
- (4) A record (which may be part of the transcript) of all votes and all documents considered at the meeting.

(b) *Open meeting.* Transcripts or other records will be made of all open meetings of the Board. Those records will be made available upon request at a fee representing the Board's actual cost of making them available.

[54 FR 20367, May 11, 1989, as amended at 54 FR 28664, July 6, 1989]

### § 1206.8 Providing information to the public.

Information available to the public under this part will be made available by the Office of the Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419. Individuals or organizations with a special interest in activities of the Board may ask the Office of the Clerk to have them placed on a mailing list for receipt of information available under this part.

[54 FR 20367, May 11, 1989, as amended at 65 FR 48886, Aug. 10, 2000]

### § 1206.9 Procedures for expedited closing of meetings.

Instead of following the procedures described in §§ 1206.4 through 1206.8 of this part, and in §§ 1206.11 and 1206.12, the Board may expedite the closing of its meetings under the following conditions by using the following procedures:

(a) *Finding.* (1) Most regular Board business consists of reviewing initial decisions in cases adjudicated after an opportunity for a hearing has been provided. Based on a review of this circumstance, the legislative history of the Civil Service Reform Act of 1978 (Pub. L. 95-454), the Government in the Sunshine Act (5 U.S.C. 552b), and the Board's regulations at 5 CFR part 1201, the Board finds that a majority of its meetings may properly be closed to the public under 5 U.S.C. 552b(c)(10) and 552b(d)(4).

(2) Absent a compelling public interest to the contrary, meetings or portions of meetings that can be expected to be closed under these procedures include meetings held to consider the following: Petitions for review or cases that have been or may be reopened under 5 CFR 1201.114 through 1201.117; proposals to take action against administrative law judges under 5 CFR 1201.131 through 1201.136; and actions brought by the Special Counsel under 5 CFR 1201.129.

(b) *Announcement.* The Board will announce publicly, at the earliest practicable time, the time, place, and subject matter of meetings or portions of meetings that are closed under this provision.

(c) *Procedure for closing meetings under this section.* At the beginning of a meeting or portion of a meeting that is to be closed under this section, the Board may, by recorded vote of two of its members, decide to close the meeting or a portion of it to public observation. The Board may take this action, however, only after it receives a certification by the General Counsel under § 1206.6(b) of this part.

(d) *Record Availability.* When the Board has closed a meeting or portion of a meeting under this paragraph, it will make the following available as soon as practicable:

(1) A written record reflecting the vote of each participating member of the Board with respect to closing the meeting; and

(2) The General Counsel certification under § 1206.6(b).

**Subpart C—Conduct of Meetings****§ 1206.11 Meeting place.**

The Board will hold open meetings in meeting rooms designated in the public announcements of those meetings. Whenever the number of observers is greater than can be accommodated in the designated meeting room, however, it will make alternative facilities available to the extent possible.

**§ 1206.12 Role of observers.**

The public may attend open meetings for the sole purpose of observation. Observers may not participate in the meetings unless they are expressly invited to do so. They also may not create distractions that interfere with the conduct and disposition of Board business, and they may be asked to leave if they do so. Observers of meetings that are partially closed must leave the meeting room when they are asked to do so.

**PART 1207—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE MERIT SYSTEMS PROTECTION BOARD**

## Sec.

- 1207.101 Purpose.
- 1207.102 Application.
- 1207.103 Definitions.
- 1207.104–1207.109 [Reserved]
- 1207.110 Notice.
- 1207.111–1207.119 [Reserved]
- 1207.120 General prohibitions against discrimination.
- 1207.121–1207.129 [Reserved]
- 1207.130 Employment.
- 1207.131–1207.139 [Reserved]
- 1207.140 Program accessibility: Discrimination prohibited.
- 1207.141–1207.149 [Reserved]
- 1207.150 Program accessibility: Existing facilities.
- 1207.151 Program accessibility: New construction and alterations.
- 1207.152–1207.159 [Reserved]
- 1207.160 Communications.
- 1207.161–1207.169 [Reserved]
- 1207.170 Compliance procedures.
- 1207.171–1207.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 70 FR 24293, May 9, 2005, unless otherwise noted.

**§ 1207.101 Purpose.**

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability in programs or activities conducted by Executive agencies or the United States Postal Service.

**§ 1207.102 Application.**

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with disabilities in the United States.

**§ 1207.103 Definitions.**

(a) *Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

(b) *Auxiliary aids* means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDDs), interpreters, notetakers, written materials, and other similar services and devices.

(c) *Complete complaint* means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

(d) *Days* means calendar days, unless otherwise stated.

**Merit Systems Protection Board****§ 1207.103**

(e) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

(f) *Historic preservation programs* means programs conducted by the agency that have preservation of historic properties as a primary purpose.

(g) *Historic properties* means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

(h) *Individual with a disability* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. The following phrases used in this definition are further defined as follows:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(iii) Also, physical and mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially

limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (i) of this definition but is treated by the agency as having such an impairment.

(i) *Qualified individual with a disability* means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with a disability who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, an individual with a disability who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) Qualified disabled person as that term is defined for purposes of employment in 29 CFR 1614.203, which is made applicable to this part by § 1207.130.

(j) *Section 504* means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

**§§ 1207.104-1207.109****§§ 1207.104-1207.109 [Reserved]****§ 1207.110 Notice.**

The agency shall make available to employees, applicants, participants, and other interested parties such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

**§§ 1207.111-1207.119 [Reserved]****§ 1207.120 General prohibitions against discrimination.**

(a) No qualified individual with a disability shall, on the basis of such disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with a disability the opportunity to partici-

**5 CFR Ch. II (1-1-08 Edition)**

pate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A qualified individual with a disability may not be excluded from participation in any of the agency's programs or activities, even though permissibly separate or different programs or activities exist.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with disabilities to discrimination on the basis of disability; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with disabilities from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency, or;

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nondisabled persons from the benefits of a program

**Merit Systems Protection Board****§ 1207.150**

limited by Federal statute or Executive order to individuals with disabilities or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive order to a different class of individuals with disabilities is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

**§ 1207.121–1207.129 [Reserved]****§ 1207.130 Employment.**

No qualified individual with a disability shall, on the basis of such disability, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1614, shall apply to employment in federally conducted programs or activities.

**§ 1207.131–1207.139 [Reserved]****§ 1207.140 Program accessibility: Discrimination prohibited.**

Except as otherwise provided in § 1207.150, no qualified individual with disabilities shall, because the agency's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

**§ 1207.141–1207.149 [Reserved]****§ 1207.150 Program accessibility: Existing facilities.**

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1207.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

(b) *Methods—(1) General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of

**§ 1207.151**

1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 1207.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of § 1207.150(a)(2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with disabilities into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

**§ 1207.151 Program accessibility: New construction and alterations.**

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with disabilities. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

**§ 1207.152-1207.159 [Reserved]****§ 1207.160 Communications.**

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with a disability an equal opportunity to participate in,

**5 CFR Ch. II (1-1-08 Edition)**

and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with a disability.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with parties by telephone, telecommunication devices for deaf persons or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1207.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action

## Merit Systems Protection Board

## § 1207.170

that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

### § 1207.161–1207.169 [Reserved]

### § 1207.170 Compliance procedures.

(a) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(b) *Allegations of discrimination in the adjudication of a Board case.* (1) When a party to a case pending before any of the Board's judges believes he or she has been subjected to discrimination on the basis of disability in the adjudication of the case, the party may raise the allegation in a pleading filed with the judge and served on all other parties in accordance with 5 CFR 1201.26(b)(2).

(2) An allegation of discrimination in the adjudication of a Board case must be raised within 10 days of the alleged act of discrimination or within 10 days from the date the complainant should reasonably have known of the alleged discrimination. If the complainant does not submit a complaint within that time period, it will be dismissed as untimely filed unless a good reason for the delay is shown.

(3) The judge to whom the case is assigned shall decide the merits of any timely allegation that is raised at this stage of adjudication, and shall make findings and conclusions regarding the allegation either in an interim order or in the initial decision, recommended decision, or recommendation. Any request for reconsideration of the administrative judge's decision on the disability discrimination claim must be filed in accordance with the requirements of 5 CFR 1201.114 and 1201.115.

(4) If the judge to whom the case was assigned has issued the initial decision, recommended decision, or recommendation by the time the party learns of the alleged discrimination, the party may raise the allegation in a

petition for review, cross petition for review, or response to the petition or cross petition.

(5) The Board shall decide the merits of any timely allegation that is raised at this stage of adjudication in a final decision.

(c) All complaints of discrimination on the basis of disability in programs and activities conducted by the agency, except for those described in paragraphs (a) and (b) of this section, shall be filed under the procedures described in this paragraph.

(1) *Who may file.* Any person who believes that he or she has been subjected to discrimination prohibited by this part, or authorized representative of such person, may file a complaint. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint. A charge on behalf of a person or member of a class of persons claiming to be aggrieved may be made by any person, agency or organization.

(2) *Where and when to file.* Complaints shall be filed with the Director, Office of Equal Employment Opportunity (EEO Director), Merit Systems Protection Board, 1615 M Street, NW., Washington DC 20419, or e-mailed to *equalopportunity@mspb.gov*, within thirty-five (35) calendar days of the alleged act of discrimination. A complaint filed by personal delivery is considered filed on the date it is received by the EEO Director. The date of filing by facsimile or e-mail is the date the facsimile or e-mail is sent. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the Board is closed for business) before its receipt. The date of filing by commercial overnight delivery is the date the document was delivered to the commercial overnight delivery service. The agency shall extend the time period for filing a complaint upon a showing of good cause. For example, the agency shall extend this time limit if a complainant shows that he or she was prevented by circumstances beyond his or

**§ 1207.170****5 CFR Ch. II (1-1-08 Edition)**

her control from submitting the matter within the time limits.

(3) *Acceptance of complaint.* (i) The agency shall accept a complete complaint that is filed in accordance with paragraph (c) of this section and over which it has jurisdiction. The EEO Director shall notify the complainant of receipt and acceptance of the complaint.

(ii) If the EEO Director receives a complaint that is not complete, he or she shall notify the complainant that additional information is needed. If the complainant fails to complete the complaint and return it to the EEO Director within 15 days of his or her receipt of the request for additional information, the EEO Director shall dismiss the complaint with prejudice and shall so inform the complainant.

(4) Within 60 days of the receipt of a complete complaint for which it has jurisdiction, the EEO Director shall notify the complainant of the results of the investigation in an initial decision containing—

- (i) Findings of fact and conclusions of law;
- (ii) When applicable, a description of a remedy for each violation found; and
- (iii) A notice of the right to appeal.

(5) Any appeal of the EEO Director's initial decision must be filed with the Chairman of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419 by the complainant within 35 days of the date the EEO Director issues the decision required by § 1207.170(c)(4). The agency may extend this time for good cause when a complainant shows that circumstances beyond his or her control prevented the filing of an appeal within the prescribed time limit. An appeal filed by personal delivery is considered filed on the date it is received by the Chairman. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the Board is closed for business) before its receipt. The date of filing by commercial overnight delivery is the date the document was delivered to the commercial overnight delivery service.

The appeal should be clearly marked "Appeal of Section 504 Decision" and must contain specific objections explaining why the person believes the initial decision was factually or legally wrong. A copy of the initial decision being appealed should be attached to the appeal letter.

(6) A timely appeal shall be decided by the Chairman unless the Chairman determines, in his or her discretion, that the appeal raises policy issues and that the nature of those policy issues warrants a decision by the full Board. The full Board shall then decide such appeals.

(7) The Chairman shall notify the complainant of the results of the appeal within sixty (60) days of the receipt of the request. If the Chairman determines that he or she needs additional information from the complainant, he or she shall have sixty (60) days from the date he or she receives the additional information to make his or her determination on the appeal.

(8) The time limit stated in paragraph (c)(2) may be extended by the EEO Director to a period of up to 180 days, and may be extended further with the permission of the Assistant Attorney General. The time limit stated in paragraph (c)(5) may be extended by the Chairman to a period of up to 180 days, and may be extended further with the permission of the Assistant Attorney General.

(9) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

(d) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with disabilities.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate entity.

## Merit Systems Protection Board

## § 1208.3

### §§ 1207.171–1207.999 [Reserved]

## PART 1208—PRACTICES AND PROCEDURES FOR APPEALS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT AND THE VETERANS EMPLOYMENT OPPORTUNITIES ACT

### Subpart A—Jurisdiction and Definitions

Sec.

- 1208.1 Scope.
- 1208.2 Jurisdiction.
- 1208.3 Application of 5 CFR part 1201.
- 1208.4 Definitions.

### Subpart B—USERRA Appeals

- 1208.11 Choice of procedure under USERRA; exhaustion requirement.
- 1208.12 Time of filing.
- 1208.13 Content of appeal; request for hearing.
- 1208.14 Representation by Special Counsel.
- 1208.15 Remedies.
- 1208.16 Appeals under another law, rule, or regulation.

### Subpart C—VEOA Appeals

- 1208.21 VEOA exhaustion requirement.
- 1208.22 Time of filing.
- 1208.23 Content of appeal; request for hearing.
- 1208.24 Election to terminate MSPB proceeding.
- 1208.25 Remedies.
- 1208.26 Appeals under another law, rule, or regulation.

AUTHORITY: 5 U.S.C. 1204(h), 3330a, 3330b; 38 U.S.C. 4331.

SOURCE: 65 FR 5412, Feb. 4, 2000, unless otherwise noted.

### Subpart A—Jurisdiction and Definitions

#### § 1208.1 Scope.

This part governs appeals filed with the Board under the provisions of 38 U.S.C. 4324, as enacted by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103–353, as amended, or under the provisions of 5 U.S.C. 3330a, as enacted by the Veterans Employment Opportunities Act of 1998 (VEOA), Public Law 105–339. With respect to USERRA appeals, this

part applies to any appeal filed with the Board on or after October 13, 1994, without regard as to whether the alleged violation occurred before, on, or after October 13, 1994. With respect to VEOA appeals, this part applies to any appeal filed with the Board which alleges that a violation occurred on or after October 31, 1998.

#### § 1208.2 Jurisdiction.

(a) *USERRA*. Under 38 U.S.C. 4324, a person entitled to the rights and benefits provided by chapter 43 of title 38, United States Code, may file an appeal with the Board alleging that a Federal agency employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with a provision of that chapter (other than a provision relating to benefits under the Thrift Savings Plan for Federal employees). In general, the provisions of chapter 43 of title 38 that apply to Federal employees guarantee various reemployment rights following a period of service in a uniformed service, provided the employee satisfies the requirements for coverage under that chapter. In addition, chapter 43 of title 38 prohibits discrimination based on a person's service—or application or obligation for service—in a uniformed service (38 U.S.C. 4311). This prohibition applies with respect to initial employment, reemployment, retention in employment, promotion, or any benefit of employment.

(b) *VEOA*. Under 5 U.S.C. 3330a, a preference eligible who alleges that a Federal agency has violated his rights under any statute or regulation relating to veterans' preference may file an appeal with the Board, provided that he has satisfied the statutory requirements for first filing a complaint with the Secretary of Labor and allowing the Secretary at least 60 days to attempt to resolve the complaint.

#### § 1208.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A (Jurisdiction and Definitions), B (Procedures for Appellate Cases), C (Petitions for Review of Initial Decisions), and F (Enforcement of Final Decisions

## § 1208.4

and Orders) of 5 CFR part 1201 to appeals governed by this part. The Board will apply the provisions of subpart H (Attorney Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages) of 5 CFR part 1201 regarding awards of attorney fees to appeals governed by this part.

### § 1208.4 Definitions.

(a) *Appeal*. “Appeal” means a request for review of an agency action (the same meaning as in 5 CFR §1201.4(f)) and includes a “complaint” or “action” as those terms are used in USERRA (38 U.S.C. 4324) and a “complaint” or “appeal” as those terms are used in VEOA (5 U.S.C. 3330a).

(b) *Preference eligible*. “Preference eligible” is defined in 5 U.S.C. 2108.

(c) *USERRA appeal*. “USERRA appeal” means an appeal filed under 38 U.S.C. 4324, as enacted by the Uniformed Services Employment and Re-employment Rights Act of 1994 (Public Law 103-353), as amended. The term includes an appeal that alleges a violation of a predecessor statutory provision of chapter 43 of title 38, United States Code.

(d) *VEOA appeal*. “VEOA appeal” means an appeal filed under 5 U.S.C. 3330a, as enacted by the Veterans Employment Opportunities Act of 1998 (Public Law 105-339).

## Subpart B—USERRA Appeals

### § 1208.11 Choice of procedure under USERRA; exhaustion requirement.

(a) *Choice of procedure*. An appellant may file a USERRA appeal directly with the Board under this subpart or may file a complaint with the Secretary of Labor under 38 U.S.C. 4322.

(b) *Exhaustion requirement*. If an appellant files a complaint with the Secretary of Labor under 38 U.S.C. 4322, the appellant may not file a USERRA appeal with the Board until the Secretary notifies the appellant in accordance with 38 U.S.C. 4322(e) that the Secretary’s efforts have not resolved the complaint. An appellant who seeks assistance from the Secretary of Labor under 38 U.S.C. 4321 but does not file a complaint with the Secretary under 38

### 5 CFR Ch. II (1-1-08 Edition)

U.S.C. 4322 is not subject to the exhaustion requirement of this paragraph.

(c) *Appeals after exhaustion of Department of Labor procedure*. When an appellant receives notice from the Secretary of Labor in accordance with 38 U.S.C. 4322(e) that the Secretary’s efforts have not resolved the complaint, the appellant may file a USERRA appeal directly with the Board or may ask the Secretary to refer the complaint to the Special Counsel. If the Special Counsel agrees to represent the appellant, the Special Counsel may file a USERRA appeal directly with the Board. If the Special Counsel does not agree to represent the appellant, the appellant may file a USERRA appeal directly with the Board.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

### § 1208.12 Time of filing.

Under chapter 43 of title 38, United States Code, there is no time limit for filing a USERRA appeal with the Board. However, the Board encourages appellants to file a USERRA appeal as soon as possible after the date of the alleged violation or, if a complaint is filed with the Secretary of Labor, as soon as possible after receiving notice from the Secretary in accordance with 38 U.S.C. 4322(e) that the Secretary’s efforts have not resolved the complaint, or, if the Secretary has referred the complaint to the Special Counsel and the Special Counsel does not agree to represent the appellant, as soon as possible after receiving the Special Counsel’s notice.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

### § 1208.13 Content of appeal; request for hearing.

(a) *Content*. A USERRA appeal may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24(a)(1) through (a)(9);

(2) Evidence or argument that the appellant has performed service in a uniformed service, including the dates of such service (or, where applicable, has

## Merit Systems Protection Board

## § 1208.16

applied for or has an obligation to perform such service), and that the appellant otherwise satisfies the requirements for coverage under chapter 43 of title 38, United States Code;

(3) A statement describing in detail the basis for the appeal, that is, the protected right or benefit that was allegedly denied, including reference to the provision(s) of chapter 43 of title 38, United States Code, allegedly violated if possible.

(4) If the appellant filed a complaint with the Secretary of Labor under 38 U.S.C. 4322(a), evidence of notice under 38 U.S.C. 4322(e) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); and

(5) If the appellant's complaint was referred to the Special Counsel and the appellant has received notice that the Special Counsel will not represent the appellant before the Board, evidence of the Special Counsel's notice (a copy of the Special Counsel's notice satisfies this requirement).

(b) *Request for hearing.* An appellant must submit any request for a hearing with the USERRA appeal, or within any other time period the judge sets. A hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established. The judge may also order a hearing if necessary to resolve issues of jurisdiction. The appellant has the burden of proof with respect to issues of jurisdiction (5 CFR 1201.56(a)(2)(i)).

(c) *Electronic filing.* An appeal may be filed electronically by using the Board's e-Appeal site (<https://e-appeal.mspb.gov>) in accordance with § 1201.14 of this chapter.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000; 68 FR 59865, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

### § 1208.14 Representation by Special Counsel.

The Special Counsel may represent an appellant in a USERRA appeal before the Board. A written statement (in any format) that the appellant submitted a written request to the Secretary of Labor that the appellant's complaint under 38 U.S.C. 4322(a) be referred to the Special Counsel for litigation before the Board, and that the

Special Counsel has agreed to represent the appellant, will be accepted as the written designation of representative required by 5 CFR 1201.31(a). The designation of representative may be filed by electronic filing, provided the requirements of § 1201.14 of this chapter are satisfied.

[69 FR 57631, Sept. 27, 2004]

### § 1208.15 Remedies.

(a) *Order for compliance.* If the Board determines that a Federal agency employer or the Office of Personnel

Management has not complied with a provision or provisions of chapter 43 of title 38, United States Code (other than a provision relating to benefits under the Thrift Savings Plan for Federal employees), the decision of the Board (either an initial decision of a judge under 5 CFR 1201.111 or a final Board decision under 5 CFR 1201.117) will order the Federal agency employer or the Office of Personnel Management, as applicable, to comply with such provision(s) and to compensate the appellant for any loss of wages or benefits suffered by the appellant because of such lack of compliance. Under 38 U.S.C. 4324(c)(3), any compensation received by the appellant pursuant to the Board's order shall be in addition to any other right or benefit provided for by chapter 43 of title 38, United States Code, and shall not diminish any such right or benefit.

(b) *Attorney fees and expenses.* If the Board issues a decision ordering compliance under paragraph (a) of this section, the Board has discretion to order payment of reasonable attorney fees, expert witness fees, and other litigation expenses under 38 U.S.C. 4324(c)(4). The provisions of subpart H of part 1201 shall govern any proceeding for attorney fees and expenses.

### § 1208.16 Appeals under another law, rule, or regulation.

Nothing in USERRA prevents an appellant who may appeal an agency action to the Board under any other law, rule, or regulation from raising a claim of a USERRA violation in that appeal. The Board will treat such a claim as an affirmative defense that the agency action was not in accordance with law (5 CFR 1201.56(b)(3)).

## § 1208.21

## 5 CFR Ch. II (1-1-08 Edition)

### Subpart C—VEOA Appeals

#### § 1208.21 VEOA exhaustion requirement.

Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation and allow the Secretary at least 60 days from the date the complaint is filed to attempt to resolve the complaint.

#### § 1208.22 Time of filing.

(a) Unless the Secretary of Labor has notified the appellant that the Secretary's efforts have not resolved the VEOA complaint, a VEOA appeal may not be filed with the Board before the 61st day after the date on which the appellant filed the complaint under 5 U.S.C. 3330a(a) with the Secretary.

(b) If the Secretary of Labor notifies the appellant that the Secretary's efforts have not resolved the VEOA complaint and the appellant elects to appeal to the Board under 5 U.S.C. 3330a(d), the appellant must file the VEOA appeal with the Board within 15 days after the date of receipt of the Secretary's notice. A copy of the Secretary's notice must be submitted with the appeal.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000]

#### § 1208.23 Content of appeal; request for hearing.

(a) *Content.* A VEOA appeal may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24(a)(1) through (a)(9);

(2) Evidence or argument that the appellant is a preference eligible;

(3) A statement identifying the statute or regulation relating to veterans' preference that was allegedly violated, an explanation of how the provision was violated, and the date of the violation;

(4) Evidence that a complaint under 5 U.S.C. 3330a(a) was filed with the Secretary of Labor, including the date the complaint was filed; and

(5)(i) Evidence that the Secretary has notified the appellant in accordance

with 5 U.S.C. 3330a(c)(2) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); or

(ii) Evidence that the appellant has provided written notice to the Secretary of the appellant's intent to appeal to the Board, as required by 5 U.S.C. 3330a(d)(2) (a copy of the appellant's written notice to the Secretary satisfies this requirement).

(b) *Request for hearing.* An appellant must submit any request for a hearing with the VEOA appeal, or within any other time period the judge sets. A hearing may be provided to the appellant once the Board's jurisdiction over the appeal is established and it has been determined that the appeal is timely. The judge may also order a hearing if necessary to resolve issues of jurisdiction or timeliness. The appellant has the burden of proof with respect to issues of jurisdiction and timeliness (5 CFR 1201.56(a)(2)(i) and (ii)).

(c) *Electronic filing.* An appeal may be filed electronically by using the Board's e-Appeal site (<https://e-appeal.mspb.gov>) in accordance with § 1201.14 of this chapter.

[65 FR 5412, Feb. 4, 2000, as amended at 65 FR 49896, Aug. 16, 2000; 68 FR 59865, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

#### § 1208.24 Election to terminate MSPB proceeding.

(a) *Election to terminate.* At any time beginning on the 121st day after an appellant files a VEOA appeal with the Board, if a judicially reviewable Board decision on the appeal has not been issued, the appellant may elect to terminate the Board proceeding as provided under 5 U.S.C. 3330b and file a civil action with an appropriate United States district court. Such election must be in writing, signed, filed with the Board office where the appeal is being processed, and served on the parties. The election is effective immediately on the date of receipt by the Board office where the appeal is being processed. The election may be filed by electronic filing, provided the requirements of § 1201.14 of this chapter are satisfied.

(b) *Termination order.* Following receipt by the Board of an appellant's written election to terminate the

## Merit Systems Protection Board

## § 1209.1

Board proceeding, a termination order will be issued to document the termination of the proceeding. The termination order will state that the proceeding was terminated as of the date of receipt of the appellant's written election. Such an order is neither an initial decision under 5 CFR 1201.111 nor a final Board decision and is not subject to a petition for review in accordance with subpart C of part 1201, a petition for enforcement in accordance with subpart F of part 1201, or a petition for judicial review.

[65 FR 5412, Feb. 4, 2000, as amended at 68 FR 59865, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

### § 1208.25 Remedies.

(a) *Order for compliance.* If the Board determines that a Federal agency has violated the appellant's VEOA rights, the decision of the Board (either an initial decision of a judge under 5 CFR 1201.111 or a final Board decision under 5 CFR 1201.117) will order the agency to comply with the statute or regulation violated and to compensate the appellant for any loss of wages or benefits suffered by the appellant because of the violation. If the Board determines that the violation was willful, it will order the agency to pay the appellant an amount equal to back pay as liquidated damages.

(b) *Attorney fees and expenses.* If the Board issues a decision ordering compliance under paragraph (a) of this section, the Board will order payment of reasonable attorney fees, expert witness fees, and other litigation expenses. The provisions of subpart H of part 1201 shall govern any proceeding for attorney fees and expenses.

### § 1208.26 Appeals under another law, rule, or regulation.

(a) The VEOA provides that 5 U.S.C. 3330a shall not be construed to prohibit a preference eligible from appealing directly to the Board from any action that is appealable under any other law, rule, or regulation, in lieu of administrative redress under VEOA (5 U.S.C. 3330a(e)(1)). An appellant may not pursue redress for an alleged violation of veterans' preference under VEOA at the same time he pursues redress for such violation under any other law, rule, or regulation (5 U.S.C. 3330a(e)(2)).

(b) An appellant who elects to appeal to the Board under another law, rule, or regulation must comply with the provisions of subparts B and C of 5 CFR part 1201, including the time of filing requirement of 5 CFR 1201.22(b)(1).

## PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING

### Subpart A—Jurisdiction and Definitions

Sec.

- 1209.1 Scope.
- 1209.2 Jurisdiction.
- 1209.3 Application of 5 CFR part 1201.
- 1209.4 Definitions.

### Subpart B—Appeals

- 1209.5 Time of filing.
- 1209.6 Content of appeal; right to hearing.
- 1209.7 Burden and degree of proof.

### Subpart C—Stay Requests

- 1209.8 Filing a request for a stay.
- 1209.9 Content of stay request and response.
- 1209.10 Hearing and order ruling on stay request.
- 1209.11 Duration of stay; interim compliance.

### Subpart D—Reports on Applications for Transfers

- 1209.12 Filing of agency reports.

### Subpart E—Referrals to the Special Counsel

- 1209.13 Referral of findings to the Special Counsel.

AUTHORITY: 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.

SOURCE: 55 FR 28592, July 12, 1990, unless otherwise noted.

### Subpart A—Jurisdiction and Definitions

#### § 1209.1 Scope.

This part governs any appeal or stay request filed with the Board by an employee, former employee, or applicant for employment where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because

## § 1209.2

of the appellant's whistleblowing activities. Included are individual right of action appeals authorized by 5 U.S.C. 1221(a), appeals of otherwise appealable actions allegedly based on the appellant's whistleblowing activities, and requests for stays of personnel actions allegedly based on whistleblowing.

### § 1209.2 Jurisdiction.

(a) Under 5 U.S.C. 1214(a)(3), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

(b) The Board exercises jurisdiction over:

(1) *Individual right of action appeals.* These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in § 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

*Example:* Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because of his whistleblowing activities. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an individual right of action appeal.

(2) *Otherwise appealable action appeals.* These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to appeal directly to the Board. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3 (a)(1) through (a)(19).)

## 5 CFR Ch. II (1-1-08 Edition)

*Example:* Agency B removes Ms. Y for alleged misconduct under 5 U.S.C. 7513. Ms. Y believes that the agency removed her because of her whistleblowing activities. Because the removal action is appealable to the Board under some law, rule or regulation other than 5 U.S.C. 1221(a), Ms. Y may choose to file an appeal with the Board without first seeking corrective action from the Special Counsel or to seek corrective action from the Special Counsel and then appeal to the Board.

(3) *Stays.* Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant's request, order an agency to suspend that action.

### § 1209.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A, B, C, E, F, and G of 5 CFR part 1201 to appeals and stay requests governed by this part. The Board will apply the provisions of subpart H of part 1201 regarding awards of attorney fees and consequential damages under 5 U.S.C. 1221(g) to appeals governed by this part.

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

### § 1209.4 Definitions.

(a) *Personnel action* means, as to individuals and agencies covered by 5 U.S.C. 2302:

- (1) An appointment;
- (2) A promotion;
- (3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;
- (4) A detail, transfer, or reassignment;
- (5) A reinstatement;
- (6) A restoration;
- (7) A reemployment;
- (8) A performance evaluation under chapter 43 of title 5, United States Code;
- (9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action;
- (10) A decision to order psychiatric testing or examination; or

## Merit Systems Protection Board

## § 1209.6

(11) Any other significant change in duties, responsibilities, or working conditions.

(b) *Whistleblowing* is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

(c) *Contributing factor* means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure.

(d) *Clear and convincing evidence* is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than "preponderance of the evidence" as defined in 5 CFR 1201.56(c)(2).

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

### Subpart B—Appeals

#### § 1209.5 Time of filing.

(a) *Individual right of action appeals.* The appellant must seek corrective action from the Special Counsel before appealing to the Board. Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed:

(1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after

the date the appellant received the Special Counsel's notification; or,

(2) If the Office of Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action, at any time after the expiration of 120 days.

(b) *Otherwise appealable action appeals.* The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to file the appeal directly with the Board. If the appellant seeks corrective action from the Special Counsel, the time limit for appealing is governed by paragraph (a) of this section. If the appellant appeals directly to the Board, the time limit for filing is governed by 5 CFR 1201.22(b).

(c) *Appeals after a stay request.* Where an appellant has filed a request for a stay with the Board without first filing an appeal of the action, the appeal must be filed within 30 days after the date the appellant receives the order ruling on the stay request. Failure to timely file the appeal will result in the termination of any stay that has been granted unless a good reason for the delay is shown.

[55 FR 28592, July 12, 1990, as amended at 59 FR 31110, June 17, 1994; 62 FR 59993, Nov. 6, 1997]

#### § 1209.6 Content of appeal; right to hearing.

(a) *Content.* Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file an appeal. Appeals may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24 (a)(1) through (a)(9);

(2) Where the appellant first sought corrective action from the Special Counsel, evidence that the appeal is timely filed;

(3) The name(s) and position(s) held by the employee(s) who took the action(s), and a chronology of facts concerning the action(s);

(4) A description of each disclosure evidencing whistleblowing as defined in § 1209.4(b) of this part; and

(5) Evidence or argument that:

## § 1209.7

(i) The appellant was or will be subject to a personnel action as defined in § 1209.4(a) of this part, or that the agency has threatened to take or not to take such a personnel action, together with specific indications giving rise to the appellant's apprehensions; and

(ii) The personnel action was or will be based wholly or in part on the whistleblowing disclosure, as described in § 1209.4(b) of this part.

(6) An appellant who first sought corrective action from the Special Counsel may satisfy the requirements of paragraphs (a)(3) through (a)(5) of this section by filing with the appeal a copy of *Part 2: Reprisal For Whistleblowing* of the complaint form submitted to the Office of Special Counsel (Form OSC-11, *Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity*, Rev. 8/00), together with a copy of any continuation sheet with answers to Part 2 questions filed with the Office of Special Counsel, and any supplement to Part 2 of the original complaint filed with the Office of Special Counsel or completed by the Office of Special Counsel and furnished to the appellant.

(b) *Right to hearing.* An appellant has a right to a hearing.

(c) *Timely request.* The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

(d) *Electronic filing.* An appeal may be filed electronically by using the Board's e-Appeal site (<https://e-appeal.mspb.gov>) in accordance with § 1201.14 of this chapter.

[55 FR 28592, July 12, 1990, as amended at 65 FR 67608, Nov. 13, 2000; 68 FR 59865, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

## § 1209.7 Burden and degree of proof.

(a) Subject to the exception stated in paragraph (b) of this section, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was threat-

## 5 CFR Ch. II (1-1-08 Edition)

ened, proposed, taken, or not taken against the appellant.

(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure.

## Subpart C—Stay Requests

### § 1209.8 Filing a request for a stay.

(a) *Time of filing.* An appellant may request a stay of a personnel action allegedly based on whistleblowing at any time after the appellant becomes eligible to file an appeal with the Board under § 1209.5 of this part, but no later than the time limit set for the close of discovery in the appeal. The request may be filed prior to, simultaneous with, or after the filing of an appeal.

(b) *Place of filing.* Requests must be filed with the appropriate Board regional or field office as set forth in 5 CFR 1201.4(d).

(c) *Service of stay request.* A stay request must be simultaneously served upon the Board's regional or field office and upon the agency's local servicing personnel office or the agency's designated representative, if any. A certificate of service stating how and when service was made must accompany the stay request.

(d) *Method of filing.* A stay request must be filed with the appropriate Board regional or field office by mail, by facsimile, by commercial or personal delivery, or by electronic filing in accordance with § 1201.14 of this chapter.

[55 FR 28592, July 12, 1990, as amended at 58 FR 36345, July 7, 1993, 59 FR 65243, Dec. 19, 1994; 68 FR 59865, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

### § 1209.9 Content of stay request and response.

(a) Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file a stay request. The request may be in any format, and must contain the following:

## Merit Systems Protection Board

## § 1209.12

(1) The name, address, and telephone number of the appellant, and the name and address of the acting agency;

(2) The name, address, and telephone number of the appellant's representative, if any;

(3) The signature of the appellant or, if the appellant has a representative, of the representative;

(4) A chronology of facts, including a description of the appellant's disclosure and the action that the agency has taken or intends to take;

(5) Where the appellant first sought corrective action from the Special Counsel, evidence that the stay request is timely filed;

(6) Evidence and/or argument showing that:

(i) The action threatened, proposed, taken, or not taken is a personnel action, as defined in § 1209.4(a) of this part;

(ii) The action complained of was based on whistleblowing, as defined in § 1209.4(b) of this part; and

(iii) There is a substantial likelihood that the appellant will prevail on the merits of the appeal;

(7) Evidence and/or argument addressing how long the stay should remain in effect; and

(8) Any documentary evidence that supports the stay request.

(b) An appellant may provide evidence and/or argument addressing the question of whether a stay would impose extreme hardship on the agency.

(c) *Agency response.* (1) The agency's response to the stay request must be received by the appropriate Board regional or field office within five days (excluding Saturdays, Sundays, and Federal holidays) of the date of service of the stay request on the agency.

(2) The agency's response must contain the following:

(i) Evidence and/or argument addressing whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal;

(ii) Evidence and/or argument addressing whether the grant of a stay would result in extreme hardship to the agency; and

(iii) Any documentation relevant to the agency's position on these issues.

[55 FR 28592, July 12, 1990, as amended at 59 FR 65243, Dec. 19, 1994]

### § 1209.10 Hearing and order ruling on stay request.

(a) *Hearing.* The judge may hold a hearing on the stay request.

(b) *Order ruling on stay request.* (1) The judge must rule upon the stay request within 10 days (excluding Saturdays, Sundays, and Federal holidays) after the request is received by the appropriate Board regional or field office.

(2) The judge's ruling on the stay request must set forth the factual and legal bases for the decision. The judge must decide whether there is a substantial likelihood that the appellant will prevail on the merits of the appeal, and whether the stay would result in extreme hardship to the agency.

(3) If the judge grants a stay, the order must specify the effective date and duration of the stay.

[55 FR 28592, July 12, 1990, as amended at 59 FR 65243, Dec. 19, 1994]

### § 1209.11 Duration of stay; interim compliance.

(a) *Duration of stay.* A stay becomes effective on the date specified in the judge's order. The stay will remain in effect for the time period set forth in the order or until the Board issues a final decision on the appeal of the underlying personnel action that was stayed, or until the Board vacates or modifies the stay, whichever occurs first.

(b) *Interim compliance.* An agency must immediately comply with an order granting a stay request. Although the order granting a stay request is not a final order, petitions for enforcement of such orders are governed by 5 CFR part 1201, subpart F.

## Subpart D—Reports on Applications for Transfers

### § 1209.12 Filing of agency reports.

When an employee who has applied for a transfer to another position in an Executive agency under 5 U.S.C. 3352 asks the agency head to review a rejection of his or her application for transfer, the agency head must complete the review and provide a written statement of findings to the employee and the Clerk of the Board within 30 days after receiving the request.

## § 1209.13

### Subpart E—Referrals to the Special Counsel

#### § 1209.13 Referral of findings to the Special Counsel.

When the Board determines in a proceeding under this part that there is reason to believe that a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

[62 FR 17048, Apr. 9, 1997]

## PART 1210—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM

### Subpart A—Jurisdiction, Definitions, and Waiver of Rules

Sec.

- 1210.1 Scope and policy.
- 1210.2 Jurisdiction.
- 1210.3 Application.
- 1210.4 Definitions.
- 1210.5 Revocation, amendment and waiver of regulations in this part.
- 1210.6 Savings provision.

### Subpart B—Procedures for Appeals of Actions Taken Under 5 CFR Part 9701, Subpart F

- 1210.10 Notice of appeal rights.
- 1210.11 Filing an appeal.
- 1210.12 Representatives.
- 1210.13 Burden and degree of proof; affirmative defenses.
- 1210.14 Initial disclosures; scope of discovery.
- 1210.15 Discovery procedures.
- 1210.16 Intervention.
- 1210.17 Settlement.
- 1210.18 Case suspension procedures; use of the Mediation Appeals Program; refiled appeals.
- 1210.19 Right to a hearing.
- 1210.20 Summary judgment.
- 1210.21 Initial decision by the adjudicating official.

### Subpart C—Petitions for Review of Initial Decisions and Petitions for Reconsideration

- 1210.30 Filing petition and cross petition for review.
- 1210.31 OPM petition for reconsideration.

## 5 CFR Ch. II (1-1-08 Edition)

### Subpart D—Review of Mandatory Removal Action Appeals

- 1210.40 Filing a request for Board review.
- 1210.41 Decision of the Board.
- 1210.42 Intervenors.
- 1210.43 Finality.
- 1210.44 Request for reconsideration.

AUTHORITY: 5 U.S.C. 1204 and 7701.

SOURCE: 72 FR 56885, Oct. 5, 2007, unless otherwise noted.

### Subpart A—Jurisdiction, Definitions, and Waiver of Rules

#### § 1210.1 Scope and policy.

The regulations in this part apply to Board proceedings in appeals of certain adverse actions of the Department of Homeland Security that are covered under subparts F and G of 5 CFR part 9701. The Board will apply these rules in a manner that promotes the fair, efficient and expeditious resolution of appeals.

#### § 1210.2 Jurisdiction.

(a) *Employees covered.* The Board has jurisdiction over appeals brought by employees covered by 5 CFR 9701.604(c), except for those classes of employees excluded under 5 CFR 9701.604(d).

(b) *Actions covered.* The Board has jurisdiction over appeals from actions taken by the Department under subpart F of 5 CFR part 9701, except for those matters excluded under paragraphs (c) and (d) of this section. Actions covered include suspensions of 15 days or more, demotions, reductions in pay, removals, or furloughs of 30 days or less, subject to the limitations set forth in 5 CFR 9701.704.

(c) *Matters excluded from MSPB jurisdiction—(1) Mandatory removal offenses.* Except as stated in paragraph (c) of this section, the Board does not have jurisdiction over first-level appeals from actions taken pursuant to 5 CFR 9701.707 for offenses that the Secretary has designated as mandatory removal offenses. The procedures governing petitions for review of decisions of the Mandatory Review Panel are set forth in subpart D of this part.

(2) *National security suspensions and removal.* The Board does not have jurisdiction over appeals from suspension

## Merit Systems Protection Board

## § 1210.5

and removal actions taken by the Secretary pursuant to 5 CFR 9701.613 when he or she considers such actions to be in the interest of national security.

(d) *Effect of status under a retirement system.* If an employee has been removed under subpart F of 5 CFR part 9701, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

### § 1210.3 Application.

Subject to modification and/or waiver by the adjudicating official, the regulations set forth in 5 CFR parts 1201, 1208 and 1209 apply to Board appellate proceedings conducted under this part except as otherwise provided herein.

### § 1210.4 Definitions.

In this subpart:

(a) *Adjudicating official* means an administrative law judge, administrative judge, or other employee designated by MSPB to decide an appeal.

(b) *Demotion* means a reduction in grade, a reduction to a lower band within the same occupational cluster, or a reduction to a lower band in a different occupational cluster under rules prescribed by the Department pursuant to 5 CFR 9701.355.

(c) *Department* means the Department of Homeland Security.

(d) *Director* means Director of the Office of Personnel Management.

(e) *Furlough* means the placement of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

(f) *Grade* means a level of work under a position classification or job grading system.

(g) *Indefinite suspension* means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or further Department action. An indefinite suspension continues for an indeterminate period of time and usually ends with either the employee returning to duty or the completion of any subsequent administrative action.

(h) *Initial service period (ISP)* means the 1 to 2 years employees must serve

after selection (on or after the date this subpart becomes applicable, as determined under 5 CFR 9701.102(b)) for a designated Department position in the competitive service for the purpose of providing an employee the opportunity to demonstrate competencies in a specific occupation. All relevant prior Federal civilian service (including non-appropriated fund service), as determined by appropriate standards established by the Department, counts toward completion of this requirement.

(i) *Mandatory removal offense (MRO)* means an offense that the Secretary determines in his or her sole, exclusive and unreviewable discretion, has a direct and substantial adverse impact on the Department's homeland security mission.

(j) *Mandatory Removal Panel (MRP)* means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

(k) *Pay* means the rate of basic pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind. For the purpose of this subpart, pay does not include locality-based comparability payments under 5 U.S.C. 5304, locality or special rate supplements under subpart C of 5 CFR 9701, or other similar payments.

(l) *Removal* means the involuntary separation of an employee from the Department.

(m) *Secretary* means Secretary of the Department of Homeland Security.

(n) *Suspension* means the temporary placement of an employee, for disciplinary reasons, in a nonduty/nonpay status.

### § 1210.5 Revocation, amendment and waiver of regulations in this part.

The Board or a judge may not revoke, amend or waive a regulation in this Part in a manner inconsistent with the Homeland Security Act of 2002 or 5 CFR Part 9701. Otherwise, the Board or a judge may revoke, amend or waive a regulation in this Part for good cause shown.

## § 1210.6

5 CFR Ch. II (1-1-08 Edition)

### § 1210.6 Savings provision.

This part does not apply to adverse actions proposed prior to the date of an affected employee's coverage under 5 CFR part 9701, subpart G.

### Subpart B—Procedures for Appeals of Actions Taken Under 5 CFR Part 9701, Subpart F

#### § 1210.10 Notice of appeal rights.

(a) When the Department of Homeland Security (or component thereof) issues a decision notice to an employee on a matter that is appealable to the Board, except as provided under 5 CFR 9701.707, the Department must provide the employee with the following:

(1) Notice of the time limits for appealing to the Board, the requirements of 5 CFR 1201.22(c), and the address of the appropriate Board office for filing the appeal;

(2) A copy, or access to a copy, of the Board's regulations at 5 CFR parts 1201 and 1210, and relevant Department of Homeland Security regulations;

(3) A copy of MSPB Form 185, the MSPB Appeal Form. MSPB Form 185 can be accessed at the Board's Web site (<http://www.mspb.gov>);

(4) Notice of any right the employee has to file a grievance, and that the election of any applicable grievance procedure may result in a waiver of the employee's right to file an appeal with the Board; and

(5) Notice that a copy of the decision notice either must be filed with the appeal or sent to the Board via facsimile or e-mail within one day after the appeal is filed.

(b) The notice must also include a specific statement that the matter was taken under 5 CFR part 9701.

#### § 1210.11 Filing an appeal.

(a) *Time of filing.* An appeal must be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later. A response to an appeal must be filed within 15 days of the date of service of the acknowledgment order. All other submissions to the adjudicating official must be filed in accordance with the time

limits set in the Board's acknowledgment order or in any other order issued by the adjudicating official.

(b) *Computation of time.* The time for filing a submission under this subpart is computed in accordance with 5 CFR 1201.23.

(c) *Place for filing.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. See 5 CFR 1201.4(d), 1201.22(a), and Appendix II to part 1201.

(d) *Decision notice.* A copy of the decision notice either must be filed with the appeal or sent to the Board via facsimile or e-mail within one day after the appeal is filed.

#### § 1210.12 Representatives.

Each party has the right to be represented by an attorney or other representative. Either party may file a motion to disqualify a representative at any time during the proceedings.

#### § 1210.13 Burden and degree of proof; affirmative defenses.

(a) *Burden and degree of proof*—(1) *Agency.* Subject to paragraph (b) of this section, the decision of the Department must be sustained if it is supported by a preponderance of the evidence.

(2) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, with respect to:

- (i) Issues of jurisdiction;
- (ii) The timeliness of the appeal; and
- (iii) Affirmative defenses.

(b) *Affirmative defenses of the appellant.* The decision of the Department must be sustained where it has met the evidentiary standard stated in paragraph (a) of this section, unless the appellant shows that:

(1) There was harmful error in the application of the Department's procedures in arriving at its decision;

(2) The decision was based on a prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) The decision was not in accordance with law.

(c) *Definitions.* The following definitions apply to this part:

(1) *Preponderance of the evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient

## Merit Systems Protection Board

## § 1210.16

to find that a contested fact is more likely to be true than untrue.

(2) *Harmful error.* Error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

(d) *Efficiency of the service.* Pursuant to 5 CFR 9701.606, the Department may take an adverse action under subpart F of 5 CFR part 9701 only for such cause as will promote the efficiency of the service.

### § 1210.14 Initial disclosures; scope of discovery.

(a) *Initial disclosures.* Except to the extent otherwise directed by order, each party must, without awaiting a discovery request and within ten calendar days following the date of the Board's acknowledgment order, provide the following information to the other party:

(1) The Department must provide:

(i) The Departmental record required by 5 CFR 9701.612; and

(ii) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the Department may use in support of its claims or defenses, identifying the subjects of such information.

(2)(i) The appellant must provide:

(A) A copy of, or a description by category or location of all documents in the possession, custody or control of the appellant that the appellant may use in support of his or her claims or defenses; and

(B) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the appellant may use in support of his or her claims or defenses, identifying the subjects of the information.

(ii) Each party must make its initial disclosure based on the information then reasonably available to the party. A party is not excused from making its disclosures because it has not fully completed the investigation of its case,

because it challenges the sufficiency of the other party's disclosures or because the other party has not made its disclosures.

(b) *Scope of discovery.* The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

### § 1210.15 Discovery procedures.

(a) *Responses to discovery requests.* Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s). To the extent not inconsistent with this subpart, and subject to modified time limits and procedures that may be set by the adjudicating official, the provisions of 5 CFR 1201.71 through 1201.85 govern discovery in cases under this subpart.

(b) *Limitations on discovery.* (1) Neither party may submit more than one set of interrogatories, one set of requests for production of documents, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts. In addition, neither party may conduct/compel more than 2 depositions.

(2) Either party may file a motion requesting additional discovery. Such motion may be granted only if the party has shown necessity and good cause to warrant such additional discovery.

### § 1210.16 Intervention.

The Director may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this Part in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

## § 1210.17

### § 1210.17 Settlement.

(a) *Settlement discussion.* Neither an adjudicating official nor the Board may require settlement discussions in connection with any action appealed under this section. If either party decides that settlement is not desirable, the matter will proceed to adjudication. The parties are not prohibited from engaging in settlement discussions on their own.

(b) *Settlement judges.* Where the parties agree to engage in settlement discussions, these discussions will be conducted by an official specifically designated by MSPB in each case for that sole purpose. That settlement discussions are being held by the settlement judge in no way alters the authority of the adjudicating official, who will continue to process all other aspects of the appeal.

### § 1210.18 Case suspension procedures; use of the Mediation Appeals Program; refiled appeals.

(a) The parties may submit a request for additional time. Requests for such case suspensions must be submitted jointly. Upon receipt of such request, an order suspending processing of the case for a period up to 30 days may be issued at the discretion of the adjudicating official. Suspension periods granted pursuant to this procedure shall not be included when determining whether an initial decision has been issued within the 90-day period specified in section 5 CFR 9701.706(k)(7) and § 1210.21(a) of this part.

(b) If the parties agree jointly to use the Board's Mediation Appeals Program (MAP), the period within which the parties participate in MAP shall not be included when determining whether an initial decision has been issued within the 90-day period specified in 5 CFR 9701.706(k)(7) and 1201.21(a).

(c) If an appeal is refiled after it has been dismissed without prejudice, the 90-day period specified in 5 CFR 9701.706(k)(7) and 1201.21(a) restarts on the date of refiling. For purposes of this paragraph, "refiled" has the same meaning as "filed" set out in § 1210.21(a).

## 5 CFR Ch. II (1-1-08 Edition)

### § 1210.19 Right to a hearing.

(a) An employee with a right of appeal under subparts F and G of 5 CFR part 9701 generally has a right to a hearing. When the adjudicating official finds that material facts are not in dispute, he or she must issue an initial decision without conducting a hearing, as appropriate. See 1210.20(e).

(b) Where the appellant requests a hearing and summary judgment is not appropriate, the adjudicating official may, in his or her discretion, hold the hearing in whole or in part by telephone, videoconference, or in person at the Board's regional or field office or at a designated hearing site listed at 5 CFR part 1201, Appendix III. Although the preferences of the parties and the nature of the issues to be heard and determined will inform the adjudicating official's decision, the ultimate selection rests in the sound judgment of the official. Among the factors that the adjudicating official will consider in deciding whether to hold a hearing in whole or in part by videoconference or telephone are:

(1) The costs of traveling to the hearing site as compared with the costs of traveling to a videoconferencing site;

(2) The distance the parties and their witnesses would have to travel to appear in person; and

(3) Whether appearance by videoconference or telephone of the appellant or his or her witnesses would unduly prejudice the appellant.

### § 1210.20 Summary judgment.

(a) *Motion by a party.* Any party may file a motion for summary judgment if the party believes that material facts are not in genuine dispute and that the party may be entitled to judgment as a matter of law. Each motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the moving party contends there is no genuine dispute. The statement shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury, or other evidence attached to the motion, relied on to support the statement.

(b) *Opposition to motion.* An opposition to a motion for summary judgment shall be accompanied by a statement separately listing all material facts as to which the party contends there exists a genuine dispute for hearing. The statement in opposition shall include references to those parts of the record, including any affidavits, declarations under penalty of perjury or other evidence attached to the opposition, relied on to support the statement. The party opposing a motion for summary judgment may not rest on the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine dispute for hearing.

(c) *Time of filing.* Any party may file a motion for summary judgment no later than 5 days after the time limit for the completion of discovery set in the Board's acknowledgment order, or other time limit set by the adjudicating official. An opposition to a motion for summary judgment shall be filed within 15 days of service of the motion, or at the time specified by the adjudicating official.

(d) *Initiated by adjudicating official.* In addition to the authority set forth in 5 CFR 1201.41(b), if the adjudicating official determines on his or her own initiative that material facts may not be in genuine dispute, he or she may, after giving the parties written notice and at least 15 days to respond in writing, find that material facts are not in genuine dispute. The written notice to the parties shall include a statement separately listing all material facts as to which the adjudicating official believes there is no genuine dispute.

(e) *Decision by adjudicating official.* If, after considering the parties' submissions, the adjudicating official finds that material facts are not in genuine dispute, he or she must grant summary judgment on the law pursuant to 5 CFR 9701.706(k)(5) without conducting a hearing.

(f) *Definitions.* A fact is material if it is capable of affecting the outcome of the appeal. For a dispute to be genuine, there must be evidence sufficient for a reasonable person to find in favor of the nonmoving party.

**§ 1210.21 Initial decision by the adjudicating official.**

(a) *General.* The adjudicating official must issue a decision after the close of the record and a copy of the decision must be provided to each party to the appeal and to the Director. An initial decision must be issued no later than 90 days after the date on which the appeal is filed. However, failure to meet this deadline will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(l). A document that is filed with a Board office by personal delivery is considered filed on the date on which the Board office receives it. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is the date on the Board's acknowledgment order, and the Board must issue an acknowledgment order within five calendar days after receiving the appeal. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. The date of filing by e-filing is the date of electronic submission.

(b) *Consideration of penalty.* The adjudicating official may modify the penalty imposed by the Department if he or she determines that such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the adjudicating official's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When a penalty is mitigated, the maximum justifiable penalty must be applied.

(c) *Interim relief.* (1) If an employee is the prevailing party in an appeal under this subpart, the employee must be granted the relief provided in the decision upon issuance of the decision, subject to paragraph (b)(3) of this section. Such relief remains in effect pending the outcome of any petition for review unless—

(i) An adjudicating official determines that the granting of such relief is not appropriate; or

(ii) The relief granted in the decision provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Department,

## § 1210.30

5 CFR Ch. II (1-1-08 Edition)

subject to paragraph (b)(2) of this section, determines, in its sole, exclusive, and unreviewable discretion, that the return or presence of the employee would be unduly disruptive to the work environment.

(2) If the Department makes a determination under paragraph (b)(1)(ii) of this section that prevents the return or presence of an employee at the place of employment, such employee must receive pay, compensation, and all other benefits as terms and conditions of employment pending the outcome of any petition for review.

(3) Nothing in the provisions of this section may be construed to require that any award of back pay or attorney fees be paid before the decision is final.

### Subpart C—Petitions for Review of Initial Decisions and Petitions for Reconsideration

#### § 1210.30 Filing petition and cross petition for review.

(a) *Who may file.* Any party to the proceeding or the Director may file a petition for review of the decision by the adjudicating official. The Director may request review when he or she believes that the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation or policy directive. All submissions to the Board must contain the signature of the party or of the party's designated representative. The requirements for an electronic signature are set forth in 5 CFR 1201.14(i).

(b) *Time for filing.* Any petition for review must be filed within 30 days after receipt of the initial decision. Absent evidence to the contrary, the Board presumes that a decision delivered by regular mail is received by the addressee 5 days after its issuance. If regular mail is not delivered on the fifth day following the issuance of the decision, the presumed date of receipt is the next date on which mail is delivered. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition for review or to a cross petition for review must be filed within 25 days after the date of service of the petition or cross peti-

tion. The Board may extend the filing period for good cause shown.

(c) *Place for filing.* A petition for review, cross petition for review, responses to those petitions, and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with 5 CFR 1201.14.

(d) *Time for decision by the Board.* MSPB must render its decision no later than 90 days after the close of the record before MSPB on petition for review as defined in 5 CFR 1201.114(i).

(e) *Effect of late decision.* The Board's failure to meet the requirement that decisions be rendered no later than 90 days after the close of the record will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(l).

#### § 1210.31 OPM petition for reconsideration.

(a) If the Director seeks reconsideration of a final Board order, the Board must render its decision no later than 60 days after receipt of the opposition to the Director's petition in support of such reconsideration. The Board's failure to meet this requirement will not prejudice any party to the case and will not form the basis for any legal action by any party. See 5 CFR 9701.706(l).

(b) The Board shall state the reasons for any decision rendered in response to a petition for reconsideration filed by the Director.

### Subpart D—Review of Mandatory Removal Action Appeals

#### § 1210.40 Filing a request for Board review.

(a) *Who may file.* Any party to the proceeding or OPM may file a request for review. All submissions to the Board must contain the signature of the party or of the party's designated representative. The requirements for an electronic signature are set forth in 5 CFR 1201.14(i).

(b) *Time for filing.* Any request for review must be filed within 15 days after issuance of the MRP's decision. Any

party's response to the request for review, cross request for review, or OPM's request for review must be filed within 15 days of the Board's receipt of the request for review. If OPM does not file a request for review, it may intervene within 15 days after MSPB's receipt of a request for review of the record. A party or OPM may submit, and the Board may grant for good cause shown, a request for a single extension of time not to exceed 15 days.

(c) *Record for review.* The Board will establish, in conjunction with the MRP, standards for the contents of the record and the administrative process for review, including notice to the parties and OPM and procedures for the transfer of records from the Department to the Board.

#### § 1210.41 Decision of the Board.

(a) *Board review of an MRP decision.* The Board must accept the findings of fact and interpretations of law of the MRP and sustain the MRP's decision unless the party appealing the MRP's decision shows that the MRP's decision was:

- (1) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) Caused by harmful error in the application of the MRP's procedures in arriving at such decision; or
- (3) Unsupported by substantial evidence.

(b) *Definitions.* The following definitions apply to this part:

(1) *Harmful error.* Error by the MRP in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the party appealing the MRP's decision to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

(2) *Substantial evidence.* The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(c)(1) *Mandatory time limit for decision.* The Board must complete its review of

the record and issue a final decision within 30 days after receiving any party's response to the request for review, cross request for review, or OPM's intervention brief, whichever is filed later. The Board may extend the period for review by a single extension of time not to exceed 15 days, if it determines that:

- (i) The case is unusually complex; or
- (ii) An extension is necessary to prevent any prejudice to the parties that would otherwise result.

(2) No further extension of time will be permitted.

#### § 1210.42 Intervenors.

The Director may intervene as a matter of right under 5 CFR 9701.707(f) or otherwise participate in any proceeding brought under this subpart, if the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

#### § 1210.43 Finality.

*Final decision of the Board.* A decision of the Board on a request for review of an MRP decision shall constitute a final decision subject to judicial review in accordance with 5 U.S.C. 7703.

#### § 1210.44 Request for reconsideration.

A decision of the Board under this subpart is final unless the Director petitions the Board for review within 30 days after the receipt of the decision. The Director may petition the Board for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. The Board may extend the filing period for good cause shown.

## PARTS 1211-1214 [RESERVED]

## PART 1215—DEBT MANAGEMENT

### Subpart A—Salary Offset

Sec.

- 1215.1 Purpose and scope.
- 1215.2 Definitions.
- 1215.3 Applicability.
- 1215.4 Notice requirements.
- 1215.5 Hearing.
- 1215.6 Written decision.

## § 1215.1

- 1215.7 Coordinating offset with another Federal agency.
- 1215.8 Procedures for salary offset.
- 1215.9 Refunds.
- 1215.10 Statute of limitations.
- 1215.11 Nonwaiver of rights.
- 1215.12 Interest, penalties, and administrative costs.

### Subpart B—Claims Collection

- 1215.21 Purpose and scope.
- 1215.22 Definitions.
- 1215.23 Other remedies.
- 1215.24 Claims involving criminal activity or misconduct.
- 1215.25 Collection.
- 1215.26 Notices to debtor.
- 1215.27 Interest, penalties, and administrative costs.
- 1215.28 Administrative offset.
- 1215.29 Use of credit reporting agencies.
- 1215.30 Collection services.
- 1215.31 Referral to the Department of Justice or the General Accounting Office.
- 1215.32 Compromise, suspension and termination.
- 1215.33 Omissions not a defense.

SOURCE: 54 FR 50603, Dec. 8, 1989. Redesignated at 72 FR 56885, Oct. 5, 2007.

### Subpart A—Salary Offset

AUTHORITY: 5 U.S.C. 5514, Executive Order 11809 (redesignated Executive Order 12107), and 5 CFR 550 subpart K.

#### § 1215.1 Purpose and scope.

(a) This regulation provides procedures for the collection by administrative offset of a Federal employee's salary without his/her consent to satisfy certain debts owed to the Federal Government. These regulations apply to all Federal employees who owe debts to the MSPB and to current employees of the MSPB who owe debts to other Federal agencies. This regulation does not apply when the employee consents to recovery from his/her current pay account.

(b) This regulation does not apply to debts or claims arising under:

- (1) The Internal Revenue Code of 1954, as amended, 26 U.S.C. 1 *et seq.*;
- (2) The Social Security Act, 42 U.S.C. 301 *et seq.*;
- (3) The tariff laws of the United States; or
- (4) Any case where a collection of a debt by salary offset is explicitly pro-

## 5 CFR Ch. II (1-1-08 Edition)

vided for or prohibited by another statute.

(c) This regulation does not apply to any adjustment to pay arising out of an employee's selection of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

(d) This regulation does not preclude the compromise, suspension, or termination of collection action where appropriate under the standards implementing the Federal Claims Collection Act, 31 U.S.C. 3711 *et seq.* 4 CFR parts 101 through 105; 5 CFR part 1215.

(e) This regulation does not preclude an employee from requesting waiver of an overpayment under 5 U.S.C. 5584, 10 U.S.C. 2774 or 32 U.S.C. 716 or in any way questioning the amount of validity of the debt by submitting a subsequent claim to the General Accounting Office. This regulation does not preclude an employee from requesting a waiver pursuant to other statutory provisions applicable to the particular debt being collected.

(f) Matters not addressed in these regulations should be reviewed in accordance with the Federal Claims Collection Standards at 4 CFR 101.1 *et seq.*

#### § 1215.2 Definitions.

(a) *Agency.* An executive agency as is defined at 5 U.S.C. 105 including the U.S. Postal Service, the U.S. Postal Commission, a military department as defined at 5 U.S.C. 102, an agency or court in the judicial branch, an agency of the legislative branch including the U.S. Senate and House of Representatives and other independent establishments that are entities of the Federal government.

(b) *Chairman.* The Chairman of the MSPB or the Chairman's designee.

(c) *Creditor agency.* The agency to which the debt is owed.

(d) *Debt.* An amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales or real or personal property, overpayments, penalties, damages, interests, fines, forfeitures (except those

## Merit Systems Protection Board

## § 1215.5

arising under the Uniform Code of Military Justice), and all other similar sources.

(e) *Disposable pay*. The amount that remains from an employee's Federal pay after required deductions for social security, Federal, state or local income tax, health insurance premiums, retirement contributions, life insurance premiums, Federal employment taxes, and any other deductions that are required to be withheld by law.

(f) *Hearing official*. An individual responsible for conducting any hearing with respect to the existence or amount of a debt claimed, and who renders a decision on the basis of such hearing. A hearing official may not be under the supervision or control of the Chairman of the MSPB.

(g) *Paying Agency*. The agency that employs the individual who owes the debt and authorizes the payment of his/her current pay.

(h) *Salary offset*. An administrative offset to collect a debt pursuant to 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of an employee without his/her consent.

### § 1215.3 Applicability.

(a) These regulations are to be followed when:

(1) The MSPB is owed a debt by an individual currently employed by another Federal agency;

(2) The MSPB is owed a debt by an individual who is a current employee of the MSPB; or

(3) The MSPB employs an individual who owes a debt to another Federal agency.

### § 1215.4 Notice requirements.

(a) Deductions shall not be made unless the employee is provided with written notice signed by the Chairman of the debt at least 30 days before salary offset commences.

(b) The written notice shall contain:

(1) A statement that the debt is owed and an explanation of its nature, and amount;

(2) The agency's intention to collect the debt by deducting from the employee's current disposable pay account;

(3) The amount, frequency proposed beginning date, and duration of the intended deduction(s);

(4) An explanation of interest, penalties, and administrative charges, including a statement that such charges will be assessed unless excused in accordance with the Federal Claims Collections Standards at 4 CFR 101.1 *et seq.*;

(5) The employee's right to inspect, request, or receive a copy of government records relating to the debt;

(6) The opportunity to establish a written schedule for the voluntary repayment of the debt;

(7) The right to a hearing conducted by an impartial hearing official;

(8) The methods and time period for petitioning for hearings;

(9) A statement that the timely filing of a petition for a hearing will stay the commencement of collection proceedings;

(10) A statement that a final decision on the hearing will be issued not later than 60 days after the filing of the petition requesting the hearing unless the employee requests and the hearing official grants a delay in the proceedings;

(11) A statement that knowingly false or frivolous statements, representations, or evidence may subject the employee to appropriate disciplinary procedures;

(12) A statement of other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(13) Unless there are contractual or statutory provisions to the contrary, a statement that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

### § 1215.5 Hearing.

(a) *Request for hearing*. (1) An employee must file a petition for a hearing in accordance with the instructions outlined in the agency's notice to offset.

(2) A hearing may be requested by filing a written petition addressed to the Chairman of the MSPB stating why the employee disputes the existence or amount of the debt. The petition for a

## § 1215.6

## 5 CFR Ch. II (1-1-08 Edition)

hearing must be received by the Chairman no later than fifteen (15) calendar days after the date of the notice to offset unless the employee can show good cause for failing to meet the deadline date.

(b) *Hearing procedures.* (1) The hearing will be presided over by an impartial hearing official.

(2) The hearing shall conform to procedures contained in the Federal Claims Collection Standards 4 CFR 102.3(c). The burden shall be on the employee to demonstrate that the existence or the amount of the debt is in error.

### § 1215.6 Written decision.

(a) The hearing official shall issue a written opinion no later than 60 days after the hearing.

(b) The written opinion will include: A statement of the facts presented to demonstrate the nature and origin of the alleged debt; the hearing official's analysis, findings and conclusions; the amount and validity of the debt, and the repayment schedule.

### § 1215.7 Coordinating offset with another Federal agency.

(a) *The MSPB as the creditor agency.* (1) When the Chairman determines that an employee of a Federal agency owes a delinquent debt to the MSPB, the Chairman shall as appropriate:

(i) Arrange for a hearing upon the proper petitioning by the employee;

(ii) Certify in writing that the employee owes the debt, the amount and basis of the debt, the date on which payment is due, the date the Government's right to collect the debt accrued, and that MSPB regulations for salary offset have been approved by the Office of Personnel Management;

(iii) Advise the paying agency of the amount or percentage of disposable pay to be collected in each installment, if collection is to be made in installments;

(iv) Advise the paying agency of the actions taken under 5 U.S.C. 5514(b) and provide the dates on which action was taken unless the employee has consented to salary offset in writing or signed a statement acknowledging receipt of procedures required by law. The written consent or acknowledg-

ment must be sent to the paying agency;

(v) If the employee is in the process of separating, MSPB must submit its debt claim to the paying agency as provided in this part. The paying agency must certify any amounts already collected, notify the employee, and send a copy of the certification and notice of the employee's separation to the creditor agency. If the paying agency is aware that the employee is entitled to Civil Service Retirement and Disability Fund or similar payments, it must certify to the agency responsible for making such payments the amount of the debt and that the provisions of this part have been followed; and

(vi) If the employee has already separated and all payments due from the paying agency have been paid, the Chairman may request unless otherwise prohibited, that money payable to the employee from the Civil Service Retirement and Disability Fund or other similar funds be collected by administrative offset.

(b) *MSPB as the paying agency.* (1) Upon receipt of a properly certified debt claim from another agency, deductions will be scheduled to begin at the next established pay interval. The employee must receive written notice that the MSPB has received a certified debt claim from the creditor agency, the amount of the debt, the date salary offset will begin, and the amount of the deduction(s). The MSPB shall not review the merits of the creditor agency's determination of the validity or the amount of the certified claim.

(2) If the employee transfers to another agency after the creditor agency has submitted its debt claim to the MSPB and before the debt is collected completely, the MSPB must certify the total amount collected. One copy of the certification must be furnished to the employee. A copy must be furnished the creditor agency with notice of the employee's transfer.

### § 1215.8 Procedures for salary offset.

(a) Deductions to liquidate an employee's debt will be by the method and in the amount stated in the Chairman's notice of intention to offset as provided in § 1215.4. Debts will be collected in one lump sum where possible. If the

## Merit Systems Protection Board

## § 1215.22

employee is financially unable to pay in one lump sum, collection must be made in installments.

(b) Debts will be collected by deduction at officially established pay intervals from an employee's current pay account unless alternative arrangements for repayment are made.

(c) Installment deductions will be made over a period not greater than the anticipated period of employment. The size of installment deductions must bear a reasonable relationship to the size of the debt and the employee's ability to pay. The deduction for the pay intervals for any period must not exceed 15 percent of disposable pay unless the employee has agreed in writing to a deduction of a greater amount.

(d) Unliquidated debts may be offset against any financial payment due to a separated employee including but not limited to final salary payment or leave in accordance with 31 U.S.C. 3716.

### § 1215.9 Refunds.

(a) The MSPB will refund promptly any amounts deducted to satisfy debts owed to the MSPB when the debt is waived, found not owed to the MSPB, or when directed by an administrative or judicial order.

(b) The creditor agency will promptly return any amounts deducted by MSPB to satisfy debts owed to the creditor agency when the debt is waived, found not owed, or when directed by an administrative or judicial order.

(c) Unless required by law, refunds under this subsection shall not bear interest.

### § 1215.10 Statute of limitations.

If a debt has been outstanding for more than 10 years after the agency's right to collect the debt first accrued, the agency may not collect by salary offset unless facts material to the Government's right to collect were not known and could not reasonably have been known by the official or officials who were charged with the responsibility for discovery and collection of such debts.

### § 1215.11 Nonwaiver of rights.

An employee's involuntary payment of all or any part of a debt collected under these regulations will not be

construed as a waiver of any rights that employee may have under 5 U.S.C. 5514 or any other provision of contract law unless there are statutes or contract(s) to the contrary.

### § 1215.12 Interest, penalties, and administrative costs.

Charges may be assessed for interest, penalties, and administrative costs in accordance with the Federal Claims Collection Standards, 4 CFR 102.13. Dated: July 24, 1987.

## Subpart B—Claims Collection

**AUTHORITY:** The authority for this part is the Federal Claims Collection Act of 1966, as amended, 31 U.S.C. 3711 and 3716-3719; the Federal Claims Collection Standards at 4 CFR parts 101-105, as amended by 49 FR 8889, 5 U.S.C. 552a, and Office of Management and Budget Circular A-129.

### § 1215.21 Purpose and scope.

This part prescribes standards and procedures for officers and employees of the MSPB who are responsible for the collection and disposition of debts owed to the United States. The activities covered include: Collecting claims in any amount; compromising claims, or suspending or terminating the collection of claims that do not exceed \$20,000 exclusive of interest and charges; and referring debts that cannot be disposed of by the MSPB to the Department of Justice or to the General Accounting Office for further administrative action or litigation.

### § 1215.22 Definitions.

(a) *Claim or debt.* An amount or property owed to the United States which includes, but is not limited to: Overpayments to program beneficiaries; overpayments to contractors and grantees, including overpayments arising from audit disallowances; excessive cash advances to grantees and contractors; and civil penalties and assessments. A debt is overdue or delinquent if it is not paid by the due date specified in the initial notice of the debt (see § 1215.26) or if the debtor fails to satisfy his or her obligation under a repayment agreement.

(b) *Debtor.* An individual, organization, group, association, partnership,

## § 1215.23

## 5 CFR Ch. II (1-1-08 Edition)

or corporation indebted to the United States, or the person or entity with legal responsibility for assuming the debtor's obligation.

(c) *MSPB*. The Merit Systems Protection Board.

(d) *Administrative offset*. Satisfying a debt by withholding money payable by the United States to or held by the United States for a debtor.

### § 1215.23 Other remedies.

The remedies and sanctions available to the MSPB under this part are not intended to be exclusive. The Chairman of the MSPB or his designee may impose other appropriate sanctions upon a debtor for prolonged or repeated failure to pay a debt. For example, the Chairman or his designee may place the debtor's name on a list of debarred, suspended, or ineligible contractors. In such cases the debtor will be advised of the MSPB's action.

### § 1215.24 Claims involving criminal activity or misconduct.

(a) A debtor whose indebtedness involves criminal activity such as fraud, embezzlement, theft, or misuse of government funds or property is subject to punishment by fine or imprisonment as well as to a civil claim by the United States for compensation for the misappropriated funds. The MSPB will refer these cases to the appropriate law enforcement agency for prosecution.

(b) Debts involving fraud, false claims, or misrepresentation shall not be compromised, terminated, suspended, or otherwise disposed of under this rule. Only the Department of Justice is authorized to compromise, terminate, suspend, or otherwise dispose of such debts.

### § 1215.25 Collection.

(a) The MSPB will take aggressive action to collect debts and reduce delinquencies. Collection efforts shall include sending to the debtor's last known address a total of three progressively stronger written demands for payment at not more than 30 day intervals. When necessary to protect the Government's interest, written demand may be preceded by other appropriate action, including immediate referral for litigation. Other contact with the

debtor or his or her representative or guarantor by telephone, in person and/or in writing may be appropriate to demand prompt payment, to discuss the debtor's position regarding the existence, amount and repayment of the debt, and to inform the debtor of his or her rights and effect of nonpayment or delayed payment. A debtor who disputes a debt must promptly provide available supporting evidence.

(b) If a debtor is involved in insolvency proceedings, the debt will be referred to the appropriate United States Attorney to file a claim. The United States may have a priority over other creditors under 31 U.S.C. 3713.

### § 1215.26 Notices to debtor.

The first written demand for payment must inform the debtor of the following:

(a) The amount and nature of the debt;

(b) The date payment is due, which will generally be 30 days from the date the notice was mailed;

(c) The assessment of interest under § 1215.27 from the date the notice was mailed if payment is not received within the 30 days;

(d) The right to dispute the debt;

(e) The office, address and telephone number that the debtor should contact to discuss repayment and reconsideration of the debt; and

(f) The sanctions available to the MSPB to collect a delinquent debt including, but not limited to, referral of the debt to a credit reporting agency, a private collection bureau, or the Department of Justice for litigation.

### § 1215.27 Interest, penalties, and administrative costs.

(a) Interest will accrue on all debts from the date when the first notice of the debt and the interest requirement is mailed to the last known address or hand-delivered to the debtor if the debt is not paid within 30 days from the date the first notice was mailed. The MSPB will charge an annual rate of interest that is equal to the average investment rate for the Treasury tax and loan accounts on September 30 of each year, rounded to the nearest whole per centum. This rate, which represents the current value of funds to the United

**Merit Systems Protection Board****§ 1215.30**

States Treasury, may be revised quarterly by the Secretary of the Treasury and is published by the Secretary of the Treasury annually or quarterly in the **FEDERAL REGISTER** and the Treasury Financial Manual Bulletins.

(b) The rate of interest initially assessed will remain fixed for the duration of the indebtedness, except that if a debtor defaults on a repayment agreement interest may be set at the Treasury rate in effect on the date a new agreement is executed.

(c) The MSPB shall charge debtors for administrative costs incurred in handling overdue debts.

(d) Interest will not be charged on administrative costs.

(e) The MSPB shall assess a penalty charge, not to exceed 6 percent per year on debts which have been delinquent for more than 90 days. This change shall accrue from the date that the debt became delinquent.

(f) The Chairman or his designee may waive in whole or in part the collection of interest and administrative and penalty charges if determined that collection would be against equity or not in the best interests of the United States. The MSPB shall waive the collection of interest on the debt or any part of the debt which is paid within 30 days after the date on which interest began to accrue.

**§ 1215.28 Administrative offset.**

(a) The MSPB may collect debts owed by administrative offset if:

(1) The debt is certain in amount;

(2) Efforts to obtain direct payment have been, or would most likely be unsuccessful, or the MSPB and the debtor agree to the offset;

(3) Offset is cost effective or has significant deterrent value; and

(4) Offset is best suited to further and protect the Government's interest.

(b) The MSPB may offset a debt owed to another Federal agency from amounts due or payable by the MSPB to the debtor or request another Federal agency to offset a debt owed to the MSPB;

(c) Prior to initiating administrative offset, the MSPB will send the debtor written notice of the following:

(1) The nature and amount of the debt and the agency's intention to col-

lect the debt by offset 30 days from the date the notice was mailed if neither payment nor a satisfactory response is received by that date;

(2) The debtor's right to an opportunity to submit a good faith alternative repayment schedule to inspect and copy agency records pertaining to the debt, to request a review of the determination of indebtedness; and to enter into a written agreement to repay the debt; and

(3) The applicable interest.

(d) The MSPB may effect an administrative offset against a payment to be made to a debtor prior to the completion of the procedures required by paragraph (c) of this section if:

(1) Failure of offset would substantially prejudice the Government's ability to collect the debt; and

(2) The time before the payment is to be made does not reasonably permit completion of those procedures.

**§ 1215.29 Use of credit reporting agencies.**

(a) The MSPB may report delinquent accounts to credit reporting agencies consistent with the notice requirements contained in the § 1215.26. Individual debtors must be given at least 60 days written notice that the debt is overdue and will be reported to a credit reporting agency.

(b) Debts may be reported to consumer or commercial reporting agencies. Consumer reporting agencies are defined in 31 U.S.C. 3701(a)(3) pursuant to 5 U.S.C. 552a(b)(12) and 31 U.S.C. 3711(f). The MSPB may disclose only an individual's name, address, Social Security number, and the nature, amount, status and history of the debt and the program under which the claim arose.

**§ 1215.30 Collection services.**

(a) The MSPB may contract for collection services to recover outstanding debts. The MSPB may refer delinquent debts to private collection agencies listed on the schedule compiled by the General Services Administration. In such contracts, the MSPB will retain the authority to resolve disputes, compromise claims, terminate or suspend collection, and refer the matter to the

**§ 1215.31**

Department of Justice or the General Accounting Office.

(b) The contractor shall be subject to the disclosure provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a(m)), and to applicable Federal and state laws and regulations pertaining to debt collection practices, including the Fair Debt Collection Practices Act, 15 U.S.C. 1692. The contractor shall be strictly accountable for all amounts collected.

(c) The contractor shall be required to provide to the MSPB any data contained in its files relating to the debt account upon agency request or upon returning an account to the MSPB for referral to the Department of Justice for litigation.

**§ 1215.31 Referral to the Department of Justice or the General Accounting Office.**

Debts over \$600 but less than \$100,000 which the MSPB determines can neither be collected nor otherwise disposed of will be referred for litigation to the United States Attorney in whose judicial district the debtor is located. Claims for amounts exceeding \$100,000 shall be referred for litigation to the Commercial Litigation Branch, Civil Division of the Department of Justice.

**§ 1215.32 Compromise, suspension and termination.**

(a) The Chairman of the MSPB or his designee may compromise, suspend or terminate the collection of debts where the outstanding principal is not greater than \$20,000. MSPB procedures for writing off outstanding accounts are available to the public.

(b) The Chairman of the MSPB may compromise, suspend or terminate collection of debts where the outstanding principal is greater than \$20,000 only with the approval of, or by referral to the United States Attorney or the Department of Justice.

(c) The Chairman of the MSPB will refer to the General Accounting Office (GAO) debts arising from GAO audit exceptions.

**§ 1215.33 Omissions not a defense.**

Failure to comply with any provisions of this rule may not serve as a defense to any debtor.

**5 CFR Ch. II (1-1-08 Edition)****PART 1216—TESTIMONY BY MSPB EMPLOYEES RELATING TO OFFICIAL INFORMATION AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS****Subpart A—General Provisions**

Sec.

1216.101 Scope and purpose.  
1216.102 Applicability.  
1216.103 Definitions.

**Subpart B—Demands or Requests for Testimony and Production of Documents**

1216.201 General prohibition.  
1216.202 Factors the MSPB will consider.  
1216.203 Filing requirements for litigants seeking documents or testimony.  
1216.204 Service of requests or demands.  
1216.205 Processing requests or demands.  
1216.206 Final determination.  
1216.207 Restrictions that apply to testimony.  
1216.208 Restrictions that apply to released records.  
1216.209 Procedure when a decision is not made prior to the time a response is required.  
1216.210 Procedure in the event of an adverse ruling.

**Subpart C—Schedule of Fees**

1216.301 Fees.

**Subpart D—Penalties.**

1216.401 Penalties.

AUTHORITY: 5 U.S.C. 1204(h); 31 U.S.C. 9701.

SOURCE: 71 FR 17967, Apr. 10, 2006, unless otherwise noted.

**Subpart A—General Provisions****§ 1216.101 Scope and purpose.**

(a) This part establishes policy, assigns responsibilities and prescribes procedures with respect to:

(1) The production or disclosure of official information or records by MSPB employees, advisors, and consultants; and

(2) The testimony of current and former MSPB employees, advisors, and consultants relating to official information, official duties, or the MSPB's record, in connection with federal or state litigation in which the MSPB is not a party.

(b) The MSPB intends this part to:

## Merit Systems Protection Board

## § 1216.103

- (1) Conserve the time of MSPB employees for conducting official business;
- (2) Minimize the involvement of MSPB employees in issues unrelated to MSPB's mission;
- (3) Maintain the impartiality of MSPB employees in disputes between private litigants; and
- (4) Protect sensitive, confidential information and the deliberative processes of the MSPB.

(c) In providing for these requirements, the MSPB does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of MSPB. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

### § 1216.102 Applicability.

This part applies to demands and requests to current and former employees, advisors, and consultants for factual or expert testimony relating to official information or official duties or for production of official records or information, in legal proceedings in which the MSPB is not a named party. This part does not apply to:

- (a) Demands upon or requests for an MSPB employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the MSPB;
- (b) Demands upon or requests for a former MSPB employee to testify as to matters in which the former employee was not directly or materially involved while at the MSPB;
- (c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; or
- (d) Congressional demands and requests for testimony, records or information.

### § 1216.103 Definitions.

The following definitions apply to this part.

- (a) *Demand* means an order, subpoena, or other command of a court or other competent authority for the production, disclosure, or release of records or for the appearance and testi-

mony of an MSPB employee in a legal proceeding.

(b) *General Counsel* means the General Counsel of the MSPB or a person to whom the General Counsel has delegated authority under this part.

(c) *Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

(d) *MSPB* means the Merit Systems Protection Board.

(e) *MSPB employee or employee* means:

(1)(i) Any current or former employee of the MSPB;

(ii) Any other individual hired through contractual agreement by or on behalf of the MSPB or who has performed or is performing services under such an agreement for the MSPB; and

(iii) Any individual who served or is serving in any consulting or advisory capacity to the MSPB, whether formal or informal.

(2) This definition does not include persons who are no longer employed by the MSPB and who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the MSPB.

(f) *Records or official records and information* all information in the custody and control of the MSPB, relating to information in the custody and control of the MSPB, or acquired by an MSPB employee in the performance of his or her official duties or because of his or her official status, while the individual was employee by or on behalf of the MSPB.

(g) *Request* means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court of other competent authority.

(h) *Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

## § 1216.201

### Subpart B—Demands or Requests for Testimony and Production of Documents

#### § 1216.201 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

#### § 1216.202 Factors the MSPB will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

- (a) The purposes of this part are met;
- (b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;
- (c) Allowing such testimony or production of records would assist or hinder the MSPB in performing its statutory duties;
- (d) Allowing such testimony or production of records would be in the best interest of the MSPB or the United States;
- (e) The records or testimony can be obtained from other sources;
- (f) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rule of procedure governing the case or matter in which the demand or request arose;
- (g) Disclosure would violate a statute, Executive Order or regulation;
- (h) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;
- (i) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;

#### 5 CFR Ch. II (1-1-08 Edition)

(j) Disclosure would result in the MSPB appearing to favor one litigant over another;

(k) Whether the request was served before the demand;

(l) A substantial Government interest is implicated;

(m) The demand or request is within the authority of the party making it; and

(n) The demand or request is sufficiently specific to be answered.

#### § 1216.203 Filing requirements for litigants seeking documents or testimony.

A litigant must comply with the following requirements when filing a request for official records and information or testimony under this part. A request should be filed before a demand.

(a) The request must be in writing and must be submitted to the Clerk of the Board who will immediately forward the request to the General Counsel.

(b) The written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs any need to maintain the confidentiality of the information and outweighs the burden on the MSPB to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an MSPB employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, and a showing that no document could be provided and used in lieu of testimony;

**Merit Systems Protection Board****§ 1216.207**

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require for each MSPB employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The MSPB reserves the right to require additional information to complete the request where appropriate.

(d) The request should be submitted at least 30 days before the date that records or testimony is required. Requests submitted in less than 30 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with the request.

(f) The request should state that the requester will provide a copy of the MSPB employee's statement free of charge and that the requester will permit the MSPB to have a representative present during the employee's testimony.

**§ 1216.204 Service of requests or demands.**

Requests or demands for official records or information or testimony under this subpart must be served on the Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419-0002 by mail, fax, or e-mail and clearly marked "Part 1216 Request for Testimony or Official Records in Legal Proceedings." The request or demand will be immediately forwarded to the General Counsel for processing.

**§ 1216.205 Processing requests or demands.**

(a) After receiving service of a request or demand for testimony, the General Counsel will review the request and, in accordance with the pro-

visions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) Absent exigent circumstances, the MSPB will issue a determination within 30 days from the date the request is received.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of the MSPB or the United States, or for other good cause.

(d) *Certification (authentication) of copies of records.* The MSPB may certify that records are true copies in order to facilitate their use as evidence. If a requester seeks certification, the requester must request certified copies from the MSPB at least 30 days before the date they will be needed. The request should be sent to the Clerk of the Board.

**§ 1216.206 Final determination.**

The General Counsel makes the final determination on demands to requests to employees for production of official records and information or testimony in litigation in which the MSPB is not a party. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and, when appropriate, the court of other competent authority of the final determination, the reasons for the grant or denial of the request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of an MSPB employee. The General Counsel's decision exhausts administrative remedies for discovery of the information.

**§ 1216.207 Restrictions that apply to testimony.**

(a) The General Counsel may impose conditions or restrictions on the testimony of MSPB employees including, for example:

(1) Limiting the areas of testimony;

(2) Requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal;

**§ 1216.208**

(3) Requiring that the transcript will be used or made available only in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requestor's expense.

(b) The MSPB may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose confidential or privileged information; or

(2) For a current MSPB employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the MSPB unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805).

(d) The scheduling of an employee's testimony, including the amount of time that the employee will be made available for testimony, will be subject to the MSPB's approval.

**§ 1216.208 Restrictions that apply to released records.**

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the MSPB may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original MSPB records may be presented for examination in response to a request, but they may not be presented as evidence or otherwise used in a manner by which they could lose their identity as official MSPB records, nor may they be marked or altered. In

**5 CFR Ch. II (1-1-08 Edition)**

lieu of the original records, certified copies may be presented for evidentiary purposes.

**§ 1216.209 Procedure when a decision is not made prior to the time a response is required.**

If a response to a demand or request is required before the General Counsel can make the determination referred to in § 1216.206, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the request is being reviewed, provide an estimate as to when a decision will be made, and seek a stay of the demand or request pending a final determination.

**§ 1216.210 Procedure in the event of an adverse ruling.**

If the court or other competent authority fails to stay a demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear, if necessary, at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touchy v. Ragen*, 340 U.S. 462 (1951).

**Subpart C—Schedule of Fees****§ 1216.301 Fees.**

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to the MSPB.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowances, and benefits). Fees for duplication will be the same as those charged by the MSPB in

**Merit Systems Protection Board****§ 1216.401**

its Freedom of Information Act regulations at 5 CFR part 1204.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district closest to the location where the witness will appear and on 28 U.S.C. 1821, as applicable. Such fees will include cost of time spent by the witness to prepare for testimony, in travel and for attendance in the legal proceeding, plus travel costs.

(d) *Payment of fees.* A requester must pay witness fees for current MSPB employees and any record certification fees by submitting to the Clerk of the Board a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony of former MSPB employees, the request must pay applicable fees directly to the former MSPB employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Waiver or reduction of fees.* The General Counsel, in his or her sole dis-

cretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(f) *De minimis fees.* Fees will not be assessed if the total charge would be \$10.00 or less.

**Subpart D—Penalties****§ 1216.401 Penalties.**

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the MSPB, or as ordered by a Federal court after the MSPB has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former MSPB employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current MSPB employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.