

(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 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]

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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.

#### § 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's appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. The Board's jurisdiction does not depend solely on the label or nature of the ac-

tion or decision taken or made but may also depend on the type of Federal appointment the individual received, e.g., competitive or excepted service, whether an individual is preference eligible, and other factors. Accordingly, the laws and regulations cited below, which are the source of the Board's jurisdiction, should be consulted to determine not only the nature of the actions or decisions that are appealable, but also the limitations as to the types of employees, former employees, or applicants for employment who may assert them. Instances in which a law or regulation authorizes the Board to hear an appeal or claim include the following:

(1) *Adverse actions.* Removals (terminations of employment after completion of probationary or other initial service period), reductions in grade or pay, suspension for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; an involuntary resignation or retirement is considered to be a removal (5 U.S.C. 7511–7514; 5 CFR part 752, subparts C and D);

(2) *Retirement appeals.* Determinations affecting the rights or interests of an individual under the Federal retirement laws (5 U.S.C. 8347(d)(1)–(2) and 8461(e)(1); and 5 U.S.C. 8331 note; 5 CFR parts 831, 839, 842, 844, and 846);

(3) *Termination of probationary employment.* Appealable issues are limited to a determination that the termination was motivated by partisan political reasons or marital status, and/or if the termination was based on a pre-appointment reason, whether the agency failed to take required procedures. These appeals are not generally available to employees in the excepted service. (38 U.S.C. 2014(b)(1)(D); 5 CFR 315.806 & 315.908(b));

(4) *Restoration to employment following recovery from a work-related injury.* Failure to restore, improper restoration of, or failure to return following a leave of absence following recovery from a compensable injury. (5 CFR 353.304);

(5) *Performance-based actions under chapter 43.* Reduction in grade or removal for unacceptable performance (5 U.S.C. 4303(e); 5 CFR part 432);

(6) *Reduction in force.* Separation, demotion, or furlough for more than 30

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days, when the action was effected because of a reduction in force (5 CFR 351.901); Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011);

(7) *Employment practices appeal.* Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104);

(8) *Denial of within-grade pay increase.* Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 U.S.C. 5335(c); 5 CFR 531.410);

(9) *Suitability action.* Action based on suitability determinations, which relate to an individual's character or conduct that may have an impact on the integrity or efficiency of the service. Suitability actions include the cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment. A non-selection or cancellation of eligibility for a specific position based on an objection to an eligible or a pass over of a preference eligible under 5 CFR 332.406 is not a suitability action. (5 CFR 731.501, 731.203, 731.101(a));

(10) *Various actions involving the Senior Executive Service.* Removal or suspension for more than 14 days (5 U.S.C. 7543(d) and 5 CFR 752.605); Reduction-in-force action affecting a career appointee (5 U.S.C. 3595); Furlough of a career appointee (5 CFR 359.805); Removal or transfer of a Senior Executive Service employee of the Department of Veterans Affairs (38 U.S.C. 713 and 5 CFR part 1210); and

(11) *Miscellaneous restoration and reemployment matters.*

(i) Failure to afford reemployment priority rights pursuant to a Reemployment Priority List following separation by reduction in force (5 CFR 330.214);

(ii) Full recovery from a compensable injury after more than 1 year, because of the employment of another person (5 CFR 302.501);

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

(iv) Failure to re-employ a former employee after movement between ex-

ecutive agencies during an emergency (5 CFR 352.209);

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

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

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

(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 or other protected activity.* 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 or other protected activity, 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, compensatory damages, and consequential damages under 5 U.S.C. 1221(g) apply to appeals governed by part 1209 of this chapter.

(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

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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 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 dis-

crimination 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; 74 FR 9343, Mar. 4, 2009; 77 FR 62363, Oct. 12, 2012; 78 FR 39545, July 2, 2013; 79 FR 48943, Aug. 19, 2014]

### § 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 the Board or any member of the Board, or an administrative law judge appointed under 5 U.S.C. 3105 or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge.

(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

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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*. “Date of service” has the same meaning as “date of filing” under paragraph (l) of this section.

(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 (h) of § 1201.14, on the MSPB.

(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.

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

(o) *Grievance*. A complaint by an employee or labor organization under a negotiated grievance procedure covered by 5 U.S.C. 7121.

(p) *Substantial evidence*. The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to

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support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

(q) *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.

(r) *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 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.

(s) *Nonfrivolous allegation*. A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue. An allegation generally will be considered nonfrivolous when, under oath or penalty of perjury, an individual makes an allegation that:

(1) Is more than conclusory;

(2) Is plausible on its face; and

(3) Is material to the legal issues in the appeal.

[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; 73 FR 10129, Feb. 26, 2008; 77 FR 62364, Oct. 12, 2012; 80 FR 4496, Jan. 28, 2015]

### 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. It is the Board’s policy that these rules will be applied in a manner that expedites the processing of each case. It is the Board’s policy that these rules will be applied in a

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manner that ensures the fair and efficient processing of each case.

[74 FR 9343, Mar. 4, 2009]

### § 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 procedural 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 MSPB's appellate and original jurisdiction may file and receive documents electronically.

(b) *System for electronic filing.* (1) The MSPB's e-Appeal system is the exclusive system for electronic filing (e-filing) with the MSPB. Except as specifically provided, the MSPB will not accept pleadings filed by email. The link to e-Appeal is available at the MSPB's website (<https://www.mspb.gov>).

(2) e-Appeal is a closed system that collects and maintains records as part of an MSPB system of records and is subject to the provisions of the Privacy Act of 1974. Access to cases in e-Appeal is limited to the parties participating

in a Board proceeding who have registered as e-filers with the MSPB, and authorized individuals providing legal support to designated representatives.

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

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

(2) File any pleading, including a new complaint, in any matter within the MSPB's original jurisdiction (§ 1201.2);

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

(4) File a request for attorney fees (§ 1201.203);

(5) File a request for compensatory, consequential, or liquidated damages (§ 1201.204);

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

(7) Notify the MSPB of a change in contact information such as address (geographic or email) or telephone number; or

(8) Receive a requested subpoena from the Board for issuance to a witness (§ 1201.83).

(d) *Matters excluded from e-filing.* E-filing may not be used to:

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

(2) Serve a subpoena on a witness (§ 1201.83);

(3) File a pleading with the Special Panel (§ 1201.137);

(4) File a pleading that contains Sensitive Security Information (SSI) (49 CFR parts 15 and 1520);

(5) File a pleading that contains classified information (32 CFR part 2001); or

(6) File a request to intervene or participate as an *amicus curiae* or file a brief as *amicus curiae* pursuant to § 1201.34.

(e) Registration as an e-filer.

(1) The exclusive means to register as an e-filer is to follow the instructions at e-Appeal using a unique email address.

(2) Registration as an e-filer constitutes consent to accept electronic

service of pleadings filed by other e-filers and documents issued by the MSPB. No one may electronically file a new appeal or a pleading with the MSPB, or view the case record in an assigned appeal, unless registered as an e-filer.

(3) Registration as an e-filer applies to all MSPB proceedings with which the e-filer is associated in their e-Appeal role (appellant, appellant representative, or agency representative). If an individual requires more than one e-Appeal role (*e.g.*, appellant and appellant representative), they must register for each role separately using a different email address.

(4) All notices, orders, decisions, and other documents issued by the MSPB, as well as all pleadings filed by parties, will be made available for viewing and downloading at e-Appeal. Access to documents at e-Appeal is limited to the parties and representatives who are registered e-filers in the appeals in which they were filed.

(5) Agency representatives and appellant attorney representatives must register as e-filers.

(6) Each e-filer must promptly update their e-Appeal profile and notify the MSPB and other participants of any change in their address, telephone number, or email address by filing a pleading in each pending proceeding with which they are associated.

(7) An appellant or an appellant non-attorney representative may withdraw their registration as an e-filer pursuant to requirements set forth in e-Appeal policies posted to the MSPB's website. Such withdrawal means that, effective upon the MSPB's processing of a proper withdrawal, pleadings and MSPB documents will no longer be served on that person electronically and that person will no longer have electronic access to their case records through e-Appeal. A withdrawal of registration as an e-filer may preclude future re-registering as an e-filer.

(f) *Pleadings by e-filers.* Agency representatives and appellant attorney representatives must file all pleadings using e-Appeal, except those pleadings excluded from e-filing by paragraph (d) of this section. A pleading, or any part thereof, filed by non-electronic means, *i.e.*, via postal mail, facsimile, or per-

sonal or commercial delivery, may be rejected.

(g) *Agency Initial Contacts.* (1) Agencies are required to designate a specific individual as an initial agency representative to whom the Board will serve a copy of an appeal when it is docketed. Agency initial contacts are responsible for monitoring case activity regularly at e-Appeal.

(2) Agency initial contacts must be designated pursuant to requirements set forth in e-Appeal policies posted to the MSPB's website.

(h) *Form of electronic pleadings—(1) Electronic formats allowed.* E-Appeal accepts 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 is set forth in e-Appeal policies posted to the MSPB's website. Pleadings filed via e-Appeal must be formatted so that they will print on 8½-inch by 11-inch paper in portrait orientation. Parties are responsible for reviewing all pleadings to confirm legibility and to minimize the inclusion of nonrelevant personally identifiable information.

(2) *Requirements for pleadings with electronic attachments.* An e-filer who uploads supporting documents, in addition to the document that constitutes the primary pleading, must identify each attachment, either by bookmarking the document using e-Appeal, or by uploading the supporting documents in the form of one or more PDF files in which each attachment is bookmarked. Bookmark names must comply with requirements set forth in e-Appeal policies posted to the MSPB's website and include information such as a brief descriptive label with dates (*e.g.*, “Oct. 1, 2021—Decision Notice”).

(3) *Submission of audio and video evidence.* Audio and video evidence must be submitted according to the formatting and submission requirements set forth in e-Appeal policies posted to the MSPB's website.

(i) *Service of electronic pleadings and MSPB documents.* (1) When MSPB documents are issued or when parties e-file any pleadings, e-Appeal will send an email notification to other parties who are e-filers. When using e-Appeal to file



a pleading, e-filers will be notified of all documents that must be served by non-electronic means, and they must certify that they will serve all such documents no later than the first business day after the electronic submission.

(2) Delivery of email can encounter failure points. E-filers are responsible for ensuring that email from *mspb.gov* is not blocked by filters.

(3) E-filers are responsible for monitoring case activity regularly at e-Appeal to ensure that they have received all case-related documents.

(j) *Documents requiring a signature.* Electronic documents filed by an e-filer pursuant to this section shall be deemed to be signed by the e-filer for purposes of any regulation in part 1201, 1203, 1208, or 1209 of this chapter that requires a signature.

(k) *Affidavits and declarations made under penalty of perjury.* 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 to this part. If the declarant is someone other than the e-filer, a signed affidavit or declaration should be uploaded as an image file or with an acceptable digital signature that complies with requirements set forth in e-Appeal policies posted to the MSPB's website.

(l) *Date electronic documents are filed and served.* (1) As provided in §1201.4(1) of this part, the date of filing for pleadings filed via e-Appeal is the date of electronic submission. All pleadings filed via e-Appeal are time stamped with Eastern Time, but the timeliness of a pleading will be determined based on the time zone from which the pleading was submitted. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e-Appeal as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Washington Regional Office (in the Eastern Time Zone) on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20.

(2) MSPB documents served electronically on e-filers are deemed received on the date of electronic transmission.

(m) *Authority of MSPB to regulate e-filing.* (1) A judge or the Clerk of the Board may issue orders regulating the method of submissions for a particular period or particular submissions.

(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.

(3) The MSPB may order any party or authorized individual to cease participation as an e-filer or access to e-Appeal in circumstances that constitute a misuse of the system or a failure to comply with law, rule, regulation, or policy governing use of a U.S. government information system.

(4) MSPB reserves the right to revert to traditional methods of service. The MSPB may serve documents via traditional means—postal mail, facsimile, commercial or personal delivery—at its discretion. Parties and their representatives are responsible for ensuring that the MSPB always has their current postal mailing addresses, even when they are e-filers.

[88 FR 67056, Sept. 29, 2023]

APPEAL OF AGENCY ACTION; PLEADINGS

**§ 1201.21 Notice of appeal rights.**

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:

(a) 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;

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

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

(d) Notice of any right the employee has to file a grievance or seek corrective action under subchapters II and III of 5 U.S.C. chapter 12, including:

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

(2) Whether both an appeal to the Board and a grievance may be filed on

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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;

(3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.155 of this part; and

(4) The effect of any election under 5 U.S.C. 7121(g), including the effect that seeking corrective action under subchapters II and III of 5 U.S.C. chapter 12 will have on the employee's appeal rights before the Board.

(e) Notice of any right the employee has to file a complaint with the Equal Employment Opportunity Commission or to grieve allegations of unlawful discrimination, consistent with the provisions of 5 U.S.C. 7121(d) and 29 CFR 1614.301 and 1614.302.

(f) The name or title and contact information for the agency official to whom the Board should send the Acknowledgment Order and copy of the appeal in the event the employee files an appeal with the Board. Contact information should include the official's mailing address, email address, telephone and fax numbers.

[74 FR 9343, Mar. 4, 2009, as amended at 77 FR 62364, Oct. 12, 2012; 78 FR 21518, Apr. 11, 2013]

### § 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 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.

(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.

(3) An appellant is responsible for keeping the agency informed of his or her current home address for purposes of receiving the agency's decision, and correspondence which is properly addressed and sent to the appellant's address via postal or commercial delivery is presumed to have been duly delivered to the addressee. While such a presumption may be overcome under the circumstances of a particular case, an appellant may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service. The appellant may also be deemed to have received the agency's decision if it was received by a designated representative or a person of suitable age and discretion residing with the appellant. The following examples illustrate the application of this rule:

*Example A:* An appellant who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision.

*Example B:* An appellant who did not receive his or her mail while in the hospital may overcome the presumption of actual receipt.

*Example C:* An appellant may be deemed to have received an agency decision received by his or her roommate.

(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

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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]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §1201.22, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.govinfo.gov](http://www.govinfo.gov).

### § 1201.23 Computation of time.

In computing the number of days allowed for complying with any deadline, 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. Unless a different deadline is specified by the Board or its designee, 5 days are added to a party's deadline for responding to a document served on the party by mail.

*Example 1:* 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.

*Example 2:* The judge orders the appellant to file a response to a jurisdictional order no later than October 15, 2012, and that the agency's response is due 10 days after the filing of the appellant's pleading. If the appellant serves the agency with a pleading via regular mail on October 15, the agency's deadline for filing a response will be October 30, not October 25.

[77 FR 62364, Oct. 12, 2012]

### § 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 electronically provided that the requirements of §1201.14 have been satisfied. All appeals must contain the following:

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

(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, telephone number, and email address of the appellant's representative, if the appellant has a representative;

(7) Where applicable, a copy of the notice of proposed action, the agency decision being appealed and, if available, the SF-50 or similar notice of personnel action. No other attachments should be included with the appeal, as the agency will be submitting the documents required by 1201.25 of this part, and there will be several opportunities to submit evidence and argument after the appeal is filed. An appellant should not miss the deadline for filing merely because he or she does not currently have all of the documents specified in this section.

(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 e-Appeal 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

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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 e-Appeal. MSPB Form 185 can be accessed at the MSPB's website (<http://www.mspb.gov>).

(d) *Right to hearing.* An appellant generally has a right to a hearing on the merits if the appeal has been timely filed and the Board has jurisdiction over the appeal.

(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 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; 77 FR 62364, Oct. 12, 2012; 88 FR 67058, Sept. 29, 2023]

### § 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 Service of pleadings and response.

(a) *Service—(1) Service by the Board.* The appropriate office of the Board will notify each party to the proceeding that a new appeal has been docketed and will attach to the initial order in the proceeding a certificate of service, consisting of a list 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

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each pleading, as defined by §1201.4(b), and all documents submitted with it, except for the appeal. They may do so by electronic filing in accordance with §1201.14, postal mail, facsimile, or commercial or personal delivery. Documents and pleadings must be served on each party and each representative. A certificate of service stating how and when service was made must accompany each pleading. The parties and their representatives must notify the appropriate Board office and one another, in a pleading, of any changes in their address, telephone number, or email address.

(b) *Submission of documents.* Pleadings and attachments filed via postal mail, facsimile, or commercial or personal delivery must be filed on 8½-inch by 11-inch paper. This requirement enables the Board to comply with standards established for U.S. courts. Paper pleadings and attachments may not contain binders, folders, staples, paper clips, or notes adhered to pages. Such items will be removed and not included in the record, or the filing may be rejected. Documents may not be submitted on an electronic media storage device such as a Compact Disc (CD), Digital Video Disc (DVD), or flash drive. Parties are responsible for reviewing all pleadings to confirm legibility and to minimize the inclusion of nonrelevant personally identifiable information. Pleadings filed via e-Appeal must adhere to the formatting and filing requirements set forth in §1201.14(h).

(c) *Submission of audio and video evidence.* Audio and video evidence must be submitted according to the formatting and submission requirements set forth in policies posted to the MSPB's website.

[88 FR 67058, Sept. 29, 2023]

### § 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

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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) *Suspension period.* The judge may issue an order suspending the processing of an appeal for up to 30 days. The judge may grant a second order suspending the processing of an appeal for up to an additional 30 days.

(b) *Early termination of suspension period.* The administrative judge may terminate the suspension period upon joint request of the parties or where the parties request the judge's assistance and the judge's involvement is likely to be extensive.

(c) *Termination of suspension period.* If the final day of any suspension period falls on a day on which the Board is closed for business, adjudication shall

resume as of the first business day following the expiration of the period.

(d) *Mediation.* Whenever an appeal is accepted into the Board's Mediation Appeals Program (MAP), the processing of the appeal and all deadlines are suspended until the mediator returns the case to the judge. This provision does not apply where the parties enter into other forms of alternative dispute resolution.

[77 FR 62365, Oct. 12, 2012]

### § 1201.29 Dismissal without prejudice.

(a) *In general.* Dismissal without prejudice is a procedural option that allows for the dismissal and subsequent re-filing of an appeal.

(b) *Procedure.* Dismissal without prejudice may be granted on the judge's own motion or upon request by either party. The decision whether to dismiss an appeal without prejudice is committed to the sound discretion of the judge, and may be granted when the interests of fairness, due process, and administrative efficiency outweigh any prejudice to either party.

(c) *Refiling.* Except in certain USERRA appeals under Part 1208 involving the use of military leave, a decision dismissing an appeal without prejudice will include a date certain by which the appeal must be refiled. The judge will determine whether the appeal must be refiled by the appellant or whether it will be automatically refiled by the judge as of a date certain. When a dismissal without prejudice is issued over the objection of the appellant, the appeal will be automatically refiled as of a date certain.

(d) *Waiver.* When a dismissed appeal must be refiled by the appellant, requests for waiver of a late filing based upon good cause will be liberally construed.

[77 FR 62365, Oct. 12, 2012]

## 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

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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 or 15 days after a party becomes aware of the conflict. 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) As set forth in paragraphs (d) and (e) of § 1201.43 of this part, a judge may exclude a representative from all or any portion of the proceeding before him or her for contumacious conduct or conduct prejudicial to the administration of justice.

[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; 77 FR 62365, Oct. 12, 2012]

### § 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.

### § 1201.33 Federal witnesses.

(a) Every Federal agency or corporation, including nonparties, must make its employees or personnel available to furnish sworn statements or to appear at a deposition or hearing when or-

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dered by the judge to do so. When providing those statements or appearing at a deposition or 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). When a desired witness is employed by an agency who is not a party to the Board proceeding, the requesting party may avail itself of the provisions of sections 1201.81 to 1201.85 of this part regarding subpoenas to ensure the attendance of the witness. In addition, the Board and the parties will implement this provision, to the maximum extent possible, to avoid conflict with other regulations governing the production of Federal employees in matters in litigation.

(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; 77 FR 62365, Oct. 12, 2012]

### § 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).

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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.* (1) An amicus curiae is a person or organization who, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge or the Board regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may request permission to file an amicus brief. The Board may solicit amicus briefs on its own motion.

(2) A request to file an amicus curiae brief must include a statement of the

person's or organization's interest in the appeal and how the brief will be relevant to the issues involved.

(3) The request may be granted, in the discretion of the judge or the Board, if the person or organization has a legitimate interest in the proceedings, and such participation will not unduly delay the outcome and may contribute materially to the proper disposition thereof.

(4) The amicus curiae shall submit its brief within the time limits set by the judge or the Board and must comply with any further orders by the judge or the Board.

(5) An amicus curiae is not a party to the proceeding and may not participate in any way in the conduct of the hearing, including the presentation of evidence or the examination of witnesses. The Board, in its discretion, may invite an amicus curiae to participate in oral argument in proceedings in which oral argument is scheduled.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62365, Oct. 12, 2012]

### § 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.

(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

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are united for consideration. For example, a judge might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent removal 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.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62365, Oct. 12, 2012]

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

(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 en-

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forced as provided under subpart F of this part.

[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; 73 FR 6833, Feb. 6, 2008]

### 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 issue timely and clear decisions based on statutes and legal precedents. 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



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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; 77 FR 62366, Oct. 12, 2012]

### § 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 another judge will be promptly assigned.

(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.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62366, Oct. 12, 2012]

### § 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), (c), (d), and (e) of this section. Before imposing a sanction, the judge shall provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document the reasons for any resulting sanction in the record.

(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.

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(d) *Exclusion of a representative or other person.* A judge may exclude or limit the participation of a representative or other person in the case for contumacious conduct or conduct prejudicial to the administration of justice. When the judge excludes a party's representative, the judge will afford the party a reasonable time to obtain another representative before proceeding with the case.

(e) *Cancellation, suspension, or termination of hearing.* A judge may cancel a scheduled hearing, or suspend or terminate a hearing in progress, for contumacious conduct or conduct prejudicial to the administration of justice on the part of the appellant or the appellant's representative. If the judge suspends a hearing, the parties must be given notice as to when the hearing will resume. If the judge cancels or terminates a hearing, the judge must set a reasonable time during which the record will be kept open for receipt of written submissions.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62366, Oct. 12, 2012]

### 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 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 listed on the Board's public Web site ([www.mspb.gov](http://www.mspb.gov)). The judge will advise parties of these hearing sites as appro-

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priate. 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.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62366, Oct. 12, 2012]

#### § 1201.52 Public hearings.

(a) *Closing the hearing.* Hearings are generally open to the public; however, the judge may order a hearing or any part of a hearing closed when doing so would be in the best interests of a party, 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.

(b) *Electronic devices.* Absent express approval from the judge, no two-way communications devices may be operated and/or powered on in the hearing room; all cell phones, text devices, and all other two-way communications devices shall be powered off in the hearing room. Further, no cameras, recording devices, and/or transmitting devices may be operated, operational, and/or powered on in the hearing room without the consent of the judge.

[77 FR 62366, Oct. 12, 2012]

#### § 1201.53 Record of proceedings.

(a) *Recordings.* A recording of the hearing is generally prepared by a court reporter, under the judge's guidance. Such a recording is included with the Board's copy of the appeal file and serves as the official hearing record. Judges may prepare recordings in some hearings, such as those conducted telephonically.

(b) *Transcripts.* A "transcript" refers not only to printed copies of the hearing testimony, but also to electronic versions of such documents. Along with recordings, a transcript prepared by the court reporter is accepted by the Board as the official hearing record. Any party may request that the court reporter prepare a full or partial transcript, at the requesting party's expense. Judges do not prepare transcripts.

(c) *Copies.* Copies of recordings or existing transcripts will be provided upon request to parties free of charge. Such requests should be made in writing to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. Nonparties may request a copy of a hearing recording or existing transcript under the Freedom of Information Act (FOIA) and Part 1204 of the Board's regulations. A nonparty may request a copy by writing 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, as appropriate. Nonparties may also make FOIA requests online at <https://foia.mspb.gov>.

(d) *Corrections to transcript.* Any discrepancy between the transcript and the recording shall be resolved by the judge or the Clerk of the Board, as appropriate. Corrections to the official transcript may be made on motion by a party or on the judge's own motion or by the Clerk of the Board, as appropriate. Motions for corrections must be filed within 10 days after the receipt of a transcript. Corrections of the official transcript will be made only when substantive errors are found by the judge or by the Clerk of the Board, as appropriate.

(e) *Official record.* Hearing exhibits and pleadings that have been accepted into the record, the official hearing record, if a hearing is held, and all orders and decisions of the judge and the Board, make up the official record of the case. Other than the Board's decisions, the official record is not available for public inspection and copying. The official record is, however, subject to requests under both the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a) pursuant to the procedures contained in 5 CFR parts 1204 and 1205.

[77 FR 62366, Oct. 12, 2012]

**§ 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 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.**

(a) *Applicability.* This section does not apply to the following types of appeals which are covered by §1201.57:

- (1) An individual right of action appeal under the Whistleblower Protection Act, 5 U.S.C. 1221;
- (2) An appeal under the Veterans Employment Opportunities Act, 5 U.S.C. 3330a(d);
- (3) An appeal under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324, in

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which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311; and

(4) An appeal under 5 CFR 353.304, in which the appellant alleges a failure to restore, improper restoration of, or failure to return following a leave of absence.

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

(i) It is brought under 5 U.S.C. 4303 or 5 U.S.C. 5335 and is supported by substantial evidence (as defined in § 1201.4(p)); or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence (as defined in § 1201.4(q)).

(2) *Appellant*. (i) The appellant has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q)), with respect to:

(A) Issues of jurisdiction, except for cases in which the appellant asserts a violation of his right to reemployment following military duty under 38 U.S.C. 4312–4314;

(B) The timeliness of the appeal; and

(C) Affirmative defenses.

(ii) In appeals from reconsideration decisions of the Office of Personnel Management (OPM) involving retirement benefits, if the appellant filed the application, the appellant has the burden of proving, by a preponderance of the evidence (as defined in § 1201.4(q)), entitlement to the benefits. Where OPM proves by preponderant evidence an overpayment of benefits, an appellant may prove, by substantial evidence (as defined in § 1201.4(p)), eligibility for waiver or adjustment.

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

(1) Shows harmful error in the application of the agency's procedures in arriving at its decision (as defined in § 1201.4(r));

(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.

(d) *Administrative judge*. The administrative judge will inform the parties of the proof required as to the issues of jurisdiction, the timeliness of the appeal, and affirmative defenses.

[80 FR 4496, Jan. 28, 2015]

### § 1201.57 Establishing jurisdiction in appeals not covered by § 1201.56; burden and degree of proof; scope of review.

(a) *Applicability*. This section applies to the following types of appeals:

(1) An individual right of action (IRA) appeal under the Whistleblower Protection Act, 5 U.S.C. 1221;

(2) A request for corrective action under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. 3330a(d);

(3) A request for corrective action under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311; and

(4) An appeal under 5 CFR 353.304, in which an appellant alleges a failure to restore, improper restoration of, or failure to return following a leave of absence (denial of restoration appeal).

(b) *Matters that must be supported by nonfrivolous allegations*. Except for proving exhaustion of a required statutory complaint process and standing to appeal (paragraphs (c)(1) and (3) of this section), in order to establish jurisdiction, an appellant who initiates an appeal covered by this section must make nonfrivolous allegations (as defined in § 1201.4(s)) with regard to the substantive jurisdictional elements applicable to the particular type of appeal he or she has initiated.

(c) *Matters that must be proven by a preponderance of the evidence*. An appellant who initiates an appeal covered by this section has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q)), on the following matters:

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(1) When applicable, exhaustion of a statutory complaint process that is preliminary to an appeal to the Board;

(2) Timeliness of an appeal under 5 CFR 1201.22;

(3) Standing to appeal, when disputed by the agency or questioned by the Board. (An appellant has “standing” when he or she falls within the class of persons who may file an appeal under the law applicable to the appeal.); and

(4) The merits of an appeal, if the appeal is within the Board’s jurisdiction and was timely filed.

(d) *Scope of the appeal.* Appeals covered by this section are limited in scope. With the exception of denial of restoration appeals, the Board will not consider matters described at 5 U.S.C. 7701(c)(2) in an appeal covered by this section.

(e) *Notice of jurisdictional, timeliness, and merits elements.* The administrative judge will provide notice to the parties of the specific jurisdictional, timeliness, and merits elements that apply in a particular appeal.

(f) *Additional information.* For additional information on IRA appeals, the reader should consult 5 CFR part 1209. For additional information on VEOA appeals, the reader should consult 5 CFR part 1208, subparts A & C. For additional information on USERRA appeals, the reader should consult 5 CFR part 1208, subparts A and B.

(g) For additional information on denial of restoration appeals, the reader should consult 5 CFR part 353, subparts A and C.

[80 FR 4496, Jan. 28, 2015]

### § 1201.58 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.

[54 FR 53504, Dec. 29, 1989. Redesignated at 80 FR 4496, Jan. 28, 2015]

### § 1201.59 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, additional evidence or argument will ordinarily not be accepted unless:

(1) The party submitting it shows that the evidence or argument was not readily available before the record closed; or

(2) It is in rebuttal to new evidence or argument submitted by the other party just before the record closed.

(d) The judge will include in the record any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62366, Oct. 12, 2012. Redesignated at 80 FR 4496, Jan. 28, 2015]

## 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.

### § 1201.63 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

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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. Discovery requests and responses thereto are not to be filed in the first instance with the Board. They are only filed with the Board in connection with a motion to compel discovery under 1201.73(c) of this part, with a motion to subpoena discovery under 1201.73(d) of this part, or as substantive evidence to be considered in the appeal.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62367, Oct. 12, 2012]

#### § 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 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 in-structive rather than controlling.

(b) *Scope.* Discovery covers any non-privileged 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 to parties, 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:

(1) The discovery sought is 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, as amended at 73 FR 18150, Apr. 3, 2008; 73 FR 21415, Apr. 21, 2008]

#### § 1201.73 Discovery procedures.

(a) *Initiating discovery.* A party seeking discovery must start the process by serving a request for discovery on the representative of the party or nonparty, or, if there is no representative, on the party or nonparty themselves. The request for discovery must state the time limit for responding, as prescribed in 1201.73(d) of this part, and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to the official 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) *Responses to discovery requests.* A party or nonparty 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 requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection. Parties and nonparties may respond to discovery requests by electronic mail if authorized by the requesting party.

(c) *Motions to compel or issue a subpoena.* (1) If a party fails or refuses to respond in full to a discovery request, the requesting party may file a motion to compel discovery. If a nonparty fails or refuses to respond in full to a discovery request, the requesting party may file a motion for the issuance of a subpoena directed to the individual or entity from which the discovery is sought under the procedures described in 1201.81 of this part. The requesting party must serve a copy of the motion on the other party or nonparty. Before filing any motion to compel or issue a subpoena, the moving party shall discuss the anticipated motion with the opposing party or nonparty, and all those involved shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. The motion shall include:

(i) A copy of the original request and a statement showing that the information sought is discoverable under section 1201.72;

(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); and

(iii) A statement that the moving party has discussed or attempted to discuss the anticipated motion with the nonmoving party or nonparty and made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement.

(2) The party or nonparty from whom discovery was sought may respond to the motion to compel or the motion to issue a subpoena within the time limits

stated in paragraph (d)(3) of this section.

(d) *Time limits.* (1) Unless otherwise directed by the judge, parties must serve their initial discovery requests within 30 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 serve 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 10 days of the date of service of the prior response, unless the parties are otherwise directed by the judge. 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 for an order to compel or issue a subpoena 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 or subpoena discovery must be filed with the judge within 10 days of the date of service of the motion.

(4) Discovery must be completed within the time period designated by the judge or, if no such period is designated, no later than the prehearing or close of record conference.

(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 or agreement by the parties, each party may not take more than 10 depositions.

(3) Requests to exceed the limitations set forth in paragraphs (e)(1) and (e)(2) 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.

[77 FR 62367, Oct. 12, 2012]

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### § 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)(1) and (d)(3). An administrative judge may deny a motion to compel discovery if a party fails to comply with the requirements of 5 CFR 1201.73(c)(1) and (d)(3).

(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.

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

[54 FR 53504, Dec. 29, 1989, as amended at 73 FR 18151, Apr. 3, 2008; 78 FR 23458, Apr. 19, 2013]

### § 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 directly material to the issues involved in the appeal.

(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; 77 FR 62367, Oct. 12, 2012]

### § 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.



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### § 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 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.

### § 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 appeal.* The judge has the authority to proceed with or to stay

## § 1201.101

the processing of the appeal while an interlocutory appeal is pending with the Board. The passage of time during any stay granted under this section is not deemed, or accounted for, as a case suspension under §1201.28 of this part. If the judge does not stay the appeal, the Board may do so while an interlocutory appeal is pending with it.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62367, Oct. 12, 2012]

### 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 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 except when such judge, officer, or other employee of the Board is serving as a mediator or settlement judge who is not the adjudicating judge.

[54 FR 53504, Dec. 29, 1989, as amended at 77 FR 62367, Oct. 12, 2012]

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

Except as otherwise provided in §1201.41(c)(1) of this part, ex parte com-

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munications 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]

### 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 all parties to the appeal, including named parties, permissive intervenors, and intervenors of right. The Board satisfies its legal obligation under 5 U.S.C. 7701(b)(1) by making electronic copies of initial decisions available to the Office of Personnel Management.

(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;

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(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.

(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; 77 FR 62367, Oct. 12, 2012]

### § 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 to accept into the record a settlement agreement that is filed prior to the deadline for filing a petition for review, even if the settlement agreement is not received until after the date when the initial decision becomes final under §1201.113 of this part.

(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; 77 FR 62368, Oct. 12, 2012; 78 FR 23458, Apr. 19, 2013]

### § 1201.113 Finality of decision.

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

(a) *Exceptions.* The initial decision will not become the Board's final decision if within the time limit for filing specified in 1201.114 of this part, any party files a petition for review or, if no petition for review is filed, files a request that the initial decision be vacated for the purpose of accepting a settlement agreement into the record.

(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

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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.

(f) When the Board, by final decision or order, finds there is reason to believe a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 59992, Nov. 6, 1997; 77 FR 62368, Oct. 12, 2012; 78 FR 39545, July 2, 2013]

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

#### § 1201.114 Petition and cross petition for review—content and procedure.

(a) *Pleadings allowed.* Pleadings allowed on review include a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review.

(1) A petition for review is a pleading in which a party contends that an initial decision was incorrectly decided in whole or in part.

(2) A cross petition for review has the same meaning as a petition for review but is used to describe a pleading that is filed by a party when another party has already filed a timely petition for review.

(3) A response to a petition for review and a cross petition for review may be contained in a single pleading.

(4) A reply to a response to a petition for review is limited to the factual and legal issues raised by another party in the response to the petition for review. It may not raise new allegations of error.

(5) No pleading other than the ones described in this paragraph will be accepted unless the party files a motion

with and obtains leave from the Clerk of the Board. The motion must describe the nature of and need for the pleading.

(b) *Contents of petition or cross petition for review.* A petition or cross petition for review states a party's objections to the initial decision, including all of the party's legal and factual arguments, and must be supported by references to applicable laws or regulations and by specific references to the record. Any petition or cross petition for review that contains new evidence or argument must include an explanation of why the evidence or argument was not presented before the record below closed (see § 1201.58 of this part). A petition or cross petition for review should not include documents that were part of the record below, as the entire administrative record will be available to the Board.

(c) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel (under 5 U.S.C. 1212(c)) may file a petition or cross 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.

(d) *Place for filing.* All pleadings described in paragraph (a) and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with 1201.14 of this part.

(e) *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. For purposes of this section, the date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3) of this

part, pertaining to an appellant's receipt of a final agency 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 or cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review.

(f) *Extension of time to file.* The Board will grant a motion for extension of time to file a pleading described in paragraph (a) only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board on or 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.) 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.

(g) *Late filings.* Any pleading described in paragraph (a) of this section 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 (f) 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.) The affidavit or sworn statement must include: The reasons for failing to request an extension before the deadline for the submission, and a specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evi-

dence. 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 (e) 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.

(h) *Length limitations.* A petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

(i) *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

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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 (i)(2)(ii) of this section. The notice of intervention is timely filed 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 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.

(j) *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.

(k) *Closing the record.* The record closes on expiration of the period for filing the reply to the response to the petition for review or on expiration of the period for filing a response to the cross petition for review, whichever is later, 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 it is new and material as defined in § 1201.115(d) and the party submitting it shows that the evidence or argument was not readily available before the record closed.

(1) *Rejection for failure to comply.* The Clerk of the Board may reject material submitted for filing that does not substantially conform to the procedural requirements of this subpart by issuing a rejection letter advising the parties of the nature of the nonconformity and the requirements and deadline for re-submission. Any deadlines affected by the rejection will be addressed in the rejection letter.

[77 FR 62368, Oct. 12, 2012, as amended at 78 FR 23458, Apr. 19, 2013]

### § 1201.115 Criteria for granting petition or cross petition for review.

The Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact.

(1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.

(2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial

decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

[77 FR 62369, Oct. 12, 2012]

**§ 1201.116 Compliance with orders for interim relief.**

(a) *Certification of compliance.* If the appellant was the prevailing party in the initial decision and the decision granted the appellant interim relief, any petition 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).

(b) *Challenge to certification.* 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.

(c) *Allegation of noncompliance in petition or cross petition for review.* 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).

(d) *Request for dismissal for noncompliance with interim relief order.* If the agency files a petition or cross petition

for review and has not provided the required interim relief, the appellant may request dismissal of the agency's petition. Any such request 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.

(e) *Effect of failure to show compliance with interim relief order.* Failure by an agency to provide the certification required by paragraph (a) 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 paragraphs (b), (c), or (d) of this section, may result in the dismissal of the agency's petition or cross petition for review.

(f) *Back pay and attorney fees.* Nothing in 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.

(g) *Allegations of noncompliance after a final decision is issued.* If the initial decision granted the appellant interim relief, but the appellant is not the prevailing party in the final Board order disposing of a petition for review, and 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 of this part. 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 disposing of a petition for review, 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 of this part.

[77 FR 62369, Oct. 12, 2012]

## § 1201.117

### § 1201.117 Board decisions; procedures for review or reopening.

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

- (1) Issue a decision that 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 initial decision of the judge, in whole or in part. The Board may issue a final decision and, when appropriate, order a date for compliance with that decision.

(c) The Board may issue a decision in the form of a precedential Opinion and Order or a nonprecedential Order.

(1) *Opinion and Order.* An Opinion and Order is a precedential decision of the Board and may be appropriately cited or referred to by any party.

(2) *Nonprecedential Orders.* A nonprecedential Order is one that the Board has determined does not add significantly to the body of MSPB case law. The Board may, in its discretion, include in nonprecedential Orders a discussion of the issue(s) to assist the parties in understanding the reason(s) for the Board's disposition in a particular appeal. Nonprecedential Orders are not binding on the Board or its administrative judges in any future appeals except when it is determined they have a preclusive effect on parties under the doctrines of *res judicata* (claim preclusion), collateral estoppel (issue preclusion), judicial estoppel, or law of the case. Parties may cite nonprecedential Orders, but such orders have no precedential value; the Board and its administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law.

[76 FR 60707, Sept. 30, 2011, as amended at 77 FR 62370, Oct. 12, 2012]

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### § 1201.118 Board reopening of final decisions.

Regardless of any other provision of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law. The Board will exercise its discretion to reopen an appeal only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final.

[77 FR 62370, Oct. 12, 2012]

### § 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 decision 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 decision.

(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 decision. 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, as amended at 77 FR 62370, Oct. 12, 2012]



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### § 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 as provided by 5 U.S.C. 7703. As §1201.175 of this 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.

[78 FR 39545, July 2, 2013]

### 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 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 a copy 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 and the party's representative, as shown on the certificate of service.

(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.

[62 FR 48451, Sept. 16, 1997, as amended at 68 FR 59863, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004; 77 FR 62370, Oct. 12, 2012]

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### § 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 regarding 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) 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 procedures for a petition for review by the Board under subpart C of this part.

[62 FR 48451, Sept. 16, 1997, as amended at 63 FR 42686, Aug. 11, 1998; 70 FR 30609, May 27, 2005; 78 FR 39545, July 2, 2013]

### § 1201.126 Final decisions.

(a) In any action to discipline an employee, except as provided in paragraph (b) of this section, the administrative

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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 a civil penalty not to exceed \$1,288, 5 U.S.C. 1215(a)(3), 7326; 28 U.S.C. 2461 note.

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

[62 FR 48451, Sept. 16, 1997, as amended at 70 FR 30609, May 27, 2005; 78 FR 39545, July 2, 2013; 82 FR 25716, June 5, 2017; 83 FR 1174, Jan. 10, 2018; 84 FR 5584, Feb. 22, 2019; 85 FR 12724, Mar. 4, 2020; 86 FR 7798, Feb. 2, 2021; 87 FR 3176, Jan. 21, 2022; 88 FR 4080, Jan. 24, 2023]

### § 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 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 a copy 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.

(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.

[62 FR 48451, Sept. 16, 1997, as amended at 68 FR 59863, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004; 77 FR 62370, Oct. 12, 2012]

### § 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

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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 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.

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### § 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 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) or 2302(b)(9)(A)(i), (B), (C), or (D), the judge, or the Board on petition for review, will order appropriate corrective action if the Special Counsel demonstrates that a disclosure or protected activity described under 5 U.S.C. 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D) 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 or protected activity. 5 U.S.C. 1214(b)(4)(B).

[62 FR 48451, Sept. 16, 1997, as amended at 78 FR 39545, July 2, 2013]

### § 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

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obtain judicial review of the decision as provided by 5 U.S.C. 7703.

[78 FR 39545, July 2, 2013]

### 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.

(d) *Initial filing and service.* The Special Counsel must file a copy 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.

(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.

[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; 73 FR 10130, Feb. 26, 2008; 77 FR 62370, Oct. 12, 2012]

#### § 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 action 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

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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).

(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 a copy 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 cer-

tificate 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 and the party’s representative, as shown on the certificate of service.

(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.

[62 FR 48451, Sept. 16, 1997, as amended at 68 FR 59863, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004; 73 FR 10130, Feb. 26, 2008; 77 FR 62370, Oct. 12, 2012]

**§ 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

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(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 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 service requirements of §1201.137 of this part apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.

[77 FR 62370, Oct. 12, 2012]

## 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.* Except when filed electronically under 1201.14, 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

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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.

(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.

[62 FR 48451, Sept. 16, 1997, as amended at 68 FR 59864, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004; 73 FR 10130, Feb. 26, 2008; 77 FR 62371, Oct. 12, 2012]

### **§ 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.

## **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



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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 grievance under a negotiated grievance procedure or a formal discrimination complaint with any agency regarding the matter being appealed to the Board. If he or she has done so, the appeal must state the date on 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; 77 FR 62371, Oct. 12, 2012]

### § 1201.154 Time for filing appeal.

For purposes of this section, the date an appellant receives the agency’s decision is determined according to the standard set forth at 1201.22(b)(3) of this part. 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 the appellant’s 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. 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.

(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

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become timely, the judge may hold the appeal rather than dismiss it.

[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; 73 FR 6834, Feb. 6, 2008; 77 FR 62371, Oct. 12, 2012]

### § 1201.155 Requests for review of arbitrators' decisions.

(a) *Source and applicability.* (1) Under paragraph (d) of 5 U.S.C. 7121, an employee who believes he or she has been subjected to discrimination within the meaning of 5 U.S.C. 2302(b)(1), and who may raise the matter under either a statutory procedure such as 5 U.S.C. 7701 or under a negotiated grievance procedure, must make an election between the two procedures. The election of the negotiated grievance procedure "in no manner prejudices" the employee's right to request Board review of the final decision pursuant to 5 U.S.C. 7702. Subsection (a)(1) of section 7702 provides that, "[n]otwithstanding any other provision of law," when an employee who has been subjected to an action that is appealable to the Board and who alleges that the action was the result of discrimination within the meaning of 5 U.S.C. 2302(b)(1), the Board will decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701.

(2) This section does not apply to employees of the Postal Service or to other employees excluded from the coverage of the Federal labor management laws at chapter 71 of title 5, United States Code.

(b) *When filed.* 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.

(c) *Scope of Board review.* If the negotiated grievance procedure permits allegations of discrimination, the Board will review only those claims of discrimination that were raised in the negotiated grievance procedure. If the negotiated grievance procedure does not permit allegations of discrimination to

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be raised, the appellant may raise such claims before the Board.

(d) *Contents.* The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., 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 recording of the hearing.

(e) *Development of the record.* The Board, in its discretion, may develop the record as to a claim of prohibited discrimination by ordering the parties to submit additional evidence or forwarding the request for review to a judge to conduct a hearing.

(f) *Closing of the record.* The record will close upon expiration of the period for filing the response to the request 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.

[77 FR 62371, Oct. 12, 2012]

### § 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

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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]

### 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 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

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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

(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.

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#### § 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.

(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 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 re-

garding 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.

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

**§ 1201.181 Authority and explanation.**

(a) *Authority.* 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 Board's decisions and orders, when appropriate, will contain a notice of the Board's enforcement authority.

(b) *Requirements for parties.* 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. Agencies must promptly inform an appellant of actions taken to comply and must inform the appellant when it believes compliance is complete. Appellants must provide agencies with all information necessary for compliance and should monitor the agency's progress towards compliance.

[77 FR 62371, Oct. 12, 2012]

**§ 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, or for enforcement of the terms of a settlement agreement that has been entered into the record for the purpose of enforcement in an order or decision 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 or enforcement of the terms of settlement agreement entered into the record for the purpose of enforcement in an order or decision issued under its original jurisdiction must file a petition for 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 fil-

ing 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 § 1201.37(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.

(4) 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.

(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.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 65235, Dec. 19, 1994; 62 FR 48935, Sept. 18, 1997; 73 FR 6834, Feb. 6, 2008; 77 FR 62371, Oct. 12, 2012]

**§ 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 non-complying party, it shall submit the name, title, grade, and address of the agency official charged with complying with the Board's order, and inform such official in writing of the potential sanction for noncompliance as set forth in 5 U.S.C. 1204(a)(2) and (e)(2)(A), even if the agency asserts it has fully complied. The agency must advise the Board of any change to the identity or location of this official during the pendency of any compliance proceeding. 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 the alleged noncomplying party has not taken all actions required to be in full compliance with the final decision, the judge will issue an initial decision resolving all issues raised in the petition for enforcement and identifying the specific actions the noncomplying party must take to be in compliance with the Board's final decision. A copy of the initial decision will be served on the responsible agency official.

(6) If an initial decision described under paragraph (a)(5) of this section is issued, the party found to be in non-compliance must do the following:

(i) To the extent that the party decides to take the actions required by the initial decision, the party must submit to the Clerk of the Board, within the time limit for filing a petition for review under §1201.114(e) of this part, a statement that the party has taken the actions identified in the initial decision, along with evidence establishing that the party has taken those actions. The narrative statement must explain in detail why the evidence of compliance satisfies the requirements set forth in the initial decision.

(ii) To the extent that the party decides not to take all of the actions required by the initial decision, the party must file a petition for review under the provisions of §§1201.114 and 1201.115 of this part.

(iii) The responses required by the preceding two paragraphs may be filed separately or as a single pleading.

(7) If the agency is the party found to be in noncompliance, it must advise the Board, as part of any submission under this paragraph, of any change in the identity or location of the official responsible for compliance previously provided pursuant to paragraph (a)(2) of this section.

(8) The complying party may file evidence and argument in response to any submission described in paragraph (a)(6) of this section by filing opposing evidence and argument with the Clerk of the Board within 20 days of the date such submission is filed.

(9) Discovery may be undertaken in accordance with the Board's regular discovery procedures (§§1201.71 through 1201.75 of this part), except that unless otherwise directed by the judge, initial discovery requests must be served no later than 15 days after the alleged noncomplying party files a response to the petition for enforcement as required under paragraph (a)(1) of this section.

(b) *Final Decision of noncompliance.* If a party found to be in noncompliance under paragraph (a)(5) of this section does not file a timely pleading with the

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Clerk of the Board as required by paragraph (a)(6) of this section, the findings of noncompliance become final and the case will be processed under the enforcement provisions of paragraph (c)(1) of this section.

(c) *Consideration by the Board.* (1) Following review of the initial decision and the written submissions of the parties, the Board will render a final decision on the issues of compliance. Upon finding that the agency is in noncompliance, the Board may, when appropriate, require the agency and the responsible agency official 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 agency and the responsible agency official to make this showing in writing, or to make it both personally and in writing. The responsible agency official has the right to respond in writing or to appear at any argument concerning the withholding of that official's pay.

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

(d) *Burdens of proof.* If an appellant files a petition for enforcement seeking compliance with a Board order, the agency generally has the burden to prove its compliance with the Board order by a preponderance of the evidence. However, if any party files a petition for enforcement seeking compliance with the terms of a settlement agreement, that party has the burden of proving the other party's breach of the settlement agreement by a preponderance of the evidence.

(e) *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.

(f) *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

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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; 77 FR 62372, Oct. 12, 2012; 80 FR 21153, Apr. 17, 2015; 80 FR 66788, Oct. 30, 2015]

### 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 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



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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 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) and Damages (Consequential, Liquidated, and Compensatory)**

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, compensatory damages, and liquidated 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 Re-employment 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 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. The Whistleblower Protection Enhancement Act of 2012 (5 U.S.C. 1221(g)) also authorizes an award of compensatory damages in cases where the Board orders corrective action. 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.

(e) An award equal to back pay shall be awarded as liquidated damages under 5 U.S.C. 3330c when the Board or a court determines an agency willfully violated an appellant’s veterans’ preference rights.

[63 FR 41179, Aug. 3, 1998, as amended at 77 FR 62372, Oct. 12, 2012; 78 FR 39545, July 2, 2013]

#### **§ 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, costs and damages as authorized by 5 U.S.C. 1214(h) where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214 and determines that the employee has been subjected to an agency investigation that was commenced, expanded or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(7) 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;

(8) 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

(9) 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. 1221(g)(4) where the Board orders corrective action to correct a prohibited personnel practice and determines that the employee has been subjected to an agency investigation that was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(3) 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.

(4) As authorized by 5 U.S.C. 1214(h) where the Board orders corrective action to correct a prohibited personnel practice and determines that the employee has been subjected to an agency investigation that was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(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. The Whistleblower Protection Enhancement Act of 2012 (5 U.S.C. 1221(g)) also authorizes an award of compensatory damages in cases where the Board orders corrective action. 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) *Awards of liquidated damages.* The Board may award an amount equal to

back pay as liquidated damages under 5 U.S.C. 3330c when it determines that an agency willfully violated an appellant's veterans' preference rights.

(e) *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 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; 77 FR 62373, Oct. 12, 2012; 78 FR 39546, July 2, 2013]

**§ 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.

(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, liquidated, or compensatory damages.**

(a) *Time for making request.* (1) A request for consequential, liquidated, 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, liquidated, 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, liquidated, or

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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, liquidated, 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 limit established by the judge or the Board, as applicable.

(d) *Addendum proceeding.* (1) A request for consequential, liquidated, 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, liquidated, 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, liquidated, 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 re-

quest for consequential, liquidated, 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, liquidated, 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 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.

[63 FR 41179, Aug. 3, 1998, as amended at 77 FR 62373, Oct. 12, 2012]

**§ 1201.205 Judicial review.**

A final Board decision under this subpart is subject to judicial review as provided under 5 U.S.C. 7703.

## Merit Systems Protection Board

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### 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. Address of Appropriate Regional or Field Office and Area Served:

1. Atlanta Regional Office, 401 West Peachtree Street, NW., 10th floor, Atlanta, Georgia 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, 1601 Market Street, Suite 1700, Philadelphia, PA 19103, 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, 1601 Market Street, Suite 1700, Philadelphia, PA 19103, Facsimile No.: (215) 597-3456, (New Jersey—counties of Bergen, Essex, Hudson, and Union; New York; Puerto Rico; and Virgin Islands).

4. Washington Regional Office, 1901 S. Bell Street, Arlington, Virginia 22202, 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, 1301 Clay Street, Suite 1380N, Oakland, California 94612-5217, Facsimile No.: (510) 273-7136, (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; 73 FR 2143, Jan. 14, 2008; 78 FR 43971, July 23, 2013; 82 FR 47083, Oct. 11, 2017; 88 FR 67058, Sept. 29, 2023]

### APPENDIX III TO PART 1201 [RESERVED]

### 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.