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 OR OTHER PROTECTED ACTIVITY

Subpart A—Jurisdiction and Definitions

Sec.

Subpart B—Appeals

Subpart C—Stay Requests

Subpart D—Reports on Applications for Transfers

Subpart E—Referrals to the Special Counsel

AUTHORITY: 5 U.S.C. 1204, 1221, 2302(b)(8) and (b)(9)(A)(i), (B), (C), or (D), 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 of the appellant's whistleblowing or other protected activity 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 or other protected activity, and requests for stays of personnel actions allegedly based on whistleblowing or other protected activity.

[78 FR 39546, July 2, 2013]

§ 1209.2 Jurisdiction.

(a) *Generally.* Under 5 U.S.C. 1221(a), 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 or other protected activity.

(b) *Appeals authorized.* The Board exercises jurisdiction over:

(1) *Individual right of action (IRA) 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 or other protected activity. 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 1: An agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee X believes that the agency has rated him ''minimally satisfactory'' because he reported that his supervisor embezzled public funds in violation of Federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Employee X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Employee X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an IRA appeal.

Example 2: As above, an agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee X believes that the agency has rated him ''minimally satisfactory'' because he previously filed a Board appeal of the agency's action suspending him without pay for 15 days. Whether the Board would have jurisdiction to review Employee X's performance rating as an IRA appeal depends on whether his previous Board appeal involved a claim of retaliation for whistleblowing. If it did, the Board could review the performance evaluation in an IRA appeal because the employee has alleged a violation of 5 U.S.C. 2302(b)(9)(A)(i). If the previous appeal did not involve a claim of retaliation for whistleblowing, there might be a prohibited personnel practice under subsection (b)(9)(A)(ii), but Employee X could not establish jurisdiction over an IRA appeal. Similarly, if Employee X believed that the current performance appraisal was retaliation for his previous protected equal employment opportunity (EEO) activity, there might be a prohibited personnel practice under subsection (b)(9)(A)(ii), but Employee X could not establish jurisdiction over an IRA appeal.

Example 3: As above, an agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee X believes that the agency has rated him ''minimally satisfactory'' because he testified on behalf of a co-worker in an EEO proceeding. The Board would have jurisdiction over the performance evaluation in an IRA appeal because the appellant has alleged a violation of 5 U.S.C. 2302(b)(9)(B).

Example 4: Citing alleged misconduct, an agency proposes Employee Y's removal. While that removal action is pending, Employee Y files a complaint with OSC alleging that the proposed removal was initiated in retaliation for her having disclosed that an agency official embezzled public funds in violation of Federal law and regulation. OSC subsequently issues a letter notifying Employee Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. Employee Y may file an IRA appeal with respect to the proposed removal.

(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 or other protected activity. Otherwise appealable actions are listed in 5 CFR 1201.3(a). An individual who has been subjected to an otherwise appealable action must make an election of remedies as described in 5 U.S.C. 7121(g) and paragraphs (c) and (d) of this section.

Example 5: Same as Example 4 above. While the OSC complaint with respect to the proposed removal is pending, the agency effects the removal action. OSC subsequently issues a letter notifying Employee Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. With respect to the effected removal, Employee Y can elect to appeal that action directly to the Board or to proceed with a complaint to OSC. If she chooses the latter option, she may file an IRA appeal when OSC has terminated its investigation, but the only issue that will be adjudicated in that appeal is whether she proves that her protected disclosure was a contributing factor in the removal action and, if so, whether the agency can prove by clear and convincing evidence that it would have removed Employee Y in the absence of the protected disclosure. If she instead files a direct appeal, the agency must prove its misconduct charges, nexus, and the reasonableness of the penalty, and Employee Y can raise any affirmative defenses she might have.

(c) *Issues before the Board in IRA appeals.* In an individual right of action appeal, the only merits issues before the Board are those listed in 5 U.S.C. 1221(e), *i.e.*, whether the appellant has demonstrated that whistleblowing or other protected activity was a contributing factor in one or more covered personnel actions and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the whistleblowing or other protected activity. The appellant may not raise affirmative defenses, such as claims of discrimination or harmful procedural error. In an IRA appeal that concerns an adverse action under 5 U.S.C. 7512,

the agency need not prove its charges, nexus, or the reasonableness of the penalty, as a requirement under 5 U.S.C. 7513(a), *i.e.*, that its action is taken ''only for such cause as will promote the efficiency of the service.'' However, the Board may consider the strength of the agency's evidence in support of its adverse action in determining whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of the whistleblowing or other protected activity.

(d) *Elections under 5 U.S.C. 7121(g).* (1) Under 5 U.S.C. 7121(g)(3), an employee who believes he or she was subjected to a covered personnel action in retaliation for whistleblowing or other protected activity ''may elect not more than one'' of 3 remedies: An appeal to the Board under 5 U.S.C. 7701; a negotiated grievance under 5 U.S.C. 7121(d); or corrective action under subchapters II and III of 5 U.S.C. chapter 12, *i.e.*, a complaint filed with the Special Counsel (5 U.S.C. 1214), which can be followed by an IRA appeal filed with the Board (5 U.S.C. 1221). Under 5 U.S.C. 7121(g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first.

(2) In the case of an otherwise appealable action as described in paragraph (b)(2) of this section, an employee who files a complaint with OSC prior to filing an appeal with the Board has elected corrective action under subchapters II and III of 5 U.S.C. chapter 12, *i.e.*, a complaint filed with OSC, which can be followed by an IRA appeal with the Board. As described in paragraph (c) of this section, the IRA appeal in such a case is limited to resolving the claim(s) of reprisal for whistleblowing or other protected activity.

(e) *Elements and Order of Proof.* Once jurisdiction has been established, the merits of a claim of retaliation for whistleblowing or other protected activity will be adjudicated as follows:

(1) The appellant must establish by preponderant evidence that he or she engaged in whistleblowing or other protected activity and that his or her whistleblowing or other protected activity was a contributing factor in a covered personnel action. An appellant may establish the contributing factor element through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure or protected activity, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) If a finding has been made that a protected disclosure or other protected activity was a contributing factor in one or more covered personnel actions, the Board will order corrective action unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure or activity.

[78 FR 39546, July 2, 2013]

§ 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, compensatory damages, and consequential damages under 5 U.S.C. 1221(g) to appeals governed by this part.

[78 FR 39547, July 2, 2013]

§ 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;

(11) The implementation or enforcement of any nondisclosure policy, form, or agreement; and

(12) Any other significant change in duties, responsibilities, or working conditions.

(b) *Whistleblowing* is the making of a protected disclosure, that is, a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority, unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences any violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a 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 Congress, the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

(c) *Other protected activity* means any of the following:

(1) The exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of 5 U.S.C. 2302(b)(8), *i.e.*, retaliation for whistleblowing;

(2) Testifying for or otherwise lawfully assisting any individual in the exercise of any right granted by any law, rule, or regulation;

(3) Cooperating with or disclosing information to Congress, the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(4) Refusing to obey an order that would require the individual to violate a law.

(d) *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.

(e) *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).

(f) *Reasonable belief.* An employee or applicant may be said to have a reasonable belief when a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence the violation, mismanagement, waste, abuse, or danger in question.

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997; 77 FR 62374, Oct. 12, 2012; 78 FR 39547, July 2, 2013]

Subpart B—Appeals

§ 1209.5 Time of filing.

(a) *General rule.* The appellant must seek corrective action from the Special Counsel before appealing to the Board unless the action being appealed is otherwise appealable directly to the Board and the appellant has elected a direct appeal. (See §1209.2(d) regarding election of remedies under 5 U.S.C. 7121(g)). 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 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) At any time after the expiration of 120 days, if the 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.