

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

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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.