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MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1201 and 1207

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure to clarify a number of matters: That the date of receipt of an agency decision is date on which the petitioner receives it; that a witness who is not a federal employee may obtain an order requiring the payment of witness fees; that the time for filing a petition for review begins on the date the initial decision is first received by either the appellant or the representative; and that complaints of discrimination must be clearly marked as raising such an issue. The Board also amends its mixed case procedures to make clear that any case older than 120 days is subject to the 30 day filing requirement once the appellant receives the agency's final decision. The Board also deletes an outdated reference to Appendix 1.

DATES: *Effective Date:* February 6, 2008.

FOR FURTHER INFORMATION CONTACT: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION: The Board is amending its rules of practice and procedure in 5 CFR part 1201 and 5 CFR Part 1207 as follows:

Section 1201.22(b)(1) is amended to make clear that the date of receipt of the agency's decision is the date on which the petitioner receives the decision;

Section 1201.37(d) and (e) and 1201.182(c) are amended to state that a witness who is not a federal employee

may obtain an order requiring the payment of witness fees and may file a petition for enforcement of such an order.

Section 1201.114(d) is amended to make clear that the time for filing a petition for review begins to run from the date of receipt of the initial decision by either the appellant or the representative, whichever comes first. The rule is consistent with that followed by the Federal Circuit with respect to petitions for judicial review. *See Monzo v. Department of Transportation*, 735 F.2d 1335 (Fed. Cir. 1984);

1201.154(a) & (d) are amended to make clear that the date of receipt of the agency's decision is the date on which the petitioner receives the decision;

1201.154(b)(2) is amended to make clear that an agency case older than 120 days is subject to the 30 day filing requirement once the appellant receives the agency's final decision. This amendment addresses an issue that arose in *Paine v. MSPB*, 467 F.3d 1344 (2006).

1207.170(b)(2) & (4) are amended to ensure that MSPB administrative judges and the Board are aware that a party is raising a complaint of discrimination in the adjudication of a Board case.

List of Subjects

5 CFR Part 1201

Administrative practice and procedure, Government employees.

5 CFR Part 1207

Administrative practice and procedure, Government employees.

■ Accordingly, the Board amends 5 CFR parts 1201 and 1207 as follows:

PART 1201—[AMENDED]

■ 1. The authority citation for part 1201 continues to read as follows:

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

■ 2. Revise § 1201.22(b)(1) to read as follows:

§ 1201.22 Filing an appeal and responses to appeals.

* * * * *

(b) * * *

(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 the

appellant's 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.

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■ 3. In § 1201.37, add paragraphs (d) and (e) as follows:

§ 1201.37 Witness fees.

* * * * *

(d) A witness who is denied the witness fees and travel costs required by paragraphs (b) and (c) of this section may file a written request that the judge order the party who requested the presence of the witness to provide such fees and travel costs. The judge will act on such a request promptly and, where warranted, will order the party to comply with the requirements of paragraphs (b) and (c) of this section.

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

■ 4. Revise § 1201.114(d) to read as follows:

§ 1201.114 Filing petition and cross petition for review.

* * * * *

(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. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. 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.

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■ 5. Amend § 1201.154 by revising paragraphs (a), (b)(2), and (d) to read as follows:

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

* * * * *

(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 the appellant's receipt of the agency's decision on the appealable action, whichever is later.

(b) * * *

(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. Once the agency resolves the matter or issues a final decision on the formal complaint, an appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue.

* * * * *

(d) This paragraph does not apply to employees of the Postal Service or to 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 he or she received the decision 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.

* * * * *

■ 6. Amend § 1201.182 as follows:

■ a. Redesignate paragraphs (c)(3) and (c)(4) as paragraphs (c)(4) and (c)(5) respectively.

■ b. Add new paragraph (c)(3) and revise newly redesignated paragraph (c)(5) to read as follows:

§ 1201.182 Petition for enforcement.

* * * * *

(c) * * *

(3) Under § 1201.37(e) of this part, a nonparty witness who has obtained an order requiring the payment of witness fees and travel costs may petition the Board for enforcement of the order.

* * * * *

(5) A petition for enforcement under paragraph (c)(1), (c)(2), (c)(3) or (c)(4) 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.

PART 1207—[AMENDED]

■ 7. The authority citation for part 1207 continues to read as follows:

Authority: 29 U.S.C. 794.

■ 8. Amend § 1207.170 by revising paragraphs (b)(2) and (b)(4) to read as follows:

§ 1207.170 Compliance procedures.

* * * * *

(b) * * *

(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. The pleading must be clearly marked "5 CFR part 1207 allegation of

discrimination in the adjudication of a Board case."

* * * * *

(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. The petition for review, cross petition for review or response to the petition or cross petition must be clearly marked "5 CFR part 1207 allegation of discrimination in the adjudication of a Board case."

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Dated: January 31, 2008.

William D. Spencer,

Clerk of the Board.

[FR Doc. E8-2104 Filed 2-5-08; 8:45 am]

BILLING CODE 7400-01-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 915

[Docket No. AO-254-A10; AMS-FV-06-0220; FV06-915-2]

Avocados Grown in South Florida; Order Amending Marketing Order No. 915

AGENCY: Agricultural Marketing Service (AMS), USDA.

ACTION: Final rule.

SUMMARY: This final rule amends Marketing Order No. 915 (order), which regulates the handling of avocados grown in South Florida. The amendments are based on those proposed by the Florida Avocado Administrative Committee (committee), which is responsible for local administration of the order. The amendments will: Add authority for the committee to borrow funds; revise voting requirements for changing the assessment rate; allow for District 1 nominations to be conducted by mail; and, add authority for the committee to accept voluntary contributions. All of the proposals were favored by avocado growers in a mail referendum, held July 23 through August 6, 2007. The amendments are intended to improve the operation and functioning of the marketing order program.

DATES: This rule is effective February 7, 2008.

FOR FURTHER INFORMATION CONTACT: Marc McFetridge or Melissa